Neutral Citation: [2023] UKFTT 00363 (TC)

Case Number: TC08787

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2016/04373
TC/2016/05913

VALUE ADDED TAX – remittal for retrial by the Upper Tribunal – input tax deductibility – right to deduct restricted under principles in Kittel *– article 5 of SPO – purchases and sales of branded Solid State Drives ('SSD') and SD Memory Cards – transactions found and conceded to be connected with fraudulent VAT evasion – whether burden on the appellant's 'innocence' as pleaded discharged – whether actual or 'blind-eye' knowledge of the transactions being connected with fraud – whether constructive knowledge in the alternative –* ***appeal dismissed***

Heard on: 28 March to 1 April 2022 and
4 April 2022
Judgment date: 3 April 2023

Before

TRIBUNAL JUDGE HEIDI POON
MEMBER JAMES ROBERTSON

Between

BEIGEBELL LIMITED (NO. 2)

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Tim Brown, of counsel, instructed by Appleton Richardson & Co, Nottingham

For the Respondents: James Puzey, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is a re-hearing of the conjoined appeals by Beigebell Limited, ('the appellant' or '**Beigebell**') against two decisions by the respondents ('HMRC') in relation to its VAT return for the period 10/15. The two decisions under appeal are:

   (1) A refusal decision to make repayments of input tax in the sum of £144,628.40 for the VAT period 10/15 by letter dated 4 October 2016, and

   (2) A notice of assessment dated 20 October 2016 to VAT of £3,647.68 under s73 of the Value Added Tax Act 1994 ('VATA') consequent on the refusal decision.

2. A hearing at the First-tier Tribunal (the '**FTT**') took place at Taylor House, London on 14 to 20 May 2019 (the '**2019 hearing**'), and the appeals were allowed by the dispositive decision *Beigebell Limited v HMRC* [2019] UKFTT 335 (TC) (the '**2019 FTT Decision**').

3. HMRC appealed, and the Upper Tribunal disposed of HMRC's appeal in *HMRC v Beigebell Limited* [2020] UKUT 176 (TCC) of 4 June 2020 (the '**UT Decision**') by setting aside the 2019 FTT Decision, and directed for the appeals to be remitted for a re-hearing by a differently constituted FTT, consisting of a judge and a member.

ISSUE FOR DETERMINATION

4. In remitting the appeals, the UT Decision stated at [69] the scope of the re-hearing:

> 'With the exception of findings relating to Shark Partners Ltd and SD 2013 Ltd we will not, therefore, make any directions that existing findings of primary fact are to stand in the appeal as remitted…'

5. The UT explicitly directed that the original findings did not stand, except for those specified by the UT at [70](3) as concerns:

   (1) The findings of primary fact relating to (a) Shark Partners Ltd and (b) SD 2013 Ltd made in the 2019 FTT Decision, as related below, and

   (2) The 2019 FTT's conclusion that Shark Partners Ltd was a fraudulent defaulter.

6. The quantum in this appeal is not in dispute.

7. The parties are agreed that the only remaining issue to be determined at the re-hearing is whether Beigebell knew or should have known that its transactions were connected with fraud.

EVIDENCE

8. In terms of documentary evidence, the Tribunal is provided with three Hearing Bundles ('**HB**'), being reproduction of the documents furnished for the 2019 hearing, and updated to incorporate Tribunal's directions since the issue of the Upper Tribunal's remittal decision.

   (1) HB1 of 1366 pages contains the parties' pleadings, Tribunal's Directions relevantly updated, the 'Consolidated Primary Facts by Both Parties' (i.e. the Statement of Agreed Facts ('**SOAF**')) and the witness statements of two HMRC officers.

   (2) HB2 of 3532 pages contains the witness statements of Officer Beaddie.

   (3) HB3 of 3737 pages contains the witness statements of six other HMRC Officers, and the witness statements of the four witnesses for the appellant.

9. The respondents have lodged the witness statements of nine officers, each of whom was responsible for the investigation of an entity in the relevant deal chains. It is expedient to set out these entities concerned as respects each officer's witness statement(s).

(1) Officer Shaheen Rehman ('**SR**') on Beigebell; first statement dated 21 December 2017; second statement of 3 May 2018 was in response to Mr Orton's witness statement.

(2) Officer Lowth on ATFX Limited ('**ATFX**');

(3) Officer Beaddie lodged three witness statements with 164 exhibits on Askos Wolt LLP ('**Askos Wolt**');

(4) Officer Guest on Shark Partners Limited ('**Shark Partners**');

(5) Officer Harvey on SD 2013 Limited ('**SD2013 Ltd**');

(6) Officer Adeleye also on SD 2013;

(7) Officer Williams on Raya International Limited ('**Raya**')

(8) Officer Tosta on Global SFX Limited ('**Global SFX**')

(9) Officer Boyko on Online Distribution Limited ('**Online Distribution**' or '**ODL**')

10. The appellant lodged the witness statements of its four witnesses, namely:

(1) Mr Jack Orton ('**JO**'), director of Beigebell;

(2) Mr Marcus Griffiths, director of Beigebell;

(3) Mr Ritesh Patel, friend of the appellant's directors; said to have set up the deal(s);

(4) Mr Leslie Worthington, friend to the other three witnesses.

11. In addition to the core Hearing Bundles updated, a Supplementary Bundle ('**SB**') of 308 pages is also lodged for the re-hearing, the contents of which are as follows:

(1) The UT's Decision and 'Consolidated Primary Facts by Both Parties';

(2) The transcript of evidence from the four-day FTT hearing on 14 to 17 May 2019;

(3) Appellant's additional evidence, being the application, and the second witness statement and exhibits by Mr Orton.

12. References to a document in the various bundles, if given, are in the format of (Bundle volume/ PDF pagination number), and for excerpts from the transcript, the internal pagination of the transcript is also given.

Witnesses called

13. The Tribunal heard the evidence from the parties' witnesses called for the re-hearing in the following order, each of whom was cross-examined by the opposing party's representative.

(1) Officer Rehman on Beigebell (Day 2 from 10:30 to 15:30 hrs);

(2) Officer Boyko, on ODL (Day 2 from15:30 to16:30 hrs; Day 3 from 10-11:45hrs);

(3) Mr Worthington (Day 3 from 12:00-13:00 hrs);

(4) Mr Griffiths (Day 3 from 13:45-15:00 hrs; resumed Day 4 from 9:40-10:00 hrs);

(5) Mr Patel (Day 3 from 15:20 to 15:55 hrs; resumed Day 5 from 11:25-13:05 hrs);

(6) Mr Orton (Day 4 from 10:02 hrs through to 16:10 hrs; resumed Day 5 from 9:50 hrs to 11:10 hrs)

14. Of the respondents' nine witnesses who have produced statements, only Officers Shaheen Rehman and Patricia Boyko were called at the re-hearing, and were cross-examined by Mr Brown. Officer Rehman has worked for HMRC since 1997, and has been an MTIC

officer from around 2012. Rehman was the monitoring officer of Beigebell, and the decision maker of the refusal decision under appeal.

15. Officer Boyko has been employed by HMRC since 2000 and was an MTIC investigator between May 2006 and March 2017, and was responsible for the enquiry into Online Distribution, (Beigebell's immediate supplier) in the relevant deal chains. We find both officers credible witnesses and accept their evidence as to matters of fact.

16. As to the four witnesses called for the appellant, our assessment of each witness' credibility and reliability varies. The probative value and the weight of their evidence to the substantive issue under appeal also vary. Our discussion of these aspects of each witness' evidence is set out in the relevant parts of this decision.

PRELIMINARY MATTER

17. By notice dated 12 January 2022, the appellant applied to lodge a second witness statement by Mr Orton dated 10 December 2021, with three exhibits attached. The application was lodged by Appleton Richardson & Co on behalf of the appellant with the submission that:

> '… the inclusion of this short witness statement and its attachments, with its natural cross examination by the Respondents [unclear as to what 'natural' is intended to mean] will help the Tribunal in understanding the fundamentals'.

18. Mr Orton's additional statement comprises five paragraphs, the gist of each is:

(1) The reverse charge enquiry to HMRC in July 2015 was in relation to a different customer unrelated to the deals in question. Exhibit 1 in support thereof is a copy of email communications on the subject of 'Reverse Charge VAT', on the face of which were from 4 June 2015. The point being made is that 'the Reverse Charge request was made on an order for Phablets supplied to a company called Servium', which has the same office address as Beigebell at Trident Court, Chessington, and unrelated to the deal chains in question as suggested by HMRC.

(2) Mr Orton started to make enquiries about handling shipping and insurance through Beigebell's own Freight Forwarder after the completion of the deals in question; exhibit 2, being email communications on the subject of 'High Value Goods – UK to Spain', and on the face of which were from November 2015.

(3) Explanation of the 'Channel Model' in the context of Mr Orton's previous employment with Secon Solutions (now Secon Cyber) ('**Secon**').

(4) That at no point in his time at Secon did Mr Orton become aware of MTIC fraud.

(5) Disagreement with comments in the visit report compiled by Officer Cole after the first MTIC Assurance visit on 10 December 2015, in terms as follows:

> 'I disagree with some of the comments submitted by Paul Cole in exhibit SR7 [attached with Officer Redman's statement] and note that they are vastly embellished from the very brief meeting notes he took whilst there [exhibit 3].
>
> These handwritten notes are the only evidence of what was discussed in the meeting. It is my belief that the meeting was brought about with a pre-determined conclusion and as such the questions were phrased in a leading fashion.'

19. The respondents opposed the application. Mr Puzey emphasised that the additional documents are lodged some five years after the start of these proceedings, and there is no adequate explanation as to why the appellant still has evidence to serve. In particular, the respondents opposed the application for the reason that Mr Orton's additional witness statement sought to dispute the account given in the report of HMRC's visit to Beigebell's

premises on 10 December 2015. The visit report compiled after the December 2015 visit, together with other further visit reports, had been served with the Commissioners' evidence several years ago, and Mr Orton did not dispute the account he gave as recorded in these visit reports until he served his most recent statement in January 2022, and even then, 'he does not say which parts of the interviews are disputed'.

20. In response to the objection, Mr Brown said that there was the 'presumption' that 'all relevant evidence' had been served; but that the appellant had 'gone through the evidence one final time' in an 'additional trawl' to identify these three exhibits; that the additional documents concerned matters raised in cross-examination in the 2019 hearing; and that the application was made in January 2022, two months before the re-hearing, which would have afforded the respondents sufficient time to consider the additional evidence; that the Tribunal should exercise its discretion under Rule 2 of the Tribunal Procedure Rules by granting permission.

21. We considered the application in the light of Rule 2, which contains the overriding objective to deal with a case fairly and justly, 'in ways which are proportionate to the importance of the case, the complexity of the issues, the anticipated costs and the resources of the parties'. Having regard to the overriding objective, we refused the application for the following reasons:

(1) The time lapse of five years since the start of these proceedings is a serious impediment to admitting the email exhibits, said to be dating back to June and November 2015, which was more than six years ago by the time of the re-hearing. The contemporaneity of the email exhibits is an issue, which would have required proof.

(2) None of the counterparties in these additional email communications was called as a witness, which renders the exhibits of no probative value in the context of our concern over their contemporaneity.

(3) To refuse the application means that Mr Orton would not be able to speak to the additional email exhibits, but there is no embargo against any reference being made in his oral evidence, and the probative value of any statements so made, so far as relevant to the substantive issue, would be assessed in the context of the overall credibility and reliability of Mr Orton as a witness.

(4) In like manner, there is no embargo against Mr Orton stating in evidence about his work experience from his time in Secon.

(5) As to the newly raised issue of disagreement with the report, we have regard that Officer Cole was not called as a witness. What constitutes being 'vastly embellished' is a qualitative and descriptive assessment. The alleged disagreement is not particularised; nor does paragraph 5 of Mr Orton's additional statement explicitly assert that the visit report SR7 is factually inaccurate. The handwritten meeting notes as exhibit 3 contain a string of catchwords such as: '*Through a Friend, CMS Peripherals Ltd, customer paid first, [illegible] due diligence checks [illegible] Flight logistics [address] RG41, Goods inspected, Online Distribution, Ritesch Patel works for CMS Peripherals Ltd, 2% profit on transactions*'. The catchwords would seem to serve as aides-memoire to supply the relevant contexts in the writing up of the report after the visit. If the 'very brief meeting notes' had been 'vastly embellished' in the sense that they had been fleshed out with specific details, that process of particularisation by Officer Cole does not render the visit report SR7 factually inaccurate.

(6) The visit report with the officers' comments and conclusion, together with the proforma questionnaire on 'Action Required' was lodged as an exhibit (SR7[1]) of Rehman's evidence in the 2019 hearing. The disputed report therefore has been in the corpus of the respondents' evidence from at least the date of the exchange of documents in the run up to the 2019 hearing. It cannot be said that the handwritten notes are 'the only evidence of what was discussed in the meeting', given that the appellant had failed to challenge the inclusion of the visit report SR7 at the time of exchange of documents.

