TC 04888

Appeal number: MAN/2008/1398

VALUE ADDED TAX – input tax – denial of right to deduct on grounds that the Appellant knew or should have known that the transactions were part of fraud by others – alleged MTIC – whether shown that the Appellant's transactions connected with fraudulent evasion of VAT – yes – whether Appellant knew or should have known of fraud – yes – valid refusal of right to deduct – assessment and jurisdiction of the FTT - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

ARIA TECHNOLOGY LIMITED **Appellants**

- and -

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

TRIBUNAL: JUDGE JENNIFER DEAN
MS SUSAN STOTT

Sitting in public at Manchester on 4, 5, 6, 7, 8, 11, 12, 13, 14 & 15 August 2014, 29 & 30 September 2014, 1, 2 & 3 October 2014 with further written submissions on 17 October 2014, 28 October 2014 and 12 November 2014

Mr Michael Firth, Counsel for the Appellant

Mr James Puzey, Counsel instructed by HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This is an appeal by Aria Technology Limited ("Aria") against the decision of HM Revenue and Customs ("HMRC") contained in a letter dated 6 October 2008 to deny input tax of £758,770.69 it incurred in relation to its purchase of computer parts in VAT period 07/06. The same letter also notified the Appellant that a further letter showing the corrected amount of VAT due in respect of period 07/06 was also enclosed; that letter, dated 7 October 2008 amended the Appellant's return for 07/06 to show input tax in the sum of £754,545.66 and the net tax due to HMRC as £313,613.71.

2. The basis of HMRC's decision and its case before this Tribunal is, as set out in its Statement of Case, that the relevant transactions carried out by the Appellant in VAT period 07/06 were connected with the fraudulent evasion of VAT and that the Appellant, through its company officers, knew or should have known of this fact.

3. By Notice of Appeal dated 3 November 2008 the Appellant appealed against HMRC's decision to deny input tax. The Notice of Appeal also appealed against the assessment of tax arising from HMRC's amendment to the Appellant's return for the relevant period.

Missing Trader Intra-Community Fraud: Legislation and Case law

4. The legislation governing the right to deduct is contained within Sections 24 – 26 of the Value Added Tax Act 1994 and the VAT Regulations 1995 (SI 1995/2518). If a trader has incurred input tax which is properly allowable, he is entitled to set it against his output tax liability or to receive a repayment if the input tax credit due to him exceeds that liability. Evidence is required in support of a claim (Article 18 of the Sixth Directive and regulation 29 (2) of the VAT Regulations 1995).

5. Missing Trader Intra-Community Fraud ("MTIC fraud") has been described frequently by the courts and tribunals and we do not consider it necessary to provide yet another; instead we respectfully adopt that of Roth J in *POWA (Jersey) Ltd v HMRC* [2012] UKUT 50 (TCC):

"[1] This is yet a further case of so-called missing trader or "MTIC" fraud on the system of VAT. The decision of the First-tier Tribunal ("FTT") conveniently describes the nature of a typical MTIC fraud as follows:

> *"5 … goods (almost always small but valuable items such as mobile phones and computer chips) are acquired by a registered trader in the United Kingdom from a trader in another member State, and sold to a second UK-registered trader. The goods then usually change hands several times within the UK before they are sold to an overseas trader*

which, if it is located in a member State of the European Union, is registered for VAT in that member State. Commonly the transactions all occur within a few days of the entry of the goods into the UK, sometimes even on the same day, so that goods enter the UK in the morning, pass through the hands of several UK traders during the day, and are exported again in the afternoon.

6. The first UK vendor, the acquirer from overseas, charges VAT on the consideration paid by his purchaser, but fails to account to the respondent Commissioners for that tax, and disappears. Such documentation as he may have had—if any—relating to his acquisition is never produced to the Commissioners. For the scheme to work he must be a VAT-registered trader who provides the purchaser with a genuine VAT invoice, on the strength of which the purchaser claims an input tax credit. The purchaser's own sale, and those of the other UK traders save the last in the sequence, usually generate a small profit and, consequently, a small net VAT liability, for which those traders account. The last trader, selling overseas, claims credit for the input tax he has incurred, but has no output tax liability since the sale is zero-rated. Usually this trader makes a significant profit, though that is not invariably the case; occasionally one of the antecedent traders can be shown to have made the greatest profit of all those in the chain. All of these sales and purchases, including the sale to the overseas buyer, are almost always properly documented.

[2] In the jargon that has developed to describe the various participants in such chains, the initial importer of the goods who fails to account for the output tax he has charged to his purchaser and disappears, is known as the "defaulter" or "missing trader." The trader at the end of the UK chain who sells the goods to a purchaser overseas is known as a "broker". The traders between the defaulter and broker are referred to as "buffers". In the present case, it is alleged that PJL was a broker.

[3] There are various variations and developments of this typical scheme of MTIC fraud. One of these, of which three of the transactions in the present case are said to be an example, comprises what is called "contra-trading". I again gratefully adopt the description given by the FTT:

"9 A contra-trader, a broker in one chain of transactions—again adopting the commonly used jargon, a "dirty" chain—in which a default has occurred, buys goods from a supplier in another member State, and sells them to a UK customer; after one or more further sales and purchases they are sold to a customer in another member State. The contra-trader and, usually, all the other traders in this chain account correctly for their VAT liabilities; taken by itself it is a "clean" chain. The acquirer in the clean chain has incurred a liability for output tax which (because the values are engineered to achieve this result) matches the input tax credit due to him (or ostensibly due to him) as the broker in the dirty chain. He

does not need to make a large repayment claim, attracting the Commissioners' attention, but instead makes a modest payment, or a minimal repayment claim. The same result may be achieved by undertaking a number of transactions generating an aggregate input tax credit matching the broker's output tax liability for the relevant accounting period. It is then the broker in the clean chain who has an input tax claim which, unless they can establish a link between the clean and dirty chains, the Commissioners must meet since the goods in the clean chain have not themselves been used for fraudulent purposes.""

6. *Kittel v Belgium, Belgium v Recolta Recycling* SPRL (C-439/04 and C-440/04) [2006] ECR 1-6161 *("Kittel")* provided the legal basis for the denial of the right to deduct in certain circumstances:

"51 … traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing the right to deduct the input VAT.

52. It follows that, where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void, by reason of a civil law provision which renders that contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller, causes that taxable person to lose the right to deduct the VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT or to other fraud.

55. Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively … It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends...

56. In the same way, 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 Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.

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.

59. Therefore, 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'.

61…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."

7. The *Kittel* test was further clarified by Moses LJ in *Mobilx Ltd and The Commissioners for Her Majesty's Revenue and Customs, The Commissioners for Her Majesty's Revenue and Customs and Blue Sphere Global Ltd, Calltel Telecom Ltd & another and The Commissioners for Her Majesty's Revenue and Customs* [2010] EWCA Civ 517 ("*Mobilx*") at [30]:

"...the Court made clear that the reason why fraud vitiates a transaction is not because it makes the transaction unlawful but rather because where a person commits fraud he will not be able to establish that the objective criteria which determine the scope of VAT and the right to deduct have been met."

8. As to the issue of connection, in *Blue Sphere Global Ltd and The Commissioners for HM Revenue and Customs* [2009] EWHC 1150 (Ch) the Chancellor stated (at paragraphs 42 – 45):

"…The nature of any particular necessary connection depends on its context, for example electrical, familial, physical or logical. The relevant context in this case is the scheme for charging and recovering VAT in the member states of the EU. The process of off-setting inputs against outputs in a particular period and accounting for the difference to the relevant revenue authority can connect two or more transactions or chains of transaction in which there is one common party whether or not the commodity sold is the same. If there is a connection in that sense it matters not which transaction or chain came first. Such a connection is entirely consistent with the dicta in Optigen and Kittel because such connection does not alter the nature of the individual transactions. Nor does it offend against any principle of legal certainty, fiscal neutrality, proportionality or freedom of movement because, by itself, it has no effect.

Given that the clean and dirty chains can be regarded as connected with one another, by the same token the clean chain is connected with any fraudulent evasion of VAT in the dirty chain because, in a case of contra-trading, the right to reclaim enjoyed by C (Infinity) in the dirty chain, which is the counterpart of the obligation of A to account for input tax paid by B, is transferred to E (BSG) in the clean chain. Such a transfer is apt…to conceal the fraud committed by A in the dirty chain in its failure to account for the input tax received from B."

9. On the issue of knowledge, Moses LJ in *Mobilx* provided the following guidance:

"4. Two essential questions arise: firstly, what the ECJ meant by "should have known" and secondly, as to the extent of the knowledge which it must be established that the taxpayer had or ought to have had: is it sufficient that the taxpayer knew or should have known that it was more likely than not that his purchase was connected to fraud or must it be established that he knew or should have known that the transactions in which he was involved were connected to fraud?

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

56. It must be remembered that the approach of the court in Kittel was to enlarge the category of participants. A trader who should have known that he was running the risk that by his purchase he might be taking part in a transaction connected with fraudulent evasion of VAT, cannot be regarded as a participant in that fraud. The highest it could be put is that he was running the risk that he might be a participant. That is not the approach of the Court in Kittel, nor is it the language it used. In those circumstances, I am of the view that it must be established that the trader knew or should have known that by his purchase he was taking part in such a transaction, as the Chancellor concluded in his judgment in BSG:-

> *"The relevant knowledge is that BSG ought to have known by its purchases it was participating in transactions which were connected with a fraudulent evasion of VAT; that such transactions might be so connected is not enough." (§ 52)…*

58. As I have endeavoured to emphasise, the essence of the approach of the court in Kittel was to provide a means of depriving those who participate in a transaction connected with fraudulent evasion of VAT by extending the category of participants and, thus, of those whose transactions do not meet the objective criteria which determine the scope of the right to deduct. The court preserved the principle of legal certainty; it did not trump it.

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

60. The true principle to be derived from Kittel does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion.

10. We also had regard to Christopher Clarke J in *Red12 v HMRC* [2009] EWHC 2563 at [109] – [111]:

"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.

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.

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.""

11. In *Megtian Limited (in administration) v HMRC* [2010] EWHC 18 (Ch) Brigg J stated at [34], [37] and [38]:

"I do not read Lewison J's analysis of the issue as to what must be shown that the broker knew or ought to have known in a contra-trading case as amounting to a rigid prescription that, as a matter of law, such an analysis must be performed in every contra-trading case, such that it will be defective unless it identifies one or other of the alternative frauds as being that which the broker knew or ought to have known...

In my judgment, there are likely to be many cases in which a participant in a sophisticated fraud is shown to have actual or blind-eye knowledge that the transaction in which he is participating is connected with that fraud, without knowing, for example, whether his chain is a clean or dirty chain, whether contra-trading is necessarily involved at all, or whether the fraud has at its heart merely a dishonest intention to abscond without paying tax, or that intention plus one or more multifarious means of achieving a cover-up while the absconding takes place.

Similarly, I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be, demonstrated precisely which aspects of a sophisticated multifaceted fraud he would have discovered, had he made reasonable inquiries. In my judgment, sophisticated frauds in the real world are not invariably susceptible, as a matter of law, to being carved up into self-contained boxes even though, on the facts of particular cases, including Livewire, that may be

an appropriate basis for analysis."

12. The burden of proof in this type of case rests with HMRC; per Moses LJ in *Mobilx* (paragraph 81):

"It is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase is outwith the scope of the right to deduct it must prove that assertion."

13. On the basis of the authorities cited above, we considered the correct approach to this appeal to be to recognise that while we must consider the merits of the individual transactions the transactions should not be viewed in isolation. In considering the issue of knowledge and means of knowledge of the Appellant we only took account of information known to him during the relevant period and we attached no weight to evidence established with the benefit of hindsight.

Preliminary issue

14. On behalf of the Appellant Mr Firth raised arguments as to whether HMRC had assessed the Appellant and the Tribunal's jurisdiction in that regard.

15. Consequently on 13 May 2014 the Tribunal directed the Appellant to file submissions no later than 30 May 2014 addressing *"the issue of whether or not there is a valid assessment or enforceable debt and whether the Tribunal has jurisdiction to determine that issue as part of the substantive appeal."*

16. In a "Note on the Tribunal's Jurisdiction etc" dated 30 May 2014 the Appellant set out its argument in relation to the assessment as follows:

"By letter dated 6 October 2008, the Respondents purported to deny the Appellant an input tax credit of £758,770.69 and by a letter dated 7 October 2008 the Respondents purported to amend the Appellant's VAT return for that period. At no point was anything purporting to be an assessment issued to recover the balance (i.e. £758,770.69 - £445,156.98 = £313,613.71."

17. The Appellant cited a number of cases relating to the principle of issue estoppel which prevents a party to civil proceedings making an assertion (whether of fact or the legal consequences of facts) as against the other party where (see *Mills v Cooper* [1967] 2 QB 459 at [468]):

(i) The correctness of that assertion was an essential element in previous civil proceedings;

(ii) That case was between the same parties or their predecessors in title;

(iii) The assertion was found by a court of competent jurisdiction to be incorrect; and

(iv) No further relevant material has been adduced which could not, by reasonable diligence, have been adduced by the party in the previous proceedings.

18. In applying these principles to the present appeal the Appellant highlighted that the question of whether or not an assessment exists is one which has no bearing on the issues to be determined in respect of HMRC's denial of input tax. It is a distinct issue and one which, when considered in isolation, the Tribunal has no jurisdiction to determine.

19. The Appellant contended that no assessment existed. It was submitted that the FTT's VAT jurisdiction derives exclusively from section 83(1) VATA 1994, which makes no provision for the FTT to determine whether or not an assessment exists. Section 83(1) provides as follows:

83 Appeals

Subject to section 84, an appeal shall lie to a tribunal with respect to any of the following matters–

(a) the registration or cancellation of registration of any person under this Act;

(b) the VAT chargeable on the supply of any goods or services, on the acquisition of goods from another member State or, subject to section 84(9), on the importation of goods from a place outside the member States;

(c) the amount of any input tax which may be credited to a person;

(d) any claim for a refund under any regulations made by virtue of section 13(5);

(e) the proportion of input tax allowable under section 26;

(f) a claim by a taxable person under section 27;

(g) the amount of any refunds under section 35;

(h) a claim for a refund under section 36 or section 22 of the 1983 Act;

(j) the amount of any refunds under section 40;

(k) any refusal of an application under section 43;

(l) the requirement of any security under section 48(7) or paragraph 4(2) of Schedule 11;

(m) any refusal or cancellation of certification under section 54 or any refusal to cancel such certification;

(n) any liability to a penalty or surcharge by virtue of any of sections 59 to 69;

(o) a decision of the Commissioners under section 61 (in accordance with section 61(5));

(p) an assessment–

(i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or

(ii) under subsection (7) of that section; or

(iii) under section 75;

or the amount of such an assessment;

(q) the amount of any penalty, interest or surcharge specified in an assessment under section 76;

(r) the making of an assessment on the basis set out in section 77(4);

(s) any liability of the Commissioners to pay interest under section 78 or the amount of interest so payable;

(t) a claim for the repayment of an amount under section 80;

(u) any direction or supplementary direction made under paragraph 2 of Schedule 1;

(v) any direction under paragraph 1 or 2 of Schedule 6 or under paragraph 2 of Schedule 4 to the 1983 Act;

(w) any direction under paragraph 1 of Schedule 7;

(x) any refusal to permit the value of supplies to be determined by a method described in a notice published under paragraph 2(6) of Schedule 11;

(y) any refusal of authorisation or termination of authorisation in connection with the scheme made under paragraph 2(7) of Schedule 11;

(z) any requirements imposed by the Commissioners in a particular case under paragraph 3(2)(b) of Schedule 11.

20. In particular, the Appellant highlighted section 83(1)(p) which provides for appeals against assessments. The Appellant contended that the scope of this provision does not include whether or not an assessment exists and therefore the FTT has no jurisdiction to determine this issue.

21. The Appellant submitted that HMRC should be barred from taking further part in proceedings on the basis that there is no reasonable prospect of HMRC's case, in respect of the assessment, succeeding.

22. The Appellant referred us the two letters from HMRC dated 6 and 7 October 2008 and the witness statement of HMRC officer Mr Bailey; it argued that the letter of 6 October 2008 entitled "notification of the decision to deny input tax" purports only to deny the Appellant's input tax. The letter dated 7 October 2008 states that HMRC consider that the amounts shown in the Appellant's 07/06 return should be amended as set out in the letter (see [1] of this Decision for amendments).

23. The Appellant submitted that there is no doubt that Mr Bailey understood what an assessment was and how to issue an assessment having issued an earlier unrelated assessment in respect of period 01/06.

24. The Appellant relied on *Benridge Care Homes Ltd v HMRC* [2012] UKUT 132 (TCC) in which the UT held (at [38] and [39]):

"In the present case the letters did not purport to be assessments and Mr Chapman did not seek to establish the Respondents' case on the basis that they were. We do not think that they were assessments: they reflect a conclusion that no assessment is

required or should be made because no net amount of VAT is sought. Even allowing for Arden LJ's comments in BUPA, as an administrative act we consider that the Commissioners, as the assessing body, must believe that they are making an assessment. We do not think that they can assess, so as to speak, "by accident". In this respect we think that the First-tier Tribunal was in error if and to the extent that it arrived at its decision on the basis that the letters constituted assessments.

There is no need, however, to assess where no amount of tax is due. The statutory mechanism does not need such an assessment to be made. It would be particularly incongruous if there were to be implied a power for the Commissioners to adjust input tax and output tax figures in a case in which an assessment has been made but for there to be no such power to do so in arriving at the conclusion that no amount of tax is due so that no assessment need be made."

25. Mr Firth also referred us to *Courts Plc v CEC* [2004] EWCA Civ 1527 at [13], [106] and [119]:

"*When is an assessment "made"?*
[106] An assessment is "made" when you have finished calculating the amount upon which the assessment is to be based and a final decision to assess that amount has been taken. This will be when the amount has been quantified, documented, checked, signed and dated. As a general rule then, the "made" date is when the VAT 641 computer input document has been completed, following the above action. However, there may be occasions when the "made" date may precede or follow this date

[106] The statutory requirement for notification of an assessment to the taxpayer demonstrates that in enacting s 73 Parliament regarded the process of making the assessment itself is an internal matter for the commissioners. However, given that the time limits in s 73(6) apply to the making of an assessment, as opposed to the notification of the assessment, it is clearly important that the commissioners' internal processes and procedures in relation to the making of assessments should, so far as practicable, be standardised; and that in relation to any particular assessment the process which has been followed, and the date or dates on which the various steps comprised in that process were taken, should be readily verifiable by contemporary documentary evidence. (See, generally, the observations of Lawrence Collins J in Cheesman, quoted in paras 43 and 44 above.) The absence of any statutory time limit within which an assessment, once made, must be notified to the taxpayer means that, in theory at least, it is open to the commissioners to delay notification for some considerable time (see Lawrence Collins J's reference in para 19 of his judgment (quoted in para 43 above) to the observation of May LJ in *House* (*trading as P & J Autos*) *v Customs and Excise Comrs* [1994] STC 211). *However, it is clearly undesirable that that should occur, and the commissioners' policy of not relying on any earlier date for the making of an assessment than the date on which the assessment was notified to the taxpayer ensures that no unfairness will be caused to the taxpayer in this respect.*

… [119] What this case has highlighted is the importance of officers of the respondents being clear in their own minds what they are doing at each stage; whether they are making an assessment or a decision to assess or some other exercise. Secondly, when an assessment is made, what is being done should be plain on the face of readily disclosible documents so that a taxpayer who queries whether and when an assessment has been made can be informed of the position."

26. It was submitted on behalf of the Appellant that HMRC officer Mr Bailey did not make a decision to raise an assessment nor did he believe that he was making an assessment hence the absence of any specific reference to an assessment. Any reliance by HMRC on authorities relating to the notification of an assessment is irrelevant to the question as to whether an assessment existed. Furthermore the Appellant submitted that Mr Bailey knew what an assessment was, therefore cannot be said to have made one by accident; he intended "*to do something entirely different*"; namely amend the VAT returns.

27. In summary, the Appellant submitted that the FTT has no jurisdiction to conclusively determine whether HMRC has issued an assessment. In the alternative it was submitted that HMRC should be barred from taking further part in proceedings to the extent that they relate to the assessment issue.

28. On behalf of HMRC it was submitted that the FTT and its predecessor the VAT and Duties Tribunal has always had jurisdiction to determine whether an assessment is in existence or not; moreover this is a jurisdiction regularly exercised. Section 83(1)(p) confers jurisdiction upon the Tribunal to hear an appeal against an assessment which must include the question of whether a valid assessment exists.

29. HMRC submitted that the doctrine of issue estoppel has no relevance to this appeal; Mr Puzey distinguished the authorities cited by the Appellant on the basis that they concerned situations in which a Court was asked to rule on a question that has already been determined by another Court or Tribunal. There has been no such ruling in this appeal; the Notice of Appeal submitted by the Appellant on 3 November 2008 appealed against an assessment to tax and the decision to deny input tax; neither matter has previously been decided. In so far as the Appellant sought to have the issues determined separately, Mr Puzey submitted that as both matters arise out of the same facts the appropriate course is to have the matters heard and decided together.

30. Mr Puzey highlighted the wording of section 83(1)(p) which provides for a right of appeal to the Tribunal against "an assessment…or the amount of an assessment." He contended that the FTT has repeatedly determined as part of that jurisdiction the question of whether an assessment is in existence. The main issue in *Courts Plc* was the question as to what constitutes an assessment for the purposes of VATA 1994. Similarly in *House t/a P & J Autos v CEC* [1996] STC 154, *CEC v Bassimeh* [1997] STC 33 and *Cheesman v CEC* [2002] STC 1119 all concerned the question as to whether an assessment was validly made and in each instance the Tribunal determined that issue. It was submitted that the distinction that the Appellant seeks to draw between whether an assessment exists or whether it has been validly made is without merit; either a valid and enforceable assessment exists or it does not.

31. Mr Puzey submitted that until the Tribunal heard evidence as to what HMRC officer Mr Bailey understood, believed and intended in relation to the assessment, no determination can be made and any suggestion that HMRC's case on this issue has no realistic prospect of success is premature and untested.

32. The starting point, HMRC submitted is section 73(1) and (2) of the 1994 Act which provides:

"(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners

that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

(2) In any case where, for any prescribed accounting period, there has been paid or credited to any person—

(a) as being a repayment or refund of VAT, or

(b) as being due to him as a VAT credit,

an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly."

33. Mr Puzey submitted that it is clear from the legislation that there is no set procedure for making and notifying of an assessment, which are two different processes.

34. Mr Puzey cited *House* in which Sir John Balcombe giving the judgment of the Court of Appeal said:

"*We have been referred to two cases before the value added tax tribunal, one of some antiquity—the case of Bell v Customs and Excise Comrs [1979] VATTR 115, a decision of the London tribunal, with Mr D A Shirley as chairman. In the report there appears this passage (at 120):*

'In our judgment, the Notice of Assessment should define precisely the period of time to which it relates. It is the formal document by which the Commissioners notify the amount of tax due from the person whose returns are said to be wrong or incomplete. We do not consider that the schedules sent (in this case but by no means invariably) with the Notice of Assessment are themselves a Notice of Assessment so much as working papers of the Commissioners leading up to the assessment contained in the Notice of Assessment. The schedules, moreover, contain references to two different periods, and want that certainty to which the Manchester Tribunal alluded in [Scott v Customs and Excise Comrs (1978) VAT Decision 517]. We see no reason why a taxpayer should have to read through a number of schedules in order to detect the precise claim against him or attempt to reconcile a formal document (form VAT 191) which is or may be inconsistent with schedules sent therewith or at a later date.'

Now, I think there are several problems which that particular passage throws up. First, it gives to the document entitled notice of assessment, whether it be in form VAT 191, which was the form used in the Rififi case, or in form VAT 655, which was the form used in this case, an importance which it cannot properly bear. As I have said, neither form is prescribed either by the 1983 Act or regulations. All that the 1983 Act provides is that the taxpayer should be notified, and, for the reasons I have already given, it seems to me that that was what had happened in this case. Whether, on the facts of the Bell case, there was adequate notification, I need not here consider. Also, it seems to me that that passage indicates a mistake, or mistaken view, which, at the time, was understandable, where it is said that the assessment is contained in the notice of assessment. As I attempted to explain in my judgment in the Rififi case (at 106–107) by reference to Grunwick Processing Laboratories Ltd v Customs and Excise Comrs [1986] STC 441 at 442 and Don Pasquale (a firm) v Customs and

Excise Comrs [1990] STC 556 at 562, the assessment of the amount of tax considered to be due and the notification to the taxpayer are separate operations. That in itself is sufficient to indicate that the judgment in Bell was made under a misapprehension as to the proper effect of the law."

35. In *Bassimeh* the Court of Appeal reiterated the distinction between an assessment and notification of the assessment made stating:

"Thirdly, the same and other authorities have considered what may be involved in defining and distinguishing between 'assessment' and, on the other hand, 'notification' of the assessment made. It has come to be accepted that this is a three-stage process; the decision to assess, followed by the assessment, then by the notice given (see in particular Don Pasquale (a firm) v Customs and Excise Comrs [1990] STC 556 at 562 per Dillon LJ, and the decision of His Honour Stephen Oliver QC the value added tax tribunal chairman in Georgalakis Partnership v Customs and Excise Comrs (1993) VAT Decision 10083). The position is complicated by the fact that where there is no evidence of the internal processes of VAT offices or of the assessment in fact carried out, the terms of the notice must be relied upon to indicate what the assessment was. This has led to the suggestion that the assessment is contained in the notice of assessment, but that analysis is wrong (see Sir John Balcombe in House (trading as P & J Autos) v Customs and Excise Comrs [1996] STC 154 at 162, where he said that 'the assessment of the amount of tax considered to be due and the notification to the taxpayer are separate operations')."

36. In *Courts* Jonathan Parker LJ stated (at [107]) on the issue of existence of an assessment:

"Mr Parker submits that the issue in the instant case is not so much as to the precise point in time at which an assessment is made (i.e. is complete); rather, it is as to the existence or otherwise of an assessment in December 1999. In one sense, this is a distinction without a difference since an assessment only 'exists' when it is made, and the point in time at which an assessment is made is the relevant point in time for the purposes of the s 73(6) time limits. On the other hand, I agree with Mr Parker that the issue in the instant case falls to be resolved on the basis of the particular facts of the case. In my judgment, given that the making of an assessment is an internal matter for the commissioners, in respect of which there is no prescribed statutory procedure, it is simply not possible to arrive at a formula which will determine in every case whether or not an assessment has been made. The commissioners may, for example, decide to treat certain cases as special or exceptional cases, to which their normal internal processes should not apply. Indeed, the instant case is an example of that (I return to this below). Accordingly, I am unable to go as far as the judge when (in para 57 of his judgment) he advanced the seemingly absolute proposition that 'an assessment is made when [the VAT 641] has been completed and signed off'. In the majority of cases, that may well be so; but there can in my judgment be no absolute rule to that effect. In my judgment the position in this respect is correctly reflected in the internal guidance issued in October 1997 (quoted in para 13 above)."