(7) If the proposition that the meeting notes had been 'vastly embellished' is to suggest that the report SR7 is factually inaccurate, it is an assertion founded on Mr Orton's recall which cannot be corroborated in the absence of a recording of the meeting. Nor is the assertion at this late stage sufficient to qualify the reliability of the report as a fair representation and a contemporaneous account of the exchanges between Orton and Officer Cole. In any event, any disagreement with the report SR7 should have been raised closer in time when the visit report was first circulated, or at the 2019 hearing, and not six years after the event, and founded solely on Mr Orton's retrospective assessment, which may have varied with the passage of time.

LEGISLATIVE FRAMEWORK

22. Articles 167 and 168 of Council Directive 2006/112/EC ('2006 Directive') on the common system of VAT provide, inter alia, as follows:

> '167. A right of deduction shall arise at the time the deductible tax becomes charged.'
>
> 168. In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT, which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person.'

23. Articles 167 and 168 are implemented in domestic legislation under sections 24, 25 and 26 of Value Added Tax Act 1994 ('VATA'), which so far as relevant, provide as follows:

> **24 Input tax and output tax**
>
> (1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say–
>
> (a) VAT on the supply to him of any goods or services;
>
> (b) VAT on the acquisition by him from another member State of any goods; and
>
> (c) VAT paid or payable by him on the importation of any goods from a place outside the member States,
>
> Being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.
>
> […]
>
> (6) Regulations may provide—
>
> (a) for VAT on the supply of goods or services to a taxable person, VAT on the acquisition of goods by a taxable person from other member States and VAT paid or payable by a taxable person on the

[1] SR7 is a reference to an exhibit attached to Officer Rehman's witness statements; SR being her initials followed by the exhibit number.

importation of goods from places outside the member States to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases; […]

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

(1) A taxable person shall–

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him form other member States of any goods,

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

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

26 Input tax allowable under section 25

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

24. Regulation 29 of the Value Added Tax Regulations 1995 (SI 1995/2518) ('the 1995 Regulations') provides, inter alia, as follows:

(1) Subject to paragraph (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which VAT became chargeable.

(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of–

(a) a supply from another taxable person, hold the document, which is required to be provided under regulation 13; ...

[…]

Provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in sub-paragraph (a) … above, such other documentary evidence of the charge to VAT as the Commissioners may direct.

AUTHORITIES

25. The citation references of the authorities referred to are set out in **Annex I**.

Case law principles for a *Kittel* denial

26. The refusal decision by HMRC to allow the input VAT claimed by the appellant is made in accordance with the *Kittel* judgment by the European Court of Justice (the '**ECJ**'), wherein the ECJ held at [56] that 'a taxable person who knew or should have known that, by his

purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods'. The rationale for such an approach is stated in the following terms:

(1) 'That is because in such a situation, the taxable person aids the perpetrators of the fraud and becomes their accomplice': at [57].

(2) 'In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them': at [58].

27. The ECJ's conclusion at [61] confirms 'it is for the national court to refuse that taxable person entitlement to the right to deduct' 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.'

28. Applying *Kittel*, Sir Andrew Morritt identified at [29] of *Blue Sphere* the four questions which a first-instance tribunal must consider in an appeal against a *Kittel* denial, namely:

(1) Was there a VAT loss?

(2) If so, did this loss result from a fraudulent evasion?

(3) If there was a fraudulent evasion, was the appellant's transaction that is the subject of the appeal connected with that evasion?

(4) If such a connection was established, did the appellant know or should it have known, that its purchases were connected with a fraudulent evasion of VAT?

29. For the transactions in question, the parties are agreed that the remaining issue concerns the fourth element of proof only.

Findings in the 2019 FTT decision to stand

30. For completeness, it is expedient to set out the background to the UT's direction that certain findings of fact contained in the 2019 FTT Decision are to stand for the purposes of the re-hearing. Those specific findings by the 2019 FTT were made in relation to the appellant's response to the *Fairford* direction filed on 18 May 2018, wherein it is stated:

> 'Further to Direction Six of the FTT's Directions dated 22 November 2017, the appellant states:
>
> a) It accepts the accuracy in each of the transaction chains evidenced by the Commissioners;
>
> b) It accepts there is a tax loss in each transaction chain;
>
> c) It does not accept that those transactions involving Shark Partners Limited can be attributed to fraudulent conduct by it. The conduct of Shark Partners Limited is not consistent with that of someone knowingly committing VAT fraud.
>
> d) It does not accept the tax losses in the remaining transactions i.e. those not involving Shark Partners, are connected to fraudulent conduct; and
>
> e) It does not accept there was an overall scheme to defraud the Commissioners; its own innocence in the transaction chains precludes it from doing so.
>
> That aside, the behaviour of Shark Partners (see c) above) also prevents the appellant from accepting there was an overall scheme to defraud the Commissioners in the respective transactions. Further, the behaviour of SD 2013 Limited was also not consistent with being an overall scheme to defraud

> the Commissioners; in particular it made a formal complaint to the Commissioners about its VAT registration being cancelled.'

31. The findings of the 2019 FTT Decision in relation to Shark Partners Ltd and SD 2013 Ltd which should stand for the re-hearing are as follows:

> '[51] We also received evidence concerning SD 2013 Ltd, including the witness statement from Officer Adeleye and Officer Harry. There was however some misunderstanding between the parties as to their respective arguments as regards SD 2013 Ltd. HMRC contend that SD 2013 Ltd was a participant in the deal chain but did not argue that SD 2013 Ltd was a fraudulent defaulter.
>
> [52] In the circumstances, based on the evidence which we received, we find that SD 2013 Ltd was a participant in the deal chains for Deal 1 and Deal 3A but we make no finding as to whether or not it was a fraudulent defaulter, since such a finding is not part of HMRC's case.'
>
> […]
>
> '[148] It is also accepted by both parties that Shark Partners was a defaulter and did not meet its VAT liabilities as assessed by HMRC. The question therefore is whether or not Shark Partners was fraudulent. If it was not fraudulent then HMRC would be unable to deny the repayment of VAT to Beigebell under the *Kittel* principle in respect of Deal 1.'
>
> […]
>
> '[161] The logical conclusion from all the evidence was that Shark had sought to keep its activities hidden away from the attentions of HMRC. It had filed no returns, had paid no assessments other than a small initial assessment, and had failed to provide documentation to support its transactions. It had dealt with another missing trader, Fast Away Services. In all circumstances, the natural and logical conclusion is that Shark failed to account for VAT deliberately, dishonestly and fraudulently.
>
> [162] In conclusion therefore, for the above reasons, we find that on the balance of probabilities Shark Partners was a fraudulent defaulter.'

32. The combined effect of the appellant's response to the *Fairford* Direction, and the Upper Tribunal that the specific findings by the 2019 FTT in relation to Shark Partners and SD 2013 Ltd shall stand, means that the first three questions in the *Blue Sphere* test can all be answered in the affirmative for *all* the deal chains in issue in this appeal, which is to say:

(1) That there was a tax loss for every one of the five deal chains in question;

(2) That the tax loss in every one of the deal chains had been caused by fraud;

(3) That the appellant's transactions that are the subject of the appeal were all connected with the fraudulent evasion of VAT.

STATEMENT OF AGREED FACTS

33. The Tribunal issued Directions consequent upon the UT Decision that the parties should seek to agree as many primary facts as possible so as to reduce the length of the re-hearing, and hence, the costs to the parties. The parties have agreed on the following facts:

(1) The appellant registered for VAT [VRN] with effect from 22 July 2010.

(2) It carries on the business from Trident Court, 1 Oakcroft Road, Chessington, Surrey. The appellant's directors and shareholders are Mr Jack Orton and Mr Marcus Griffiths.

(3) The appellant carries on business as a supplier of a range of merchandise. It has in the past, and continues to supply, products such as USB Sticks, Stickers, bags, Phablets, Power banks, Clothing, Notebooks and Mouse Mats to companies such as McLaren, Triumph Motorcycles, Channel 4 and The Ritz.

(4) Between 1 September 2015 and 8 September 2015, the Appellant made six purchases of memory cards from a single supplier, Online Distribution Limited, and sold these on in five deals to Hi View Trading SL ('**Hi View**' or '**HVT**'). Each of these transactions was connected to a fraudulent defaulting trader or contra trader.

(5) The transactions were dealt with by Mr Orton alone. They comprised as follows

(a) Invoice SI-1227233 ('**Deal 1**') dated 1 September 2015, 1,000 San Disk 256GB SD cards (traced back to Shark Partners Ltd);

(b) Invoice SI-1227344 dated 7 September 2015, 1,000 Samsung Evo SSD's ('**Deal 2**') (traced back to a contra trader, Askos Wolt LLP) and 550 Sandisk 256 GB SD cards ('**Deal 3A**') (traced back to Raya International Ltd);

(c) Invoice SI-1227360 dated 8 September 2015, 200 Sandisk 256GB SD card ('**Deal 3B**') and 500 Sandisk 512GB SD card ('**Deal 4**') (both deals traced back to Askos Wolt LLP); and

(d) Invoice SI-1227234 dated 1 September 2015, 1,000 Sandisk 512 GB SD cards ('**Deal 5**') (traced back to Askos Wolt LLP).

(6) The dates of the transactions executed by Beigebell are tabulated in the statement (and reproduced below at §34).

(7) The appellant included these transactions on its 10/15 VAT return. The input tax claimed on the transactions was £190,807.99; after accounting for output tax, the resulting VAT liability was a repayment claim of £140,980.78.

(8) The outputs and inputs were very significantly higher than in previous quarters. The appellant had never traded in these exact products before.

(9) The appellant did not pay its supplier until it has received payment from its customer.

(10) The appellant received an email on 19 August [2015] javier@hiviewtrading.com ('**Javier**'), attaching 'company details and trading application pack'.

(11) The same day [i.e. 19 August 2015] Mr Orton replied by email asking for information about Hi View Trading.

(12) On 20 August 2015, Mr Orton received an email from TradeSales@onlinedistribution.co.uk, attaching various documents including a certificate of incorporation and VAT certificate.

(13) On 25 August 2015, Mr. Orton emailed Javier giving him the price for 1,000 x 512GB SD Cards at €410 per pc. Javier replied a couple of hours later saying he only wanted 500pcs and was looking to pay €408 per pc and could the Appellant meet this price. He also enquired about a price for 1,000 x 256GB SD Cards.

(14) Mr. Orton emailed Javier explaining that he couldn't reduce the unit price but could do 500 x512GB at €410 and 1,000 x 256GB at €210.

(15) There then followed a series of email correspondence between the appellant and Javier, and the appellant and Javier, and the appellant and Online Distribution relating to these transactions.

(16) On 26 August 2015, the appellant carried out a Creditsafe check on Online Distribution.

(17) Mr Orton visited Flight Logistics Group Ltd on 1 and 7 September 2015 where goods were held.

(18) HMRC's first visit to the appellant was on 10 December 2015.

(19) HMRC's second visit to the appellant was on 10 February 2016.

(20) HMRC's third visit to the appellant was on 21 June 2016.

(21) The appellant logged two appeals with the Tax Tribunal 4 October 2016 and 1 November 2016.

(22) Online Distribution Ltd was registered for VAT from 20 February 2007. The declared business activity was Consumer Electronics with an estimated turnover of 10 million.

(23) On 15 April 2016, HMRC requested a SCAC report from the Spanish Tax authorities into High View Trading [i.e. Hi View]. The report, inter alia, states: 'it is apparent that the taxes on the acquisitions of goods in the UK were paid by High View Trading and High View Trading is up to date with their Tax Returns'.

(24) The EC supplier's lists for Online Distribution Ltd held by HMRC show that during these periods in question no supplies from this company have been sent to any other member state.