37. Mr Puzey highlighted the judgment of Arden LJ in *HMRC v BUPA Purchasing Ltd & Others* [2007] EWCA Civ 542 at [37]:

"There is no statutory definition of 'assessment'. It is in general a legal act on the part of the Commissioners constituting their determination of the amount of VAT, interest,

penalty or surcharge that is due (*see generally, Courts plc v Customs and Excise Comrs [2004] EWCA Civ 1527, [2005] STC 27).”*

38. HMRC also relied on *Queenspice v HMRC* [2011] UKUT 111 in which the Upper Tribunal (referring to *House*) said at [23]:

“*May J dealt with this submission where he said ([1994] STC 211 at 226):*

'Although the commissioners choose to use printed forms headed “Notice of Assessment”, there is in my judgment no magic about such forms. They are not required by statute or regulation which prescribe no particular formality at all. All that is required is that the commissioners should make an assessment to the best of their judgment and notify it to the taxpayer. There is perhaps an understandable tendency to merge the assessment with the notification and to look only or mainly at a single document if it is called notice of assessment. But there appears to be no reason why notification should not be given by letter, nor any reason why in this case the letter dated 24 May 1990 should not be seen as, or part of, due notification. That letter states the amount of the assessment and refers to the schedules for the details of the build up of the amount. I do not see why a notification cannot be contained in more than one document provided that it is clear which document or documents are intended to contain the notification and that that document or those documents contain in unambiguous and reasonably clear terms the substantial minimum requirements to which Mr Cordara has referred.'”

39. In applying the points that can be taken from the authorities relied on, Mr Puzey submitted that the letters of 6 and 7 October 2008 make it clear that input tax has been denied in the sum of £758,770.69 in respect of period 07/06 on the basis of *Kittel*. The letter of 6 October 2008 explained that *“a further letter showing the corrected amount of VAT now due in respect of period 07/06 is enclosed.”* That letter set out the tax due for that period as £313,613.71. It is clear from those documents that Mr Bailey, as confirmed by his evidence, had determined that VAT was due from the Appellant for period 07/06, that the sum had been calculated and then set out the reason for the decision. The fact that the word “assessment” was not used does not prevent the letters amounting to the valid notification of an assessment nor does it lead to the conclusion that no assessment had been made.

Decision on the question as to whether an assessment existed and the FTT’s jurisdiction

40. The issue as to whether an assessment existed arises out of HMRC’s decision to deny input tax. The evidence on the issue came from Mr Bailey, the decision making officer. The Notice of Appeal set out that the appeal was against an assessment to tax and other decision, namely that denying input tax. No details were set out as to the grounds relied upon in respect of the assessment nor did the Notice of Appeal dispute that an assessment had been made.

41. The crux of the argument now advanced by Mr Firth is that no assessment exists and this tribunal has no jurisdiction to determine that issue.

42. Whether or not an assessment exists is a matter of fact. The Appellant submits that this is not the correct forum to determine such an issue but advanced no argument as to which court or tribunal would have the power to decide the matter.

43. Having considered the authorities we were satisfied that this tribunal does have power to hear such matters and furthermore that is a power regularly exercised. We found the case of *Benridge* was distinguishable on the basis that in *Benridge* HMRC did not seek to argue that the letters constituted assessments. In *Benridge* it was held that an assessment cannot be made by accident and on the facts of the case there was no need for assessments as no tax was due.

44. We found the remainder of the authorities supported the following propositions:

- The "making" of an assessment refers to the determination that an amount is due;
- There is no set formula by which an assessment must be made;
- The processes of assessing and notification of that assessment are separate;
- The assessment process involves a decision that tax is due and a calculation of that amount;
- Notification can take any form so long as the terms are clear to the taxpayer.

45. We agreed with the comments of Jonathan Parker LJ in *Courts* which we concluded are applicable in this case (emphasis added):

"Mr Parker submits that the issue in the instant case is not so much as to the precise point in time at which an assessment is made (ie is complete); rather, it is as to the existence or otherwise of an assessment in December 1999. In one sense, this is a distinction without a difference since an assessment only 'exists' when it is made, and the point in time at which an assessment is made is the relevant point in time for the purposes of the s 73(6) time limits.

46. Accordingly, we concluded from the authorities that this tribunal has jurisdiction to decide whether an assessment exists.

47. We went on to consider whether on the evidence before us an assessment, or determination that tax was due, was made.

48. In oral evidence Mr Bailey described his actions as follows:

"Mr Firth: Q. Mr Bailey are you aware of what an assessment is?

A. Yes

Q. And you knew that you could issue an assessment?

A. Yes

Q. And you understood that there was a difference between an assessment and amending a VAT return?

A. Insofar as an assessment can be issued on a processed VAT return, it can't be issued against a VAT return that is unprocessed, i.e. suspended

Q. So you didn't issue an assessment?

A. No, I issued a V135 letter, which notifies of an amendment to the VAT return…

Mr Puzey: Q. What was the effect of your V135 letter on the tax position, Mr Bailey?

A. It rendered the trader into a payment position, i.e. owing money to HMRC

Q. Was that your decision?

A. No, that's a direct result of my decision to deny the input tax in that period

Q. So did you consider that the return as rendered by Aria was correct or incorrect?

A. As rendered, incorrect, due to the disallowance of the input tax

Q. And what action did you take to correct that, if any?

A. Other than my issuing of that V135 letter, none. It's dealt with by the internal HMRC ledger

Q. And what does that reflect, a debt to the Commissioners or a debt to Aria as a result of your action?

A. Debt to the Commissioners

Q. And you knew you were doing that when you did it, did you, or not?

A. Yes

(Transcript 8 August 2014 page 135 – 136)

49. The letter of 6 October 2008 was Mr Bailey's letter entitled "Notification of Decision to Deny Input Tax". The letter set out the grounds upon which input tax was denied and stated:

"This decision affects input tax of £758,770.69 claimed on the purchase of Computer Chips in period 07/06…A further letter showing the corrected amount of VAT now due in respect of period 07/06 is enclosed."

50. The letter of 7 October 2008 stated:

As you have been notified, HM Revenue and Customs consider that the amounts shown should be properly amended as follows:

Box 4 Input tax	*£754,545.66*
Box 5 Net tax due to HMRC	*£313,613.71*

51. We were satisfied that the action taken by Mr Bailey constitutes an assessment, irrespective of the fact that he did not use that specific term. By his decision to deny input tax he determined that VAT was due and calculated the amount. The amendment to the return effected the decision by Mr Bailey and his calculation. The letters of 6 and 7 October 2008 notified the Appellant in clear and unambiguous terms of the amount assessed, or determined, as due.

Issues

52. The issues to be determined in relation to the denial of input tax are:

(a) Was there a tax loss;

(b) If so, did this loss result from a fraudulent evasion;

(c) If so, were the Appellant's transactions which are the subject of appeal connected with that fraudulent evasion; and

(d) If so, did the Appellant know or should it have known that its transactions were so connected.

53. In its skeleton argument dated 1 August 2014 the Appellant confirmed that it did not challenge HMRC's case on (a), (b) or (c) on the basis that the Appellant had no knowledge of the facts upon which HMRC rely. We will therefore set out the facts and findings in relation to these issues briefly in order that the reader can understand the background and context of the case as a whole.

Undisputed Background Facts

54. Aria Technology Ltd was established in 1993 by Managing Director Mr Aria Taheri. It was incorporated as a limited company on 17 July 1997 and registered for VAT on 1 August 1997. The main business activity declared on the VAT application was the "wholesale/retail of computer hardware."

55. The principal place of business in Manchester consists of a large storage warehouse with a retail counter and office space. Mr Taheri is the owner and sole shareholder of the company. Mr Frank Harasiwka was the Finance Director and Company Secretary from 10 October 2005 to 28 February 2008. Mr Paul Frank Lee was the previous Director and Company Secretary from 17 July 1999 to 21 March 2005.

<u>Associations</u>

56. Mr Lee and Mr Taheri were previously the company officials of:

- Arianet Ltd which was registered for VAT from 20 May 2003 to 21 September 2004. Nil VAT returns were submitted throughout its registration;
- Aria.co.uk Ltd which was registered for VAT from 20 May 2003 to 21 September 2004. Nil VAT returns were submitted throughout its registration;
- Plaza PC Ltd – now dissolved.

57. Mr Taheri was previously a company official of:

- All Trade (NW) Ltd – now dissolved;
- Cobco 855 Ltd – now dissolved;
- Aria Computer Systems Ltd – de-registered for VAT from 22 August 1997;
- Syntrica Ltd – Registered for VAT from 17 May 2000 to 4 October 2004. Nil VAT returns were submitted throughout its registration.

58. Mr Taheri is currently a company official of:

- Aria Technology Holdings Limited;
- Velo Systems Limited; and
- Aria Land Limited.

Aria Technology Ltd

59. Aria is a supplier of computer components and peripherals. In the year ending 31 July 2005 Aria declared a gross profit of £3,300,000 at Companies House. For the 18 month period ending 31 January 2007 a gross profit of £4,600,000 was declared which up to and including the quarter ending 07/06 was generated by retail trade and wholesale transactions. The declared profit for the year ending 31 January 2008 was £2,300,000.

60. During the period relevant to this appeal the retail side of the business offered between 2000 and 3000 product lines. Suppliers were based both inside and outside the UK. Customers were other businesses and the general public. Sales were made via the onsite shop, telesales and online. In the same period the wholesale deals involved CPUs and flat screen computer monitors which the Appellant purchased from UK suppliers and sold to customers in Spain, Luxembourg, Portugal and Canada. Aria had accounts with Barclays, NatWest and the FCIB; the latter was used exclusively for the wholesale side of the business.

Transactions connected to fraudulent tax losses

61. We are concerned in this appeal with 11 transactions ("the Relevant Transactions") in VAT period 07/06 in which the Appellant purchased CPUs. Details of the transactions and the Appellant's suppliers and customers are as follows:

DEAL NO.	DATE	GOODS/UNITS	SUPPLIER	CUSTOMER
1	17 May 2006	Giga CPU 7074/1320	Supreme Distribution Limited ("Supreme")	Mitz International FZE ("Mitz")
2	19 May 2006	Giga CPU 7074/1980	Supreme	Mitz
3	25 May 2006	17" Digimate L-1721 TFT	Digimate Ltd	Ordin Informat

		Monitor/2068		SL
4	8 June 2006	Intel Pentium 4 3.0 Gig 800 mhz/4725	Supreme	Mona
5	9 June 2006	Intel Pentium 4 3.0 Gig 800 mhz/4725	Supreme	Mona
6	23 June 2006	Intel Pentium 4 3.0 Gig 800 mhz/4725	Supreme	Mona
7	29 June 2006	Intel Pentium 4 3.0 Gig 800 mhz/4725	Supreme	Mona
8	10 July 2006	Intel Pentium 4 3.0 Gig 800 mhz/4725	Supreme	Mona
9	10 July 2006	Intel Pentium 4 3.0 Gig 800 mhz/4725	Supreme	Mona
10	21 July 2006	Intel P4 3Ghz SL7Z9/6300	Ashtec Distribution Limited ("Ashtec")	Silver Pound Trading LDA ("Silver Pound")
11	31 July 2006	Intel P4 3Ghz SL7Z9/7875	Ashtec	Silver Pound
12	1 August 2006 (purchase invoice from customer dated 31 July 2006 and input tax claimed on purchase on 07/06 return)	Intel P4 3Ghz SL7Z9/12600	Ashtec	Silver Pound

62. We have included deal 3 in the table above as the transaction, which took place during the period with which we are concerned, was not traced to a tax loss. The Appellant relied on this transaction in support of its case, more about which we will say in due course.

07/06 VAT Return

63. The Appellant's 07/06 VAT Return declared the following:

- Output tax £1,035,508.40
- EU acquisitions £32,650.97
- Total Output tax £1,068,159.37
- Input tax £1,513,316.35
- Repayment claim £445,156.98
- Outputs £9,922,422
- Inputs £8,996,838

64. The Return was selected for extended verification and, save for deal 3 (which is not appealed) all transactions were traced back to a tax loss. By letter dated 6 October 2008 the Appellant was notified that input tax for all deals except deal 3 was denied on the basis that the Appellant knew or should have known of the connection to fraud in each of the deals.

Deals 1 and 2

65. Both deals involved the purchase of Giga CPUs from Supreme which the Appellant sold to Mitz in Canada. The transaction chains were not traced directly to a defaulting trader but were instead traced to a tax loss via contra trader 4A Developments Ltd which in the same period also acted as a broker trader, selling goods to Cayenne in Luxembourg. It had purchased those goods from Highbeam Ltd who in turn had purchased the goods from defaulting trader Open Line Trading Ltd.

4A Developments

66. HMRC officer Graham Taylor provided unchallenged evidence regarding 4A Developments. The company was registered for VAT with effect from 22 July 2005; the declared business activity was "*Building Development (alterations and extensions of domestic buildings); E-Bay sales, wholesale and retail of used motor vehicles and other wholesale.*" Trading was to be conducted from the director Mr Robert Morton's home address in Wrexham.

67. During a visit by HMRC on 13 November 2005 Mr Morton declared his intention to trade in the wholesale supply of mobile phones. The acquisition and despatch deals undertaken by 4A Developments between January 2006 and June 2006 (periods 03/06 and 06/06) are almost equal in value which meant that the output tax on the acquisition transactions was cancelled out by the input tax on the despatch transactions thereby extinguishing the VAT liability generated by the acquisition deals:

PERIOD	NET ACQUISITION	NET DESPATCHES
03/06	£6,145,567	£6,356,093

06/06	£84,995,345	£85,138,509

68. HMRC concluded that similar values achieved supported the contention that the deals were pre-determined and artificially structured. HMRC highlighted the following features as indicative of the contrived nature of the company's trading :

- The absence of due diligence checks before entering into high value transactions;
- The lack of insurance, no losses ever made by the company and no return of damaged stock;
- The lack of any value added to the transactions by the company;
- Credit given to a company with no trading history or known assets;
- Consistent gross profit margins in the deals.
- The increase in turnover in a 15 month period from £600,000 per month in August – September 2005 to £84,000,000 per month in April – June 2006 with only one full time employee (the director).

Highbeam UK Limited ("Highbeam")

69. HMRC officer Martin Joseph Silvester provided unchallenged evidence regarding Highbeam which was registered for VAT with effect from 1 November 2005. The intended business activities declared on the VAT 1 were: "wholesale electrical i.e. washing machines etc. plus future intended resale of re-conditioned items as above." The business records obtained by HMRC did not show any activities connected with washing machines. Highbeam was de-registered with effect from 31 August 2006 and entered compulsory liquidation with effect from March 2007.

70. The director, Dawn Rozzell, has been disqualified as a director for 13 years; the schedule of unfit conduct records, inter alia, that Ms Rozzell failed to account to HMRC for Highbeam's VAT causing HMRC to raise assessments totalling £1,434,862.

71. In Highbeam's first VAT period (12/05) it declared sales of £302,400 and purchases of £301,738. Output tax was £52,920 and input tax was £52,795.80. In period 03/06 Highbeam's turnover increased significantly with sales of £65,746,502 and purchases of £65,667,121. Output tax was £11,505,637.85 and input tax was £11,491,732.35. The deal log relating to this return showed 85 wholesale, back to back mobile phone transactions. All of the deal chains were traced back to defaulting traders and a VAT loss; those defaulting traders were:

- AS Genstar Ltd which was assessed for over £40,000,000 in relation to output tax charged on its sales and not declared;
- CHP Distribution which has an outstanding VAT debt to HMRC of £42,389,413;

- V2uk Ltd which has an outstanding VAT debt to HMRC of £51,182,018.76; and

- C&B Trading UK Ltd which has an outstanding VAT debt to HMRC of £84,368,677.22.

72. In period 06/06 Highbeam's turnover increased again. Sales were declared as £482,094,486 and purchases as £481,066,641. Output tax was £84,181,757.70 and input tax was £84,186,207.81. The return for 06/06 was subject to extended verification during which records obtained by HMRC showed more trading in 06/06 than the company had declared; 818 deals in which sales were £532,797,648.76 and purchases £531,627,895.26. In this period Highbeam undertook buffer, acquisition and broker deals.

73. The following features of Highbeam's trading were highlighted as indicative of the contrived nature of the transactions:

- The deals were carried out on a back to back basis and Highbeam did not see or inspect any of the goods traded which exceeded £550,000,000;

- At the same time as Highbeam carried out these transactions, the director Ms Rozzell ceased trading as an estate agent at Rozzells Estate Agents (on 31 March 2006) and advised HMRC that she could not meet the liability of the business and that she was in receipt of £57.45 per week Job Seekers Allowance;

- All of the buffer deals undertaken in 06/06 were traced to a defaulting trader and tax loss;

- Its commercial checks lacked substance and the company failed to query the legitimacy of the companies with which it traded;

- The absence of written contracts or terms and conditions with trading partners;

- The lack of any insurance for the goods traded; and

- The significant increase in turnover to £598,846,550 in the first eight months of trading with only 3 employees and a director with no previous experience of the industry.

Open Line Trading ("Open Line")

74. HMRC officer Ceris Afron Jones provided unchallenged evidence in respect of Open Line which was registered for VAT with effect from 1 November 2005 and de-registered with effect from 6 June 2006. The VAT 1 declared the main business activity as "Electrical Dealers".

75. At a visit to the company by HMRC on 25 May 2006 the director Mr Lee Ryan Harper confirmed that he had commenced trading solely in wholesale transactions of mobile phones as soon as he was notified of his VAT registration number despite having previously told HMRC that it was unlikely that he would ever enter this type of trade.

76. Open Line failed to submit its VAT return or records to HMRC despite requests save for one file containing 26 deals conducted between 4 May 2006 and 24 May 2006; the net sales value of these deals was in excess of £16,112,477.50. Further records obtained from the Insolvency Service show the net sales figure between the same dates as in excess of £93,446,647.08. The insolvency assessment for the final period (covering 1 June 2006 to 6 June 2006) is £328,449.00.

77. Open Line Trading Ltd failed to declare its transactions with Highbeam and was assessed by HMRC for this and other undeclared transactions in the sums of £10,931,839.38 and £6,197,640. The assessments were not appealed and remain outstanding. On 19 October 2009 Mr Harper was disqualified as a director for 12 years. The schedule of unfit conduct states that Mr Harper caused Open Line to fail to account for VAT.

Deals 4 to 9

78. The transactions involved the purchase of CPUs from Supreme which the Appellant sold to Mona. The deals chains were all traced back directly to the following defaulting traders:

3D Animations Ltd ("3D")

79. HMRC officer Martin Russell William Evans provided unchallenged evidence in respect of 3D which was incorporated on 5 April 2006. The VAT 1 declared the business activity as "Design, Multimedia and Animation Graphics". The company was registered for VAT on its requested date of 3 May 2006. No returns were submitted and the company was de-registered before reaching its first quarter operating as a VAT registered entity.

80. At a visit to the company by HMRC on 1 June 2006 officers found a residential address that had been converted into offices with the name 3D Animations Ltd written on a piece of paper that had been taped to the door. The officers were unable to make contact with anyone from the company. 3D failed to respond to the Regulation 25 letter left by HMRC and the company was de-registered with effect from 7 June 2006.

81. Freight Forwarder release notes obtained by HMRC indicated that the company had misrepresented its intended activity on the VAT 1. It transpired that a significant number of deals had been conducted by the company over a short period and to date the VAT assessments that have been raised against the company total £128,783,561.00; its gross sales were approximately £866,000,000 over the course of one month's trading. The assessments remain unpaid to date. 3D went into compulsory liquidation on 20 September 2006.

West 1 Facilities Management Ltd ("West 1")

82. HMRC officer Fu Sang Lam provided a witness statement detailing the trading activities of West One which was incorporated on 7 March 2000 under the name of Computer Solutions Direct Limited ("Computer Solutions"). On 6 April 2001 the company changed its name to West 1.

83. West 1 was registered for VAT on 21 August 2000; the main business activities described on the VAT 1 were as "providing computer and software solutions and services."

84. On 18 March 2003 HMRC visited the company's trading premises and met with the director at that time Mr Richard Paul Harrison. Mr Harrison told the officer that he had purchased the company in December 2002 after seeing it advertised in "Loot". The main business activities were the purchase and sale of computer chips and the visit note records that Mr Harrison did not have any previous history in this trade. It was also noted that West 1 had made a number of third party payments. On 2 February 2004 Mr Michael Owen McGrath notified HMRC that he would shortly be re-appointed as the director of West 1. At a visit by HMRC on 7 October 2005 it was established that Mr McGrath had purchased the company for £3,000 from his friend Mr Harrison.

85. By letters dated 17 February 2006 and 24 March 2006 HMRC notified Mr McGrath that all 38 deals undertaken by West 1 in January 2006 had commenced with a tax loss causing tax losses to the revenue in excess of £12,500,000. On 27 February 2006 HMRC notified Mr McGrath that 32 of the 40 deals undertaken in period 12/05 had commenced with a tax loss causing tax losses to the revenue in excess of £9,000,000. Similar notifications were given to Mr McGrath in respect of deals undertaken in 03/06 and 06/06.

86. In July 2006 the sales and purchase invoices provided by West 1 on 24 May 2006 were compared with the figures the company had declared on its return for period 03/06. The business records showed that the company had made more UK sales than it had declared and it had also made EU acquisitions which were not declared. A review of the transactions showed a pattern consistent with contra-trading in that 53.91% were standard rated transactions and 46.38 were zero rated. By excluding the company's buffer deals the difference between standard and zero rates is just 1.7% (49.15% and 50.85% respectively). It was also found that West 1 had under-declared its sales and purchases by £318,810,299 and £308,993,764 respectively the net sales totalling £691,753,311 and net purchases £681,377,476.

87. West 1 did not submit a VAT return for its final period (06/06). However business records showed that the company undertook 40 transactions of CPUs for the net value of £402,000,000.

88. The company has been assessed for £126,090,717.00 for output tax due on undeclared sales. Input tax was also denied on some of its supplies on the basis that HMRC was not satisfied that the transactions actually took place; West 1 failed to declare the supplies until confronted with a substantial output tax liability on the parallel supplies. HMRC took the view that the supplies were fabricated in order to offset that tax liability. West 1 failed to provide any evidence other than the purchase invoices from two suppliers who defaulted on their output tax liabilities in respect of those supplies. No evidence of transport or inspection of the goods was supplied and West 1 neither made nor received payment for the purported purchases and supplies.

89. On 27 January 2009 Mr Ryan David Foley, director during the relevant period, gave an undertaking that for a period of 13 years he would not act as a director. The schedule of unfit conduct stated that he failed to declare sales in the sum of £477,429,810.50 including VAT of £83,550,216.83.

Heathrow Business Solutions Ltd ("HBS")

90. HMRC officer Romaine Lewis provided unchallenged evidence regarding defaulting trader HBS which featured in the Appellant's deals number 6 and 7. HBS

registered at Companies House where the principal business activities were stated as labour recruitment, software consultancy and supply. It was registered for VAT on 14 October 2004; the declared business activity was "IT Software Solutions and Recruitment, Recruitment in IT industry". Between its incorporation in October 2004 and March 2006 HBS only submitted nil returns. The VAT return for the period to 30 June 2006 was never submitted.

91. On 20 June 2006 HMRC officers visited the company's premises and found no evidence that HBS was trading from the premises. The owner of the premises was contacted and confirmed that HBS had never operated from the address given as the current principal place of business.

92. On 1 July 2006 HBS was de-registered for VAT purposes. Evidence obtained by HMRC in the form of freight forwarder release notes show that HBS was dealing in the purchase and sales of mobile phones. The deals in question were all conducted on 28 and 30 June 2006. HBS had acquired the goods from the EU and sold them on to companies in the UK; no output tax was declared on these sales.

93. Assessments were raised against the company for outstanding VAT. The amount totals £32,763,865 which remains unpaid and was not appealed.

Vision Soft UK Ltd ("VSUK")

94. HMRC officer Dean Maurice Walton provided a witness statement regarding defaulting trader Vision Soft which featured in the Appellant's deals 8 and 9. VSUK was incorporated on 8 October 2004. The VAT 1 declared the business activity as Software Development, Consultants and Supply. The company was registered for VAT with effect from 15 March 2005. A Companies House search carried out by officer Walton showed that VSUK have not rendered any accounts, and that accounts and returns are overdue.

95. VSUK rendered five quarterly VAT returns (May 2005, August 2005, November 2005, February 2006 and May 2006) that were all nil returns, which indicates that they did not trade.

96. Information obtained by HMRC, such as freight forwarder release notes, showed that VSUK had acted as an EC acquirer supplying UK companies. The deals took place on 3 and 4 July 2006 and were not declared to HMRC.

97. HMRC officer Okoro visited the company's PPOB on 6 July 2006 which was found to be a residential block of flats. To safeguard the Revenue an immediate request to de-register VSUK with effect from 6 July 2006 was made to HMRC's VAT Registration Unit. The de-registration date was later amended to 13 July 2006 after HMRC obtained information which showed that the company had traded after 6 July 2006. The records obtained by HMRC showed that third party payments were made to the company director Mr Shadiq personally rather than payment being made to VSUK for its supplies which left the company unable to meet its obligation to pay VAT. The tax loss assessed currently amounts to £12,122,808 which remains unpaid and was not appealed. The company was compulsorily wound up on 16 January 2008.

Deals 10, 11 and 12

98. These transactions involved the purchase of CPUs from Ashtec and the onward sale by the Appellant to Silver Pound. The defaulting traders were:

Alartec Ltd ("Alartec")

99. HMRC officer Alistair Duncan Strachan provided an unchallenged witness statement regarding defaulting trader Alartec. Alartec was incorporated as a private limited company on 19 September 2005. The nature of the business standard industry classification at Companies House is shown as "not supplied". An introductory letter from the company dated 30 May 2006 obtained by HMRC during the course of their enquiries describes the company as a wholesale import export company trading in electrical goods across numerous sections of industry, both in the UK and Europe. The VAT1 described the main business activity as "*import/export of mobility scooters, electric scooters and bikes and electrical goods"*. The company was registered for VAT with effect from 10 March 2006.

100. From late May 2006 the company began trading in wholesale commodities (electrical and communications equipment). Without any known expertise or experience and with no known employees the company achieved a turnover (from the VAT declaration) of almost £69,000,000 over an eight week period.

101. Alartec is currently in liquidation. Information obtained by HMRC showed that in May 2006 the company conducted at least 15 deals but chose to provide HMRC details of only 6 transactions in which the company acted as a buffer trader. The suppliers were all defaulting traders. 25 high value deals were conducted in June 2006 in which Alartec acted as a buffer in all but three; in those three deals it acted as an acquirer where the goods emanated from non-compliant EU supplier Fine Arts of India. In July 2006 Alartec purchased all goods in its 23 deals from UK defaulting trader DTM Provisions against which assessments have been raised in excess of £30,000,000 having failed to account for VAT and gone missing.

Carisma Industrial Supplies Ltd ("Carisma")

102. HMRC officer Strachan also provided an unchallenged witness statement regarding defaulting trader Carisma which was incorporated as a private limited company on 12 December 2000. The nature of the business was shown on Companies House information as "Agents in industrial equipment, etc" and "Other wholesale". The company is currently in liquidation; liquidators having been appointed in July 2007.

103. The VAT 1 described the main business activity as the supply of industrial commodities, textiles, gloves and paper. The company was VAT registered with effect from 22 December 2000. On 23 August 2005 the company notified HMRC that it continued to trade but had not taken any orders since 28 March 2005. The main business activity was said to be the supply of industrial items, e.g. rubbish chutes to industries or sites. On 26 January 2006 an accountant representing the company telephoned HMRC to notify it that the company had ceased to trade as of mid December 2005.

104. Mr Strachan noted that the level of trading shown on the returns for period 06/02 to 12/05 was fairly modest and fluctuated from a low sales value of £963 in period 12/02 to a high sales value of £12,047 in period 09/03. Trading steadily declined in the 12 months from period 03/05 to 12/05. Sales invoices found in the course of

HMRC's verification enquiries show that the company's turnover rocketed from July to August 2006.

105. No VAT returns were submitted for the periods 03/06, 06/06 or the final period. The first tax assessment amount raised against the company for the failure to render the final period VAT return was £1,396,659. This assessment was not appealed and remains unpaid. The total amount assessed for the final period was £3,587,902. Further assessments were raised against the company as a result of sales invoices documents headed Carisma Industrial Supplies Ltd but which bore a different VAT number to that of the company. The VAT registration number contained on the documents was found to have been previously allocated to a company called C&B Trading UK Limited ("C&B Trading").

106. C&B Trading was registered for VAT on 1 May 2003 and its trading activity was notified as car valeting services. In 2006 it was found that the company was trading in mobile phones. On 1 May 2006 the company was compulsorily de-registered from VAT having failed to provide documents and accounts to HMRC. In July 2006 a VAT assessment was raised against the company for over £59,000,000 for undeclared sales made in the final period. HMRC noted that the sales invoices of C&B Trading bear a striking resemblance to those purporting to belong to Carisma. HMRC concluded that C&B Trading may have re-invented itself as a "new" VAT entity under the trading banner of Carisma for the purpose of facilitating fraud.

107. A Civil Recovery Proceedings Order was notified to Carisma in the sum of £3,587,902 on the basis of assessments raised against the company following its serious non-compliance and defaults. A winding up order was made against Carisma on 11 July 2007. The Official Receiver's investigation into the company was abandoned due to the failure to locate the sole director Mr Mark Brown. Carisma has been categorised as a blocker trader as a result of its actions which prevented HMRC in tracing the chains of supply and establishing the acquirer.

Carpets With More Ltd ("CWM")

108. HMRC officer Strachan also provided an unchallenged witness statement regarding defaulting trader CWM. The VAT 1 received by HMRC on 16 January 2006 and completed by the director of CWM described the main business activity as the retail sales of carpets. The company was registered for VAT with effect from 1 February 2006. No returns were submitted for period 07/06 or the final period. On 22 February 2007 an assessment of £1,303,988.55 was raised for the final period. The assessment remains unpaid and was not appealed.

109. Release notes obtained by HMRC from freight forwarding business Secure Freight Management identified CWM as being involved in a number of transactions involving mobile phones where the company was supplied by Carisma. A review of the company's trading records revealed payment instructions from Carisma directing amounts to be paid to an apparently unconnected third party. Further analysis of the trading records showed the total net sales achieved between 28 July and 15 August 2006 was £6,309,961.50. The net sales achieved between 2 August and 4 August 2006 was £3,329,154.35. The total amount of unpaid VAT due to HMRC for the period 07/06 and the final period was calculated as £1,802,654.78.

110. On 28 September 2006 HMRC officer visited the company's premises and found a 'for sale' sign above the shop and a quantity of post stacked up behind the door.

CWM was de-registered with effect from 10 October 2006 and wound-up on 23 May 2007. The director was disqualified from acting as a director for a period of 12 years until 27 May 2021. The schedule of unfit conduct refers to the director causing CWM to undertake a method of trading that involved it in and put HMRC at risk of being subject to MTIC fraud.

DBP Trading Ltd ("DBP")

111. HMRC officer Strachan also provided a witness statement outlining the trading activities of DBP which was incorporated as a private limited company (then known as Derwyn Building & Painting Contractors) on 2 August 2001. The nature of the business was "general (overall) public service". The company did not notify HMRC of a change in its name to DBP Trading Limited until 14 February 2006. In an interview with the managing director Mr Ian Fradley on 1 December 2005 he told HMRC that he had known Mr Derek Wynne, the previous director and intended to go into partnership with him. Mr Fradley had purchased the company as a going concern for £10,000 on the expectation that there were building contracts waiting in the pipeline but these had not materialised.

112. The VAT 1 submitted to HMRC on 11 May 2004 described the main business activity as building repairs, building alterations and extensions. Records subsequently obtained by HMRC showed that prior to September 2005 DBP had been engaged in high value wholesale trading within the UK of various commodities including mobile phones and computer components. At the visit to the company on 1 December 2005 Mr Fradley told HMRC that DBP was involved in the electrical trade buying and selling a range of commodities. He stated that he had little experience in selling electrical commodities but had become interested in the trade after a meeting with two men in a nightclub who told him about it.

113. HMRC noted that the sales value on the VAT return for 05/05 had grown modestly to £52,410. The sales figure declared on the 08/05 return rose dramatically to £16,645,835. The figure for inputs for the same period also rose significantly from £29,438 to £16,629,107. By period 02/06 turnover had risen to a sales value (net of VAT) of £100,844,962 and inputs of £100,723,643.

114. A Notice of Direction was issued which shortened the VAT return period for 05/06 from 1 June 2006 to 27 June 2006 with a submission date of 29 June 2006. The bookkeeper Mr Roy Henney was at the premises when the Notice was served by HMRC. He stated he believed the turnover for the period was in the region of £330,000,000 but that he was not in possession of all the purchase invoices for the period. Mr Henney telephoned HMRC on 27 June 2006 to say that he was unable to complete the return by the due date as more deal information had been provided to him including an additional 121 deals which would make the turnover exceed £323,000,000. On 29 June 2006 Mr Henney emailed HMRC to say that he had subsequently received a call informing him that documentation had been left in a vehicle overnight which had been broken into and the documentation taken. Mr Henney had asked the director to provide copies of the stolen paperwork.

115. The records were collected by HMRC on 31 July 2006. On the same date the company was informed that as of 1 August 2006 its VAT registration would be cancelled on the basis that it had been a willing participant in trade in relation to which it had no intention of accounting for the VAT charged on invoices.

116. A CD subsequently provided by Mr Henney included a trading summary for the periods 02/06 and 05/06. The total recorded sales in the six month period were shown as over £433,000,000. HMRC noted that there were considerable gaps in the purchase side of the company's records where it had caused supplier information to be omitted from accounting records. This led HMRC to conclude that DBP may have taken the role of a blocker trader.

117. A series of tax assessments were raised against the legal entities Derwyn Building & Painting Contractors and DBP Trading covering periods 02/06, 05/06 and the final period which exceeded £64,000,000 as a result of VAT due on undeclared sales and its failure to render returns for 05/06 and the final period. The assessments remain unpaid and were not appealed. On 27 June 2007 a winding-up order was made against DBP. The debt owed by the company was calculated as £64,147,498.85. Mr Fradley was subsequently disqualified from acting as a director for a period of 12 years as a result of DBP's trading activities.

Evidence of contrivance

118. Mr Bailey highlighted the following features as evidence that the Appellant's chains of supply were contrived:

(a) The membership of the supply chains show a remarkable degree of consistency; deals 1 and 2 involve the same traders in the same positions within the chains, as do deals 4 to 9 and 10 to 12;

(b) The Appellant achieved a significantly higher profit than that of the buffer traders in the chains;

(c) Consistent profits were made across the chains of supply which was not affected by varying dates, quantities or purchase price of goods;

(d) There is no evidence of an end user, retailer or consumer for the goods traded; the goods were moved in the same quantities between different wholesalers;

(e) None of the traders physically handled the goods which remained at the freight forwarders premises;

(f) None of the traders made a financial loss on any of the deals despite trading in goods which were traditionally associated with a volatile pricing environment;

(g) Examination of the FCIB accounts of the traders revealed that Globaltech Services Ltd ("Globaltech") which was the first line buffer and purchased from the defaulting trader in deals 4 to 9 paid into accounts in the names of individual company officials rather than the company accounts.

119. We should note that Mr Bailey accepted in oral evidence that these features did not show direct knowledge of contrivance on the Appellant's part, an issue which we will address in due course.

Findings on whether the tax loss was fraudulent and whether the Appellant's transactions connected with fraudulent VAT losses?

120. We considered the evidence in respect of the defaulting traders, contra-trader and transaction chains carefully. We disregarded any opinions expressed by the HMRC officers. We found the evidence compelling and we were satisfied that HMRC had accurately traced the Appellant's chains of supply to fraudulent tax losses caused by the defaulting traders and contra trader set out above.

121. In those circumstances we were satisfied that HMRC had proved to the requisite standard that the Appellant's transactions were connected to fraudulent tax losses.

Did the Appellant know, or should it have known that the transactions in this appeal were connected to fraud?

122. The live evidence we heard related mainly to this principal issue. Given the volume of oral and documentary evidence before us the following is intended as an overview of the points raised however we should make clear that all of the evidence was carefully considered.

123. HMRC relied on a numbers of factors as indicators that the Appellant knew or should have known that its transactions were connected to fraud.

The Appellant and Awareness of MTIC fraud

124. Mr Bailey highlighted HMRC's correspondence and visits to the Appellant prior to the transactions with which we are concerned in this appeal as evidence that the Appellant had been made aware of MTIC fraud and the indicators of such fraud. By way of example the Appellant was visited by HMRC on 18 September 2002 as a result of its trading activities in period 06/02 and to examine the 07/02 records. At that meeting Mr Lee stated that the Appellant would not be trading in CPUs in the future due to the close attention it brought from HMRC. On 8 January 2003 HMRC visited the Appellant again to verify a repayment claim for the period 10/02 which had been generated as a result of the high value purchase of CPUs in the UK and the zero rated sale of those goods to a company in Denmark. In June 2003 the Appellant was sent a number of budget notices and consultation documents from HMRC which would affect businesses dealing in phones, computer parts and accessories including "CE 15 VAT: A New Joint and Several Liability Provision" and "VAT Strategy: Joint and Several Liability Consultation on Reasonable Checks". A letter was also sent to the Appellant on 2 December 2003 written by Mr Rod Stone and in which the problems with MTIC fraud within the EU, particularly in the trade class of the Appellant, were set out. The letter advised that future VAT verifications had to be carried out through HMRC's Redhill Office; Mr Bailey noted that the Appellant had carried out such checks which demonstrated that the contents of the letter had been acknowledged and understood. On 4 May 2005 HMRC officer Mr Terry Mendes wrote to the Appellant reiterating the contents of Mr Stone's letter and the ongoing problems of MTIC fraud in the Appellant's trade sector.

125. The Appellant made a number of requests to transfer to monthly returns. Those requests were refused by HMRC and on 1 July 2004 HMRC set out in writing to the Appellant that the basis of this refusal was the high level of MTIC fraud in the computer component wholesale industry, stating that a move to monthly returns exposed HMRC to an increased risk of loss of revenue. A letter from the Appellant's representatives at the time, Mokhtassi Williams Chartered Accountants and Registered Auditors dated 16 July 2004 queried the basis of HMRC's decision and in doing so acknowledged the risk of fraud prevalent in the Appellant's trade sector.

126. When Mr Bailey visited the Appellant on 20 September 2006 he was told by Mr Harasiwka that they were aware of MTIC fraud and the current dangers for businesses in their trade class.

127. Mr Bailey outlined a conversation with Mr Taheri which took place on 25 October 2006 and in which Mr Taheri had stated that it was irrelevant if HMRC were to find tax losses in his deal chains as the Appellant had done everything to ensure there was no tax loss between it and its direct trading partners. Mr Bailey explained that at no stage prior to this statement had tax losses within the Appellant's transaction chains been suggested by either himself or his colleague Ms Tarr; Mr Bailey highlighted this statement by Mr Taheri as indicative of his awareness of the essence of MTIC fraud and the relevance of tax losses within deal chains.

128. Mr Taheri provided a consolidated witness statement which incorporated and expanded upon those previously provided. In that statement he explained that his final year project in his engineering degree was the design of an encryption/decryption chip which was selected for manufacture and sold to the industry for a significant sum. He started Aria Technology in 1993 as a sole trader with a view to making computer products and services more accessible to individuals and businesses by ensuring that quality products were sourced and distributed to the marketplace at affordable prices. In July 1997 Mr Taheri incorporated Aria Technology Ltd to continue running his sole trading business as a limited company. Mr Taheri provided the following description of Aria:

"ATL has a vast array of knowledge and expertise within the information technology sector. As the business continues to develop, the team is constantly being strengthened through in-house training and product knowledge updates in line with the launch of new technology…currently and during the relevant time I was the managing director of ATL and the sole shareholder. I therefore exercised a high level of control over the business including in terms of the transactions it undertakes."

129. In cross-examination Mr McFadden confirmed that Mr Taheri had the final say in respect of the wholesale deals undertaken. Mr Taheri described the role of Mr Harasiwka as finance director and explained that his role was not to deal exclusively with the brokerage deals which formed a *"relatively small part of his activity"*. Mr McFadden's main role was purchasing which included finding new suppliers and products.

130. Mr Taheri explained that trading with suppliers he had known for many years was a deliberate policy based on information he had obtained from HMRC as a result of which he understood that MTIC fraud was a problem with suppliers. He confirmed in his witness statement that he was aware of MTIC fraud through visits from HMRC officers, although he stated that the exact nature of the fraud was understood by him to be *"where a trader imports goods from the European Union, re-sells the goods with VAT in the UK and subsequently declares bankruptcy/goes missing without paying the VAT due to Customs. What was not explained to me was what HMRC now rely on: the long chains of traders in order to re-export the goods. As far as I was aware it was a problem with suppliers and it was for that reason that we focussed our attention on suppliers and only dealt with a small group of trusted suppliers for brokerage deals."* In cross-examination Mr Taheri stated that at the time he did not know how the carousel fraud worked:

"Q. You knew the expression?

A.I didn't know carousel fraud as such, no. I cant' – I cannot remember the words "carousel fraud" in 2006, that I was familiar with it, no.

Q. Okay. But you knew from notice 726 that you had to check your customers as well, and you didn't did you?

A. I knew that part of the check is to customers, but the majority of the check is to the suppliers."

(Transcript 14 August 2014 page 99).

131. In cross-examination Mr Taheri was asked about the notifications from HMRC regarding the Appellant's transactions being linked to tax losses:

"Q. Your own transactions had been linked to tax losses, hadn't they?

A. When I read these documents about a couple of weeks ago, two or three weeks ago, I noticed a visit report that was not…that was communicated to us, but it had said that many of the transactions were allowed for VAT, so obviously HMRC had checked them, and it vaguely also outlined there's some of the transactions that seemed to have traced back to tax losses, but it said a lot of the other transactions were bona fide and genuine…

Q. 'The enquiries have so far established that the other transactions included in your VAT return form part of a chain of supply which involved issue of invoices from missing or hijacked traders. The effect of this is that substantial amounts of VAT have not been remitted to Customs & Excise.' Did that concern you, that you'd been trading in transaction chains which had gone back to missing and hijacked traders?

A. It says --

Q. Did that concern you, Mr Taheri?

A. Excuse me, can I explain myself?

Q. I need you to reply.

A. It says transaction numbers 13, 14 and 15, they have looked at the input tax. And the other one, of course it concerned us.

Q. Thank you for answering the question, Mr Taheri. So as a result of the concern that you had, what steps did you take?

A. We had decided --- we decided to deal with suppliers that we knew for many years, or at least a year.

Q. And you hadn't been doing that before?

A.We had to some extent.

Q. But not entirely?

A. I cannot remember…

Q. Your input tax was withheld for a period of time, wasn't it, Mr Taheri?

A. It was withheld. Part of our input tax there ---because we were building that cost us about £2.2 million, and there was a lot of input tax to be claimed on that. We had a visit, we went through extended verification in 2004. Part of the money was refunded to us that was apparently due to the building, the rest of it we gave security, which we received back then, and next year the security was discharged.

Q. The letter informs you that the problem occurred in your chain of supply. So you knew it wasn't with your supplier or your customer because you knew that they were not hijacked or missing, didn't you?...

A. On some of the deals. The rest of the deals, it says they were fine…

Q. Was the problem that was identified in some of your transaction chains in the chain of supply, in this letter?

A. Yes.

Q. And you knew it couldn't be with your supplier or your customer because you knew they hadn't gone missing, didn't you?

A. I hadn't looked at that. I don't know who were the --- the immediate supplier was that this is referring to…

Q. So if you knew there was no problem with your supplier and customer and the problem was in the chain of supply, what were you going to do about that?...

A. I said to you, we would just deal with suppliers that we've known for a long time, faxing the deals to HMRC as the deals happened.

Q. Well, how could that protect you from losses higher in the chain?

A. Presumably somebody in HMRC has been dealing with these companies, they would look at the faxes and flag it up…

Q. So you relied on HMRC to do your due diligence for you; is that what it comes to?

A. Part of it…

Q. What did they tell you?

A. That there's been checked real time as they are receiving it.

Q. They told you that, did they, Mr Taheri?

A. We assumed that they are being checked real time. There's no other way.

Q. So they didn't tell you that, you assumed that?

A. They didn't tell us, no, no, but that's the only conclusion anyone can draw…"

(Transcript 14 August 2014 page 14 – 19)

132. Mr McFadden explained in his written evidence that he ran the purchasing department and answered directly to Mr Taheri. He was aware of VAT fraud within the industry. In his oral evidence Mr McFadden stated that at the time he did not believe he understood the term "MTIC fraud" and may not have heard it before. He still remains unsure as to the mechanics of such fraud. Mr McFadden explained that he understood the methods of checking tax evasion which could be prevented by checking the suppliers were trustworthy. HMRC provided little by way of assistance and would not provide a checklist to comply with. Mr McFadden was referred to a visit by HMRC in 2004 at which he was present and the visit note in respect of which recorded that *"Mr Harasiwka and Mr McFadden were told of the current problems with MTIC fraud in certain trade sectors"*. Mr McFadden could not recall such an explanation being given but did not dispute that the meeting took place or the record of the meeting.

133. As to the approach taken to due diligence generally Mr McFadden stated in oral evidence:

"JUDGE: What was the purpose of doing it? In your mind, were you just aware that there was the checklist and that had to be adhered to?
A. The checklist had to be adhered to, but I presumed the reason for -- they really wanted us to send the documents, so I presume once the documents arrived at Redhill, they would check into the suppliers and make sure that every -- I mean, they wanted them so badly, they must have been doing something with them. I don't think -- would that be wrong to say?
JUDGE: It's your evidence, Mr McFadden.
A. Sorry, I'm just ... I mean, we never heard anything back from them on anything, you know, within that period, so I presume there was nothing untoward. You do rely on them, they are the tax office, after all.
JUDGE: And once you'd ticked all the boxes on the checklist or done what was believed to be sufficient, was any decision made or was it simply a case of: we've got X amount of documents, we'll put them in the file?
A. Once the checklists were ticked off, once everything was ticked off, they were put together into -- from what I recall -- two ring binder files, you've probably got them here. Other documents, CMRs and transport documents, they were separate, I don't know whether Lorna reconciled them into a global file at the end. The checklist was certainly separate. There were so many files, which -- I do know that at one stage they were all collated together, I'm presuming by Lorna, I'm guessing there, into the master file to be archived.
JUDGE: So they were put into a file to be archived at some point, but at that point presumably you got on with your job?
A. Yes, I did, yes."

(Transcript 29 September 2014 page 85)

<u>*Commercial Checks*</u>

134. Mr Bailey set out in his written evidence the due diligence documents provided by the Appellants.

135. At a visit to the Appellant on 20 September 2006 Mr Harasiwka told Mr Bailey that the company undertook commercial due diligence checks into its suppliers. He stated that the checks took the form of Redhill VAT verifications, requests for Certificates of Incorporation and obtaining Creditsafe reports. Mr Bailey was told that

suppliers were not visited as Mr Taheri insisted on using only known and trusted suppliers with whom he had previously dealt. Mr Bailey highlighted that the Appellant's deals with Ashtec (deals 10, 11 and 12) were the first instances of trading between the two companies which, Mr Bailey stated, was confirmed by Mr Taheri at his visit on 25 October 2006 although this was disputed by Mr Taheri.

136. On the issue of due diligence generally Mr Taheri explained in his witness statement that VAT numbers and trading addresses of EU customers were checked with HMRC's Redhill department. For a non-EU business the Appellant would ask for a letter of introduction:

"The purpose was to establish that there was a genuine customer and to try and get to know the customer as a basic level. We would not normally carry out this due diligence until a deal looked very likely or had been agreed because of the time involved."

137. In cross-examination Mr Taheri accepted that Mona, Mitz and Silver Pound were all new customers during the relevant period and that he had not previously traded to such a high level with Supreme or Ashtec:

"Q. And not too many questions were asked of either your suppliers or your customers in that period, were they?...You didn't enquire too closely as to the source of the goods or why these traders had suddenly appeared on your horizon or why they were trading at a significantly higher level than your previous experience of them. Those were not matters that you particularly troubled yourself with, were they, Mr Taheri?

A.The question where they potentially could have come from, from the suppliers. The source, was the source bona fide?

Q. And you were told, 'Don't worry, it's genuine', and you accepted that at face value?

A. It wasn't just 'Don't worry it's genuine', it was quite an involved conversation, the contents of which I don't know right now, but the contact of which I remember, roughly."

(Transcript 14 August 2014 page 11).

138. Mr Taheri explained that the "extensive checks" on new customers referred to by Mr Harasiwka comprised *"VAT number. It would be their company registration details. Other details Frank would know…the Creditsafe report will have certain details on…data registration…the company turnover perhaps."* (Transcript 14 August 2014 page 29)

139. Mr Taheri explained that the Appellant had a due diligence checklist. It was put to him that no completed due diligence forms for Ashtec, Supreme, Mona, Mitz or Silver Pound were provided to Mr Bailey either at his visits in September and October 2006 or thereafter. Mr Taheri queried whether Mr Bailey had lost the documents but accepted that they might not have been completed. He could not recall asking his employees whether the checklists were being completed or whether there were any disciplinary procedures in place if the form was not filled in.

140. Mr Taheri went on to explain that the account information and turnover were not necessarily looked at but the average credit score was checked and at some stages the turnover reports. However Mr Taheri would not have time to make these checks himself although Mr Harasiwka might. Mr McFadden stated in oral evidence that Mr Harasiwka had the main responsibility for due diligence although he would check VAT numbers and fax documents to Redhill.

141. In cross-examination Mr McFadden explained that trust played a significant part in the Appellant's trading:

"Q. Yes. So was Aria Technology as a company prepared to pay half a million pounds on the basis of a verbal assurance from the freight forwarders?
A. Verbal, pending -- you know, a conversation might go like this: yes, everything's fine, we'll get the copy over -- I'm not saying this happened because that would be a lie. Everything's fine, boxes are there, you've got 22 boxes, they're all right, you'll get the inspection report over in a few days, we're just putting -- that could have happened.
Q. And the company would have paid out half a million pounds on that basis, is that what you're telling us?
A. I'm telling you if a freight forwarder tells you that the stock's there and it comes from a supplier you've been trading with for years and you've got trust in, you've got no reason not to ...
Q. I'm sorry, Ashtec --
A. I mean, it's just -- on retrospect, you make me sound like I was very stupid and maybe Aria was very stupid, but at the time there was a lot of trust and, you know, these weren't entities we knew nothing about, these were people we'd done business with.
Q. Well, you did £2.3 million worth of business with Ashtec in three deals in period 07/06. You hadn't done any deals with them for the preceding six years.
A. No, but they'd been in contact with us.
Q. That was good enough for you, was it?
A. It was good enough for Harry, good enough for me, so ...
Q. So it was down to Harry? If he was happy, then that was fine?
A. Well, Arash certainly had more of a relationship with Harry than I -- I'd met Arash on maybe two occasions, but he was certainly closer to -- they were countrymen, so frequently they spoke in their own language, so, you know -- but I have no reason to think he was anything other than genuine."

(Transcript 29 September 2-14 page 80)

Supreme

142. Mr Bailey highlighted that other than checking Supreme's VAT number through the Redhill office the only due diligence carried out by the Appellant on Supreme was to run a Creditsafe report. The hard copy of this report which had been printed off that day was presented to Mr Bailey at his visit on 20 September 2006. Mr Bailey noted that the report may have been looked at online at the time of the deals in May and June 2006 but he queried why the report had not been printed and retained with the company's business records at that time. The report gave Supreme a credit rating of zero and shows an increasingly negative equity over the three previous years. In response to Mr Bailey's queries raised by the report Mr Harasiwka stated in a letter dated 25 October 2006 that credit ratings were irrelevant as Supreme were suppliers

not customers and that Creditsafe reports *"provide guidance to us in terms of extending credit to customers…"*. In those circumstances Mr Bailey queried the relevance of the report to the Appellant and its reasons for producing it as part of its due diligence. Mr Bailey noted that Supreme had offered trade to the value of £2,800,000 over a three month period yet the due diligence was insufficient to establish Supreme's credibility as a legitimate trader.

143. In cross-examination Mr Taheri agreed that the Appellant had not previously traded with Supreme to such high values. The largest invoice produced by the Appellant for previous trade with Supreme was for £22,000 in March 2004. He agreed that the trade in 2006 valued at £200,000 was *"a step up"* (Transcript 14 August 2014 page 70). He stated that Mr Harasiwka obtained a Creditsafe report:

"A….just for us to carry out an extra due diligence check.