34. The dates of the transactions executed by Beigebell as set out at paragraph 6 of the Consolidated Primary Facts are as below:

Deal	Goods	Purchase Order	Invoice fr ODL	Cash to ODL	Cash from Hi View	Goods in	Good out
1	1000 Sandisk 256GB	24.08.15	01.09.15	01.09.15	28.08.15	27.08.15	07.09.15
2	1000 Samsung 250 SSD	04.09.15	07.09.15	07.09.15	04.09.15	07.09.15	08.09.15
3A	550 Sandisk 256 GB	04.09.15	07.09.15	07.09.15	04.09.15	07.09.15	07.09.15
3B	200 Sandisk 512 GB	04.09.15	08.09.15	08.09.15	07.09.15	07.09.15	07.09.15
4	500 Sandisk 512GB	04.09.15	08.09.15	08.09.15	07.09.15	07.09.15	07.09.15
5	1000 Sandisk 512GB	24.08.15	01.09.15	01.09.15	28.08.15	27.08.15	07.09.15

MTIC fraud

35. Missing Trader Intra-Community ('MTIC') fraud comes in two main versions: the so-called 'classic' variety and the 'contra-trading' variety. The transaction chains in question concern both varieties. The modus operandi of the 'classic' variety is succinctly set out by Clarke J in *Red 12*:

> '[2] The classic way in which the fraud works is as follows. Trader A imports goods, commonly computer chips and mobile telephones, into the United Kingdom from the European Union ("EU"). Such an importation does nto require the importer to pay any VAT on the goods. A then sells the goods to

> B, charging VAT on the transaction. B pays the VAT to A, for which A is bound to account to HMRC. There are then a series of sales from B to C to D to E (or more). These sales are accounted for in the ordinary way. Thus C will pay B an amount which includes VAT. B will account to HMRC for the VAT it has received from C, but will claim to deduct (as an input tax) the output tax that A has charged to B. The same will happen, *mutatis mutandis*, as between C and D. The company at the end of the chain – E – will then export the goods to a purchaser in the EU. Exports are zero-rated for tax purposes, so Trader E will receive no VAT. He will have paid input tax but because the goods have been exported he is entitled to claim it back from HMRC. The chains in question may be quite long. The deals giving rising to them may be effected within a single day. Often none of the traders themselves take delivery of the goods which are held by freight forwarders.'

36. Clarke J went on in *Red 12* to explain how the VAT registration of an innocent trader may be hijacked in a fraudulent chain (which occurred in some of the chains concerned in this appeal) and how a VAT tax loss arises to HMRC.

> [3] The way that that fraud works is that A, the importer, goes missing. It does not account to HMRC for the tax paid to it by B. When HMRC tries to obtain the tax from A it can neither find A nor any of A's documents. In an alternative version of the fraud (which can take several forms) the fraudster uses the VAT registration details of a genuine and innocent trader, who never sees the tax on the sale to B, with which the fraudster makes off. The effect of A not accounting for the tax to HMRC means that HMRC does not receive the tax that it should. The effect of the exportation at the end of the chain is that HMRC pays out a sum, which represents the total sum of the VAT payable down the chain, without having received the major part of the overall VAT due, namely the amount on the first intra-UK transaction between A and B. This amount is a profit to the fraudsters and a loss to the Revenue. …
>
> [4] A jargon has developed to describe the participant in the fraud. The importer is known as "the defaulter". The intermediate traders between the defaulter and the exporter are known as "buffers' because they serve to hide the link between the importer and the exporter, and are often numbered "buffer 1, buffer 2" etc. The company which exports the goods is known as the "broker".
>
> [5] The manner in which the proceeds of the fraud are shared (if they are) is known only by those who are parties to it. It may be that A takes all the profit or shares it with one or more of those in the chain, typically the broker. Alternatively the others in the chain may only earn a modest profit from a mark-up on the intervening transactions. The fact that there are a series of sales in a chain does not necessarily mean that everyone in the chain is party to the fraud. Some of the members of the chain may be innocent traders.'

37. The variety of MTIC fraud involving contra trading is explained by Clark J in *Red 12*:

> '[7] … Another variant is called "contra trading". … Goods are sold in a chain ("the dirty chain") through one or more buffer companies to (in the end) the broker ("Broker 1") which exports them, thus generating a claim for repayment. Broker 1 then acquires (actually or purportedly) goods, not necessarily of the same type, but of equivalent value from an EU trader and sells them, usually through one or more buffer companies, to Broker 2 in the UK for a mark-up. The effect is that Broker 1 has no claim for repayment of input VAT on the sale to it under the dirty chain, because any such claim is matched by the VAT accountable to HMRC in respect of the sale to UK Broker 2. On the contrary a small sum may be due to HMRC from Broker 1.

> The suspicions of HMRC are, by the means, hopefully not aroused. Broker 2 then exports the goods and claims back the total VAT. The overall effect is the same as in the classic version of the fraud; but the exercise has the effect that the party claiming the repayment is not Broker 1 but Broker 2, who is, apparently, part of a chain without a missing trader ("the clean chain"). Broker 2 is party to the fraud.'

38. The same terminology of 'defaulter', 'buffer', 'broker, and 'EU trader' is adopted in setting out the factual matrix. In broad terms, the facts are summarised first from documents emanating from or relied upon by HMRC, followed by those emanating from and relied upon by the appellant, although there is some inevitable overlapping between the parties' documents.

THE FACTS

Company background

39. Beigebell was incorporated on 22 July 2010, and its shareholders are Mr Griffiths (50.50%) Mr Orton (49.50%), who were appointed its directors on 27 July 2010. The controlling party is identified as Mr Griffiths in accounts information filed with the Companies House ending 31 July 2016.

40. The business is closely overseen by its directors; Mr Griffiths is the marketing manager who sources the deals and looks into the contracts, while Mr Orton is responsible for conducting the deals. As recorded in the first monitoring visit report dated 10 February 2016, the denied deals were the responsibility of Mr Orton. Mr Griffiths stated that he did not look into these deals although he is otherwise the default salesperson for Beigebell's usual business.

41. HMRC's PAYE records for Beigebell state that there are eight current employees, of which two are the directors. At the visit on 10 February 2016, it was mentioned that the business has a call team that filters potential clients.

VAT profile and business activities

42. The relevant facts as concerns Beigebell's VAT profile and history are as follows:

(1) Beigebell was registered for VAT with effect from 22 July 2010.

(2) The application was submitted by Jack Orton as its director.

(3) The VAT1 registration form stated that the company activities are to be that of 'Suppliers of Promotional Merchandise', and its main activity was stated to be 'Advertising agencies'. Further, the application gave the following details:

(a) The taxable supplies were estimated at £300,000 in the next 12 months.

(b) Its estimated value of EU purchases was £10,000, and estimated value of EU sales was £20,000.

43. The appellant's business activities as described on other sources of information are:

(1) Its business activities on FAME (an external database of company information used by Officer Redham) are shown as 'non-specialised wholesale trade'.

(2) Its own company website at www.beigebell.com states Beigebell to be a 'creative merchandising' company, and its business as 'Colourful Gifts Adding Value'.

(3) Aside the transactions in question, the business activities of Beigebell involve dealings in bespoke specialised merchandise for corporate entities or individuals.

(4) In the main, the appellant brands products for sector industries to include Retail, Fashion, Food & Drink, Sports, Automotive, Entertainment industries.

(5) The branded products cover a range of merchandise such as pens, T-shirts, Hoodies, mugs, bags, and other products as required by customers.

(6) The business activities recorded on VAT1 do match Beigebell's 'normal' trading activity of supplying promotional merchandise, as concluded in HMRC's report on the visit to the business undertaken on 10 December 2015.

44. Consequently, HMRC concluded after the MTIC Assurance visits that the wholesale trading of Samsung branded Solid State Drives ('**SSD**') and Sandisk branded SD memory cards in the transactions under appeal does not fit within the appellant's normal trading activity of supplying promotional merchandise as notified to HRMC on VAT1.

VAT Repayment Return 10/15

45. Beigebell submits quarterly returns since its registration in July 2010, with its first return being for 09/10. After its 09/11 return, Beigebell filed a return for 10/11, and then quarterly thereafter. It was a payment trader up until 10/15 period, when it made its first repayment claim.

46. Beigebell is a growing company with a steady increase in turnover, from £250,000 to £400,000 in the three quarters prior to 10/15, then spiked to nearly £1,060,000 in period 10/15.

47. The spike in turnover in 10/15 quarter coincided with Beigebell's change in its products via trading in SSDs and SD cards, which resulted in its first and only repayment claim for input VAT. The trade of these products occurred only in 10/15 period, and these products have not been traded in subsequent periods (as confirmed in the visit report dated 21 June 2016).

48. Beigebell's 10/15 VAT return shows the following entries. The output tax was more than double any other quarter in the previous three years, and the input tax was very significantly higher than in previous quarters.

Output VAT	£49,827.21
Input VAT	£190,807.99
Net VAT (repayable)	(£140,980.78)
Total Sales	£1,059,530
Total Purchases	£956,090

Accounts and Profit: five years to 31 July 2016

49. From Beigebell's corporation tax database records for the accounting periods ending from 31 July 2012 to 31 July 2016, it would appear that despite the turnover spiked in the year to July 2016, by incorporating the deals in 10/15 quarter, the appellant's profit did not increase proportionately.

	Year end	Turnover	Trading Profit	Net tangible assets
1	31 July 2012	£320,393	£89,074	£1,180
2	31 July 2013	£707,894	£228,699	£858
3	31 July 2014	£870,864	£281,841	£59,086
4	31 July 2015	£1,080,524	£228,050	£75,533
5	31 July 2016 (with 10/15 Qtr)	£1,880,493	£225,725	£89,061

50. In terms of key financials (HB1/296), the last column in the table above represents the overall balance sheet position where assets exceeded liabilities, and the net tangible assets balance would represent the capital of the shareholders' funds.

51. There was no entry for the Gearing percentage for all the years except for the year to 31 July 2016 where the gearing percentage was at 192.64%; this was the year in which the repayment claim arose. The VAT repayment claim was therefore a significant factor in the year ended 31 July 2016 in terms of the appellant's cash flow position. A breakdown of current assets (HB1/297) on the balance sheet is as follows:

	Y/E 2016	Y/E 2015	Y/E 2014	Y/E 2013	Y/E 2012
Trade Debtors	125,763				
Bank & Deposits	49,799	160,083	223,287	148,220	22,541
Other Debtors	181,531	253,308	187,203	140,706	101,070
Prepayments	5,750				
Deferred Taxation	125,781				
Total Current Assets	£307,093	£413,391	£410,490	£288,926	£123,611

The Deals and Transaction Chains

Beigebell as the Broker

52. There were five deals carried out by Beigebell in six transaction chains. In all the six transaction chains, the same entities were involved either end of Beigebell as the 'broker':

(a) Online Distribution as the UK 'buffer' to supply Beigebell;

(b) Beigebell as the UK broker to export to the EU;

(c) Hi-View as the EU purchaser from Beigebell.

53. As to the nature of fraud in the transaction chains, they can be categorised as:

(1) Defaulting deals: Deals 1 and 3A; with the UK fraudulent defaulters being Shark Partner (for Deal 1) and Raya International (for Deal 3A);

(2) Contra trading deals: Deals 2, 3B, 4 and 5, with Askos Wolt acting as the contra-trader in each of the transaction chains.

Beigebell's delivery direct to Poland

54. In all the transaction chains, Hi-View as the EU acquirer *never* took delivery of any of the goods, which were delivered by Beigebell's freight forwarder, Flight Logistics direct to another freight forwarder in Poland, D&D Trading ('**D&D Poland**'). The facts as concerns the delivery of the goods consigned by Beigebell are as follows:

(1) Hi-View never took delivery of the goods for any of the deals.

(2) The goods for all deals were delivered in a single consignment by Flight Logistics to D&D Poland.

(3) Two delivery notes were provided by Beigebell to HMRC, and the reference number on the two delivery notes matches Hi-View's purchase orders sent to Beigebell.

(4) The first delivery note dated 7 September 2015 records the delivery of six cartons by Beigebell to D&D Poland, and the goods match those for Deals 1, 3A, 3B, 4 and 5.

(5) The second delivery note dated 8 September 2015 records the delivery of one pallet containing 17 cartons by Beigebell to D&D Poland, with goods related to Deal 2.

Deal 1 (1000 Sandisk 256GB)

55. The transaction chain concerned 1000 Sandisk 256GB Extreme Pro SD cards. The corporate entities participating in this chain were:

Shark Partners (UK defaulter) → SD 2013 (UK buffer) → Online Distribution (UK buffer) → Beigebell (UK broker) → Hi View (Spain) (EU purchaser) → Kritos (Poland) (missing trader)

56. The dates of the transactions in Deal 1 are as follows:

(1) Shark Partners sold to SD 2013 by invoice dated 28 August 2015;

(2) SD 2013 to ODL by invoice dated 1 September 2015;

(3) ODL to Beigebell by invoice dated 1 September 2015;

(4) Beigbell to Hi View (Spain) by invoice dated 26 (or 31) August 2015 (pre-selling);

(5) Hi-View to Kritos SP by invoice dated 21 September 2015.

Deal 2 (1000 Samsung 250GB)

57. The transaction chain concerned 1000 Samsung EVO 250GB SSD cards. The corporate entities participating in this chain were:

Borough Brothers Kft (Hungry) (EU supplier) → Askos (UK acquirer) → Global SFX (UK buffer) → Online Distribution (UK buffer) → Beigebell (UK broker) → Hi View (Spain) (EU purchaser) → Tibizon Company (Poland) (defaulting trader)

58. The dates of the transactions in Deal 2 are as follows:

(1) Borough Brothers supplied to Askos Wolt by invoice dated 3 September 2015;

(2) Askos Wolt supplied to Global SFX by invoice dated 3 September 2015;

(3) Global SFX supplied ODL by invoice dated 4 September 2015;

(4) ODL supplied to Beigebell by invoice dated 7 September 2015;

(5) Beigbell supplied to Hi-View by invoice dated 7 September 2015;

(6) Hi-View supplied to Tibizon SP by invoice dated 21 September 2015.

59. HMRC made a SCAC request to the Hungarian authorities regarding Borough Brothers on 22 October 2015 as supplier to Askos Wolt's in this deal. The response on 20 November 2015 advised as follows:

(1) Borough Brothers started trading on 21 April 2015 with its main business activity being wholesale of electronics, telecommunications equipment and parts.

(2) It was deregistered on 25 September 2015 for failing to meet its tax obligations;

(3) It had no employees, vehicles or place of business, and no contact could be established with the company to confirm the supply to Askos Wolt.

Deal 3A (550 Sandisk 256GB)

60. The transaction chain concerned 550 Sandisk 256GB Extreme Pro SDXC memory cards. The corporate entities participating in this chain were as follows:

Raya International (UK defaulter) → SD 2013 (UK buffer) → Online Distribution (UK buffer) → Beigebell (UK broker) → Hi View (Spain) (EU purchaser) → Tibizon Company (Poland) (defaulting trader)

61. The dates of the transactions in Deal 3A are as follows:

(1) Raya International sold to SD 2013 by invoice dated 8 September 2015;

(2) SD 2013 to ODL by invoice dated 2 September 2015;

(3) ODL to Beigebell by invoice dated 7 September 2015;

(4) Beigbell to Hi View (Spain) by invoice dated 7 September 2015;

(5) Hi-View to Tibizon SP by invoice dated 21 September 2015.

62. HMRC made a SCAC request to the Polish authorities regarding Tibizon on 29 June 2016. The response on 28 July 2016 advised as follows:

(1) Tibizon did not conduct activity at the registered address (a rented dwelling);

(2) It was deregistered for failing to account for any transactions since October 2015;

(3) The company's only representative Mrs Renu Newitt (a British citizen) could not be contacted for documentation in relation to the transaction with Hi-View.

Deal 3B (200 Sandisk 256GB)

63. The transaction chain concerned 200 Sandisk 256GB Extreme Pro SDXC memory cards. The corporate entities participating in this chain were as follows:

> Borough Brothers Kft (Hungry) (EU supplier) → Askos (UK acquirer) → Global SFX (UK buffer) → Online Distribution (UK buffer) → Beigebell (UK broker) → Hi View (Sp) (EU purchaser) → Occtanis (Pl) (defaulting trader)

64. The dates of the transactions in Deal 3B are as follows:

(1) Borough Brothers supplied to Askos Wolt by invoice dated 7 September 2015;

(2) Askos Wolt supplied to Global SFX by invoice dated 7 September 2015;

(3) Global SFX supplied ODL by invoice dated 7 September 2015;

(4) ODL supplied to Beigebell by invoice dated 8 September 2015;

(5) Beigbell supplied to Hi-View by invoice dated 7 September 2015;

(6) Hi-View supplied to Occtanis SP by invoice dated 21 September 2015.

65. HMRC made a SCAC request to the Polish authorities regarding Occtanis on 19 May 2016. The response advised as follows:

(1) Occtanis did not submit tax returns or respond to correspondence; the registration address was a virtual office;

(2) The Polish authorities were unable to provide the detailed information requested;

(3) The authorities concluded that that the circumstances 'indicate on the apparent nature of the registered business activity allowing participation in the VAT frauds' and advised that the company would be de-registered.

Deal 4 (500 Sandisk 512GB)

66. The transaction chain concerned 500 Sandisk 512GB Extreme Pro SDXC memory cards. The corporate entities participating in this chain were:

> Borough Brothers Kft (Hungry) (EU supplier) → Askos (UK acquirer) → Global SFX (UK buffer) → Online Distribution (UK buffer) → Beigebell (UK **broker**) → Hi View (Sp) (EU purchaser) → Occtanis (Pl) (defaulting trader)

67. Borough Brothers at the start of the chain, and Occtanis at the end of the chain were both missing traders. The dates of the transactions in Deal 4 are as follows; the invoices with an asterisk are the same invoice rendered for Deal 3B (ie supplying goods for Deals 3B and 4).

(1) Borough Brothers supplied to Askos Wolt by invoice* dated 7 September 2015;

(2) Askos Wolt supplied to Global SFX by invoice* dated 7 September 2015;

(3) Global SFX supplied ODL by invoice* dated 7 September 2015;

(4) ODL supplied to Beigebell by invoice dated 8 September 2015;

(5) Beigbell supplied to Hi-View by invoice dated 7 September 2015;

(6) Hi-View supplied to Occtanis SP by invoice dated 21 September 2015.

Deal 5 (1000 Sandisk 512GB)

68. The transaction chain concerned 500 Sandisk 512GB Extreme Pro SDXC memory cards. The corporate entities participating in this chain were:

> Borough Brothers Kft (Hungry) (EU supplier) → Askos (UK acquirer) → Global SFX (UK buffer) → Online Distribution (UK buffer) → Beigebell (UK **broker**) → Hi View (Sp) (EU purchaser) → Occtanis (Pl) (defaulting trader)

69. The dates of the transactions in Deal 5 are as follows:

(1) Borough Brothers supplied to Askos Wolt by invoice dated 27 August 2015;

(2) Askos Wolt supplied to Global SFX by invoice dated 27 August 2015;

(3) Global SFX supplied ODL by invoice dated 27 August 2015;

(4) ODL supplied to Beigebell by invoice dated 1 September 2015;

(5) Beigbell supplied to Hi-View by invoice dated 31 August 2015;

(6) Hi-View supplied to Occtanis SP by invoice dated 21 September 2015.

Hi-View as the EU acquirer

70. On 22 January 2016, HMRC issued a SCAC request in relation to Hi-View. (Mutual assistance enquires with the tax authorities in other EU member states are referred to by HMRC as SCACs.) The Spanish authorities' SCAC report dated 15 April 2016 states the following:

(1) Hi-View Polish customers were identified by the Spanish authorities, and confirmed to be wholesale customers and not end-users.

(2) The report confirmed that the transport of the goods was contracted by Beigebell, and that Beigebell would have had the responsibility for insuring the goods. (This would appear to conflict with Mr Orton's statements during HMRC's visit on 10 February 2016 that Hi-View had responsibility for arranging transport, and that Flight Logistics would be responsible for the insurance.)

(3) According to the administrator of Hi-View, the transactions were made through an online portal which allowed Hi-View access to offers and to requests for different types of goods. Hi-View provided email correspondence with Beigebell relating to the deals.

(4) Hi-View had registered in February 2015, and the Spanish authorities s had not had sufficient time to establish credibility, no current evidence of any fraudulent transactions.

(5) The directors of Hi-View were Arvind Sachdeva and Gursharan-Sing J; both are UK passport holders and based in Wembley, UK.

(6) The Spanish authorities had visited Hi-View's premises on 24 February 2016 and recorded that the company operated from an industrial warehouse near Barcelona which contained goods stacked on metal shelves, and that there was sufficient space to maintain a stock , with the property having an area of 516 square metres and an entrance for lorries.

(7) A contract between Hi-View and the owner of D&D Poland was provided; storage in Poland was at Hi-View's expense; no evidence of any other relationship between the two companies.

Beigebell's purchase invoices relating to the transaction chains

71. There were in all four invoices in relation to Beigebell's six purchases for the products that were sold onto Hi-View in the deal chains. The 4 invoices issued by Online Distribution to Beigebell have notable details as follows:

(a) The delivery address of the goods is stated to be Beigebell's PPOB at Trident Court, Chessington;

(b) The figures for value on the purchase invoices are all stated in Euros;

(c) Payment terms is stated to be 'Payment on Delivery';

(d) Bank payment details given are the sort-code, account number, IBAN No., Swift Code of Online Distribution, and are in respect of ODL's bank account with Barclays Bank, at 22-24 Marlborough Road in St Albans.

72. The amounts of input VAT on these invoices form the basis of the input tax repayment claim.

Invoice Date/ Number	Defaulter/ Contra Tdr	Description	Qty	Deal No.	Net Value £	Input VAT £
01/09/2015 SI-1227233	Shark Partners	SanDisk 256GB Extreme Pro	1000	Deal 1	141,416.61	28,283.32
01/09/2015 SI-1227234	Askos Wolt (contra)	SanDisk 512GB Extreme Pro	1000	Deal 5	276,099.09	55,219.82
07/09/2015 SI-1227334	Raya International	SanDisk 256GB Extreme Pro	550	Deal 3A	139,293.44	27,858.69
	Askos Wolt (contra)	Samsung EVO 250GB	1000	Deal 2		
08/09/2015 SI-1227360	Askos Wolt (contra)	SanDisk 256GB Extreme Pro	200	Deal 3B	166,332.87	33,266.57
	Askos Wolt (contra)	SanDisk 512GB Extreme Pro	500	Deal 4		
			Total		£723,142.01	£144,628.40

HMRC's MTIC Assurance and Monitoring Visits

First visit on 10 December 2015

73. The appellant's 10/15 VAT return was submitted on 17 November 2015, and due to the sum of repayment involved, an MTIC Assurance visit was made to Beigebell's premises by Officers Cole and Banks on 10 December 2015. The report on the visit recorded the following:

(1) Met with Mr Orton (not Griffiths) at stated Principal Place of Business ('**PPOB**').

(2) Ritesh Patel from CMS Peripherals introduced Beigebell to four wholesale deals involving the purchase and sale of memory cards.

(3) The products were purchased from ODL and sold to Hi View in Spain, although 'it emerged that the goods were actually delivered to Poland', and that export documents would be sent in by Beigebell.

(4) Mr Orton 'readily admitted that these transactions were different and much larger than anything they have done before'; that the goods were inspected by Orton at the freight forwarder they used which was Flight Logistics Group Ltd (at PPOB RG41 2RF which is as recorded in the hand-written note by Officer Cole).

(5) 'In terms of finance the customer paid Beigebell before they had to pay their supplier. No third-party payments were made and the transactions were made using UK bank accounts. Although statements have not yet been seen and these will be sent in by Mr Orton.'

(6) Due Diligence – 'Mr Orton readily admitted that they had done no real checks on customers or suppliers but were content because money was paid up front. I explained that due diligence was important to ensure that the transactions being dealt in are free from VAT Fraud, … pointed out the suggested checks in Notice 726.'

(7) Profit – 'Mr Orton stated that they made a 2% profit on these transactions and he conceded it was an easy deal for a quick profit. No payment was made to his friend Mr Patel who introduced them to the deals.'

Email exchanges between first and second visits (SR25)

74. Officer Rehman was allocated to enquire into Beigebell's repayment claim after the December 2015 assurance visit. The email exchanges between Orton ('JO') and Rehman ('SR') following Officer Cole's visit are informative to the background of Orton's subsequent dispute over the report.

(1) 22/01/2016 at 12:09 – SR to JO, referring to conversation on 19 January 2016 and confirmed that she was progressing with the enquiries into the repayment claim, (which could not be paid out therefore).

(2) 22/01/2016 at 12:22 – JO to SR:

> 'Thanks, however as discussed on the phone you were going to send me a synopsis of the case as you have it so we can check that you have everything factually correct. *I have already had to advise you of mistakes in the notes Paul took down so I want to ensure there are not any more*.' (Italics added)

(3) 22/01/2016 at 13:23 – SR to JO:

> 'Can you please advise what "mistakes" you are referring to in Paul's notes?'

(4) 22/01/2016 at 13:26 – JO to SR:

> '*I can't remember off the top of my head as it was over a month ago* that we discussed it on the phone. This highlights exactly why I need this information from you as we have a right to check that you are working from accurate information. [Italics added]
>
> Please send through as a matter of urgency today as already agreed.'

(5) 22/01/2016 at 14:15 – SR to JO:

> 'Please see attached letter. I trust this answers your query.'

(6) 28/01/2016 at 14:04 – JO to SR:

> 'When my colleague Marcus called you, he said that you mentioned that I had not supplied you with all the information you required. I have not had any request from you about this. Please could you let me know what, if anything, is outstanding on this case from our side.'

(7) 01/02/2016 at 17:14 – JO to SR to chase for a response.

(8) 03/02/2016 at 15:38 – SR to JO:

> 'Mr Griffiths must be referring to my comments regarding your email response that you do not have any paperwork for delivery. I wanted to know how you instructed Flight Logistics regarding the movement of these goods.
>
> Please provide me with copies of any emails instructing Flight Logistics regarding these deals.
>
> Also can you provide copies of any Due Diligence paperwork on your supplier or customer in these deals?
>
> I trust that you can provide me with the paperwork at our meeting.'

Second visit on 10 February 2016

75. The visit was attended by Officers Rehman and Harris. Mr Orton and Mr Griffiths were present, along with Mark Richardson as the appellant's tax representative. The points relevant to our consideration of the substantive issue as stated in the visit report are as follows.