Q. And did he make you aware of these rather anomalous figures, that here was a company, Supreme, that wasn't doing very well, according to its accounts, and yet offering you £200,000 worth of goods in one deal? Did Mr Harasiwka make you aware of that?

A. No, that was – I don't think that was part of his job to do that sort of analysis…He was mainly dealing with reconciliation of the retail business and trade business.

Q. But he did due diligence checks for you?

A. To some extent, yes…Due diligence was carried out by a mixture of people.

Q. And so what did you do with KD to satisfy yourself in this particular deal, the first deal that we're dealing with, that these were genuine bona fide goods and not linked to MTIC fraud?

A. I talked to him on the phone, I had dealt with him, we had a relationship going on, the business relationship was going on for years, and I believed him based on the relationship and the track record that we had dealt with him.

Q. What I'm interested in is the detail of what he told you about why he was now offering such a large quantity of goods that you hadn't heard of before.

A. KD at the time was importing goods from the Far East, he used to have a brand name called Inacam, which was the reverse of his surname Macani, and these are modems that we used to sell hundreds of and it's probably in some of the invoices here.

Q. We're not talking about modems, Mr Taheri, I was asking about this deal, about how he was able to put forward these goods in this deal.

A. And I am giving you a background to that.

Q. Well, I was asking about this deal and these goods. Could you address that please?

A. Well, you're asking me to speculate.

Q. No. I'm just asking what he told you about the goods in this deal.

A. I can't remember eight years ago what he told me. I can remember some context of it, but if you're asking me how I came to believe that he is not a VAT fraudster – it's because of the nature of the business he ran. He imported goods, he actually received an award from Intel for selling these Inacam Intel…modems."

(Transcript 14 August 2014 page 73).

144. Mr Taheri accepted in cross-examination that there were many unusual features of deal 1; a product the Appellant had never traded in before, a new customer, the large scale purchase from Supreme and exporting in bulk to Canada.

Ashtec

145. At his visit on 25 October 2006 Mr Bailey was told by Mr Taheri that a member of his staff had visited Ashtec to establish its credibility. Mr Bailey noted that this contradicted the information given to HMRC by Mr McFadden and Mr Harasiwka on the previous visit when they had stated that suppliers were not visited. At the visit on 20 September 2006 the member of staff in question was asked by Mr Taheri to join the meeting where he asked her about the visit; she stated that she had obtained photo ID, utility bills and taken photographs with the director. In cross-examination Mr Bailey was asked his view about this information; he stated he did not believe the member of staff and his impression was that she had been asked to give this information. He also queried why it had not been mentioned at his first visit approximately one month earlier when he had asked the question about visits and why there were no documents provided at the visit to support it which could not be located and which Mr Bailey was told would be sent to him at a later date.

146. Documentation was subsequently sent to Mr Bailey to support the assertion that Ashtec had been visited. Mr Bailey noted that the documents were not dated and there was no way to confirm that they had been obtained prior to the deals. The documents included a photocopy of the director's driving licence, a copy of the Certificate of Incorporation, a copy of the VAT registration certificate and an electricity bill for the director's residential address rather than the business address. Although he accepted that the employee, Ms Owens, had emailed Mr Taheri on 19 July 2006 as follows:

"Hi Aria. You asked me about my visit to Arash at Ashtec. I got a copy of his driving licence and utility bill and company documents. I had a quick look around his office. The documents are in a folder on my desk. I have put in a claim for mileage. Please let me know if you need anything else. Thanks, Cherrie."

Mr Bailey queried what the documents contributed to the decision by the Appellant whether or not to trade with the company and whilst he accepted that a business relationship existed he noted it was *"not to that level, not in this style of trading."* (Transcript 7 August 2014 page 78)

147. Mr Bailey was provided with a Creditsafe report on Ashtec at his visit on 20 September 2006. Mr Bailey noted that the report had only been printed off that day, which post dated the deals in question. The report gave Ashtec a rating score of 0 out of 100 and showed the company to have negative equity over the three previous years. The annual accounts submitted by Ashtec for the years 2002, 2003 and 2004 all showed a nil turnover. When Mr Bailey queried this in correspondence Mr Harasiwka responded in the letter referred to at [202] that credit ratings were irrelevant as Ashtec was a supplier not customer. Mr Bailey noted that between 2000 and 2006 Ashtec was

dormant. The VAT return for June 2006 showed a turnover of approximately £100,000 and the return for September 2006 showed a turnover in excess of £1,900,000. Mr Bailey highlighted the Appellant's apparent failure to question this change from a dormant company to one which had the ability to offer £1,800,000 of stock on credit over a period of 11 days.

148. In cross-examination Mr Bailey was taken to his typed notes of his meeting on 25 October 2006 with Mr Harasiwka and Mr Taheri which indicated that Supreme and Digimate were said by Mr Taheri to be trusted trading partners he had known for 12 years. When compared with the handwritten notes of the meeting which showed that Ashtec had been known for 12 years and Digimate and Supreme were "existing retail suppliers" Mr Bailey accepted that he had made a mistake in the typed notes. He went on to explain:

"I recorded it incorrectly. The fact I recorded it incorrectly doesn't add or take anything away from the decision I made. That's what I'm trying to put across.
Q. Just to pick out what you said at the beginning there, are you saying that it was not a main factor, instead the main factor was the absence or presence of due diligence?
A. I didn't mention the term "due diligence".
Q. Checks.
A. I said in relation to these deals. So the pre-existing relationship, which pre-dates these deals in that respect is irrelevant. However, looking at the overall picture, it obviously is relevant that he's aware of them and has traded with them in the past, albeit six years prior to these deals, albeit that the Creditsafe report, which was the only thing Mr Harasiwka relied on, showed Ashtec not to have traded for those six years. So yes, I take the point, there was a pre-existing relationship. However, in relation to these deals, it's irrelevant. If you want to rely on it, it kind of weakens the argument that you did checks into the company."

(Transcript 7 August page 46)

149. In cross-examination Mr Taheri was asked if he queried why Ashtec was able to supply large volumes of CPUs when the maximum purchased by the Appellant in the past was 190:

"A. He said that he has a supply source that's genuine again and bona fide, and he knows them, and I asked him about whether this has got any issues, any issues with VAT, and he said 'no'.

Q. You asked that question, did you?

A. Yes, I believe so.

Q. So he told you they were genuine and bona fide and had no issues with VAT. Did he tell you anything else about them?

A. I don't know if I asked him specifically if they had issues with VAT, but --

Q. So you're not sure?

A. It was implying VAT – VAT channel, that if they are…If the VAT has been paid on these goods.

Q. Did he say anything about VAT or not?

A. I can't remember at the moment, Mr Puzey. But in the context of it, I can remember that I asked him.

Q. And what was his answer?

A. His answer would have been that – as far as I remember, that VAT has been paid on all these goods and there's no issues, he knows his supplier.

Q. So you can remember?

A. I can remember the context of the conversation, nit the exact words.

Q. I'm not asking you for the exact words. All I said was: 'Was VAT mentioned?', you said 'I can't remember', and now you say it was mentioned. Which is it?

A. It might have been mentioned."

(Transcript 15 August 2014 page 9).

150. As regards the issue of due diligence, Mr Taheri could not recall if he had asked Mr Afzalnia about his procedures in detail although he believed he had asked whether Mr Afzalnia trusted his supplier. Mr Taheri confirmed that he had not made any checks on the freight forwarders as he had trusted his supplier. He stated:

"I neither had the time or the focus to check Imex Logistics…there's only so many checks we can do…if we were doing [the deals] often, day in day out, I suppose there would have been procedures in place…"

(transcript 15 August 2014 page 31 & 35).

151. Mr Arash Afzalnia, Managing Director and sole shareholder of Ashtec at the relevant time, was called to give evidence on behalf of the Appellant. Mr Afzalnia stated that since approximately 11 or 12 years ago he has owned and operated a chain of bars and restaurants called Elysium Group. Between 1999 and 2000 and earlier the Appellant was one of his customers when he was operating as a sole trader at Ashtec. The Appellant purchased goods from Ashtec on 30 day credit terms.

152. Mr Afzalnia stated that he remained in contact with Mr Taheri over the years up to 2006 when he visited Manchester and regularly passed on offers given to him by potential suppliers. As a result of this contact Ashtec sold the Appellant goods on three occasions between June and July 2006; Mr Afzalnia ensured he was paid for each sale before supplying the Appellant again as the transaction values were relatively high.

153. Mr Afzalnia recalled being asked by Mr Taheri whether he checked his suppliers and carried out due diligence; Mr Afzalnia confirmed that he did so prior to the first transaction with the Appellant in 2006. He stated that he was visited by a lady from the Appellant who reported back as to how he ran his business.

154. In cross examination Mr Afzalnia explained that he recalled the payment terms for 2006 as being on delivery; payment was due when the goods were released by the freight forwarder. He explained that this was different to the earlier trade with the

Appellant due to the high values involved; 30 days credit was given where the deals were smaller. Mr Afzalnia confirmed that he did not trade between 2000 and 2006; he stated the transactions came about because he had a competitive supplier. He paid his supplier when he received payment as he could not otherwise finance the deals.

155. Mr Afzalnia explained that his supplier had carried out due diligence on him and trusted him as he had been in the market for a long time. He stated that that the due diligence followed the checklist of checks to carry out in order to satisfy HMRC. Mr Afzalnia was unable to recall due to the passage of time whether he had dealt with 4A Developments, although he thought he may have done a deal or two with them. He did not know that 4A Development's declared business activity was building development nor could he recall whether the company had a trading history. He stated he had assumed the company traded in computers and did not know the company traded from the director's home address but had thought it was an office premises. He stated that he would have been more concerned if 4A Developments had been his customer rather than supplier as it is the customer who is relied upon for payment. He stated that due diligence was a checklist and he did what HMRC advised traders to do.

156. As to why Ashtec was trusted by its supplier Mr Afzalnia stated:

"A. It's my credibility, it's about not being a company that's just appeared out of nowhere, you know, running it from your bedroom, if you like.
Q. Okay. Why's that? What's wrong with being a company run out of a bedroom?
11 A. Well, credibility. If a company's got offices, employees, track record and they've been around for a long time, I'd be much more comfortable and inclined to deal with them than a company that just doesn't have that."

(Transcript 29 September 2014 page 95).

157. Mr Afzalnia was asked about his supplier 4A:

"Q. Did you ask them what their business was?
A. It's like going into a car showroom and asking what the business is. It's obviously a car showroom.
Q. Well, did they have a car showroom?
A. No, hence I didn't ask them if it was a car showroom. If I was buying memory from them and semiconductors from them and computer parts from them, then one would assume that the business was that.
Q. Paragraph 16: "Trading was to be conducted from the director's home address at Neyland House, 98 Bradley Road, Wrexham." Is that the address you visited?
A. I really can't recall.
Q. You might be able to remember whether the company that you bought £2 million of goods from in three transactions in June and July of 2006 was being run out of somebody's bedroom?
A. No, I don't think it was, I think it was an office premises."

(Transcript 29 September 2014 page 102)

158. Mr Afzalnia went on to explain that he was more concerned with due diligence on his customers than suppliers and that due diligence was a tick list suggested by HMRC.

Customers

159. Mr Bailey highlighted the lack of substantial due diligence checks undertaken by the Appellant into its customers; he referred to his conversation with Mr Harasiwka on 20 September 2006 in which he was told that the only checks made into EC customers were to check the validity of their EC VAT numbers on the Europa website. Mr Bailey queried the lack of checks given that the Appellant was reliant on payment from its customers to pay its own suppliers.

160. In respect of Mitz Mr Bailey highlighted faxes purportedly received by the Appellant from the company. He noted that the documents contained the words "MVS Digital Ltd" and "TO: 908454560807" (the latter being the fax number to which the documents were sent). The fax number was shown on an internet search to be that of MVS Digital based in Middlesex. Mr Bailey noted that MVS Digital feature in deals 1, 2 and 4 to 9 inclusive as the supplier to Supreme but it did not deal directly with the Appellant in any of the deals. Mr Bailey concluded that the fact that MVS Digital was faxing correspondence to the Appellant on behalf of Mitz was indicative of the contrived nature of the deals. He questioned why if MVS Digital had knowledge of the Appellant's customer it did not sell directly to that customer.

161. An introductory letter from Mitz to the Appellant was dated 17 May 2006 which was the same date as the sales invoice from the Appellant to Mitz for deal 1. Mr Bailey noted that the introductory letter gave no indication as to the nature of the business or its trading activities.

162. Also within the bundle of correspondence presented by the Appellant in support of its decision to trade with Mitz was an introductory letter from Mitz addressed to UK company Sanche Technologies Ltd ("Sanche") based in Wolverhampton. Mr Bailey highlighted the similarity with the introductory letter from Mitz to the Appellant. When the Appellant was asked about this, Mr Harasiwka stated that the letter must have been sent via e-mail by mistake from Mitz to the Appellant rather than to Sanche although it appeared to Mr Bailey that this unusual occurrence had not been questioned by the Appellant. Mr Bailey further noted that the letter from Mitz to Sanche was a faxed letter which contradicted Mr Harasiwka's explanation that it had been emailed and the fax number contained on the document was that of MVS Digital. Mr Bailey noted that Sanche had been directly supplied by MVS Digital in periods 07/06 and 08/06 and that Sanche had sold to Mitz in earlier periods.

163. It was put to Mr Bailey in cross-examination that it was odd he had not noted the letter from Mitz to Sanche and the reason he had not noted this was because the document was not provided by the Appellant:

"A. I understand the question. I think you asked it earlier and I answered. I agree with you, I can't say if that was -- Mr Harasiwka sent me things on e-mail and he handed me things physically. When we refer to the letter addressed to Aria, it was clearly part of the bundle, handed to me physically, because I refer to it in the visit report. I don't specifically refer to the visit report to the Sanche Technologies. So my answer is I may have been handed that and not noticed the Sanche, or it may have arrived on an e-mail later. Whichever way you look at it, it was furnished to me by Aria.

MR FIRTH: No, a third possibility is that you got it from another source. I'm not saying you deliberately did it, but by accident you've mixed in documents from another source.

A. No, because I said earlier I didn't obtain physical documents from other officers…

Q. So this would form the basis for saying it's possible at the very least that the ones sent to MVS Digital were not sent to Aria? You would agree it's possible?
A. Of course it's possible. I don't believe that to be the case. Unfortunately, I don't have the receipt of documents to prove that. To the best of my recollection, my belief is what's presented in my witness statement…

MR FIRTH: Let me put the case on that right now. You've explained that Electronic Folders are kept in relation to each trader. Logically, and I think you've already accepted, there would be a folder for MVS Digital.
A. Yes.
Q. If an officer, therefore, went to MVS Digital, collected these documents and uploaded them on the electronic file, they would have been available for you to see?
A. Yes.
Q. It's possible that you or someone within your office -- it could be Annette Clark, it could have been yourself -- has printed these documents off because they appear to relate to Mitz?
A. Of course it's possible.
Q. And it's also possible that once they've been printed off, they've been mixed in with documents actually provided by Aria?
A. Of course it's possible….

MR FIRTH: That occurred later. So what appears to have happened is that Mr Bailey has referred to the letter to Sanche, and a rather confused Mr Harasiwka has just said, "That must have been a mistake".
JUDGE BLEWITT: That's going to be the appellant's evidence, is it?
MR FIRTH: Mr Harasiwka will have to give his own evidence, I can't give his evidence for him.
A. But you can understand, Mr Firth, that once Mr Harasiwka's answered the question I put to him in that way, then that puts my mind at rest that I did obtain those documents from Aria. If at the time he'd said, "I'm not sure what you're talking about", then perhaps it would have opened up a line of enquiry as you have just intimated….

If you flick to 114, Mr Harasiwka says in the second paragraph: "The bundle of papers provided to you were those received by us and clearly Mitz transmitted a letter addressed to Sanche to us in error." So again, that's the explanation offered to me by Mr Harasiwka, which left me in no doubt as to where the letter from Sanche Technologies had come from. He didn't take that opportunity then to say, "I didn't give you a letter [inaudible] Sanche", he says in that letter and it's a letter -- he's not put on the spot, it's a considered written response to my query – Sanche Technologies handed to Aria in error. Sorry, Mitz."

(Transcript 7 August 2014 pages 113 – 125)

164. Mr Bailey obtained information regarding Mitz from HMRC's Central Co-ordination Team following a mutual assistance check from the Canada Border Services Agency. Checks of the commercial systems in Canada found no imports to have been made into Canada by Mitz, although Mr Bailey accepted in cross-

examination that freight forwarders may have been used. The director of the company was Mr Zaya Dad, a non-resident of Canada. A visit to the company premises found that Mitz rented an office at the location; the investigator was informed by the receptionist that no one had attended Mitz's office for the previous month and a half (from on or about 3 April 2008). The fax number on the purchase order between Mitz and the Appellant was the phone number for the Toronto Window Company; two messages were left for Mr Dad but no contact made. The Canada Border Services Agency concluded that Mitz did exist with a valid business number in Canada but it could not be established if the company had actively traded any goods.

165. In cross examination Mr Bailey was provided with documents purported to have been provided by Sanche to HMRC which indicated the existence of Mitz:

Q…we've got another commercial licence. We've got a certificate of incorporation of Mitz. We have confirmation of the business number from the Canadian border authority. We've got letters of introduction, we've got another letter of introduction. We've got bank details. Another copy of the certificate of incorporation. Mitz's bank details and Mitz headed paper. Does that tend to confirm the existence of Matz?
A. It confirms the existence of an entity known as Matz. This would have been useful had it been presented to me by Aria Technology at the time we asked about Mitz and Matz.
Q. Sure, but --
A. It wasn't.
Q. It's --
A. I had no involvement at all with Sanche Technologies. The first time I ever saw the name was when I viewed a fax document supposedly from Mitz to Aria, which featured the name Sanche Technologies. Q. We'll come to --
A. So again, I can only deal with what I had at the time...

Q…It's reasonable to assume that if Aria had asked, in the same way that Sanche did, for documentation, it would have received the same bundle.
A. But they didn't ask….

A. I agreed the existence of an entity of Matz. I didn't agree there's a company called Matz with a subsidiary of Mitz that purchases a chip that nobody in the UK who sold seems to have a clue what that chip was.
Q. I'm sorry, you've not answered my question.
A. I have answered the question. This paperwork furnished hypothetically by somebody else at a point we're not sure of confirms the existence of an entity somewhere by the name Matz International FZE.
Q. So when this e-mail says there's no trace of it, we can now say there is a trace of it, can't we?
A. No, because the e-mail says -- we established earlier we don't know the nature of that check. So I assume that the intel officer from HMRC hasn't contacted Mr Dad. I assume they've checked the database they always checked and came back and told us the result. I didn't -- I don't say the company doesn't exist, I said there's indications, that e-mail is an indication. This is an indication it may exist.
Q. So --
A. However, this paperwork had nothing to do with Aria's deals."

(Transcript 7 August 2014 page 101 – 102)

166. Mr Bailey attempted to research the goods traded in deals 1 and 2; he queried the nature of the goods with the Appellant and following his second request for information Mr Harasiwka emailed on 24 November 2006 a link to the website www.cyclickdist.com . The website showed that Cyclick Distribution is a company based in Dubai which was not the Appellant's supplier. Mr Bailey described the website in his written evidence in the following terms:

"The Cyclick dist website is unconvincing in both its nature and design. Photographs of the company's "premises" appear to have been doctored, with apparently a computer image sign and flag for Cyclick Distribution superimposed onto a photograph of a commercial premises which could be anywhere in the world. Very few of the links on the website function. One of the few links on the site that does work is that which relates to Giga products. The website gives the following product description for CPU7074s (the product traded by Aria):

'IC's controller are made from large thin slices (the actual chips) of silicon which are etched and cut in small pieces and then packaged in all kinds of housings with generally a lot of tiny feet sticking out on all sides. The earliest and still very common form is the 4IP…which is also for humans very easy to handle. Later Packaging forms have all kinds of advantages like being cheaper per pin, wasting less PCB area, being more easily handled by pick and place machines etc. whose reputation for design and support is respected throughout the industry.'

The above description uses basic, simplistic (almost childish) language. It does not include the detail or the technological terminology that would be expected of a normal commercial company selling such a product. Potential customers are not told what the product does nor what it can be used in conjunction with. There is not even an indication as to the price of the product anywhere on the site, nor any links to actually purchase any of the goods advertised."

167. Mr Bailey noted that the website contained a customer notice within which it was stated:

"Many Practical customers…"

"Delivery schedules are Practical's and the factory's best estimates…"

"Please be assured that Practical's purchasing department works every day…"

168. Mr Bailey entered the sentences into an internet search engine which resulted in a link to the website www.practicalcomponents.com. The website advertises a company which appeared to supply dummy computer components for the electronics industry.

169. We should note that the information set out by Mr Bailey as shown on the Cyclick dist website was not exhibited and, we were told, could no longer be found on the internet. However we had no reason to doubt the truthfulness of Mr Bailey's evidence and we accepted his outline of the site as an accurate portrayal of what he had seen during the course of his enquiries.

170. In cross-examination Mr Taheri confirmed that he had not made any enquiries into the director of Mitz, Mr Dad's business history. He reiterated that the focus was

on the Appellant's supplier. He was asked about checks made into Mona prior to the first transaction with the company:

"Q. 'VAT numbers and address check on customer to be done by Cherrie. Frank to oversee.'…The address check, how was that going to be done?

A.KD would have – Eddie would have probably informed me about the customer and if it's a European customer, then the address check needs to be done –the VAT number and address check, just to see that the customer is as genuine as they can be.

Q. I asked how the address check was done, Mr Taheri.

A. Maybe through Redhill, perhaps.

Q. They don't offer an address checking service, they offer a VAT number checking service.

A. Maybe on the Europa site.

Q. That's even worse. You just get confirmation that the number is valid, you don't even get told whether it relates to the company itself.

A. In that case, the details of which I'm not too familiar with. The details of how to check and match up VAT numbers with addresses, I'm not – I don't think I was familiar with.

Q. You've asked that this be done and it's important enough, you say to be noted in your personal diary because it was so important, so must have had some idea?

A. I would have walked into the office, I would have said probably something like, 'make sure you deal – you check the VAT number and address of the customer'"

Q. How were they going to do that?

A. That, again – as I said, I had quite a few projects running on at the same time. It's up to them how they're going to do that. As I said, it was the suppliers' relationship that dictated the due diligence and I think that was perhaps perceived by administrative staff also."

(Transcript 14 August 2014 page 112).

171. Mr Taheri stated in cross-examination that the purchase by Silver Pound of £2,300,000 of goods in 11 days did not raise his suspicion; he believed they were *"just business people"* (transcript 15 August 2014 page 63). He agreed he had not heard of the company before nor did it cross his mind to check if they were retailers or whether he was selling to another broker.

172. In cross-examination Mr McFadden stated that he was never asked to carry out due diligence on customers *"to any level at all"* (Transcript 29 September 2014 page 24). He had no idea whether Mitz was a well-known company in the trade sector or what the director, Mr Dad's background was.

<u>Box and Lot numbers</u>

173. Mr Bailey noted that at a visit to the Appellant by HMRC officer Alison Teal on 4 June 2004 Mr Lee had stated that Mr Edward McFadden deals with all broker deals. Mr Lee also advised that the Appellant did not keep a record of box and lot numbers of the CPUs traded. Officer Teal requested that these numbers be recorded for future trade to which Mr Lee agreed and stated that the company was considering photographing boxes in the future. At a further visit by Ms Teal on 8 September 2004 it was requested again that a record of box and lot numbers be retained. HMRC officer Linda Tarr visited on 15 November 2005 to look specifically at high value broker deals carried out by the Appellant in periods 04/05 and 07/05. At the visit Ms Tarr requested that the Appellant record box and lot numbers for all CPUs traded as the Appellant had not maintained such a record. The officer was told that a manual record would be kept in future.

174. In fact the Appellant never maintained a record of lot numbers but did keep box numbers. Mr Bailey accepted in cross-examination that at the time he believed that both were needed but that was not the case. However, he noted that the Appellant had never queried HMRC's request or explained to Mr Bailey that both numbers were not required; instead the Appellant agreed on each occasion to keep a record but failed to do so. Furthermore Mr Harasiwka stated in an email dated 7 November 2006 that *"the requirement to record both lot and box numbers was not communicated in advance of examinations undertaken and are not obtainable retrospectively…"* which was untrue given the repeated requests by HMRC between June 2004 and December 2005 that the numbers be recorded.

175. In a telephone call with Mr Harasiwka on 27 July 2005 Ms Teal advised that there were a significant number of "junk" CPUs in circulation and that she would expect the Appellant to inspect the stock to confirm authenticity. The officer also advised the Appellant to carry out more extensive due diligence checks. Mr Harasiwka stated that he was carrying out quite extensive checks on the backgrounds of new companies before going ahead with any bulk deals. When asked why the company had started carrying out bulk deals Mr Harasiwka stated that it was an easy way of making a profit and there was no risk to the Appellant as payment from customers was received in advance.

176. In cross examination Mr Taheri was asked about the inspection reports containing box numbers:

"Q. What did you do with them once you'd received them from the inspection company?

A. What do you mean, what we did with them?

Q. What happened to them?

A. We stored them…

Q. Did you compile a database of these numbers?

A. No.

Q. Did you check new inspection reports and the numbers on those new inspection reports against records for numbers that you already held?

A. I don't think we did, no.

Q. Why not?

A. Why should we?

Q. It's a sensible check to avoid dealing in stock that is not being carouselled.

A. In that case, I am not aware if we did. Not on a computer, maybe just having a look visually, but I doubt that we would put it on a database.

Q. Did you ask anybody to do that?

A. No"

(Transcript 14 August 2014 page 35)

177. Mr McFadden stated in cross-examination that both box and lot numbers were retained:

"Q. Would it be of interest to you to know whether those boxes had been into the UK before or not? Is that something you'd have been interested in?
A. On reflection, yes, it would, but we kept lot numbers and box numbers.
Q. What did you do with those?
A. We kept them in a file with -- it was a red file, stored with communications from freight forwarders.
Q. And after you got those numbers, what use did you make of them after that?
A. We would check, for instance -- I mean, the numbers are quite specific, specifically lot numbers, and we would go through manually check whether -- I mean, I remember physically doing this on at least two occasions, making sure that the numbers weren't -- well, basically, it wasn't the same stock.
Q. As what?
A. As anything else.
Q. As anything else what?
A. We were told we should check the numbers. Obviously, by this stage we were aware of problems and we wanted to make sure we were doing everything right. We obviously had to recall(?) the lot numbers to make sure that they were concise and we -- we were just doing our best.
Q. What did you do with the numbers? What were you checking them against?
A. Each other.
Q. Your entire -- you tell us what you were checking --
A. Do you have some of them there? I can show you them.
Q. We'll come to that in a while. I'm just asking what the procedure was.
A. The lot numbers would have -- they'd be fairly unique, so you would be able to go through six or seven pieces of paper and -- it was part of Harry's checklist that we had to have these numbers, so I had to do it, that's what I did. So I was just performing a function, really.
Q. Let me ask the question again and if it's not clear, please say. What were you checking these numbers against?
A. In essence, nothing. Just making sure they were all there.
…
Q. And the check that you performed was to count the numbers to ensure that the total number of numbers corresponded with the number of boxes you purchased?