(1) Griffiths 'is the sales person for their usual business but did not look into *this deal*[2] as it had already been set up by Ritesh Patel' (emphasis added).

(2) That in 'period 10/15 Ritesh Patel (Ricky) introduced [Beigebell] to four wholesale deals involving the purchase and sale of memory cards'[3].

(a) 'Ritesh had completed these deals[4] on behalf of his employer Beta Distribution but at the last minute found out he was unable to sell these products because of "conflict of interest".'

(b) 'Ritesh asked if they [i.e. Beigebell] could do the deals. Mr Orton agreed to carry out the deals at the request of this friend.'

(3) *Due Diligence* – When asked if he actually did any of his own checks on the supplier and customer prior to carrying out the deals, Mr Orton said:

(a) He carried out credit checks which came back as low risk;

(b) He checked his customers VAT number on a European Website;

(c) He dealt with a Javier Saenz ('**Saenz**') but did not ascertain his position in the company;

(d) He did not know who the directors were for Hi View SL.

(4) *Contracts* – When asked if contracts were negotiated, Mr Orton said there were no contracts 'as *the deal*[5] was already put together by Patel'.

(5) *Insurance* – No insurance taken out, as Mr Orton 'assumed that the goods would be covered by Flight Logistics, but he did no query this with Flight Logistics'.

(6) *Warehouse* – the goods were delivered to Flight Logistics on two separate days.

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[2] The first reference of the 'deal' in the singular as a single deal set up by Patel; see footnote 5 also.

[3] We understand Rehman's reference to '*four wholesale deals*' in the report is by reference to the four invoices on which input VAT has been claimed.

[4] We understand 'deals' here in the plural to mean the deal chains in question.

[5] In closing submission, Mr Brown said that it was 'an inaccurate use of language by the officer', to refer to 'the deal' in the singular, and that 'it has to be one or the other'. We take no issue with the reference to 'the deal' in the singular in the context of what Patel was said to have 'put together'. Officer Rehman's evidence is clear that there were four invoices involved, and the products concerned in the four invoices were being transacted in five deal chains. Her visit report recorded what the appellant mentioned twice that a single deal was set up by Patel.

(a) The goods were delivered in separate boxes and one Pallet.

(b) Orton said the boxes were sealed and he opened the boxes to check the products.

(c) Orton said from memory that Flight Logistics called him to let him know when the goods were delivered.

(d) Orton could not say if the goods had come in from another warehouse but only that Online had supplied the goods.

(e) A copy of the invoice from Flight Logistics states 'handover of 6 cartons plus 1 pallet of memory cards and drive'.

(f) Orton was asked if he had an account with Flight Logistics, and he confirmed he had. This was not the usual warehouse used for their merchandise business, which is IJS Global.

(g) 'It transpired during the conversation that the account with Flight Logistics was set up for the SSDs transactions.'

(h) Orton was asked how did Flight Logistics know what goods and quantities were being delivered for them, and he said he would provide emails.

(7) *Payments* – it was noted that there was no stipulation of any payment terms on the invoices for Hi View, to which Mr Orton said:

(a) '[Orton] did not offer any credit on these deals as Hi View paid in full before he paid his supplier'.

(b) Orton 'could not see any risk for him as he was receiving the payments. All the risk lay with the customer who was making payments up front'.

(c) Orton confirmed that 30 days credit is offered on the merchandise business.

(d) A copy of Beigebell invoice for its merchandise business contains a lot more details, unlike the invoice to Hi View.

(8) *Ownership* – Orton said he took ownership of the goods when the goods were delivered to Flight Logistics and goods were sold when payment was received.

(9) *Delivery* – the following is recorded in the visit report:

(a) 'Orton stated that the delivery arrangements and transporter was arranged by Hi View.'

(b) 'Orton *thinks* he called Hi View to confirm who had arranged transport to move the goods' (italics added).

(c) It was pointed out to Orton that the CMR provided on 10 December 2015 was not signed at the point of delivery, so did not necessarily show that the goods had left the UK.

(d) Orton had not made any enquiries once the goods left Flight Logistics, but had emails from his customer which he would forward.

(e) When asked if any confirmation had been received from Hi View that the goods had arrived, Orton said it was the customer's responsibility; that he had emails from customer to forward.

(10) *MTIC Information* – when asked what checks had been 'undertaken to protect the integrity of these deals', given that the transactions were different and much larger than anything Beigebell had done before, it is recorded in the report that:

(a) Orton said that it looked like a good business deal and they trusted Ritesh.

(b) Beigebell had made €30,000 profit on the deals and Patel did not receive any payment.

(c) Orton did not see any risk in the deal or the way it was conducted.

Correspondence after second visit

76. By email dated 11 February 2016, Officer Rehman wrote to Mr Orton to request:

(1) Dates and time Orton visited Flight Logistics Group Ltd;

(2) Orton mentioned checking the goods, asked if he noted and retained the serial numbers for his records;

(3) Whether Orton send inspection reports with the consignment for his customer;

(4) To forward all evidence of communication for these transactions between Beigebell and its supplier, customer, and Freight forwarders;

(5) Evidence showing the consignment leaving the UK and confirmation of receipt;

(6) To obtain from supplier the amended invoices showing the VAT in sterling.

77. By letter dated 16 February 2016, Mr Richardson referred to the email of 11 February , and the meeting of 10 February as 'a very productive meeting', and requested that the notes of the meeting on 10 February be sent to him. By letter dated 24 February 2016, a copy of Officer Harris' handwritten notes was furnished to Mr Richardson.

Third visit on 21 June 2016

78. Beigebell was visited again by Officers Rehman and Harris in June 2016. Mr Orton and Mr Richardson were present, (Mr Griffiths not present). The relevant points noted in the visit report are as follows.

(1) There has been no change to trading since the last meeting and no SSDS commodities have been bought since 10/15 period.

(2) All goods are branded merchandise imported direct from manufacturers or distributors.

(3) Beigebell does not wholesale their products as they buy according to customer requirements.

(4) The merchandise goes to IJS Global Freight, forwarders which is now part of the GEFCO group, or is delivered direct to customers; inspection reports are received for the merchandise (from IJS Global).

(5) Marine insurance is in place for any damaged goods.

Sample Invoices for merchandise business (SR25)

Invoice from Beigebell to customer

79. A sample invoice dated 26 January 2016 for the appellant's merchandise business shows the details incorporated on a typical invoice:

(1) at the top left hand corner are Beigebell's logo, address, phone and fax numbers, email and website addresses, below which are the details of the customer being invoiced: contact name, company name, postal address;

(2) at the top right hand corner: invoice date, due date (i.e. for payment), invoice number, VRN, and below which are customer's Ref, Phone, and Email address;

(3) middle section: description of the merchandise to include product specification, (e.g. *MWCS 16207 – Rectangular Triumph Clock*), Model specification (*DZMC 14001*), Size (*39x29cm*), Packing (e.g. *Black box with 1 colour logo including delivery to one UK address*).

(4) Followed by extrapolation in relation to the invoice total by detailing *quantity, unit price, net value, VAT rate, VAT, Amount* (i.e. net £4,690 plus VAT £938) for total £5,628.

(5) Bottom section is the Payment Advice (i.e. remittance slip) with details to pay by bank transfer to Beigebell Current Account or by cheque to its office address.

Freight forwarder's Invoice to Beigebell

80. IJS Global, Freight Forwarding and Logistics Services ('**IJS**' or '**IJS Global**') is the appellant's usual freight forwarder. The sample invoice dated 29 January 2016 with the heading: '*Tax Invoice [Number] Original*' and shows:

(1) Address and contact details of IJS Global, its VRN; followed by Beigebell's details;

(2) Beigebell's address and customer account details (with IJS), including its terms of payment being 30 days after invoice date;

(3) Details of consignor, consignee, order reference, goods description, weight, volume, chargeable, packages;

(4) References entered under each of the headings for (i) *Vessel/Voyage/IMO (Lloyds)* (ii) *Ocean Bill of Lading* and (iii) *House Bill of Lading*;

(5) Details of the consignment under the headings of: (i) *Origin* (Fuzhou, China) and *ETD* (08-Dec-15), (ii) *Destination* (Felixstowe, UK) and *ETA* (11-Jan-16), (iii) *Container Number (Type)*;

(6) Description of the invoice total with a breakdown for *International Freight, Customs Clearance Fee, Terminal Handling Charges, Delivery Charges, Security Charges*, *Cartage, Palletisation*, (all at zero-rate), and a total of £667.92 (no VAT);

(7) IJS's VRN appears once more against the 'Total' payable, with a note: 'Please contact us within 7 days should there be any discrepancies. All business undertaken as per our Standard Trading Conditions, a copy of which is obtainable on request.'

Sample documentation for the deal transactions (HB1/662 et al)

81. Mr Orton stated that Beigebell made £30,000 from the deals in question. A sample of the documentation relevant to Deal 1 shows:

(1) *28 August 2015*: Shark Parnters' (Birmingham) invoice to SD 2013 Ltd (Harrow) for 1,000 SanDisk Extreme Pro 256 SD Cards at unit price €199.61, net total of €199,610, and VAT at 20%. The value of supply is converted to pound sterling using HMRC Base Rate of 1.3986, to arrive at a net total of £142,721.29 and VAT of £28,544.26; no freight charge. The bank for payment of the invoice is a As Latvijas Pasta Banka in Latvia.

(2) *27 August 2015:* SD 2013 Ltd's purchase order (to Shark Partners); and

(3) *1 September 2015*: SD 2013's invoice (to ODL) are in identical format (but for the description under the date as either 'PO' or 'Invoice'); for the exact goods and quantity with the unit price on the invoice is marked up to €200.62, and a manuscript note of exchange rate at 1.39812 and £172,191.23 indicates the conversion of the gross value of supply (inclusive of VAT) from Euros to pound sterling.

(4) *27 August 2015*: ODL's purchase order (to SD 2013 Ltd) – for the exact goods and quantity – at the unit price of €200.62 and the extrapolation all in Euros.

(5) *1 September 2015*: ODL's invoice (to Beigebell) – for the exact goods and quantity, with the unit price marked up to €202.65 and VAT totalling €40,530 (no sterling conversion on the face of the invoice), and payment details refer to a branch of Barclays in St Albans.

(6) *26 August 2015*: Beigebell's Proforma Invoice (to Hi-View) is addressed to Javier Sáenz at an address at Tela in Barcelona; Javier's email address is also noted on the face of the invoice, with only the brief description of 'Sandisk 256GB Extreme Pro' – for the exact quantity, at the unit price marked up to €210, and VAT rate at 0%. The transaction value remains in Euros, and payment to 'Beigebell Euro Account', which appeared to have reached Beigebell's account on 28 August 2015 per date stamp imprint and a manuscript note initialled. (The Proforma Invoice was followed by an Invoice dated 31 August 2015, presumably after the payment receipt although not stated as paid).

(7) *25 August 2015*: Hi-View's purchase order (to Beigebell) – for the exact goods and quantity at the unit price of €210.

Due Diligence Documentation

82. On 10 December 2015, Mr Orton stated to HMRC that 'no real checks' had been done on ODL or Hi-View because Beigebell was paid up front by Hi-View before it had to pay ODL as its supplier. In fact, no due diligence documentation was seen by HMRC at the three visits in December 2015, February 2016, and June 2016.

83. On 7 March 2016, Beigebell's agent provided a bundle of papers which contained the following documentation in respect of ODL and Hi-View.

Online Distribution – company documents due diligence

84. By email dated 21 August 2015 to Orton from ODL (email address from 'tradesale@saverstore.com'), saying as follows and attaching documents as below listed.

> 'As requested, please find attached our company documents.
> We will have some stock available on Monday which we can offer to you.
> Please could you forward your company documents for our records.'

(1) Certificate of incorporation on change of name from formerly 'Globally Limited' to 'Online Distribution Limited' on 23 May 2008;

(2) VAT Certificate for registered name 'Online Distribution Limited', with the date of VAT registration stated to be 27 February 2007, and the date of the certificate being issued on 11 July 2014, and the business activity being 'Retail sale of electrical household appliances in specialised stores'.

(3) Certification of registration for VAT, (obtained in response to HMRC's enquiry) with the registered address being at 'Jessa House' (1 Finway, Luton, Bedfordshire);

(i) effective from 27 February 2007 and amended on 4 June 2008;

(ii) trade classification being '*Retail Elect HHold Appl Specialist*'.

(4) Company Introduction, which is signed off by its director,

(i) A so-called *Mr M Jessa* (a coincidence with the registered address being at Jessa House?);

(ii) The Company Introduction is on one side of A4, with three headings being 'Our Company', 'Our Products', and 'Our Service', and very short paragraph(s) under each heading are 4 to 5 lines of text in total.