A. Yes.
Q. Was there anything else?
A. I don't recall. I mean, I don't recall doing anything else with them. I know that it was important we kept them."

(Transcript 29 September 2014 page 66 – 68)

Nature of trading

178. Mr Bailey highlighted that in all of the deals relevant to this appeal the Appellant was, without exception, able to source, purchase and sell the same product in the same quantity within a matter of days. Mr Bailey relied on this as indicative of the contrived nature of the deals and a matter which would have put a reasonable businessman on notice that his transactions were connected to fraud.

179. Mr Bailey highlighted the clear distinction between the Appellant's retail transactions and wholesale deals. He noted that having asked Mr Harasiwka for the highest value deals, those which Mr Bailey characterised as displaying features of MTIC fraud far outweighed the others in terms of goods and value. In cross examination Mr Bailey explained:

"…as I've just expanded, it doesn't pin it down to a difference between those deals and retail, they're just unusual in their very nature in comparison to other transactions. Regardless of the type of transaction, they're different to other transactions undertaken by Aria in that period and prior to that period."

(Transcript 6 August 2014 page 84)

180. Mr Bailey explained that at the time of the relevant deals the company employed approximately 120 staff in the retail side of the business. Only three members of staff appeared to have been involved in the broker deals despite the fact that these deals generated almost half of the company's turnover in period 07/06.

181. Despite the business premises of the company including a large storage warehouse with security measures in place, Mr Bailey noted that the goods traded in the deals under appeal were not stored or physically handled there. Mr Bailey drew the contrast with the retail side of the business where all goods sold were stored at the warehouse at some point.

182. Mr Bailey noted that there was no indication or advertisement on the company's website or premises that it was a wholesaler of any kind yet it generated a significant turnover from wholesale deals without any apparent effort. Mr McFadden's explanation when asked was that suppliers sometimes contacted him offering bulk deals at good prices, at other times he was contacted by customers asking for bulk goods and he contacted suppliers to see if those goods could be sourced; the Appellant was always contacted rather than opening up communications in respect of the wholesale deals. Mr Bailey queried how the Appellant was identified as a contact for those who contacted the company and how other traders became aware that the Appellant was involved in wholesale trading.

183. Mr Bailey highlighted the lack of written contracts and queried how the Appellant planned to account for potential liabilities to suppliers in the event of non

payment from customers. He noted that if the customer had decided not to pay or claimed that the goods received were faulty or sub-standard the Appellant had no recourse against liabilities to its suppliers.

184. In his written evidence Mr Taheri described the "two sides" to the business as follows:

"One of them is the bread and butter retail side of things – selling to end users through the internet as well as to educational establishments, businesses and local governments. The other is the trade side which included brokerage deals and, sometimes, speculative purchases. The speculative side of the business can be explained fairly simply. Sometimes we would buy stock speculatively because we thought it would go up in price, for example if we thought there was going to be a shortage of that component. Sometimes we lost money on these, but the name of the game was to win more than you lose…Through operating the retail side of the business I built up an MSN contact list with literally hundreds of people on it and so did Eddy…We would use these contacts to source goods to replenish our stock...We advertised in trade publications…I would also attend trade shows…On top of that, I used to travel a lot, all over the world, attending exhibitions and meeting people…the brokerage market depends upon excess stock. Only in the slow season are people like Dell trying to sell off their excess stock rather than trying to sell it to retail customers. They would dump it on people they had relationships with and that would provide the opportunities for us to buy and sell on."

185. In oral evidence Mr Taheri added:

"The brokerage business, by the nature of it, it does not require much human resources. It's an opportunistic business activity done at a time because you are in that business. So it can be done by one person fairly easily, I would say, given enough time and attention."

(Transcript 13 August 2014 page 101).

186. On the issue of contracts Mr Taheri stated:

"So for example, if the customer is paying us for the goods, they know what they're paying for, and if we don't deliver, they can sue us for it, they can say, 'Well, this is the quote, this is what they've given us or what we've agreed over the phone, over Messenger, over on email.' That's a contract…We are not in the habit of creating a contract between our suppliers and customers apart from due diligence documents."

(Transcript 13 August 2014 page 98).

187. Mr Taheri stated that in 07/06 the company was dealing with suppliers in its large deals that it had known for at least a year and trusted. The reason given was that the company had ceased carrying out large brokerage deals in 2002 *"because of the attention it was bringing from HMRC and the fact that they were not telling us what due diligence we needed to do"*.

Insurance

188. Mr Bailey found that the insurance policy provided by the Appellant was unclear as to whether the insured value was proportionate to the actual value of the goods

traded. The policy referred to a "limit" of £200,000 for "any one vessel, aircraft or conveyance" and a limit of £200,000 for "any one location in the ordinary course of transit" during the period 12 November 2005 to 11 November 2006. Mr Bailey noted that the value of goods removed from the UK by the Appellant in the deals relevant to this appeal exceeded £4,700,000 and only one of the deals under appeal (deal 1) had an individual value of less than £200,000. Mr Bailey concluded that whilst the insurance policy appeared to cover the Appellant's retail trade it did not cover the bulk wholesale deals.

189. Mr Taheri explained that the company had its own insurance up to the value of £200,000 but:

"…like any successful business, we always endeavoured to minimise our own risk and part of this was transferring the insurance obligations to suppliers and customers whenever possible. We still carry out brokerage deals from time to time and the insurance is always passed on to customers and suppliers either through verbal or written agreement."

FCIB, payments and pricing

190. The Appellant paid suppliers once it had received payment from customers. Mr Bailey noted the lack of formal written contracts or agreements between the parties in each of the deals.

191. In eight of the deals relevant to this appeal (1, 2 and 4 – 9 inclusive) the Appellant received payment from its customers and paid its suppliers through its FCIB account. Mr Bailey queried why the Appellant used this account at his visit on 20 September 2006 and was told by Mr Harasiwka that the transaction process with the FCIB was quicker than Barclays (with which the Appellant also had an account) which could take up to a week to process international transactions. Mr Bailey noted that deals 10 to 12 were completed using the Barclays account. Mr Bailey drew the distinction between the broker deals which used the FCIB account and the retail side of the company which did not.

192. Mr Bailey pointed to the FCIB statements which showed, in respect of deals 8 and 9 that the amount of £642,600, which was the combined total invoiced by the Appellant to Mona, was deposited into the Appellant's FCIB bank account on 5 July 2006 which was 5 days before the sales appeared to take place, 5 days before the Appellant purchased the goods from Supreme and 5 days before the Appellant paid its supplier. On 6 July 2006 two payments of £400,000 and £242,562.40 were withdrawn from the Appellant's account under the descriptions: *"Intra Account Transfer Refund of payment made in error – 1st instalment"* and *"Intra Account Transfer Refund of payment made in error – 2nd instalment less charges of GBP37.60."* The two amounts plus charges equal £642,600. On 10 July 2006 after the sale had taken place the same amount was again paid into the Appellant's account. Mr Bailey queried the circumstances of these payments and how a potential customer would have known the amount to deposit before its purchase and the Appellant's purchase of the goods had taken place. In response to the query Mr Harasiwka stated that these were cancelled deals which eventually went ahead. Mr Bailey noted the lack of paperwork to support this explanation such as credit notes relating to the cancelled deals or correspondence setting out the cancellation or reason for the purported cancellation.

193. From the deal paperwork provided to him Mr Bailey understood that deals 10, 11 and 12 took place on 20, 25 and 31 July respectively. He noted that despite varying quantities and dates the purchase price was £68.50 per unit for both deals 10 and 11. The price rose by 10p in deal 12 despite the fact that the Appellant purchased double the quantity of goods than in deals 10 and 11. In all three deals the goods were sold at £72 per unit. Mr Bailey referred to a letter from Mr Harasiwka dated 13 November 2006 which addressed this query. The letter described the goods as commodities with the potential for price movement over a short space of time. However Mr Bailey noted that the sale of the goods in all three deals at the same price despite differing quantities and dates did not tally with the explanation given. In cross examination Mr Bailey was questioned about his observations on pricing:

"Q. "…deal 2 took place two days after deal 1 and each deal involved a different quantity of goods…Despite the different date and quantity traded, Aria's purchase and selling price per unit remained the same across both deals, thus contravening the universal business pattern of quantity and time affecting price.' Mr Bailey, I'm just wondering on what basis you felt able to give sworn evidence to the tribunal as to what is the universal wholesale business pattern of quantity and time affecting price?

A. Potentially, I've oversold that statement. However, I stand by – it's my understanding that quantity and certainly time would affect price…and also Mr Harasiwka and also Mr McFadden were keen to tell me about the volatility of the market in terms of prices of chips and how it can fall or rise wildly within a matter of hours, let alone days or different quantities. So I agree it's a bit of an overstatement to say "universal wholesale business pattern". It's just the way I've written it."

(Transcript 6 August 2014 page 98)

194. Mr Bailey went on to agree that it is difficult to draw certain conclusions from the price on one day as compared to the price in relation to another day or the price in one deal as compared to the price in another deal but stated:

"…I can agree that the only thing that remains constant, despite the huge ability for the price to fluctuate, is that Aria Technology never made a loss on any of the chips traded."

(Transcript 6 August 2014 page 118)

195. Mr Bailey was told that the Appellant paid its suppliers after it was paid by its customers which is borne out by the FCIB statements. Mr Harasiwka stated that the customers paid once the goods were received and inspected. Mr Bailey drew our attention to the introductory letter from Mitz dated 17 May 2006 which requested that the Appellant confirmed receipt of funds transferred that day in respect of goods which it had not at that point seen or inspected. When he queried this in November 2006 Mr Bailey was provided with a letter from Mr Dad at Mitz which stated:

"What your Government Officer fails to mention was that another letter was sent to you on 18/5/06 asking for the deal to be cancelled and funds returned as we were informed by your sales rep that you were having problems with the stock. This indicates that no unusual business practice was exercised in the first place."

196. Mr Bailey queried why the Appellant had failed to mention that the deal had been cancelled at Mitz's request and noted the absence of any supporting

documentary evidence. He also noted that no second invoice was raised and that the date of the sales invoice remained the same, 17 May 2006. The case put in cross examination to Mr Bailey was that the Appellant was offered goods by Supreme following which it found Mitz as a customer. A deal was agreed with Mitz and funds were transferred on 17 May 2006. On the same day Supreme indicated that there were problems supplying the goods. The following day Supreme was able to source the goods and the deal went ahead as originally planned. Mr Bailey confirmed that this had not been the explanation provided to him nor had he been provided with any evidence to show that the "returned" funds had been transferred in the first place or a credit note to support the assertion that the deals had been cancelled.

197. Mr Taheri explained in cross-examination that Supreme must have released goods to the Appellant prior to payment based on trust. As regards the terms of payment agreed between the Appellant and Supreme he stated:

"It's payment on receipt of goods, on average, something like that. I don't exactly know the nuances of the terms."

(Transcript 14 August 2014 page 104).

198. One condition of entering into a transaction, described by Mr Taheri as a *"deal-breaker"* was that the customer had to pay cash in advance. The reason for this condition was for the Appellant to protect itself if the customer failed to pay.

199. HMRC officer Kathryn Smith gave evidence regarding the FCIB accounts of traders in the Appellants' supply chains. Miss Smith analysed all of the transactions for period 07/06 in respect of which the Appellant's input tax was denied. Miss Smith noted that each of the deals involved payments being made through FCIB although in respect of deals 10, 11 and 12 payments to and by the Appellant were made using their Barclays account. Miss Smith traced payments until either the payments/receipts could not be traced any further or the monies were returned to the FCIB account that had commenced the series of transactions.

200. Miss Smith provided a detailed witness statement together with exhibits. We do not intend to rehearse the contents set out therein however by way of example we will set out Miss Smith's analysis of deal 1.

201. Miss Smith was unable to find an account in the name of Mitz. However she found that payments had been made to Aria from an account in the name of Matz International FZ E ("Matz").

202. The Appellant received payment of £188,100 on 17 May 2006 from Matz; this was the amount invoiced by the Appellant to Mitz on the same date. The payment narrative is consistent with the goods contained on the invoice to Mitz.

203. The Appellant made two payments totalling £211,866.60 to its supplier Supreme on 18 May 2006. The transfer values and payment narratives correspond with the Inter Account Transfer Forms provided by the Appellant. Miss Smith noted that the Appellant appears to have paid Supreme before the invoice dated 19 May 2006 had been issued.

204. Supreme paid MVS Digital on 18 May 2006 in the same amount as MVS Digital had invoiced Supreme on 15 May 2006. On 18 May 2006 MVS Digital paid DP

Resources Ltd in the amount invoiced by DP Resources Ltd on 17 May 2006. DP Resources Ltd paid Eldonstow Ltd on 18 May 2006 in the amount invoiced by Eldonstow Ltd on 17 May 2006. The reference number corresponds with that shown on the deal sheet and with the sales invoice issued by Eldonstow Ltd to DP Resources Ltd on 17 May 2006.

205. Eldonstow Ltd paid Chatterbox Communications Ltd ("Chatterbox") on 18 May 2006 in the amount invoiced by Chatterbox on 17 May 2006. Chatterbox paid 4A Developments on 18 May 2006 in the amount invoiced on 17 May 2006. 4A Developments paid International Trading SRL on 18 May 2006 in the amount invoiced on 17 May 2006. Miss Smith noted that despite not having been charged VAT by International Trading, 4A Developments paid an amount of £30,435 which bears a close resemblance to the amount of VAT (£30,434.25) that 4A had charged and been paid by its customer Chatterbox. Miss Smith also noted that following the two payments made by 4A Developments the closing balance on 18 May 2006 was £25,243.55 which was insufficient to have met 4A Development's liability to HMRC in respect of deal 1.

206. International Trading made two payments on 18 May 2006 to Komidex Spolka z Ogranicz ("Komidex") based in Poland and which does not appear in the invoice chain. Komidex made a payment to Matz on 18 May 2006 the narrative in respect of which matched that of the Appellant's payment.

207. Komidex also made a payment to Matz on 17 May 2006 which appears to have funded Matz's onward payment to the Appellant because its balance as at 16 May 2006 was insufficient to pay the Appellant. The amount paid on 18 May 2006 by Komidex to Matz appears to have partially funded deal 2 together with the amount left over from the payment on 17 May 2006 and the balance in the account.

208. Miss Smith noted that in deal 1 all the payments in respect of invoices matched the invoiced amounts. Additional payments were made from International Trading to Komidex, including a payment which appears to coincide with the initial VAT charge raised in deal 1 by 4A Developments, and from Komidex to Matz. There was circularity in the payments and moreover six of the ten companies identified in deal 1 used the same IP address on the same day (18 May 2006) between 18:35:01 and 19:01:32 although we should note that the Appellant was not one of the six. In cross-examination Miss Smith stated that the circularity of payments indicated contrivance but she could not say who had orchestrated the scheme.

209. Many of the features of deal 1 were found in the remaining deals. Miss Smith highlighted the following features as evidence that the transaction chains were contrived:

- Circularity was present in all but two of the transaction chains;
- VAT appears to be diverted to third parties instead of being declared to HMRC;
- In deals 1 and 2 all members of the invoice chain received payment before the money was paid to Komidex in Poland, however when payment was made out of the UK it appeared to include the VAT;

- In deals 4 to 9 the diverted money passed through the account of Komidex and Komidex appeared on all but three of the chains despite not appearing in the deal chains;

- In deals 4 to 7 money passes through Nordic Telecommunications APS to Komidex to Metalix Corporation;

- Consecutive and almost consecutive EB reference numbers in deals 4 and 5 indicate that the money was moved between several companies at the same time;

- In deals 6 and 7 all the money transferred from Komidex to Metalix Corporation was transferred back to Komidex;

- In all deals save deal 11 it appears that the money was transferred to the initial supplying company in the UK and then transferred to a recipient outside the UK in full thereby leaving insufficient money to pay the VAT liability to HMRC;

- Third party payments to traders who do not appear in the invoice chains are made in all of the deals;

- In all of the deals at least two companies used the same IP address and in deals 5, 6 and 7 eight companies used the same IP address.

210. Mr Taheri queried the conclusions drawn by Mr Bailey in respect of profit margins; he highlighted the fact that the mark-ups achieved fluctuated by 20% which cannot be described as a relatively consistent margin. The profit margins ranged from about 4.14% on the Mitz deals to approximately 4.86% on the deals with Silver Pound. Mr Taheri explained that brokerage trades have to be reasonably large in order to be profitable. Prices depended upon the dollar rate, global demand, global supply, local demand and supply, how much stock the supplier had and whether they had agreed their price in advance with their own supplier. Mr Taheri stated that it would be quite unusual for the price to go up three or four times a day, but not impossible.

211. Mr McFadden explained in his witness statement that: *"prices could be very volatile on core computer items; this is understood across the industry and is the reason why the sales quotes say that all quotes are valid for 5 days, except memory and CPUs."*

212. On behalf of the Appellant Mr Neil Barwick provided a witness statement. Mr Barwick was a Sales Account Manager employed by the Appellant from October 1998. He stated that he had carried out large deals in excess of £200,000 and quite often the Appellant invoices and obtains payment in advance for the deals prior to receiving the goods from its suppliers on the assurance from the suppliers that the goods are available. He explained that occasionally the customer cancels the order or the supplier says that the goods are no longer available which causes friction with trading partners but has never resulted in a financial loss.

213. Mr Peter Wright, a buyer employed by the Appellant since 2010 provided an unchallenged witness statement in which he explained that he carries out approximately 30 purchases per day through a bespoke reverse auction system. He stated that due to the number and complexity of the Appellant's products it is a

regular occurrence that typing errors occur when setting up products and it is almost immediately obvious to the customers when there is such an error. Mr Wright also stated that he has purchased goods from one supplier and sold them to a customer who is also a supplier to the Appellant. He carries out the sale before purchasing the goods because the Appellant does not want to be left holding stock and to ensure that there is no loss on the sale. He uses MSN to maintain multiple simultaneous conversations with suppliers and customers as his predecessors did and takes at least 30 calls per day.

214. Mr Philip Meredith, an operations manager employed by the Appellant since 2010 provided an unchallenged witness statement. Mr Meredith was formerly the sales director of Overclockers UK from 1999 to 2010. Overclockers UK is a direct competitor of the Appellant. Mr Meredith explained that the two companies operate in a similar manner. At Overclockers UK no formal minutes of morning meetings were kept as the company worked at speed. Supplier contracts did not extend beyond basic terms and conditions of trade and were not formalised despite some of the transactions running into several thousands of pounds. Goods were often sold in advance, invoiced and then order placed with suppliers.

215. Mr Peter Mason, Managing Director of Ramesses Ltd provided a letter dated 12 May 2011 which explained that his company had traded with the Appellant for many years as a supplier of CPUs. He stated that when Ramesses Ltd's VAT repayment was withheld by HMRC in 2006 the Appellant immediately stopped trading with the company. Ramesses was eventually repaid the money by HMRC.

216. Mr Robin Martin was employed by the Appellant from 2000 as a telesales advisor. He also worked in the technical/returns department and recalled that Ashtec was one of many suppliers that had goods returned to it that were faulty.

217. Mr Amir Haghshenow is the Managing Director of GETC bv in Holland which regularly purchases goods of a value in excess of £100,000 from the Appellant. GETC always handles insurance of the goods while in transit from the Appellant to GETC in the Netherlands.

218. Mr Paul Frank Lee who was the company secretary and employed by the Appellant from 1997 to 2005 provided an unchallenged witness statement. He explained that in his last four years of employment by the Appellant his role was that of administration manager which involved reconciling cash and credit card transaction and credit control and reconciliation of the Appellant's customer accounts. He also carried out supplier payments through the company's electronic banking system.

219. Mr Lee explained that Mr Taheri was his direct line manager and had provided a checklist that Mr Lee followed for setting up new suppliers, checking VAT numbers and keeping relevant documents for large transactions which included shipping documents, customer and supplier records. Mr Lee could not recall the exact details of this checklist. As an ongoing procedure when he was informed by Mr Taheri or Mr McFadden about a large transaction taking place Mr Lee would immediately get in touch with the Appellant's contact at HMRC and fax the transaction details including customer, supplier, the amount and the relevant VAT numbers. This directly resulted in the goods being inspected by a visiting HMRC officer at the Appellant's premises on at least three occasions. Photos were taken of the goods to help HMRC with their queries. Mr Lee recalled struggling to get through to the Redhill office by fax and phone on several occasions.

220. Mr Lee explained that he asked the VAT office for a full list of due diligence checks and procedures to do when a large volume deal took place however HMRC could not provide one; the visiting HMRC officer explained that such a list could be used to abuse the system. Mr Lee stated that HMRC's request that all new supplier VAT numbers were to be checked with Redhill was complied with.

221. Mr Frank Harasiwka gave oral evidence on behalf of the Appellant. His witness statement explained that Mr Bailey's assertion that the Appellant ignored HMRC's requests for information was not the general attitude or modus operandi of the Appellant. Mr Harasiwka explained that a series of procedures for the types of transactions under appeal existed at the time when he joined the company. As Mr Taheri had vouched for the traders concerned as having been known to him for many years and credit checks confirmed that the companies had been incorporated for many years a number of transactions had been carried out on this criteria. Mr Harasiwka's concern in respect of credit checks was to confirm that the legal entities with which the Appellant traded had been in existence for some time and were not "off-the-shelf entities obtained for the sole purpose of undertaking large value sales/purchase transactions."

222. Mr Harasiwka estimated that 95% plus of his time was spent on trade other than the wholesale deals given the volume of activity that the 300,000 orders per annum generated within the business. He disputed HMRC's assumption that his role dealt exclusively with the wholesale transactions.

223. Mr Harasiwka's written evidence explained that he was unaware whether the deals under appeal were the first that took place between the Appellant and Ashtec but it was policy that deals were undertaken with those with whom Mr Taheri had experience of trading and that he trusted. The process of releasing goods to a customer was reliant on the customer for confirmation of cleared payment whereupon the Appellant paid its supplier which in turn meant title passed from the supplier to the Appellant and then to the customer. The specifics of the deals entered into were the preserve of Mr Taheri and Mr McFadden in terms of pricing; Mr Harasiwka stated that HMRC had misunderstood conversations with him which related to the retail side of the business where prices would fluctuate daily as his knowledge of the wholesale side was "extremely limited".

224. In cross-examination Mr Harasiwka confirmed that he had little knowledge of the wholesale side of the business the specifics of which were dealt with by Mr Taheri and Mr McFadden. He recalled that checks were carried out on trading partners to establish their veracity for instance its trade history and Mr Harasiwka would look at credit references which provided a company's financial history and accounts. Mr Harasiwka confirmed that he and Mr Taheri were the signatories for the company's FCIB account which was opened at the prompting of suppliers and customers on the wholesale side of the business as it expedited payments. Mr Harasiwka said he became aware of concerns regarding the financial integrity of the FCIB but he did not mention this to their trading partners as it was Mr Taheri who had direct relationships with them. He added that there was no risk to the Appellant as the goods were not released until payment received by the customer. Mr Harasiwka could not recall the Appellant's payment terms, stating that an invoice was raised to a customer and when paid the money was then paid to the Appellant's supplier.

225. Mr Taheri explained that the Appellant was encouraged by Digimate to use the FCIB because it allowed faster payments to be made.

226. Mr Harasiwka was questioned as to the term on the Appellant's invoices which read "payment by courier inspection". He did not know the meaning of the phrase and said he imagined that Mr McFadden would tell him when the goods were received by the customer and when payment had been made. He did not know how the Appellant was notified that an inspection had taken place and could not explain why goods were paid for by the Appellant on 12 June 2006 when the inspection report was dated the following day, 13 June 2006. He said he would have been advised to make payment to the supplier by either Mr Taheri or Mr McFadden.

227. In respect of deals 5 and 12 where goods were released without payment having been received Mr Harasiwka could provide no explanation, stating that the procedure was to release funds on the instructions of the managing director. Mr Taheri was unaware that goods had been released to the customer prior to receiving full payment. He stated that this was not the company's policy and had anything gone wrong with the deal the member of staff responsible would have potentially lost their job. He explained that the typical process was that Mr Harasiwka would check the bank to see if the payment had cleared. Once this check was done Mr Harasiwka would instruct Mr McFadden to give the freight forwarders notice to release the goods and payment would be made to the Appellant's supplier. In cross examination Mr Taheri stated:

"…the only explanation I can give for this is that Eddie must have somehow received a proof of transfer…It's quite conceivable that they had sent him a proof of transfer for the shipment on Tuesday. Now, having said that, Eddie was not allowed to – Eddie made a mistake, Eddie was not allowed to ship goods, receiving half the payment, it was supposed to have been on full payment…

Q. You exercised strict control over your company because you have a very good eye for detail…you said yourself these deals require 'a lot of attention and focus'. But this really shows that all your talk of due diligence is hollow…because you knew that you were going to get paid regardless of when these goods went, didn't you?

A. I don't agree with you. I wish I had a lot of eye for detail. I do have a certain eye for detail on certain parts of the business where it is relevant to my role…Don't forget that Eddie was working in a purchasing team of six people, buying goods, 3,000 different stock lines. So this deal would not have had his full-time focus. Maybe a small part of his focus would have been on this.

Q. And how much of Frank's focus would have been on this deal. Again, a small part?

A. I would say, yes, compared to what he did during the day it would have been a small part.

Q. And how much of your focus would have been on this deal. Another small part?

A. Compared to the rest of the business, yes."

(Transcript 15 August 2014 page 47 - 48).

228. Mr McFadden stated in oral evidence that he had been unaware until recently that goods had been released prior to full payment being made. He stated that he

would either have been told that payment had been made or the customer may have sent over a proof of transfer in advance of the funds. Mr McFadden confirmed that he did not have access to the Appellant's bank accounts and he therefore relied on Mr Harasiwka and his team.

229. As regards Mitz Mr Harasiwka recalled the name but could not recall what documents the Appellant had provided to HMRC in that regards or whether they included the letter from Mitz to Sanche. Mr Harasiwka said that he had drawn the conclusion that the Appellant had provided HMRC with the letter but could not explain how the Appellant had come to have it in its possession although he denied it was because the deals were contrived.