(iii) The company throughout the introduction is actually referred to as 'Saverstore', which claimed to date back to 1972, and 'became part of the Online Distribution Limited' in February 2007. Apart from that one mention of ODL, the company introduced was referred to as Saverstore.

(iv) There is repetition of the content under each heading, under 'Our Company' it states: '*Saverstore.com is one of the largest online resellers of IT and consumer electronics products.*'

(5) Online VAT certificate shows the VRN of Online Distribution Ltd, but the trading name is not provided, and the email address is 'sales@saverstore.com', the business activity is stated as: '*Retail sale of electrical household appliances in specialised stores*'.

(6) The CreditSafe document was issued on 26 (or 28) August 2015, and gave ODL a credit rating of 87 and a credit limit for £27,000.

Hi-View – company documents for due diligence

85. Mr Orton at the initial visit and subsequent monitoring visit by HMRC said he did not know what position Javier Saenz held in Hi-View; that he did not find out this piece of information when he was completing the deals; that since the deals were already pre-set by Patel, Mr Orton did not feel there was a need to question.

86. On 'The Company Details & Trading Application Pack' attached by HVT to open an account with Beigebell, HVT identifies itself as 'wholesale, distribution, and retail'; the covering letter states, inter alia, the following:

> Our main lines of sale at the moment are: Fashion, Technology, Office Furniture, Children stuff and Bargains.

87. HVT's '*Terms and Conditions of Purchase*' document was attached to the Trading Application Pack sent to Beigebell. The clauses of the Terms and Conditions of note include:

(1) 4**. VAT status and legitimacy of trading**

> 4.1 The Supplier acknowledges the risks of 'missing trade fraud' and 'carousel fraud' in the context of supplies within certain markets. Accordingly, the Supplier undertakes and warrants to the Company [i.e. HVT] that:
>
> 4.1.1 the Supplier is validly registered for VAT.
> 4.1.2 the Goods exist and have not been previously sold by the Supplier to any other person.
> 4.1.3 the facts, matters and representations contained in the Supplier's Invoice are accurate and true in all respects and have been independently verified by the Supplier or its agents.

(2) 7. **Delivery**

> 7.1 Time for delivery shall be the essence of the contract.
>
> 7.2 The Goods shall be delivered to the Company at the location specified in the Company's Purchase Order. *The Supplier shall procure a contract of carriage and insure the Goods from despatch they are paid for in full*.

(3) 9. **Title to the Goods**

> 9.4 Immediately upon payment by the Company to the Supplier for any Goods the Supplier shall obtain and supply to the Company a written

> acknowledgement from the relevant freight forwarder in possession of the Goods that the Goods concerned are now the property of the Company and that such goods are now held to the order of the Company.

88. Included in the Trading Application Pack was a Tax Certificate issued by the Spanish tax agency dated 8 June 2015, which was the date of endorsement of Hi-View's export tax status. A Trade Form was included to be completed by Beigebell for return to Hi-View; the Trade Form asked for company details of Beigebell as a supplier to Hi-View, and was completed to the extent of leaving bank details to be confirmed; the named forwarder on the form was Flight Logistics Group Limited.

Flight Logistics – correspondence

89. Beigebell did not contract with its usual freight forwarder, IJS Global, for the transactions in question, and no equivalent invoice (see §80) from a freight forwarder for the goods in these transactions has been produced. Beigebell provided copies of correspondence with Flight Logistics during enquiry, but no due diligence would appear to have been conducted by Beigebell on Flight Logistics.

90. HMRC obtained additional correspondence relating to Flight Logistics from HMRC's Lanyard team which investigated freight forwarders and identified an entity by the name Create Leisure Limited ('**Create Leisure**') also used Flight Logistics as the forwarder. There is a dearth of contractual documentation in connection with contracting with Flight Logistics.

Create Leisure

91. HMRC rely on the fact that Mr Orton was asked to give the reference of 'Create Leisure Ltd' to open its account with Flight Logistics, and it was Matt Jones from ODL who gave Orton the reference of Create Leisure for this purpose. In turn, HMRC rely on the fact that Create Leisure had come under HMRC's radar as a participant in fraudulent transaction chains at the relevant time when Beigebell became involved with the deals in question.

92. A *Kittel* denial was issued by letter dated 13 October 2016 to Garry Mills as director of Create Leisure, a company based in Wokingham, in relation to the input tax claimed of £269,676.09 on purchase of PlayStation 4's and SanDisk Memory Cards in 07/15 and 10/15 periods. A factor taken into account (at paragraph 11) for the denial is that:

> 'Despite Create's customer being located in Spain the goods were delivered to Poland and the Netherlands. It would be expected in a normal commercial transaction that the goods would end up with an end consumer, and at least be delivered to the same country in which the customer resided, thus cutting down any additional intra-community transport costs. ..'

93. Create Leisure appealed against the denial decision, but its appeal was withdrawn by its liquidator in November 2018.

94. The common features between the transaction chains involving Create Leisure and Beigebell are as follows:

(1) Online Distribution was the only supplier to Create Leisure in all the 7 denied deals.

(2) Two of the transaction chains dated (27 August 2015) were for the same products being dealt in this appeal, namely SD cards of 500x 512GB and 2000x 256GB.

(3) The entities in the transaction chains with Create Leisure were common to those in the Beigebell chains:

(a) Deal 2 (07/15) a contra trading chain

Borough Brother KFT (Hungarian missing trader) → Askos Wolt (Contra trader) → Global SFX (UK buffer) → Online Distribution (UK buffer) → Create Leisure (broker) → Hi-View (EU acquirer)

(b) Deal 3 (07/15) a defaulting chain

Shark Partners (fraudulent defaulter) → SD 2013 (UK buffer) → Online Distribution (UK buffer) → Create Leisure (broker) → Hi-View (EU acquirer)

95. The transaction chains involving Create Leisure were therefore parallel chains to those involving Beigebell, with participants in contra trading chain Deal 2 (for Create Leisure) being mirrored by the contra trading in Deal 2 (for Beigebell), and the defaulting chain Deal 3 (for Create Leisure) being mirrored by the defaulting chain Deal 1 (for Beigebell), with Beigebell acting as the broker in place of Create Leisure.

Patel's involvement

96. The accounts given to HMRC of Patel's role in relation to how Beigebell came to be involved in the transaction chains are as follows.

(1) At the first visit on 10 December 2015 and February 2016, Orton explained that Mr Patel was from a company called CMS Peripherals, which could not do the deal because the goods were outside of what CMS Peripherals normally dealt in. As recorded by HMRC, Mr Orton stated at the first visit that it looked like a good business deal, as there was no risk involved given that the customer paid upfront; that he agreed to take on the deals because Patel is a long-term friend and he trusted him; and that Patel had not received any payment for setting up the deal.

(2) At the second visit on 10 February 2016, Orton said that Patel had completed these deals on behalf of his employer Beta Distribution but at the last minute found that the products could not be sold due to 'conflict of interest' and asked if Beigebell could do the deals on the same or similar margins.

(3) Following the second visit, Orton wrote to Patel on 11 February 2016, asking him to assist with the enquiry by providing as much detail as possible in relation to:

(a) Overview of the position you held within Beta Distribution and your trading relationship/history with Hi-View Trading;

(b) Full explanation of why you approached use about this deal;

(c) Details of other products you were supplying to Hi-View at the same time;

(d) Any other information you think may be of importance in this matter.

(4) Patel's response dated 17 February 2016 was included in the bundle of information on 7 March 2016 forwarded to HMRC, wherein Patel stated:

'In my various positions within the IT distributors that I have been employed in, I have had many years of dealing with the directors of Hi-View Trading at the present company and in their previous companies. I have been able to supply them with a number of goods for them to resell to their clients within the UK & Europe. I have typically supplied them with storage peripheral products [for resale].

I had the opportunity to supply various products to Hi-View in late August and was able to source the list of goods which contained products from manufacturers such as Quantum, Seagate, LaCie, Apple and SanDisk.

> As I started to procure the stock to supply Hi-View I had a call from SanDisk who informed me that our contract was to supply UK customers only and therefore could not supply Hi-View with the Sandisk products.
>
> At this point I was asked by Hi-View if I could help find a partner who could help supply these products at the agreed margin as they had already pre-sold the goods. My supplier could not sell directly to Hi-View *due to the channel model that exists and channel ethics*. I suggested Beigebell as we have a long-standing relationship and understood that you are looking to grow your revenue streams so would potentially be open to a revenue deal with minimal margin that was built in to the deal for this element.' (Italics added)

Enquiry on 'Reverse Charge'

Transcript of phone calls

97. Before the first deal was transacted, Mr Orton enquired into whether SD memory cards are subject to reverse charge. If reverse charge applies to memory cards, then instead of the seller charging output VAT on the value of supply, it would be the customer who accounts for the output VAT to HMRC. The reverse charge is a measure introduced by section 55A of the Value Added Tax Act 1994 ('**VATA**') to counter MTIC fraud.

98. At the 2019 hearing, Officer Rehman included an exhibit after listening to the enquiry phone call recording when Mr Orton spoke to an HMRC officer named Carol.

> 'Note of Call recording of Jack Orton to HMRC on 25/08/2015 re SSD cards
>
> Listened to the recording on 12/02/2016.
>
> Spoke to Carol. Gave out his VAT number, name and relationship with company as director. Had to hold as problems with systems.
>
> Apologies for delay. Jack Orton confirmed his business name and first line of the address. His query related to reverse charge. Domestic reverse charge on product purchasing SD card. Wasn't sure if applicable. He was getting the products from a UK company.'

99. As part of Officer Rehman's evidence, she had regard to Orton's enquiry phone calls on 25 August 2015 to HMRC specifically in relation to whether SD cards are subject to a reverse charge. In terms of the timing of the phone calls, Officer Rehman stated that the reverse charge enquiry fitted into the timeline given in Mr Orton's witness statement as being after Orton had spoken to Patel, and at the same time as Orton was emailing ODL and HVT to arrange the deal.

100. Apart from Officer Rehman's 'Note of Call', HMRC also produced the transcripts of two phone calls by Mr Orton on 25 August 2015, the first being answered by an officer named Carol, and was the one listened to by Officer Rehman in drawing up the Note of Call exhibit. The excerpt from the transcript of the first phone call (at 11:32 hrs) is as follows:

> 'HMRC: … Now it just says here is it to do with a reverse charge …?
>
> JO: Yeah, the Domestic Reverse Charge.
>
> HMRC: Right and how can I help with that?
>
> JO: Umm, I want to see if it applies to a product we're purchasing. Umm it is a SD card. I wasn't sure whether it would be applicable.
>
> HMRC: Right, where are you getting it from?
>
> JO: Coming from a UK company.
>
> HMRC: Oh right, I see what you mean now. If you're ok to hold I'll then check that for you, alright?
>
> JO: Thank you. (The call ended though.)

101. Mr Orton did not seem to hold for a response in his first call, and made another call at 12:55 hrs. The excerpt from the transcript of the second phone call contains the substantive exchanges he had with HMRC on whether SD cards are subject to a reverse charge.

> HMRC: You're speaking to Terry, how can I help?
>
> JO: Hi Terry, erm, I've got a question about Domestic Reverse Charge VAT. Um, we're about to purchase some computer, well some SD Cards.
>
> HMRC: Alright, ok.
>
> JO: And I'm not sure whether the Reverse Charge would apply to them or not.
>
> HMRC: So they're mobile phones, computer chips and that kind of thing …
>
> JO: Yeah exactly.
>
> HMRC: It's an SD card is it? Like an SD card for like a camera …
>
> JO: Yeah exactly.
>
> HMRC: Ok, let's have a look. …. Right, reverse charge on specified goods and services. So you're buying it over a certain amount obviously is it, it's over the £5,000?
>
> JO: Yeah.
>
> HMRC: Ok. Right which specified goods – Mobile Phones, Computer Chips. It's not that is it? It's not a phone, it's not a computer chip. Umm
>
> JO: I didn't know if it would come under that Computer Chip category as it is a memory card.
>
> HMRC: … Let me just double check. I would say no looking at that because it's all about integrated units isn't it, it's CPUs and it's micro-processors. Let me just find out for sure …
>
> […. pause of about 3 minutes]
>
> HMRC: … I did speak with a technician, … what I thought really. … It wouldn't come under that regulation, no.
>
> JO: Alright, brilliant, thanks for confirming.'

Officer Boyko's evidence

102. Officer Boyko worked in HMRC's MTIC team between May 2006 and March 2017, and was responsible for the investigation into Online Distribution Limited during the period February 2016 to March 2017. Her witness statement was signed on 6 December 2017. From her evidence, we find the following facts:

(1) The company incorporated on 5 February 2007 under the name of Globally Limited and applied to be registered for VAT on 27 February 2007, with its main business activities as the supply of 'Consumer Electronics', and an estimated turnover of £10m.