230. Mr Taheri did not recall ever seeing the letter addressed to Sanche and which bore the fax number of MVS Digital. He surmised that the letter to Sanche only serves to show that Mitz was seeking other trading partners and an administrative error caused the letter to be sent to the Appellant by mistake.

Inspections

231. Mr Bailey noted that he was told at his meeting with Mr Harasiwka on 20 September that the Appellant's customer inspected the goods while they were held by the Appellant's supplier. Following inspection the Appellant instructed its supplier to release the goods to its customer. The Appellant never physically handled the goods nor did it inspect them before it agreed to pay its supplier as the suppliers had been trusted trading partners with the Appellant for long periods. Mr Bailey noted that this was incorrect as Mr Taheri had confirmed on 25 October 2006 that deals 10 to 12 were the first instances of trading with Ashtec. Mr Bailey also highlighted a contradiction later in his meeting on 20 September 2006 when Mr McFadden told him that the Appellant employed an inspection company prior to agreeing to purchase the goods.

232. The inspections were purportedly undertaken by Alpha International Freight Forwarders Ltd ("Alpha") in deals 4 to 9 and by Imex Logistics ("Imex") in deals 10 to 12. Mr Bailey noted that the only inspection reports which had been provided to HMRC for deals 1 and 2 belonged to 4A Developments rather than the Appellant. Mr Bailey also noted that there was no indication on the reports from Alpha as to how the goods were inspected, no separate invoice for inspection charges provided in the Appellant's deal paperwork and no reference to inspection charges on the invoices for export from Alpha in respect of the relevant deals: the invoice simply states "freight" under the description of services. The inspection reports from Imex refer to a "100% physical inspection" however there is no detail as to what the inspection entailed nor any documented result of the inspection: the report sets out box numbers, specification and the country of origin.

233. Mr Bailey highlighted a visit by HMRC to Imex's premises in Staffordshire where no goods were found. Mr Bailey accepted that Imex had alternative premises in Kent:

"Q. Mr Bailey, what was said about these reports, it's my understanding that the premises were visited, there were no goods there, and therefore you conclude that the goods must not exist or something to that effect; is that right?
A. Yes, that's correct, yes…

Q. If we go again to page 454, again we have the standard questions asked: "Are these your only premises?" And the answer is?
A. "No".
Q. So we have a consistent question and answer in every meeting where they've said, "Are these your only premises?", and the answer every time has been no.There's one down south, Kent, Tunbridge, you know about that. So just thinking in common sense terms, if you visit one premises and you're told there's another premises, your visits to one premises don't rule out the existence of goods at another premises, do they?
A. No, that would be correct.
Q. How can we tell then where the goods were despatched from?
A. The only indication I had and still have is that the paperwork from Imex Logistics relevant to those deals refers to a Staffordshire address, as far as I'm aware…

Q. That's not what you're saying, is it, Mr Bailey? You said the officer went to the premises, there were no goods at that premises, therefore the goods didn't exist. I have taken you through each report and in each report it said that there is another premises other than this one, Tunbridge in Kent. We then look at the document which proves where the goods were picked up from and it says Imex Logistics, Tunbridge, Kent?
A. I agree that that CMR document, not produced by Imex Logistics, shows the goods were at Imex, Tunbridge. However, the paperwork from Imex doesn't…

A. I assume given the position of the stamp, which is in part of the document that's relevant to the physical inspection, that then that would imply -- the way I read it, that implied to me that the inspection had been carried out at Stoke. Staffordshire, sorry.
Q. But you accept, Mr Bailey, don't you, that it's not clear, is it?
A. It's certainly not clear, which is why it raised my attention….

Q. It's produced by an independent logistics company, saying, "This is where we picked up the goods."
A. But surely the inconsistency between the parties involved in purchasing and reselling those goods --
Q. What's the inconsistency?
A. -- compared to the person who's supposed to be moving the goods on behalf of those --
Q. What's the inconsistency?
A. That there's two different addresses, two different locations of the goods, apparently, according to the paperwork which I formed my opinion on…

Q. Let's go through the facts then. They were told about the second premises, so we know there are two premises. The inspection report does not say in any clear terms where the goods were inspected, does it?
A. It doesn't say in any clear terms. The only address on the inspection reports, either at the header or at the stamp, is a Staffordshire address.
Q. So we agree --
A. It does not say in plain English that they were inspected at that premises, no.
Q. So it remains open that there's two options. There's the Kent premises and there's the Stafford premises; yes?
A. Exactly, it remains open, so it's not clear to anybody, least of all us, where –
Q. We just don't know.
A. That's my point, exactly.

Q. But then we come to the CMR and it tells us the goods were picked up from Imex Logistics, Tunbridge. So we can imagine, can't we, a perfectly consistent, perfectly reasonable sequence of events whereby these goods have been at Tunbridge all along? That's perfectly reasonable, isn't it?
A. To imagine?
Q. As an explanation of why the goods weren't at the Staffordshire premises when they were visited.
A. So based on the paperwork I was presented, I'm supposed to imagine and make a leap of faith that that's what happened?"

(Transcript 7 August 2014 pages 1 – 9)

234. Mr Taheri's witness statement set out that the transactions were carried out through freight forwarders in order to minimise the risk of exposure to the Appellant and reduce the requirements for extra insurance. The freight forwarders would inspect the goods; Mr Taheri expected the freight forwarders to look at the labels on the boxes and check that they corresponded with the invoice product description. The boxes would not be opened as it was important that the seals remained intact. The box numbers were scanned. Mr Taheri did not accept that HMRC had made clear to the Appellant that both box and lot numbers should be retained.

235. Mr Taheri stated that in relation to the Gigapro 7074 Controller (deal 1)it was not the Appellant's policy to investigate all product descriptions; to do so would have been impossible given the rate at which new products came onto the IT market. He had not heard of the Gigapro controller before it was offered for sale by Supreme. He had not seen the Cyclick Distribution website at the time of the transaction but stated that *"At the time I remember Eddie saying to me that he's looked into this product"* (transcript 14 August 2014 page 67) although he had not referred to this in his witness statements and could not recall what he had been told.

236. In cross-examination Mr McFadden agreed that the information relating to a Giga Pro 7074 was not contained within his witness statement:

"*Q. You said to my learned friend that you've got to be careful of what you remember and what you remember from reading.*
A. Well, I mean, memory's a funny thing, isn't? There's certain things I remember clearly, certain things I remember vaguely, and certainly reading through documents later refreshes your memory to a great degree.
Q. Well, you tell us what you've been reading recently.
A. Just the notes that were provided to me.
Q. What notes were those?
A. A big bundle of documents I got given.
Q. Where is that big bundle of
A. I give them back to Aria.
Q. Can I see this big bundle of documents?
A. I haven't got them. I gave them back to Aria.
Q. I just want to see the bundle that the witness has been reading.

…

Q: What was in the bundle?
A. There were certainly copies of invoices, there was my statement. There were copies of these notes and that's all I really remember?

Q. Transcripts?
A. I don't understand what a transcript is.
Q. A record of evidence given in this tribunal.
A. I don't recall ever seeing anything like that.

…

A. I think I met with Mr Taheri about three or four times in the last couple of months.
Q. In the last six weeks have you met him?
A. Yes. Initially, I didn't know I could be much help.
Q. And did you discuss the questions that had been asked already in this case?
A. No.
Q. Are you sure about that?
A. Reasonably sure.
Q. You see, my learned friend asked you what a Giga Pro7074 was and you said, quick as a flash, VGA controller. Video controller. Type of micro processor.
A. Which is what it is.
Q. Where do we see that in your witness statement?
A. I don't know. I've not read it.
Q. You haven't read your witness statement?
A. I've not read it all."

(Transcript 29 September 2014 page 13 – 15)

237. As to what the product Giga Pro 7074 was, Mr McFadden stated:

"Q. And where did you find out this information about the Giga Pro 7074?
A. It would have been on the -- I'm presuming it was the Internet.
Q. The Internet is rather large. Could you be a bit more specific, please?
A. Google, I'm presuming.
Q. You Googled it?
A. I'm trying to recollect something that happened many many years ago. If you were to give me a piece of information, the first thing I'd do is Google it, look up some information, and then store it in my memory.
Q. On what site was this information?
A. I have no idea. It was eight years ago. Maybe more."

(Transcript 29 September 2014 page 17)

238. Mr McFadden could not recall if he knew of other traders trading in the product and as to whether the product worked or not he stated: *"the customer would have known what he was buying"*(Transcript 29 September 2014 page 19). He explained that *"product to me is a product at the end of the day"* (Transcript 29 September 2014 page 21) and he would not have looked into the technical side of the product to any great degree.

239. Mr McFadden did not believe that he had seen the Cyclick Distribution website and agreed that if he had it would have caused him concern given the use of the term "dummy component".

240. In cross-examination Mr Taheri agreed that there was no documentary evidence before the Tribunal to support the assertion that a written inspection report was

requested by the Appellant. Mr Taheri could not recall if Mitz had requested the Appellant to arrange an inspection although he agreed that there was no evidence to indicate that they had done so or that they had arranged their own inspection. Mr Taheri went to speculate that the Appellant must have received a verbal inspection report in relation to deal 1.

241. Mr McFadden's written evidence explained that on many occasions he would ask and pay for fresh inspections as an extra security measure as the value of the goods was high. He would accept verbal inspection reports for the sake of efficiency as long as the written report followed within a short period thereafter. In cross examination he stated:

"Q. There's no report addressed to Aria in these documents. So how did you know that these goods were in order?
A. I would have either received a fax like this or I would have received a phone call.
Q. You would have or you did?
A. I don't know, I can't remember. Everything was different, every transaction -- it was a long time ago and everything was different. I would have received some type of assurances, presumably phone call, but faxes weren't uncommon either.
Q. So all you might have had was a phone call?
A. You've got to remember logistics companies are not IT companies, they're not tied to a computer. If you want an instant response, a lot of the time the phone is better.
Q. Surely you'd want some assurance in writing that these goods were present and correct and in good condition?
A. Well, frequently on the phone they would send assurances later. It all depends on how much of a rush you're in.
Q. Did they always do that or did sometimes you simply rely on their word over the phone?
A. On occasion, I might have relied on the word over -- I don't know, it's a long time ago
…

Q. And you relied on an inspection that was verbal, how could you determine later what had been told to you by the freight forwarder?
A. Well, pending a paper document.
Q. So you'd always had a paper document?
A. I am pretty sure we would have done. It would have had to have been filed somewhere with some paperwork on some occasion. You know, it's a long time ago and everything was different and ... But I want you to reflect, it makes me sound like I have some very slack commercial practices, but I had a lot to do and this wasn't a large part of my job, so I did my best."

(Transcript 29 September 2014 page 32 & 35)

242. On behalf of the Appellant Mr Sanjay Patel of iForce Technologies Ltd ("iForce"), previously known as Sanche Technologies Ltd ("Sanche") gave evidence. He explained that in 2008 Sanche brought an appeal against HMRC's decision to deny input tax. The case was eventually conceded by HMRC. Mr Patel set out that his first contact with Mr Dad of Mitz was online. He explained that he had not heard of the Gigapro until it was offered by a supplier. Mitz showed an interest in it which led to Sanche trading with Mitz. Mr Patel stated:

"After we had done a few deals, I was in Dubai for other reasons and met up with Zaya Dad. The products were there and I inspected the,. It's an industrial controller – not a CPU that you could put into a laptop or a computer...The product was definitely real – we looked at the product and saw the chips inside. They opened the box, showed us the reel. It was as genuine as you can get…After being in the game for 20 odd years, you know the difference between the dummy and what is real."

Deal 3

243. Mr Bailey explained that the Appellant's supplier in deal 3 was Digimate Ltd. He noted that the deal had the same features as those under appeal, namely a high value back to back wholesale deal involving monitors. The goods were Digimate branded manufactured by and purchased from the associated company Digimate Hong Kong and therefore there was no defaulting or contra trader in the transaction chain and no tax loss. Mr Bailey noted that Digimate were an existing and long term supplier to the Appellant which stocked Digimate products in its warehouse and sold them through the retail outlet as individual units during the relevant period. The deal was verified by HMRC and the input tax was repaid to the Appellant. In cross-examination Mr Bailey agreed that the deal was a legitimate, high value brokerage transaction which had taken place in a relatively short period of time.

Legal title

244. Mr Bailey queried why the Appellant's sales invoices stated:

"Goods remain the property of Aria Technology Ltd until this invoice is paid in full"

245. He noted that the invoices of the Appellant's two suppliers contained similar statements regarding their respective ownership and he concluded that it was unclear as to where title was held and how it passed and to whom given that the Appellant was paid by its customer before it paid its supplier.

246. Mr Taheri explained that it was very common for suppliers to include as a term of sale that the goods remain the property of a certain company until the invoice is paid in full. The Appellant insisted upon payment in advance of shipping; Mr Taheri explained that: *"When ATL was paid, we would be able to pay Ashtec or Supreme and that would allow title to transfer to us which, in turn, would transfer to our customer."* Mr Taheri saw no difficulty with agreeing to sell goods to a customer and then going to a supplier to buy the goods required to fulfil the order.

247. Mr McFadden stated that on many occasions he would sell the goods before buying or creating a purchase order. Suppliers not having received the purchase order would then send an invoice based on verbal contract.

Grey Market

248. Dr Kevin Findlay gave evidence about the grey market in CPUs. Dr Findlay is an independent consultant who advises PricewaterhouseCoopers LLP ("PwC") and other firms on electronics, semiconductors, IT and software markets and technologies.

249. Dr Findlay provided a report setting out the typical distribution channels for the electronic components market ("the white market"), explaining the reasons and a description of the legitimate electronic component distribution "grey market" and

setting out the tests he would perform in considering whether a transaction falls within his understanding of the legitimate grey distribution market.

250. Dr Findlay explained that Authorised Distributors ("ADs") cannot and do not provide complete coverage of every possible component from all component manufacturers for all customers. These gaps in coverage of manufacturers, components and customers are limitations in the white market that give rise to a legitimate grey market opportunity. Dr Findlay identified the following legitimate grey market opportunities:

(1) Sub-distribution i.e. purchasing goods from an authorised distributer and selling on to an assembler;

(2) Distribution of obsolete and/or niche components;

(3) Providing an emergency supply of components;

(4) Offload of an excess inventory; and

(5) Arbitrage

251. Dr Findlay concluded that if the Appellant is not holding stock and demonstrates "back to back" trades in its deal chains then it cannot be addressing the sub-distribution opportunity and is likely to be broking. If the Appellant does not take physical custody of stock in any of the deal chains examined then it is unlikely to be addressing the obsolete/niche distribution opportunity. Dr Findlay would expect to see significantly higher profit margins than the industry average ones exhibited by the Appellant of it was providing an emergency supply. If the Appellant was offloading excess inventory Dr Findlay would expect to see broking fees being paid to assemblers to dispose of the stock and deal chains with assemblers at the beginning and end of the chain. He would also expect to the Appellant to demonstrate significant industry relationships with assemblers and ADs and attempts by the Appellant to minimise the length of a deal chain in order to maximise profit. Brokers in the arbitrage market are incentivised to minimise deal chain lengths through direct relationships with assemblers and ADs; excessive deal chain lengths and no obvious relationships with assemblers and ADs suggests that the broker is not trading in the legitimate grey market.

252. Dr Findlay's report provided guidance on how to assess whether a transaction is in the legitimate grey market. He set out the following questions:

(i) Is the product description specific enough to identify the component?

(ii) Do the prices have a commercial basis grounded in market rates?

(iii) Does the volume traded represent a reasonable market share?

(iv) Is the deal chain efficient compared to the typical deal chains?

253. Dr Findlay explained that if the product description on the invoice or purchase order is insufficient to uniquely identify the component, then a normal businessman will be unable to price the component. It therefore provides evidence that the trades do not represent part of the legitimate grey market.

254. If the price is significantly different (eg more than 20%) than the Intel or AMD CPU list price then it could be concluded that the businessman is not able to price his, or her, products correctly. If this is observed across a significant number of deal chains then it is possible to conclude that the businessman is not trading in a normal commercial manner and may not be part of the legitimate grey market in CPUs.

255. If a company is exceeding the projected legitimate grey market exports in CPUs from the UK then it is highly likely that the company is operating in another market than the UK legitimate grey export market in CPU components.

256. If the deal chains examined show significant repeating patterns (in sale price, volumes and profit margins) and do not conform to a typical deal chain (see Section III of Dr Findlay's report) it is possible to conclude that the company is not operating in the legitimate grey market. Additionally, if prices at the beginning of a "back to back" deal chain are successively and repeatedly different from the price achieved by the last participant then one can conclude that the earlier participants in the chain are behaving un-commercially in that they do not achieve the available prices in the market place at that time.

257. In terms of adequate specification of goods Dr Findlay explained that the contractual documentation, such as purchase orders and invoices, should be sufficient to enable the parties in a transaction to correctly identify, understand and ultimately price the component. Failure to do so would give rise to an unacceptable risk to the parties to the transaction; for instance a purchaser would risk paying too much for a component that it may not be able to use or sell onwards if it was not exactly what was required. Dr Findlay explained that it is also vital that the electronic components has an adequate technical specification, for instance knowing whether the product is in its "Boxed" or "Tray" form which are physically different products.

258. Dr Findlay stated that one of the most important strategies to establish a profit in electronic distribution is to buy from the supplier which can sell at the lowest price and sell to the customer which can buy at the highest price. The addition of a party to a deal chain dilutes the already low profit margins of the parties further down the chain; Dr Findlay would not expect to see long deal chain and he would be surprised to see three or more brokers in a chain. The pattern he would expect of a typical deal chain is as follows:

<u>Excess inventory opportunity</u>:

Manufacturer – Assembler/Authorised Distributer ("AD") – Broker – Assembler

<u>Arbitrage opportunity</u>:

Manufacturer – AD (Country A) – AD (Country B) – Assembler.

259. In cross-examination Dr Findlay agreed that typical contractual documentation includes the purchase order and/or invoice in a transaction in order to understand the product by its description although he agreed that there may also be overarching contracts and other types of documentation. He disagreed with the Appellant's use of the term "OEM" as referring to processors in trays explaining that "*OEM is a different phrase. It means original equipment manufacturer/assembler. OEMs manufacture with boxes and trays…[Intel] wouldn't agree with you that OEM means trayed processor, no…OEM means assembler in their language, in my opinion, to be*

clear" (transcript 12 August 2014 page 30 - 31). Mr Taheri expressed surprise at this, stating that *"an OEM CPU is an industry standard way of referring to CPUs in tray formats…everybody in the industry has referred to it as a tray CPU"* (transcript 13 August 2014 page 94 - 95).

260. In terms of the specific description on the Appellant's sales invoice in its first sale to Mona, Dr Findlay stated that it was not necessarily sufficient. As regards the description of a SL7Z9 Dr Findlay referred to an Excel spreadsheet containing codes which identified whether a product was unique or not. He concluded as follows:

"There's SL7Z9 there, and that's a tray. I think when I looked at this before, there's multiple trays and boxes for that particular code number. Therefore, to be clear, I consider that inadequate, because a box is a physically different shape, deliverable to the end customer than a tray is…Invoices need to be as accurate as possible…There's already problems with these invoices other than box and tray. Most of them don't even have the SL7Z9..."

(Transcript 12 August 2014 page 35 & 94).

261. He went on to explain that in order to continuously trade in the marketplace rather than opportunistically trade in it, a trader would need business relationships with the authorised distributors and assemblers added to which he noted that long deal chains mean reduced profit margins. He accepted that it is possible to have longer deal chains in certain situations but stated that it would not be typical of the majority of situations as it is in the interests of everyone in the marketplace to minimise the number of intermediaries. He stated:

"It is, of course, possible for individuals to buy some of these chips and strike it lucky, but not systematically…doing it to make a proper business that generates profits year-on-year."

(Transcript 12 August 2014 page 64).

262. On behalf of the Appellant Mr Lesley Derek Billing, an expert in the dynamics of trade in the computing industry provided an unchallenged report. Mr Billing explained that in the semiconductor component market there can be several different versions of the same original silicon under different part numbers and brands and these can be brought to market via many different channels addressing many tiers of end customer across a global supply chain.

263. Mr Billing described that the channels to market for semiconductor components can be very convoluted and complex or very clear and simple:

> (a) In the case of an Intel CPU for building or upgrading a PC they are built by Intel and sold via a few ADs to system builders or component resellers, or they are sold directly to a major builder of computers such as Dell;
>
> (b) In the case of standard embedded components they are sold via a wide range of authorised global and local distributors;
>
> (c) In the case of non-standard, remarked or rebranded embedded components these are sold to whoever has the cash to buy them or has specified the design originally. These

components can then be resold through other channels from these companies under any part number they choose for any deal they can make.

264. Mr Billing explained that the IT channel could easily get involved in this embedded component trading activity thinking it was similar to trading Intel CPUs and it would be very difficult for them to clearly identify what was or was not a real product because many of the components are worth much more than they appear on the surface.

Handwritten Notes

265. With the consolidated witness statement dated 7 April 2014 the Appellant produced handwritten notes which Mr Taheri explained he had found after extensive searching. These notes were a significant point of contention between the parties and it may assist to set out the background to their production.

266. Mr Taheri explained in oral evidence:

"I remember that we had kept – I had asked my staff at the time of the visits of officer Bailey or during that time to keep anything that's relevant, keep a copy of everything that's relevant, and I went through these boxes and I found, and I pulled out, the notes that belong to me. I went through these to look for the CMR documents…That is the only relevance I deemed them to have at the time during my first witness statement…At the time of writing my third statement, I believe it was February/March, and I was asked by my legal team…to look for anything that's relevant to the case, including any notes, any handwritten notes, and I remember that we had handwritten notes relevant to this case…Catherine, my PA… helped me to find the notes…she found the first batch of notes belonging to me…I found Eddie's…We got the relevant ones scanned in and we decided to discard the majority of the documents…"

(Transcript 13 August 2014 page 15 – 19)

267. In cross-examination Mr Taheri explained how the notes were found:

"Q. 'Catherine found the first batch of these notes that were written in May of 2006.' Where did she find them?

A. I believe she found them in one of the boxes on the mezzanine floor. My flat is on the mezzanine floor too.

Q. What is comprised in this first batch? We've got the notes in front of us. What are you referring to when you're referring to the first batch?

A. I believe these are the notes in May.

Q. So from page 61 to where?

A. I can't tell you. It could be partly through to June, it could stop at 25 May, 23 May. I cannot tell you exactly where it starts and where it stops.

Q. You talk about batches, I just want to know what you're referring to when you say a batch.

A. A batch, a first few pieces of paper that belong to the May period.

Q. And were they found with anything else or just these sheets?

A. I think they were found with some other notes that were irrelevant…other notes by, I suppose, other people, or maybe there might have been some scratch pad(?) by me…but it was not relevant…

Q. You made a statement earlier this year, which was your third witness statement…your consolidated witness statement…:'After extensive searching I found some of my handwritten notes from the 07/06 period.' Well, it was Catherine that found these notes, wasn't it?

A. Under my instructions.

Q. You hadn't found them, Catherine did. Why don't we see any reference to Catherine here?

A. Because it was under my instruction, I found the majority of these notes.

Q. It's not accurate what you say there, is it?

A. Where is the inaccuracy?

Q. The fact that Catherine found them or found some of them. You don't mention that, so that's an inaccuracy, isn't it?

A. That is an omission of detail, but not necessarily relevant…

Q. Where did you find these?

A. I found them on the mezzanine and I did some search in the warehouse.

Q. Warehouse or mezzanine?

A. I found some of them in the warehouse and I think some of them on the mezzanine. I can't remember exactly where.

Q. This is deeply unconvincing…you are unable to say where these very important notes were found just a few months ago. You are unable to say who found what and where.

A. I found these notes, together with lots of other notes, Mr Puzey…I didn't know exactly how important they were…

Q. They were important to your case, weren't they?

A. Yes, they were…but the thing is, I knew the importance of them back in February, between the months of February and when I first found them and communicated it with my lawyer…

Q. Do you specifically remember these documents being shredded?

A. Not specifically…

Q. Did she tell you, when she's done this, the point at which she had shredded these documents?

A. No, I can't remember…I don't believe that she told me, no…

Q. You know Catherine's evidence is – and it's the evidence you've put forward –that you were present and that she checked these documents with you prior to putting them in the shredder?...Now, you don't recall that at all, you say?

A. I recall that she checked with me and she said 'Shall I shred these notes or get rid of them or discard them?'

Q. What notes? Did she describe them to you or show you them?

A. At some stage she did. They were copy notes, these.

Q. So your evidence is now that you were aware she'd shredded these documents and she had checked that with you at the time?

A. I never said I was aware, I said that she showed me documents and she pointed to boxes of documents to me and at the time I was quite busy, I was – I had my focus on a lot of different things and so I can't remember, so I'm not aware that she did that…"

(Transcript 14 August 2014 page 50 – 56).

268. Mr Taheri agreed in cross-examination that Mr Harasiwka had not referred to handwritten notes in his communications with Mr Bailey nor were the notes mentioned by Mr Taheri in his 2011 witness statement:

"Q. And did you find your notes when you were looking for them at this time when you were preparing your first witness statement?

A. I did find – I went through my notes, as far as I remember, and I vaguely remember this, I went through my notes and I found the ones for May. I pulled out the ones for May to look for any evidence of Mitz. May or thereabouts, Mitz's shipment.

Q. …You could have dealt with that by referring to the notes from May 2006 that you just found, couldn't you…

A. As I said, my objective was to look for a consignment number…

Q. [reading from visit note] 'I asked Mr Taheri about the Canada deals. He was vague as to how he had come into contact with Mitz and said it was probably through a trade exhibition.' Well, that's dealt with in your notes in May, isn't it? Why wouldn't you have referred to your notes at that point?

A. Because I said to you that my main objective was to look for the shipment documents, any reference – any CMR or tracking record to Canada. At the time I was looking for tracking records to Canada to prove that these were shipped to Canada. That was the most important objective.

Q. If these notes had been in existence, Mr Taheri, in 2011 and you had found them, you would have realised they were gold dust, and you would have referred to them. That's the truth, isn't it?

A. No, I didn't. I didn't realise that they were gold dust, as you put it."

(Transcript 14 August 2014 page 46 – 47).

269. Mrs Catherine Foster gave evidence on behalf of the Appellant. She stated that a few months earlier she had been Mr Taheri's PA and he had asked her to look for any handwritten notes and indicated several locations to search. Mrs Foster found some copies of notes in Mr Taheri's handwriting and others in different writing. When Mrs Foster showed the notes to Mr Taheri he stated that the ones in different writing were not needed. She was later told by Mr Taheri that he had found some additional notes which he asked her to scan. Mrs Foster confirmed that she had not read the notes she had found and therefore could not confirm to the Tribunal that those exhibited by the Appellant were those that she had found although they looked similar. The notes found by Mrs Foster amounted to 3 or 4 sheets.

270. Mrs Foster explained that she had shredded a large amount of documents in or around June 2014. The items shredded were duplicates and the remainder of the documents were given to Mr Taheri who confirmed that they too could be shredded after being scanned into the system.

Notes of Mr Taheri

271. Mr Taheri explained in his witness statement that at the relevant time he usually carried with him an A4 clipboard in which he chronicled significant business events. He highlighted that the brokerage deals were only one part of a large business and his time was spent on many different tasks. We were shown a DVD clip from a television programme which featured Mr Taheri and which showed him with a clipboard and sheets of A4 paper and which, it was submitted, supported the proposition that notes were made.

272. We will not set out the contents of the handwritten notes verbatim but it may assist to give an example of them. Mr Taheri's witness statement set out the details of the transactions on 17 May 2006. He stated that the managing director of Supreme, KD, spoke to him on 9 May 2006 and informed him that he had CPUs and other components available to sell in bulk. KD assured Mr Taheri that he had carried out extensive due diligence on his suppliers. On 15 May Mr McFadden told Mr Taheri he had found some interest from a potential customer. Mr Taheri made clear that he wanted a margin of no less than 3% and Mr McFadden was reminded about carrying out due diligence. On 17 May 2006 the customer paid however later that day there was an issue with the supply of the goods. Mr McFadden and Mr Harasiwka were told to refund the payment if the goods could not be sourced by the next day. On 18 May 2006 Mr Taheri was told by Mr McFadden that Supreme now had the goods available. The customer asked if more goods could be sourced which is how deals 1 and 2 took place.

273. The handwritten notes produced contained the following:

"09/05/06

Sales £95.5k

…

Talked to KD, he has CPUs as well as other components we can sell in bulk. Eddy's been informed…

15/05/06

…

Eddy's found some interest with a customer for KD's goods. I informed him no less than 3% margin. Due dil and VAT number validity. We have dealt with Supreme for years. All deal details need faxing to HMRC as the deal takes place per usual, If any issues flagging up, Eddy to let me know…

17/05/05

…Eddy's on order for KD's goods and the customer has done a transfer. I met their rep @ CES…Just had a call & Mehrtad has been given jail for 15 years. Verdict just out. Best B.day present ever for stealing £70k from warehouse...

There is an issue with KD supplying goods, Customer has been informed and is furious. Asked Eddy & Frank to refund if goods cannot be sourced by tomorrow…

20/06/06

…New deal on offer from KD…same customer.

Arash from Ashtec came to visit. Had a coffee and drove his new Range Rover…He has a source available for P4 CPUs. His prices are a touch above KD's though. Brought him in office, introduced him to purchasing staff. Talked about old times & how we can get business started. Eddy says he needs to work on his prices. He'll keep in touch with Arash."

274. We should note at this point that the memorandum of conviction in respect of the custodial sentence referred to in the notes was not readily available however HMRC made a formal admission to the effect that the conviction date and sentence were correct and we accept that as fact.

275. Mr Taheri's written evidence set out that on 20 June 2006 another deal arose with Mona and Supreme. On the same day Mr Afzalnia from Ashtec came to see Mr Taheri for a coffee. Mr Taheri described how he was allowed to drive Mr Afzalnia's new Range Rover. He offered Mr Taheri CPUs and Mr Taheri noted that the price was slightly higher than that offered by Supreme. Mr Taheri explained that he knew Mr Afzalnia through his father who was one of the merchants at computer exhibitions attended by Mr Taheri and the pair had done business together in the past. He explained that Mr Afzalnia started Ashtec in or around 1997 and that the business mainly consisted of importing computer chips from abroad. In the past Mr Taheri had purchased goods from Mr Afzalnia in brokerage deals. In about 2001 trade with Mr Afzalnia died down and although he still offered the Appellant goods on an ad hoc basis between 2001 and 2006 the prices were either too expensive or Mr Taheri had no requirement for them. Mr Taheri was not aware that Ashtec had been dormant in

that period. In oral evidence Mr Taheri explained that he had not seen Mr Afzalnia for two or three years prior to this visit although they had spoken on the phone every three months or so regarding business *and "I thought that at some level he was still in the computer business"* (transcript 13 August 2014 page 65). Mr Taheri said he could vaguely recall driving Mr Afzalnia's car and he remembered asking about the source of the goods and being assured that *"everything is genuine, is bona fide"* (transcript 13 August 2014 page 69).

276. On 23 June 2006 a deal with Supreme was cancelled because they could not supply the goods. The Appellant refunded the payment it had received. A further deal fell through on 3 July 2006 because of Supreme's inability to source the goods. As a result of this Mr Taheri informed Mr McFadden to stop dealing with Supreme. In oral evidence Mr Taheri stated that he thought he had spoken to KD at Supreme about this *"maybe round about the time that – maybe at the same day that this deal happened. It must have been at the same time that this deal happened. Maybe the next day"* (transcript 13 August 2014 page 82).

277. In cross-examination Mr Taheri denied misleading the Tribunal as to the existence of the handwritten notes:

"Q. You told the tribunal that the handwritten notes were still in existence when in fact they had been shredded according to you; is that right?

A.I thought that there might be – there is a high chance of them being in existence and I informed my counsel in a way that he must have thought that they are in storage."

(Transcript 14 August 2014 page 2).

Notes of Mr McFadden

278. Copies of notes purported to have been made by Mr McFadden were produced. In oral evidence Mr McFadden stated that the notes looked like his handwriting but he could not recall writing them. The notes were undated and we were not provided with original copies.

279. Mr Taheri explained that he had found Mr McFadden's notes with his notes:

"Q. They've plainly been torn out from a notebook…Something like a reporter's notebook.

A. Yes

Q. Where is that notebook?

A. The notebook, as I said to you, it must have been discarded together with all the originals.

Q. Why were copies made and when were they made?

A. I believe copies would have been made if these notes were given to either Officer Bailey or – because they were important

Q. When were these copies made?

A. Probably some time in 2006

Q. I'll ask again. Why?

A. I'm under the impression that the originals were given to officer Bailey or –

Q. That wasn't put to officer Bailey in his evidence was it?

A. Maybe it wasn't, no. I don't know.

Q. …There's nothing in the visit report to suggest he was given any such notes…

A. Maybe we were planning to give them to officer Bailey. Somebody would have gone through my notes and Eddie's notes to pull out the relevant ones.

Q. Where are the rest of the pages to this notebook?

A. Well, if they're irrelevant, they wouldn't have been kept.

Q. How did you decide what was relevant and irrelevant?

A. By looking at the notes themselves.

Q. And who made that decision?

A. Somebody in administration in 2006.

Q. What do you mean, somebody in administration? What would that person know of these deals?

A. They would have been probably instructed. They must have been.

Q. Instructed by whom?

A. By myself

Q. To do what?

A. To keep any relevant –to keep anything relevant to these deals, any documents relevant to these deals at the time of these deals happening…

Q. So you know that they're important and yet you don't refer to them in the visits, in the correspondence, or in your first two witness statements?...

A. these are important. I explained the context of importance. The contact of importance was if I could find any consignment numbers that related to the shipments to Canada…when I wrote my first witness statement, I was focussing on what officer Bailey was talking about in terms of the dates that the deals happened, in terms of a lot of issues that he was talking about. I was shocked and flabbergasted by some of the claims that were made and I was focussing on that, some business practices that he was saying that it's very unusual."

(Transcript 14 August 2014 page 57 - 60)

Submissions

HMRC's submissions

280. On behalf of HMRC Mr Puzey highlighted in closing features of the evidence given on behalf of the Appellant which, he submitted, indicated knowledge or means of knowledge. We were invited to consider the whole picture of the Appellant's trading and form a real world judgment taking onto account all of the circumstances of that trade.

281. The Appellant's turnover in 07/06 was in the region of £9,900,000; an increase of £3,000,000 on the previous quarter. Approximately 50% of the turnover in 07/06 resulted from the 11 transactions which form the subject of this appeal. Those deals were put together by three employees acting part-time; Mr Taheri, Mr McFadden and Mr Harasiwka. The Appellant had never before traded with, or traded in such significant sums with the suppliers involved, Supreme and Ashtec. The Appellant had never traded with the customers involved, Mitz, Mona and Silver Pound.

282. The Appellant relies on its history in the industry and previous co-operation with HMRC. However this must be measured against the extraordinary circumstances of the 11 transactions and its knowledge of MTIC fraud generally in question in determining what the Appellant knew or should have known.

283. The Appellant failed to pay its VAT on the basis that the extended verification impacted on cash flow. Payment of VAT is not optional and VAT cannot be used to finance a business. Mr Puzey submitted that this demonstrated that Mr Taheri, as the sole director and shareholder of the Appellant, was prepared to flout the law if it interfered with business.

284. The Appellant described the transactions as opportunistic. The opportunity resulted in a quick profit, a boost to turnover and a reduction in its output tax liability. The opportunity was quite clearly too good to be true. Mr Taheri himself acknowledged in evidence that more could have been done: *"If we were doing them often, day in, day out, I suppose there would have been procedures in place because one deal can go wrong"* (transcript 15 August 2014 page 35).

285. As regards the deals, deal 3 (in respect of which there was no tax loss) is different to the rest; the supplier in that deal was Digimate which had supplied the Appellant for years in bulk deals. The goods were also different; monitors rather than CPUs. The remaining 11 deals all had long deal chains and consistent levels of mark-up with the Appellant making the largest mark-up by a significant amount in each deal.

286. Mr Puzey highlighted the Appellant's lack of knowledge about the product it was trading, the Giga Pro 7074. The Appellant had never heard of the product before nor traded in it. Supreme offered the product and a new customer, Mitz, appeared on the scene expressing an interest in it. Mr Taheri's evidence as to what he did to satisfy himself as to the legitimacy of the deal was evasive. Furthermore the only information provided to HMRC by Mr Harasiwka when asked about the goods was a website for Cyclick Distribution. Mr Taheri knew nothing about the product but stated Mr McFadden had looked into it. Mr McFadden's witness statement made no mention of his enquiries however in oral evidence in September 2014 after a break in proceedings Mr McFadden provided further information. Mr Puzey submitted that the Appellant's willingness to trade in a product it had not heard of with a customer it did not know to a value of £200,000 indicates knowledge. Mr Patel's evidence does not assist the

Appellant; he knew little about Mitz, the information he did have was not in the Appellant's possession and his visit to Dubai took place after the relevant transactions.

287. A further indicator of contrivance is the Appellant's possession of the introductory letter from Mitz which was addressed to Sanche and faxed to MVS Digital. There was no legitimate reason for the Appellant to have this letter and it raises the obvious question as to why MVS Digital did not deal directly with Mitz.

288. Moreover the Appellant's willingness to pay for goods before inspection and release goods without payment demonstrates knowledge. The inspection reports exhibited by the Appellant do not assist its case; one is addressed to 4A and the other is not addressed to any company and there is no evidence it was seen by the Appellant; even if the report was seen by the Appellant it is dated the day after payment was made. The Appellant's evidence that goods may have been mistakenly released before payment received was unconvincing and contradicted by the evidence that perhaps some form of payment confirmation had been received. The inspection reports themselves sometimes set out the condition of the goods and sometimes did not yet the Appellant failed to query this. Although the Appellant kept box numbers, it did nothing with them and made no checks to guard against circularity because it either knew or was indifferent to the fraudulent nature of the transactions.

289. The due diligence carried out by the Appellant was inadequate and superficial; it made no checks on customers, there was no evidence that any consideration was given to the Appellant's checklist nor have any due diligence files on trading partners been produced. The information produced by the Appellant such as Creditsafe reports was not queried despite the negative information regarding the financial status of both Supreme and Ashtec. The existing relationships with Supreme and Ashtec did not withstand scrutiny given the fact that the Appellant had never traded with either in such large volumes and had not traded with Ashtec for 6 years.

290. Mr Puzey highlighted the stark contrast between the Appellant's retail transactions and the broker deals. The retail operation involved storing the goods in the Appellant's warehouse, a sophisticated stock control system and security scanning. By contrast the wholesale side of the business involved goods being stored by freight forwarders, no due diligence on the freight forwarders and inadequate inspection reports. The back to back payments in the 11 transactions took place over a short period of time despite no clear contractual terms regarding payment.

291. As regards the handwritten notes of Mr Taheri, Mr Puzey queried why originals had not been produced. He highlighted that the originals had been requested at the commencement of proceedings and the Tribunal was told that the documents were in storage. A few days later the Tribunal was informed that the documents had been shredded in the recent past. It is not HMRC's case that Mr Taheri did not make notes; HMRC submits that Mr Taheri did not make the notes at the time. In support of this contention Mr Puzey noted that the notes were never referred to by Mr Taheri during visits by Mr Bailey nor were they mentioned in his two witness statements made in 2011 and 2012. The notes specifically relate to queries raised by Mr Bailey and it lacks credibility that Mr Taheri would not mention the notes until 3 months prior to the hearing. Furthermore the contents of the notes are dubious; references to "we have dealt with Supreme for years" are matters that Mr Taheri would be fully aware of and have no need to remind himself of by recording it in his diary. HMRC contend that

the notes are an attempt to construct corroboration for the Appellant's case after the event. As to Mr McFadden's notes, Mr Puzey noted that he could not recall making the notes which were undated; for that reason the notes do not assist the Appellant's case.

Appellant's submissions

292. In addition to oral submissions on 2 and 3 October 2014 Mr Firth provided detailed written closing submissions. Due to the volume of the submissions, what follows is an overview of the principle points raised but we should make clear that all of the submissions, both oral and documentary were fully considered.

293. On behalf of the Appellant it was submitted that HMRC have failed to establish knowledge or means of knowledge on the part of the Appellant. Mr Firth contended that HMRC have simply made up a case against the Appellant as they went along and in the end the only factors relied upon were the 10 points highlighted by Mr Puzey in oral closing submissions.

294. Mr Firth highlighted the different tests for knowledge and means of knowledge. He submitted that the evidence before the Tribunal may be relevant to one, or both in different ways. By way of example Mr Firth submitted that the Appellant's failure to carry out due diligence may be relevant to actual knowledge if the Tribunal concludes that the reason for the omission was because it knew the transactions were contrived. However in relation to means of knowledge Mr Firth submitted that the first question is whether it is reasonable to expect a taxpayer to carry out that piece of due diligence. If so, the fundamental question is what information that due diligence would have provided. If it would have provided nothing by way of a means of knowledge then the failure to perform it is irrelevant.

295. Mr Firth set out those factors which he submitted are irrelevant to means of knowledge. For instance there is no evidence that the Appellant traded in the same goods more than once and therefore HMRC's complaint that box numbers were not kept is irrelevant.

296. It was submitted that there is no duty to carry out due diligence and it is therefore irrelevant. If by taking every reasonable precaution the trader would have found out nothing which gave him means of knowledge then input tax cannot be denied.

297. Mr Firth submitted that HMRC cannot rely on a point not put to all relevant witnesses. It is a fundamental principle of natural justice that if HMRC want to rely on a factual proposition that is a serious allegation or inconsistent with the evidence of a witness of fact then the point must be put in cross-examination, as per Floyd J in *Mobilx* [2009] EWHC 133 (Ch):

"It is a fundamental aspect of civil litigation that parties do not learn for the first time in a judgment or a decision of serious adverse allegations against them. They must be given a proper opportunity of dealing with them before they can form a building block of any substance in the case against them"

298. Mr Firth set out in a schedule the points he submitted had not been put to the witnesses for the Appellant on both knowledge and means of knowledge which included, inter alia:

- The link between easy profits and fraud;
- That the Giga Pro products were researched by Mr McFadden;
- That the inspection reports were uninformative which indicates knowledge of fraud;
- The circumstances of deals 1 and 2;
- Due diligence on both customers and suppliers.

299. Mr Firth submitted that the Tribunal cannot take judicial notice and make findings of fact as to what a reasonable businessman would have thought or done in a particular circumstance without evidence before it on the matter.

300. On the issue of contracts Mr Firth submitted that it is common for it to be unclear as to whose terms a contract is made on, otherwise known as "battle of the forms" (see *Butler Machine Tool v Ex-Cell-O Corporation* [1979] 1 WLR 401). Mr Firth highlighted Dr Findlay's agreement that a purchase order and invoice would be typical contractual documents and noted the features of Dr Findlay's evidence which he said could not be relied upon. As to HMRC's suggestion that there should be an overarching contract Mr Firth submitted that this would not necessarily be expected in a one-off brokerage transaction

301. On the issue of legal title Mr Firth referred us to the Sale of Goods Act sections 16 to 19 which provides that where the intention between traders is clear as to the passing of title, no default rule is required.

302. As to insurance Mr Firth noted that the Appellant's evidence that insurance was passed to customers went unchallenged and therefore the Tribunal cannot make any adverse findings of fact on the issue.

303. Mr Firth warned against relying on the facts of one deal in relation to another without careful consideration. He highlighted that the principles relating to similar fact evidence must work both ways and therefore deal 3, which was verified and repaid, must be taken into account. Furthermore, whilst the impression that deals occurred easily and without much effort may be gleaned, Mr Firth submitted that in order to have the opportunities contacts must have been made and groundwork carried out.

304. Mr Firth submitted that HMRC had not properly put its case in respect of the handwritten notes. It was not put to Mr McFadden that his notes were not genuine, written at the time and whether or not he recalled writing them is irrelevant. He explained that:

"You can't mislead a witness into thinking that the issue is when the notes were created but the issue is not the contents of the note by agreeing with him that they're all corroborated by facts that happened, and then…the case is put in terms of…trying to recreate what did happen, not: you were inventing things that never happened. That's a very different case and it's not one that was put."

305. Mr Firth submitted that HMRC's allegation that there was actual knowledge was not put to Mr McFadden and therefore HMRC must rely on the case as put to Mr

Taheri and not the case as put to Mr McFadden. Nor can a combination of what the various witnesses knew be put together to reach a finding of knowledge.

306. Mr Firth submitted that the inference of HMRC's case in closing is that payment was made as part of a contrived scheme of which Mr Taheri was aware. That case is wholly different to saying that Mr Taheri knew the deal was going to go through and that payment would be received. In the latter case it is irrelevant that payment was made before a written inspection report was received. Similarly release prior to payment is only relevant if the Appellant had actual knowledge however, that Mr Taheri knew that goods were released prior to payment was not a matter that was alleged against him. That the goods were released prior to payment by error was not an explanation that was challenged. Mr Harasiwka could not provide an explanation however he did suggest that it could have been a mistake.

307. Mr Firth highlighted that there is no evidence before the Tribunal as to industry practice regarding CPU inspection reports. Some reports set out the condition of the goods and others don't; no conclusions can be drawn from that. Mr McFadden stated in evidence that different operatives work in different ways and he would have expected to have been informed if there was anything wrong with the goods.

308. On the issue of box numbers Mr Firth highlighted that HMRC's case is that the Appellant's attitude in retaining numbers but doing nothing with them indicated indifference to whether the transactions were connected to fraud. Mr Firth noted that indifference means a lack of interest and is irrelevant to actual knowledge and means of knowledge. Furthermore HMRC did not explain to the Appellant what checks should be carried out using the numbers and therefore it was a reasonable inference for the Appellant to have drawn that HMRC was undertaking checks for their own purposes.

309. It was submitted that the Appellant's lack of due diligence on its freight forwarders is irrelevant to actual knowledge nor was it put to the Appellant's witnesses that this was a badge of fraud. Furthermore it must be borne in mind that if there are two broker deals and one is connected to fraud but the other is not but in neither case was due diligence carried out on the freight forwarder then this cannot lead to a finding of actual knowledge.

310. As regards due diligence generally Mr Firth submitted that the premise is trust:

"…if you already trust someone, if you already know someone, if you've had business dealings with them in the past, and you've already formed the view that this person is an honest, upstanding, legitimate businessman, who wouldn't deal in goods tainted by MTIC fraud, then necessarily anything extra you do is for the purposes of HMRC. Necessarily."

311. It was submitted that Mr Bailey's evidence on the issue of due diligence was inconsistent. Emails exhibited by the Appellant demonstrate that due diligence was carried out and there was a policy in place requiring a trading relationship involving deals worth less than £10,000 for at least one year. It was never suggested that Mr Taheri did not trust his suppliers or that there had been contact with Mr Afzalnia on a semi-regular basis. Mr Firth highlighted that the same level of due diligence was carried out on Digimate and Ordin Informat, the supplier and customer respectively, in deal 3 which was verified and re-paid. Furthermore the misunderstanding by Mr

Taheri that due diligence should be carried out on foreign customers does not indicate actual knowledge.

312. As regards the Appellant's possession of the Sanche letter Mr Firth submitted that the significance of this was not put to Mr Taheri. He submitted that in putting its case to Mr Harasiwka, HMRC accepted that it was an error. He added that it was, in any event, not accepted that the document was ever received by the Appellant nor was it given to HMRC by the Appellant. Mr Firth contended that HMRC had accepted that the document had possibly come from HMRC's own system which is strengthened by Mr Bailey's evidence that he had not commented on any irregularities at the time of receiving documents from the Appellant from which it can be inferred that there were no such irregularities.

313. The distinction between the wholesale and retail side of the Appellant was not put to the witnesses as a badge of fraud and is irrelevant to the issue of knowledge. Furthermore no conclusions can be drawn from the number of people in the chains of supply unless it can be shown that one trader knew of another further up the chain who was not his immediate supplier.

314. Mr Firth submitted in respect of circularity of payments that it does not indicate that the Appellant was involved in the fraud. Equally, there is no evidence that the prompt payments made were anything other than good business practice.

315. On the issue of the handwritten notes Mr Firth submitted that the DVD shown to the Tribunal demonstrated that Mr Taheri made notes in the same way as those exhibited at the relevant time. He contended that HMRC's case was not that Mr Taheri did not make notes at the time and therefore it must be accepted that notes were made at the time. Furthermore HMRC have not said when they allege that the notes were forged. If they were forged after Mr Firth requested any contemporaneous notes (a request made in 2014) then the level of detail is beyond that which would be expected of someone recreating events eight years ago. The circumstances in which the notes were shredded were entirely unsuspicious; HMRC ambushed the Appellant in the request for the originals and although a request had been made in or around May 2014, it was not taken seriously enough at the time.

316. Mr Firth submitted that many factors highlighted by HMRC are irrelevant to means of knowledge including release before payment, inspection reports and the retention of box numbers.

317. As to HMRC's witnesses Mr Firth submitted that Mr Bailey, whilst broadly honest, was unreliable having made assumptions on matters outside of his expertise and avoidable errors. Dr Findlay made serious errors and was misleading in evidence.

The Decision

Additional Evidence

318.On day 8 of proceedings after HMRC had closed its case the Appellant applied to adduce 269 pages of additional evidence comprising turnover records, emails and purchase invoices. The Appellant sought to adduce the documents to support two main areas of its case. First, various emails related to the manufacturer of the Giga Pro 7074 product traded by the Appellant. Second, the turnover figures, purchase invoices and remainder of emails were items said to be referred to in Mr Taheri's

handwritten notes. Mr Firth clarified that the emails had been in the Appellant's possession since the start of August 2014 and the turnover figures were provided to him a few days earlier.

319.HMRC did not object to the turnover figures. However they objected to the remainder of the items. Mr Puzey highlighted the large amount of material that was adduced by the Appellant throughout the proceedings without any formal applications being made and without putting HMRC on notice. HMRC had taken a pragmatic view that if the material could be addressed without disruption to proceedings, no objection would be taken. However the documents now sought to be adduced could not be dealt with after HMRC had closed its case and tipped the balance to such an extent as would cause unfairness to HMRC if admitted. The issues in the appeal, such as the origin and existence of the Giga Pro 7074, have been known to the Appellant since 2006. The emails are more recent but the last is dated 4 August 2014 yet no explanation has been provided as to why the Appellant has failed to mention or disclose the documents until 9 days later. The prejudice to HMRC is that there can be no investigations into the material or provenance of it nor was it put to HMRC's witnesses. The documents are not supported by witness statements attesting to their contents and litigation cannot be conducted in such a manner.

320.We considered the application and bore in mind The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009, in particular the overriding objective set out in Rule 3 to deal with cases fairly and justly, our case management powers under Rule 5 and the desirability that the judicial process should achieve the right result.

321.We refused the application save for those documents to which HMRC did not object. Our reasons for that decision are as follows: there was no cogent reason given for the delay in disclosing the documents. The Appellant failed to put HMRC on notice of the existence of such documents nor were the documents put to HMRC's witnesses. In our view, at the stage of proceedings at which the application was made, particularly bearing in mind that HMRC had closed its case, the attempt to adduce the items amounted to an ambush. That parties must disclose their cases is not a novel concept and in our view the Appellant's failure to do so in these circumstances contravened its obligations under Rule 2 of the FTT Rules.

322. HMRC were not in a position to make any enquiries and the prejudice to HMRC in admitting the documents far outweighed their relevance. The issues in the appeal have been known for a significant number of years and the Appellant has had ample opportunity to serve any documents upon which it seeks to rely. Indeed, the case management directions issued throughout the history of this appeal have required such items to be served and we concluded that it is not in the interests of justice to allow the Appellant to serve vast numbers of documents on an ad hoc basis as we noted it had throughout proceedings; to allow the Appellant to do so serves only to render the tribunal's directions redundant and condone a blatant disregard for the tribunal and HMRC.

Evidence of HMRC officers relating to defaulters and contra traders

323.On day 12 of proceedings Mr Firth raised an issue regarding the HMRC officers who provided evidence on the defaulting traders and contra-traders. He contended that the evidence was not unchallenged but rather it was not in evidence as a result of an understanding between the parties arising from the Appellant's indication that the tax loss and connection would not be challenged. Mr Firth submitted that the tax loss and

connection to fraud was not going to be challenged "*but that didn't mean we accepted all these statements and all the facts contained within them. We simply hadn't had time to go through them all, we weren't prepared to do that*" (transcript 30 September 2014 page 3). Mr Firth referred us to a list of witnesses required for cross examination which was served by HMRC in February 2014 and which contained the defaulter and contra officers.

324.In response Mr Puzey referred us to a Direction issued by Judge Demack on 30 July 2009 which provided for the service of witness statement and directed:

"Subject to any further direction, the witness statements shall stand as evidence-in-chief, subject to cross-examination…

All witness statements shall be deemed to be objected to unless the other party states otherwise…"

A further set of directions was issued on 26 January 2010 in the same material terms.