(2) A VAT5 was sent for completion for further information, and the completed VAT5 gave the details of supply as: making 'e-tail' supplies of 'white goods and home entertainment products which will include TV games, consoles, computer peripherals (ie. printers and scanners); other products being 'microwave fans, toys and sensational gifts'.

(3) Online Distribution Ltd was not an authorised distributor of Sandisk products.

103. In December 2011, ODL entered into the 'continuous monitoring programme' ('CMP') for its input VAT claims. Tax loss letters were issued to ODL on a number of occasions, including those relating to purchases from SD2013 for period 08/15 that were concerned in the fraudulent chains in question. The tax loss letters around the relevant period are as follows:

(1) On 15 March 2012, ODL was issued with a tax loss letter in relation to May and August 2010 VAT returns in an overall sum exceeding £230,000.

(2) On 31 July 2014, in the sum of £20,745 in relation to period 05/13.

(3) On 11 September 2015, HMRC notified ODL that SD2013 Ltd had been deregistered with effect from 3 September 2015.

(4) On 11 March 2016, for £51,634 in relation to period 08/15, relating to 2 purchases from SD2013 Ltd.

(5) On 8 August 2016, for £132,474 in relation to period 08/15, relating to 5 purchases from SD2103 Ltd.

(6) On 16 February 2017, for £42,492 in relation to period 11/15.

(7) On 17 February 2017, for £203,224 in relation to period 02/16.

104. On 14 March 2016, ODL was informed that three purchases from Global SFX in period 08/15 had been identified as being connected with a fraudulent VAT default.

105. Officer Boyko confirmed that ODL acted as a buffer trader in all the tax loss transactions, which were all related to wholesale deals, and it was always purchase and sold within the UK, and stated that the purpose of a buffer trader is 'to distance the purchase of the goods and the defaulting trader'. In cross-examination, Officer Boyko confirmed that historically, there had been occasions where tax losses were found but the input tax was not denied, as that was the approach by HMRC in relation to buffer traders.

Appellant's witnesses

106. The Tribunal is mindful that this is a re-hearing, and that our findings of fact may be contested further on an appeal. For this reason, we have set out the witness evidence for the appellant more fully than is necessary for reaching our conclusion on key findings of fact.

Mr Worthington

107. Mr Worthington's evidence on Day 3 from 12 noon was to state that for the past 20 years, he has held several positions within the IT industry, and for the past 12 years, he has worked at one of the largest IT resellers in the UK. His statement explains the IT channel as follows:

(1) The IT channel is made up of an ecosystem of partners, (usually 3 in number):

(a) A vendor who manufactures the product;
(b) A distributor who will buy the product from the manufacturer, and
(c) A reseller, who will be selling the product to an end user, usually a corporate or government organisation.

(2) The reseller will often take care of all the end user communications, from understanding the requirements, quoting for the product in question and dealing with all the details to get the product through the IT channel and onto the end user.

108. In cross-examination, Mr Worthington confirmed that in his experience, a distributor would be 'an authorised distributor' in the IT channel. His replies to further questions were:

(1) There are two types of distributors: authorised and unauthorised (where the vendor has not required for the distributors to be authorised).

(2) Vendors equate manufacturers, being 'the same term' used in the IT channel. The IT channel model applies to hardware as to software.

(3) An end-user can buy products outside the IT channel; but 'grey market' was not a term he came across in the last 10 years or so; that he has not worked for a company that operates within the grey market.

(4) When asked if it makes good business sense to make the transactions as short as possible, he replied: 'the fewer people in the chain the better'; and replied in the affirmative that 'the longer the chain, the lower the margin'.

(5) When asked if there is a rule that there should be 3 parties before the end-user, he replied: 'No, not aware of such a rule', and 'yes, it is a matter of business common sense'.

(6) When asked if an Authorised Distribution Channel 'rarely sees four or five' parties before the end-user, he replied: 'In my experience, that would be very unusual'.

(7) When asked what would be required for a distributor to be authorised by a vendor, he replied: 'In my experience, the 'more sophisticated' a product, the more terms there will be, as set out in 'terms and conditions' to be signed by a distributor and a vendor; it will be 'a higher level of accreditation'.

109. In re-examination, Mr Worthington replied to Mr Brown's questions as follows:

(1) Whether the contract between a vendor/manufacturer and an authorised distributor places any restriction on the resellers as to whom it can sell to, he replied: 'it is not for me to speak on behalf of manufacturers'.

(2) Whether authorised distributors sell without any restriction under a contract, he replied: 'unusual, but perhaps not beyond possibility, depending on requirements'.

(3) What if a vendor sells to a distributor without restriction imposed, he replied: 'that will be "unrestricted" distribution', not necessarily mean "unauthorised" distribution'.

110. The Tribunal asked the following questions:

(1) In the IT channel where the 3 parties are Vendor → Distributor → Re-seller, does the reseller sell on to another wholesaler or retailer? He replied: 'A reseller could sell to a retailer, but not something I have experience of.'

(2) Would you classify a reseller as a wholesaler? He replied: 'A reseller in the ecosystem sells onto corporate or government organisations, not the general public'. When asked if a wholesaler can be a reseller, he replied: 'this is outside my experience of dealing within the IT channel, which is 3 parties: manufacturer/distributor/reseller – but that's not the whole spectrum'.

(3) When asked what remit he received for being a witness, since his evidence seems to be giving 'expert evidence' on the IT channel, he replied that he was asked by Orton to 'describe what the IT channel is'; that 'at a basic level, how the IT channel operates in this case', which he understood to be about whether 'fraudulent transactions have taken place'; of 'VAT not claimed or paid'; that the basis for him being called as a witness is that he has worked in the IT channel.

Mr Griffiths

111. Mr Griffiths started his evidence on Day 3 from 13:45 hrs – 15:00 hrs (to accommodate Patel's availability from 15:00hrs), and resumed on Day 4 from 9:40hrs to 10hrs. His written statement was signed on 11 March 2021, wherein he referred to events in August 2015.

(1) On 18 August 2015, he was travelling to meetings when JO called him to 'talk through a possible sale' that Patel had called him about earlier that day; that due to the high turnover, he questioned JO 'vehemently over his take on its legitimacy and overall security'; that JO gave him 'some confidence by detailing his thoughts', and also Patel's 'affirmation and assurances'.

(2) On 18 and 19 August 2015, Griffiths discussed with JO various times over the pros and cons of the potential sale; came to a mutual agreement to proceed, largely due to the faith they had in Patel as a 'close' friend of 20 years (since their school days).

(3) That he called Patel himself about the sale and after the call(s) he felt 'assured enough to proceed'.

(4) From 21 August onwards, Jack kept him appraised 'fairly infrequently of the order's status', talking through things like him checking the stock at Flight Logistics.

(5) Apart from Orton's 'good marketing and operations experience', that he chose Orton to be a business partner because of: (i) his honesty, and (ii) his diligence; and that was the reason why he felt 'comfortable letting Jack facilitate all aspects of the transaction in question.'

112. In cross-examination, Mr Griffiths' replies to some of the questions are as follows.

(1) Q: A possible sale', would that be just one sale? A: yes, Ricky put to him.

(2) Q: Why should high turnover question its legitimacy?' A: 'I have to question and play the Devil's Advocate'; to check what Ricky put to Orton.

(3) Q: Why do you think it may not be legitimate? Mr Griffiths gave a long answer going into what he does: 'most of the sales I do' being due to his 'resourcefulness'; to get new customers by cold-calls; asking for the reception of the marketing department to talk about the merchandise projects; whether there is a marketing campaign coming up in a few months' time; put together some product ideas to be considered; a project would take the course of a few months; from sourcing a network of suppliers to manufacture this sort of products; that his knowledge of the industry means buying from 'a catalogue group' which will deal with suppliers in the Far East as well.

(4) The average project will take 3 to 4 months; every single job is to be 'completely turned round'; other projects can take up to a year; the mark-up by Beigebell is around 30%, so a product supplied to Beigebell at £1 will be marked up to £1.30 to supply to a customer, and add VAT at 20% on £1.30.

(5) Goods would be delivered to customers and invoices of goods are given 30 days to pay by customers; some suppliers give Beigebell credit terms, which would come under the umbrella contract with the supplier; some would ask for upfront payments with no credit terms.

(6) When asked how he questioned JO 'vehemently', he replied 'the nature of the questions' was 'how much Jack trusts Ricky' – 'ultimately, that's what boiled down to'; and was 'enough to give me the piece of mind'.

(7) When asked how much profit was being gained by this deal, he replied: 'Can't remember, but £75,000 was the value of the merchandise'.

(8) That 'in the initial conversation', he was not aware of the customers in the deal; that it was more about 'how' rather than 'who' the customer was at that point.

(9) When asked what 'assurances' were given per his written statement, whether it was about 'how much JO believed in the project', he replied: 'more nuanced than that'.

(10) Whether 'at the end, the assurances given to [Griffiths] by Jack was on the basis of assurances from Ricky which you gave great weight', he replied: 'Exactly right'.

(11) What were the 'pros and cons' of the sale? A: 'the pro is making a profit'; 'the cons are the size of the overall deal, and the small margin'.

(12) What remembered about the size of the deal? A: can't remember. Q: €7,500 odd profit for €220,000 in Deal 1, was that a large overall deal for a small margin/ A: yes, 'could very well have been' the 'largest deal ever done by that stage'.

(13) On his phone call(s) to Patel, Griffiths 'can't remember what [Patel] said', but that Patel 'had brought deals to us before' that Patel always 'looking after Beigebell'.

(14) What is meant by Patel being a 'close' friend? A: drinks, nightclub once a week; once a year in most years went on holiday together – Greece 2005, Germany in 2006; Ricky was at Jack's wedding in 2014; but would still go on an annual holiday together as 'singles', like in 2015, 2016, and 2018.

(15) When asked when he became aware of the other transactions, he replied: 'Jack made me aware of the other transactions'; when asked whether he asked any questions about those other deals, A: that he 'let Jack deal with those by themselves under the same umbrella'; 'happy with the details' and 'nothing to ask'.

113. The Tribunal asked Mr Griffiths whether it was quite unusual to have such a short time to turn around orders, he replied 'that they had done it in two days if delivery needed very quickly', but admitted that was 'unusually urgent'; and confirmed that the 'normal mark-up' for Beigebell's invoices to customers is 30%; that Orton deals with banking within Beigebell.

Mr Patel

114. Patel's evidence came in two parts: on Day 3 from 15:20 hrs to 15:55 hrs, and then on Day 5 from 11:25hrs to 13:05hrs. Patel's evidence was truncated due to his limited availability, which in turn also caused the truncation of Griffiths' evidence. Mr Brown admitted that there were some miscommunications with Mr Patel in relation to the timing of Patel's Day 5 appearance. When Patel resumed his evidence on Day 5 at 11:25hrs, he seemed to have expected to be called earlier that morning, and indicated that he had childcare duties at lunch time. The signal connection on Mr Patel's Day 3 session was strong without any issue, but on Day 5, there were repeated instances of Mr Patel dropping out altogether, and the screen going completely blank; the hearing adjourned at 1:05 hrs after having waited for his reconnection for some 5 minutes; Mr Patel was informed by the Video Hearings Officer by other means that the hearing would resume at 1:45pm. However, Mr Patel remained disconnected after the lunch adjournment, and his evidence was therefore not completed. The Video Hearings Officer on duty who telephoned Mr Patel to check any connectivity issues a few times reported to the Tribunal the following, which was read out at open court:

> 'I have told [Mr Patel] that it's a mystery why he has not been maintaining his connection because I can see his connection is very strong – straight as an arrow, and he has promised to do a hard start before he re-joins the hearing.'

115. Mr Patel provided a written statement dated 11 March 2021 for the re-hearing. He was not called as a witness at the 2019 hearing. The statement was therefore made more than 5 years after the relevant time in August/ September 2015 when the transactions took place. Patel stated that: 'My supplier, Online Distribution, could not sell directly to Hi-View as they have to follow a Channel Model which prevents selling to End Users'; that his 'involvement in the Sandisk part of the deal stopped' after he had introduced Matt Jones and Javier Saenz to Orton.

116. In cross- examination, Mr Patel was asked to explain the circumstances leading to his being called as a witness for Beigebell. Patel indicated that his friendship with Orton and Griffiths had 'broken down' – 'irreparable', but that he agreed to appear as a witness for the sake of their mutual friends. The timing of the breakdown was put to HMRC's first visit of Beigebell in December 2015. In terms of what oral evidence Mr Patel managed to give, we summarise as follows.

(1) He started working for Beta Distribution ('**Beta**') in October/ November 2014. Before Beta, for about 6 months he had worked for Burker, a Cloud Storage company. Before Burker, he was working for CMS Peripherals, where he was for 9 years.

(2) Beta had 80 to 100 employees with a turnover of over £1.3m in 2014; was one of the biggest consumables distributors: hard drives, printer cartridges, SSDs, USBs, screens, encrypted storage systems, through three sales teams with different focuses: (i) Enterprise Solutions; (ii) Print Team; (iii) Consumables team.