325.Mr Puzey noted that the statements were not objected to and the Appellant's request that HMRC would not refer to the defaulter or contra officer witness statements was not met with agreement by HMRC and there was, therefore, no understanding or agreement between the parties as suggested by the Appellant. Mr Puzey clarified that the list of witnesses served by HMRC pre-dated the case management hearing in February 2014 and was no more than an attempt by HMRC to guess which witnesses may be required.

326.We considered the submissions by the parties. Over the course of litigation generally, particularly in cases such as this which have a lengthy history, the positions of parties can change in many ways including their approach to evidence which is or is not challenged. It is not the responsibility of the tribunal to carry out the function of the parties' representatives. It was a matter for the Appellant as to whether the statements served were read in order to reach an informed view on the evidence contained therein. The statements of the officers dealing with the defaulters and contra traders were put in evidence before the tribunal by HMRC who provided the statements in the agreed bundles containing all documents relied upon; there can therefore be no doubt that the statements were in evidence before us.

327.The Appellant raised no challenge to these statements and did not require the officers to attend for cross-examination. To the contrary, in response to a direction issued by Judge Cannan dated 8 November 2012 the Appellant confirmed that no issue was taken with the identification of deal chains or tax losses and the Appellant could not comment on whether the deals chains were fraudulent or connected to his transactions. A direction was issued by the Tribunal on 24 February 2014 which required full particulars as to whether the Appellant disputed:

(a) the identification of deals chains;

(b) that there was a tax loss;

(c) that the tax loss was fraudulent; and

(d) that the Appellant's transactions were connected to the fraudulent tax loss

Mr Taheri responded by email on 28 February 2014 confirming that the issues set out at (a) to (d) above were not disputed. The email contained the caveat that HMRC would not refer to the defaulter or contra officers' statements. There was no agreement to this request by HMRC and we concluded that the Appellant misunderstood the position.

328.We should add that even if the Appellant had made its objections known, it remained unclear exactly what part of Mr Taylor's evidence in respect of 4A was challenged or the basis of any such challenge. We adopt the words of the UT in *HMRC v Fairford Group plc (in liquidation) & others* [2014] UKUT 0329 (TCC) at [48] – [49]:

"…An appellant who advances a positive case will be required, by virtue of other customary directions, to set it out in witness statements or, if that is not practicable, in a response or a letter, or in some similar way. Accordingly, an appellant putting a positive case must disclose his hand in advance; we see no reason why one merely putting HMRC to proof should be in a better position. If there is a real challenge to HMRC's evidence it should be identified; if there is not, the evidence should be accepted. We see no reason why an appellant who does not advance a positive case should be entitled to require HMRC to produce witnesses for cross-examination when their evidence is not seriously disputed. Such a course is wasteful not only of HMRC's resources but also of the resources of the FTT, since it increases the length of hearings and adds to the delays experienced by other tribunal users.

In our view the FTT should also direct that if an appellant raises no positive case, serves no evidence challenging the evidence of HMRC's witnesses, and does not identify the respects in which the statements of those of HMRC's witnesses who deal only with the questions set out at para 47 above are disputed, then their evidence can be given, and will be accepted by the tribunal, in the form of a written statement under FTT Rule 15(1) (see also Rule 5(3)(f)), and that cross-examination of that witness will not be permitted."

Findings of fact on whether the Appellant knew, or should have known, that its transactions were connected to fraud.

329.We considered the law, oral and written evidence and submissions of both parties carefully in reaching our conclusions. We were satisfied that the evidence proves objective factors within the Appellant's knowledge at the time of the transactions which support our conclusion that the Appellant knew of the connection to the fraudulent evasion of VAT or should have known that the only reasonable explanation was that connection to fraud. We should add that we have based our decision on the totality of the evidence and we were careful not to focus unduly on the issue of due diligence or judge the evidence with the benefit of hindsight. We have not set out a detailed examination of individual deals from the perspective of due diligence but instead we have summarised certain compelling features of the vastly extensive evidence which we regard as material to our decision although we should make clear we took account of all of the evidence before us.

330.We did not agree with Mr Firth's submission that HMRC had simply "made up a case against the Appellant as they went along"; to the contrary, and for the reasons we will set out we found the evidence cogent and compelling. We did not accept Mr Firth's contention that HMRC had abandoned parts of the case and that only 10 points

were ultimately relied upon; Mr Puzey closed his case in a concise and succinct manner which highlighted a number of features of the case; the absence of a reference to every single point raised in the proceedings was not, and we did not take it as an indication that certain factors were no longer relied upon.

331.We also did not accept that HMRC had failed to put its case to the Appellant's witnesses. We were wholly satisfied that the case for HMRC was clearly and fairly put to the relevant witness, the challenge to the witness' evidence made abundantly plain and that the Tribunal can make findings of fact and draw inferences where appropriate as a result. The Appellant was fully aware of the case against it and the opportunity was given to address the allegations. The authorities make clear that the injustice or mischief sought to be guarded against is that of an allegation previously unknown to a litigant being raised after the opportunity to address it has expired. We were quite satisfied that the Appellant suffered no such injustice. In our view the detailed submissions by Mr Firth on the matter isolate parts of the evidence and do not provide the full picture. Moreover the challenge made by Mr Puzey in testing the Appellant's case must be viewed in the context of proceedings as a whole; the case against the Appellant was and always has been hinged on the allegation that the Appellant knew, or should have known, that its transactions were connected to fraud.

332.We agreed with Mr Firth's submission that some evidence may be more relevant to either actual knowledge or means of knowledge, or equally relevant to both. However we disregarded parts of the cross-examination of Mr Bailey in which he proffered an opinion as to whether an issue was relevant to knowledge or means of knowledge on the basis that it is a matter for the Tribunal, and not for witnesses, to assess on the evidence before us whether or not the Appellant knew or should have known that its transactions were connected to fraud.

333.We rejected as misconceived Mr Firth's submission that the Tribunal cannot have regard to the actions of a reasonable businessman where there has been no evidence adduced by HMRC as to the practices of a reasonable businessman in the industry at the time. The term "reasonable businessman" indicates the yardstick by which the Tribunal applies the objective test and is no more than a description of our approach to the issues we have to determine by reference to objective factors. In those circumstances we did not accept that evidence as to what a hypothetical reasonable businessman might do or evidence as to the standards that such a person in the trade might apply was necessary.

334.We found Mr Bailey to be a credible and honest witness and the minor concessions made by him in oral evidence did not, in our view, undermine the material parts of his evidence overall. We were satisfied that Ms Smith's evidence was accurate and reliable. Whilst we did not doubt the credibility of Dr Findlay's evidence ultimately it provided limited assistance in determining the issues of knowledge and means of knowledge.

335.The oral evidence on behalf of the Appellant was not convincing. The evidence of each of the witnesses was vague and littered with what they "would have done" or "would have been told" yet the clear impression we formed from each of the witnesses, and on Mr Taheri's own admission, was that there were no set procedures in place for the brokerage deals:

"…if we were doing [the deals] often, day in day out, I suppose there would have been procedures in place…"

(transcript 15 August 2014 page 35).

In those circumstances we found the witnesses' references to what would have been done was not supported by any evidence of usual practice and was wholly unconvincing.

336.We also found the Appellant's case was contradictory in parts. By way of example, it was suggested that the deals did not happen "overnight" and that groundwork had been put in to effect the deals. Aside from the fact that we saw no evidence to support this assertion and the oral evidence on the topic was vague, we noted that the witnesses all claimed that the broker deals formed little part of their daily roles. The evidence that Mr Taheri oversaw all of the deals was at odds with his own evidence from which we formed the conclusion that he had little or no involvement in the practical side of carrying out the deals. When we viewed this against the evidence of Mr Harasiwka and Mr McFadden who also gave the impression of knowing little about the detail of deals whilst simultaneously claiming responsibility for them we formed the view that the transactions were carried out with minimal effort and little work involved.

337.We found the unchallenged witness statements on behalf of the Appellant provided little assistance to us in determining what the Appellant knew or should have known about the connection of its transactions to fraud at the relevant time. The statements were general in content and did not specifically address the transactions with which we were concerned. That said, we bore in mind their contents which provided general information about the Appellant's trading.

338. We were satisfied that the Appellant, through Mr Taheri particularly and also Mr Harasiwka and Mr McFadden, was aware of the existence, prevalence and characteristics of MTIC fraud within the mobile phone trade sector and we assessed the nature of the companies' trading against this background. We did not accept that Mr Taheri, who is clearly an intelligent man with significant professional and business experience, did not have a full understanding of MTIC fraud, particularly when viewed against the fact that he had in the past had input tax denied as a result of problems in the chain of supply. We also did not accept that Mr McFadden and Mr Harasiwka were not aware of MTIC fraud; again both were experienced in the industry and they had been present at a meeting when HMRC had outlined the problems with fraud.

339. The transactions took place on a back to back basis and there was no documentary evidence to show that Appellant was ever left with unsold stock. We did not conclude from this feature of trading alone that the Appellant knew or should have known that the transactions were contrived. However it was a factor that added to the larger picture of the Appellant's trading as a whole, bearing in mind the questions posed by Moses LJ in *Mobilx* at [72]:

"(1) Why was…a relatively small company with comparatively little history of dealing in mobile phones, approached with offers to buy and sell very substantial quantities of such phones?

(2) How likely in ordinary commercial circumstances would it be for a company in [the Appellant's] position to be requested to supply large quantities of particular types of mobile phone and to be able to find without difficulty a supplier able to provide exactly that type and quantity of phone?

(3) Was [the supplier] already making supplies direct to other EC countries? If so, he could have asked why [the supplier] was not making supplies direct, rather than selling to UK traders who in turn would sell to such other countries.

(4) Why are various people encouraging [the Appellant] to become involved in these transactions? What benefit might they be deriving by persuading [the Appellant] to do so? Why should they be inviting [the Appellant] to join in when they could do so instead and take the profit for themselves?"

340.The Appellant had not traded with Supreme since 2004 and never to such a high value yet the Appellant was willing to enter into deals on the basis of trust. We found the evidence lacked credibility; whilst knowledge or trust in a trader may provide some comfort this must be viewed in the context of the sudden increase in the value of trade, the limited due diligence on the trader, the profit achieved by the Appellant and the fact that a customer appeared "out of the blue" expressing interest in exactly the type and quantity of goods Supreme was selling. The only due diligence carried out on Supreme was a VAT number check and Creditsafe report; the latter of which in our view would have caused any reasonable businessman to make further inquiries given the zero credit rating and negative equity report. The Appellant's argument that it did not give credit to Supreme only raised further questions as to why the report was obtained if it was to be ignored. We concluded on the evidence before us that the relationship with Supreme amounted to little more than it being a trader with whom the Appellant had dealt in the past. The evidence as to what the Appellant did to satisfy itself that the deals in 2006 was vague and we concluded that this indicated knowledge on the part of the Appellant; the circumstances of the deals were quite obviously too good to be true and we inferred that the Appellant's failure to query this indicated that it knew the deals were contrived.

341.Similar issues were present in the Creditsafe report on Ashtec which we found would have caused any reasonable trader seeking to satisfy himself that the deals were legitimate to have undertaken more meaningful checks on his supplier particularly in circumstances where Ashtec had not traded for 6 years. We were satisfied that the visit to Ashtec by one of the Appellant's employees was no more than window-dressing; if the Appellant trusted Ashtec to the extent it purported to there was no need for the visit other than to satisfy HMRC. Furthermore the documents obtained by the employee such as a copy of Mr Afzalnia's driving licence did nothing to assist the Appellant in assessing the veracity of the deals and the evidence that she *"had a quick look around his office"* provided no detail as to what she had looked for, what she had found or why this was necessary. The Appellant relied on Mr Taheri's pre-existing relationship with Mr Afzalnia as the basis for trust. However this simply did not withstand scrutiny in cross-examination; the evidence as to what inquiries Mr Taheri had made as to the veracity of the deals was vague, uninformative and amounted to no more than possibly having asked about the VAT issue and taking Mr Afzalnia's word that the deals were genuine at face value. We found that this was wholly insufficient for any reasonable businessman seeking to protect himself from fraud.

342.We found the evidence of Mr Afzalnia provided us with little assistance in determining what the Appellant knew about the deals. His evidence as to how he had come to purchase the goods was not detailed. It was clear that Mr Afzalnia's due diligence on 4A was lax and he had made a number of assumptions about the company which we found to be incorrect.

343.Given that the Appellant was reliant on its customers for payment we found that the lack of any meaningful due diligence on those customers was indicative of the Appellant's knowledge of contrivance as it knew there was no credit risk associated with those customers being unable to pay. The consequences to the Appellant of such a risk were significant as it would be left in a position where it could not honour its obligations to its suppliers which could have given rise to a claim against it. The fact that the Appellant carried out no due diligence to assess the extent of this risk could only lead to the conclusion that it was aware of the overall scheme to defraud the Revenue. The due diligence was wholly inadequate for its purpose of assisting a trader to avoid connection to fraud. In our view a reasonable businessman would have found the information worthless and we concluded that the only purpose of carrying out due diligence was to satisfy HMRC. Despite the witnesses for the Appellant stressing that Mr Taheri had emphasised the importance of such checks, in reality very little was done and little or no independent inquiries were made.

344.We noted the Appellant's submission that there is no legal requirement to conduct due diligence and we did not focus unduly on this feature. However the relevance was not whether the Appellant had any obligation to carry out due diligence but rather what reasonable steps the company took to check the integrity of its deals in an industry rife with fraud. Any reasonable businessman seeking to protect himself from fraud would see due diligence and verification of the integrity of its deals as a commercial necessity. We concluded from the inferences we have drawn from the Appellant's lack of commercial checks that its lack of due diligence was indicative of knowledge on its part.

345.We reached a similar point on the issue of box numbers which were retained by the Appellant but were put to no use. Mr McFadden's oral evidence on the matter was poor; having initially asserted that the box numbers were checked against each other he ultimately accepted that he was *"just performing a function"* and *"checking they were all there…I don't recall doing anything else with them."* Mr Taheri, who had included box numbers on his checklist of due diligence stated that nothing was done with the numbers. We found that this was indicative of the Appellant's attitude to due diligence generally; that it was a box-ticking exercise of no substance. No real assessment was made from the information collated which in our view supported knowledge on the part of the Appellant that the deals were contrived; clearly there would be not be any need for a knowing participant in the fraud to undertake any effective or thorough due diligence.

346.As regards the letter from Mitz addressed to Sanche which contained the fax number for MVS Digital we found the Appellant's evidence contradictory and wholly unconvincing. An email from Mr Harasiwka to Mr Bailey in 2007 explained that: *"the bundle of papers provided to you were per those received by us and clearly Mitz transmitted a letter addressed to Sanche Technologies Limited to us in error."* Mr Taheri's first witness statement also explained this as an administrative error. In evidence the Appellant sought to argue that the document may not have been in its possession and that one possible explanation was that HMRC had somehow mixed documents from another trader's file on the EF with those of the Appellant. We did not accept the Appellant's assertion and we were satisfied that the document was one in the Appellant's possession and which had been given to Mr Bailey by Mr Harasiwka. Having reached that conclusion and there being no explanation, credible or otherwise before us as to why the Appellant would have this document in its

possession we concluded that there was no legitimate reason for the letter being in the Appellant's possession other than that the transactions were contrived.

347.We concluded that the Appellants' turnover figures from the broker deals were, on any view, significant. In our view any reasonable businessman would be fully aware of his turnover, at least in general terms, and we were satisfied that the rapid growth would have been obvious to Mr Taheri. When viewed in the context of the company's trade as a whole, the contrast with the manner of retail trading, the apparent ease with which deals took place and the short period over which such significant sums were achieved we took the view that the reasonable businessman would have wished to understand why such profits could be made in circumstances that were too good to be true. In our view the mere ability of the Appellant to export goods does not explain the significant and consistent profits achieved. We found that the only reasonable explanation for Appellant's sudden success in brokerage deals that reaped such large rewards simply as a result of trusted relationships was not opportunity but contrivance and we found that the circumstances were such that the Appellant must have known of this fact.

348. We noted HMRC's reliance on the Appellant's use of the FCIB in which all accounts were suspended by the Dutch authorities in the autumn of 2006. There was no evidence to demonstrate that users of the FCIB were aware of any such problems during the relevant period and we were not satisfied that this indicated knowledge or means of knowledge on the part of the Appellant.

349.The evidence as to important terms when entering into transactions, for example regarding dates of payments, prices or return of faulty goods was vague and there was a notable absence of any record of agreements, verbal or otherwise or features such as offers, counter-offers or discussions about payment which we would expect to see in commercial arms length transactions of such high value. The circumstances in which the deals came about and were undertaken was vague and we noted that the Appellant had not carried out this type of deal for a number of years. Despite the extensive evidence we were unable to form a clear picture as to the way in which deals were actually negotiated on a day-to-day basis in the period in question; there were no details of the individual negotiations that might have been expected to have been conducted with suppliers and customers, only general assertions that there were telephone conversations messages and many MSN messages. We found that the manner of trading lacked commerciality; in our view any trader would ensure that the details of his purchase and sale were recorded in order to guard against receiving goods or having goods returned as incorrect. We concluded that the absence of such details between the parties was indicative of knowledge that the deals were contrived.

350.We found Mr McFadden's oral evidence regarding the product unpersuasive; he was vague as to where he had found out about the product citing the passage of time as the reason yet he was able to provide information about the product which was consistent with that given by Mr Taheri one month earlier. We found unconvincing that neither witness had made reference to this information in their written statements but recalled the information in oral evidence so many years later. We rejected the evidence as untrue; more about which we will say in due course.

351.As regards the inspection reports we found that the content provided scant detail as to the goods. This was striking given that the Appellant on Mr Taheri's admission knew little or nothing about the goods in which it was trading, it never took physical

possession of the goods and the inspections were purportedly carried out by freight forwarders upon which the Appellant conducted no due diligence. We found the evidence of Mr McFadden that verbal reports would have been obtained prior to a written report unconvincing and we found the evidence of Mr Taheri on the issue amounted to no more than speculation and assumption.

352.We considered the evidence regarding the deals in which goods were released prior to full payment being received by the Appellant; we found the oral evidence of Mr Taheri, Mr McFadden and Mr Harasiwka was unsatisfactory. Mr Taheri claimed not to have been aware of the fact whilst Mr McFadden stated he relied on Mr Harasiwka and his team to be told when payment was made yet Mr Harasiwka could provide no explanation. In deals of such high value where the Appellant's main comfort was said to come from the lack of risk by receiving payment prior to releasing the goods we concluded that the only explanation for these events was that the inadequacy of the inspection documents, time of payment and release of the goods were irrelevant as the Appellant was fully aware that the deals were contrived.

353.We considered the use of the same IP addresses for making payments through the FCIB accounts. We were left in no doubt that the circularity of payments and use of identical IP addresses by some of the traders was a clear indicator as to the contrived nature of the deals however we were not satisfied this indicated knowledge or means of knowledge on the part of the Appellant.

354.We noted the Appellant's submissions regarding deal 3 which was verified and repaid. In our view the circumstances of this deal are distinguishable from the remainder in which input tax was denied; the supplier to the Appellant was a longstanding trading partner and the goods were Digimate branded monitors which were manufactured by and purchased from the associated company Digimate Hong Kong. We took the view that the circumstances of this deal did not assist us in determining the issues in this appeal.

355. We considered the submissions of Mr Firth as regards legal title and the intention between traders. However, the issue for us to determine is what was known to the Appellant at the time, not the various legal possibilities. It was quite clear from the evidence that the holding and passing of title was not a matter to which the Appellant had given any thought. Building on the other evidence before us which indicated the lack of concern on the part of Aria as to the commercial risks in its business, we found that this lack of thought on the part of Aria as to the position of legal title was another issue which bore on the inference of knowledge that the deals were not genuine business transactions but were part of a fraudulent scheme.

356. From Dr Findlay's evidence we were satisfied that both legitimate and illegitimate grey market trading existed in the UK market at the relevant time. We were satisfied that the deals, as a result of their connection to fraud, did not form part of the legitimate grey market.

357.We did not accept Mr Firth's submission that Dr Findlay's evidence was misleading and we did not doubt the truthfulness of it. Our conclusions from the evidence were that the description of the goods on the documents, which we accept could constitute the contractual documentation, taken together with the lack of any other record of agreement of the precise specification, was not indicative of normal commercial trading and gave rise to significant risk. We concluded from this that any reasonable trader would seek to minimise that risk by ensuring that its documents,

particularly those said to form the basis of the contract between the parties, contained sufficient information to correctly identify and match the goods. In the absence of such important descriptions, taken together with the nature of trade we were satisfied that a reasonable businessman would have concluded that the trade was not normal arbitrage trading nor opportunistic. We were satisfied that the Appellant was not concerned about the documentation or contents thereof as it was aware that the deals did not fall within the legitimate grey market.

358.We considered the arguments regarding the handwritten notes carefully; HMRC urged us to find that the notes had, at least in part, been constructed to bolster the Appellant's case and therefore the notes do not reflect a contemporaneous note of events. The Appellant strongly disputed this. It is important to set out the background as to how the notes came to be produced in order to explain why we have reached our findings.

359.The notes were first produced in 2014 with the statement of Mr McFadden and the consolidated statement of Mr Taheri. The notes had not been referred to by Mr Taheri in his previous statements nor had they been exhibited. The statement of Mr Taheri dated 7 April 2014 was vague as to how the notes were found and simply referred to his *"extensive searching."* On 13 June 2014 HMRC requested the originals to assess their condition, presumably given the age of the notes which were purportedly made in 2006, and to see if they formed part of a larger document. The documents were not provided to HMRC and the application was renewed orally before us on 5 August 2014 at which point we were told by Counsel that the documents had been scanned and returned to storage and would take time to find. We directed that the documents be produced and offered to allow time during the proceedings for Mr Taheri to assist in finding the documents.

360.On 8 August 2014 we were told that in fact the documents had been shredded a few months earlier, shortly after Mr Taheri had written his consolidated witness statement and that this fact had only come to light when Mr Taheri had spoken to Ms Foster, his former PA, the evening before. Later that same day we were told that Ms Foster had texted Mr Taheri on 5 August 2014 stating she believed Mr Taheri had shredded the notes, however Mr Taheri did not recall doing this. This was followed by the telephone call on the evening of 7 August 2014 when the pair recollected that Ms Foster had shredded the notes with Mr Taheri's authorisation.

361.The entire explanation was wholly unsatisfactory; the information given to the Tribunal that the documents were in storage was provided in the presence of Mr Taheri and was at best inaccurate and at worst untrue. We queried why Mr Taheri, who clearly recognised the importance of the notes when writing his consolidated statement, would go on to authorise the shredding of them and how, given that the request for the documents was first made in June 2014, only 2 months or so after writing that statement he did not recall that the documents had been shredded.

362.The notes are a matter of importance as they clearly go to the credibility of Mr Taheri.

363.Mr Taheri's oral evidence on the subject was uninformative and there was no credible reason given for the fact that Mr Taheri had not produced or even referred to these notes which he stated he had found when he made his first witness statement in 2011. We formed the impression that Mr Taheri is clearly a shrewd man with a good understanding of these proceedings and we rejected his evidence that he had not

mentioned the notes in 2011 because his main objective at that time was looking for shipping documents as untruthful.

364.The evidence of Ms Foster did not assist; we found the evidence as to what she had found was vague. Ms Foster stated that she had put the notes she had found, after they were returned to her by Mr Taheri with additional notes, into the trial bundle. However Ms Foster could say with no certainty that the notes before us were those she had found or that that they were in the same form as when found as she had not read them.

365.We accepted that Mr Taheri may well have been in the habit of making notes, as shown in the DVD footage exhibited, albeit that did not cover the period with which we are concerned. That said, this appeal involves an allegation of fraud and the vague and varying accounts given as to the circumstances in which the notes were found, the absence of the original documents, the destruction of them, the information given to the Tribunal and HMRC and the delay in their production led us to the conclusion that we could not be satisfied as to their provenance and we attached no weight to them. We did not however make the finding that the notes had been fabricated.

366.The same conclusion applies to Mr McFadden's notes which were produced in similar circumstances. We should note that Mr Taheri appeared to suggest at one point that copies of the notes may have been provided to Mr Bailey. This was not put to Mr Bailey and Mr Taheri was unsure on the point; in those circumstances we were satisfied that copies of the notes had never been provided to HMRC. Moreover, Mr McFadden could not recall writing the undated notes nor could he state with any certainty that they were made at the relevant time. This strengthened our conclusion that we should attach no weight to the notes.

367.We considered the issue of who the individuals were whose knowledge of the connection to fraud could be attributed to the Appellant. We were satisfied that Mr Taheri, Mr Harasiwka and Mr McFadden all knew that the deals were connected to fraud. Mr Taheri presented as a shrewd businessman who was fully aware of what was going on in his business. He oversaw and had the final say in respect of transactions and whilst he may not have known the minutiae of each transaction we were satisfied that he authorised the deals and must have known of the connection to fraud. Mr Harasiwka and Mr McFadden gave the impression of trying to minimise their roles in carrying out the deals. However both accepted they exercised authority and involvement in undertaking the practical aspects of the deals, whether by being in charge of payments, release of the goods or due diligence. We were satisfied that both had sufficient awareness of the circumstances of the transactions and the features lacking commerciality or credibility we have highlighted above that they too must have been aware that the deals were connected to fraud.

368.The factors identified above, from which we inferred the Appellant's actual knowledge, would in our view also support a finding of means of knowledge. The deals at the time were quite clearly "too good to be true"; something which we were satisfied would have been obvious to Mr Taheri, Mr Harasiwka and Mr McFadden for example the consistently high profits, the little amount of work done to earn those profits, the casual way the business was conducted without contractual terms and the woefully inadequate due diligence which provided no assistance in assessing the integrity of the transactions. In our view a reasonable businessman would have undoubtedly queried these features of the broker deals and would not have reached

the conclusion as asserted on behalf of the Appellant that the deals were simply opportunistic.

369.We concluded that there was no other reasonable explanation for the circumstances and features of the deals other than their connection to fraud. Accordingly we found that if the Appellant did not know that the transactions in question were connected to the fraudulent evasion of VAT, it should have known that they were so connected.

Conclusion

370. We were satisfied HMRC had established fraudulent tax losses and that there was an orchestrated scheme for the fraudulent evasion of VAT connected with the transactions which form the subject of this appeal.

371. We concluded that in respect of the period under appeal that the Appellant knew that the transactions were connected with the fraudulent evasion of VAT or that the factors set out above would at the very least support a finding of means of knowledge.

372. The appeal is dismissed.

Costs

373. We direct that the Appellant is to pay HMRC costs of, incidental to and consequent upon the appeal, to be the subject of detailed assessment if not agreed.

374. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JENNIFER DEAN
TRIBUNAL JUDGE

RELEASE DATE: 16 FEBRUARY 2016