(3) By the time he introduced the deal to Beigebell in August 2015, he had been with Beta for about 9 months. He said in the first session of evidence that he left Beta in early 2016, and that when Orton wrote to him in February 2016, he was 'on garden leave' about to leave Beta. When asked when he started his garden leave, he replied: 30 days, because he was going to work for a rival company (renamed MISCO) after being approached.

(4) When he was cross-examined on when those 30 days were, he said 'end of January early February 2016'. He said he was 'Head of the Team' for Enterprise Solutions, selling products such as (i) Enterprise Storage system network attached storage to hard drives; (ii) solid state disks; (iii) USBs, cards, drives, (iv) tape storage, (v) back-up software.

(5) He confirmed that Beta went into involuntary insolvency in November 2018.

(6) That he had never heard of Global SFX; that he would not get involved with every single transaction; that he worked in sales, not procurement.

(7) Referring to the *Kittel* denial issued to Beta for alcohol being supplied by Global SFX, Patel said he was not aware of a major IT supplier also dealing in alcohol to Beta.

(8) That it was only the First Deal that he brought to Beigebell, and JO had done further deals a few months later; that Deal 1 was for 1,000 SD cards, but that he was not aware of any information about Deal 1 or any subsequent deals.

(9) When asked if Beta was a reseller as well as a distributor, he said Beta was *not* a re-seller but a distributor.

(10) When asked if he had organised a sale to HVT, being the 1,000 SanDisks 512 GB, he confirmed that Hi-View would be a *reseller*, and clarified that HVT was a *wholesale reseller* such as Tesco and Dixon.

(11) When asked what was the total value of the whole deal (for the 1,000 SanDisks) he said the total invoice value was for US$980,000.

(12) When asked what was in that order, he said USB keys, Flash cards, tape storage, network storage units, (of which Mr Puzey reflected to Patel that it was 'remarkable memory' on his part to remember the contents of the invoice), Patel claimed that he had printed documents of Beta he could refer to in storage in his attic.

(13) When asked why the currency was in US$, Mr Patel's connection failed.

(14) He stated that HVT approached Beta to make the purchases; that it was Harry Burner from HVT, and that he still has documents which he could print off from his home office 'files from lots of different deals set up'.

(15) He was questioned why he would still have documents from past deals of his ex-employer, he said he would print off and file documents on 'significant deals so I have a record of them'; his connection dropped out and he did not answer.

(16) When asked what the unit price of the SanDisks 512 GB was, he said: 'can't remember'; then ventured a guess of US$ 200 to 255; then dropped out for good.

117. There was no closure to Mr Patel's evidence therefore, and our evaluation of his evidence is set out in the discussion, in conjunction with our consideration whether any adverse inferences should be drawn.

Orton's evidence

118. Mr Orton's evidence at the re-hearing is summarised under different subject headings that are relevant to the evaluation of the circumstances under which Beigebell came to be involved as the broker in the fraudulent transactions. Mr Orton's evidence at the re-hearing was contrasted with his evidence given at the 2019 hearing, whether in cross-examination or in Mr Puzey's closing submissions. The relevant aspects of his evidence at the 2019 hearing are set out for the purpose of assessing Mr Orton's evidence.

Work experience background

119. Mr Orton's evidence on his work experience is summarised as follows:

(1) He left school in 1997 and did an apprentice course, and worked as a payroll clerk in a car sale company by the name of Currie Motors on M25 in London.

(2) He moved into website design in the late 1990s for Currie Motors, and was put in charge of maintaining and running the website, and his role 'morphed' into a marketing role, which involved designing leaflets and marketing campaigns.

(3) After three years of being in that role, he was promoted 'Marketing Executive', responsible for sales events, getting people into show rooms; Currie Motors had about 20 branches in SE England; each branch would align with a manufacturer, although some branches carried more than one make, such as Toyota, Peugeot and Lexus. Mr Orton would be working to the lead of the marketing director, who had overall responsibility.

(4) In 2001, Mr Orton left Currie Motors to spend time travelling and working as a 'temp' in Australia with a working holiday visa.

(5) Back in the UK, Orton worked as the marketing executive from 2002 to 2010 for A92, the parent company to Secon. (In mid-2010, Mr Orton left to start up Beigebell.)

(6) A92 was set up in 1989 as a *distributor* of IT security products, such as firewalls.

(7) Secon was set up to be a *re-seller* of IT security products, and would supply, install and maintain firewalls which were physical boxes that would sit at a server to protect the system against hackers.

(8) Mr Orton said that Secon would buy from distributors, which would be buying from manufacturers; and that it was necessary to split Secon from A92 for Secon to operate as a re-seller to the end users.

(9) At the time, Secon had about 5 or 6 employees, and A92 had more, but within the marketing team of A92, there were 4 employees. Orton's role was to generate customers' interest in the products through marketing campaigns, trade shows, emails to corporations, promotional events.

(10) Secon would source the products from authorised distributors, such as E92 Plus, Wickhill, and Secon acted as a VAR (Value Added Re-seller).

(11) By 2008, Secon grew to around 20 employees, and A92 to around 40 employees. Orton saw that the orders were still paper-based, sale forecasts were still done on spreadsheets, he grew increasingly interested in the operational side of the business. He

researched and tested a few software systems to run the database, and chose the the Customer Relationship Management ('CRM') system with Miscrosoft. It was his focus from 2008 onwards to implement and improve the CRM system so as to join up the different sections of the operation of the business.

(12) When asked if he had implemented the CRM system for Beigebell, Mr Orton said Beigebell was 'very small' by comparison, and there was no need for CRM, but in 2015, he did implement a bespoke CRM system specially designed for merchandising business which has the functionality of: (i) recording customers details; (ii) logging enquiries; (iii) generating quotations; (iv) generating purchase orders; (v) producing invoices.

Chronology of key events for the Deals

120. The chronology of the key events behind the transaction chains forms the backdrop of following Mr Orton's evidence, and is summarised as follows:

(1) 19 August 2015, Orton was introduced to the ODL (contact Matt Jones).

(2) 19 August 2015, JO was approached by HVT (contact Javier Saenz).

(3) 20 August 2015, JO set up account Flight Logistics (by reference Create Leisure).

(4) 24 August 2015, JO was offered stock by ODL (1000 x Sandisk 512GB and 1000 x Sandisk 256GB memory cards).

(5) 25 August 2015, JO offered and HVT agreed to buy 1000x Sankdisk 512GB and 1000 x Sandisk 256GB; (HVT emailed purchase orders; JO emailed proforma invoices).

(6) 3 September 2015, HVT sought further stock – 3000/4000 x Samsung 250GB.

(7) 3 September 2015, JO offered: (i) 1000 x Samsung 250 GB; (ii) 750 x Sandisk 256GB, and 500 x Sandisk 512 GB); emailed by JO).

(8) 3 September 2015, HVT accepted offer of all stock by JO.

(9) 8 September 2015, all stock bought and sold by Beigebell was paid for by this date.

(10) 8 September 2015, stock shipped direct to Poland from the UK without going to HVT in Spain.

The flow of funds and currency for the deals

121. Mr Orton was asked about the cashflow to fund the transactions. Referring to the first invoice, (see §72, for Deals 1 and 5), Mr Orton said HVT paid Beigebell about £400,000 upfront, and Beigebell paid ODL £390,000 plus input VAT of some £80,000, which Beigebell would not get back until the end of the VAT quarter; that there was a healthy cash reserve built up over the previous 5 years for Beigebell to cover the input VAT shortfall in the interim.

122. The transactions in question were all dealt with in Euros, and ODL was paid by Beigebell using a currency broker. Beigebell had dealt in US$ and Pound Sterling, and had to open a euro currency account to deal in these transactions.

123. Mr Orton disputed that description of 'an easy deal for a quick profit' recorded in Officer Cole's report; he said he did not know what words came out of his mouth; it was too long ago; that far from it being 'an easy deal', he found it all 'very stressful'; 'didn't enjoy it'; 'not a nice experience'; and finished his reply by asserting that he 'did not say that', which is taken to mean 'an easy deal for a quick profit'.

124. On further cross-examination, Mr Orton accepted that £30,000 stated in the second visit report as the profit for doing the deals would have come from him; that it was 'good business'

for a period of 2 ½ weeks' work with four invoices; and boosted Beigebell's turnover by two/three times when comparing one quarter to another.

Communications with HVT and ODL

125. The communications that put the trading parties in touch with each other are as follows.

(1) On 19 August 2015, at 9:12hrs, Patel sent JO an email to Orton with 'Matt (Trade Sales)' copied in with the subject being 'Spain', and the brief message being:

> 'Jack meet Matt
> Matt meet Jack
> Jack can let Matt know the best number and time to talk about ***these deals***.'
> (Emphasis added)

(2) On 19 August 2015, at 10:28 hrs, Orton replied to Matt with Patel copied in:

> Hi Matt, Good to e-meet you, if you want to give me a call on [mobile number] we can have a chat about any potential business. Any time is fine.'

(3) On 19 August 2015, at 12:17 hrs, Matt replied to Orton with Patel copied in: 'I will call you shortly to discuss'.

(4) On 19 August 2015, at 16:45 hrs, Javier Saenz from HVT emailed Orton (with a Billy J copied in at HVT), with the subject heading being: *New Client – Hi View Trading SL*, and attaching PDF file with details of the company. The body of text:

> We are Hi View Trading SL. We are interested in open [sic] an account with you.
> Find attached our company documents, please complete them and send yours.'

(5) On 19 August 2015, at 17:55 hrs, Orton replied to Javier listing items to set up an account with Beigebell: invoice address with contact name, phone number and email address; delivery address with the corresponding details; VAT number, Company number, and bank details.

(6) On 20 August 2015, 8:40 hrs, Javier supplied details as requested.

126. As regards the introduction of Beigebell to ODL and self-introduction of HVT, questions put to Orton and his replies included:

(1) Q: there was no reference in HVT's email of New Client that there were any deals having been set up at all; and no reference to 'a deal' having been pre-arranged by Patel.

(2) The fact that no reference to a deal having been set up in HVT's email to open an account with Beigebell was highlighted time and again in cross-examination, which culminated in the reply: 'Since the first hearing, I don't know where the truth really lies.'

Hi-View's T&C and Certificate from Spanish Tax Agency

127. The introduction of Hi-View to Beigebell included a letter from its CEO by the name of Gursharan Jhookie, and HVT as 'a company that manages online sales of various products around the world' with its 'main lines of sale at the moment' being 'Fashion, Technology, Office Furniture, Children stuff and Bargains'.

128. HVT's '*Terms and Conditions of Purchase*' document was attached to the Trading Application Pack sent to Beigebell. Mr Orton's replies to questions as regards HVT's Terms and Conditions included:

(1) That clause 4 would have alerted Beigebell to the possibility of MTIC fraud, Orton replied that he did not read clause 4 on 'missing trader fraud' or 'carousal fraud'; that it was not an area he focused on since Beigebell operates to its own terms given that Hi-

View was a customer; that every customer has its own terms and conditions attached, but that is not the way Beigebell 'transacts' with customers by referring to customers' terms and conditions –'that is not what happens in everyday business'.

(2) When challenged that the deals were not 'everyday business' but the biggest deals Beigebell ever did, Orton asserted that they were 'just like every other deal'.

(3) When asked what he cared to check with Hi-View as a customer, Orton said given that Hi-View was pre-paying, the risk level was much lower, and the terms and conditions are 'not important'.

(4) Orton confirmed that he did not sign and return the form to indicate his acceptance of Hi-View terms as part of the Trading Application Pack procedure; he repeated that because Beigebell was being paid upfront, there was 'less to be concerned with', notwithstanding the repeated challenge that the goods here were of 'high value'.

(5) In relation to Delivery, Orton was asked the supplier was supposed to insure the goods, but in the end Hi-View was insuring the goods; he replied: 'No, Hi-View arranged carriage, and no insurance was arranged.'

(6) Another stated term not being observed in the execution of the transactions was that Beigebell was supposed to provide HVT with a written acknowledgement from the freight forwarder. Orton confirmed that he did not provide the said document to HVT from the forwarder; nor did HVT asked for it.

129. Included in the Trading Application Pack was a Tax Certificate issued by the Spanish tax agency dated 8 June 2015, which was the date of endorsement of Hi-View's export tax status. Orton was cross-examined on the fact that Hi-View had only gained its export tax status two months prior to trading with Beigebell in those high-value transactions, and he confirmed that it did not trouble him greatly because he was told that Beigebell would be paid upfront by HVT.

Beta Distribution's* Kittel *denial

130. In reply to questions why Orton considered Hi-View's Terms and Conditions *not* to apply to Beigebell, Orton reiterated that the deal had been set up by Patel, which he said was 'a normal transaction', and Beigebell was 'taking the place of Beta Distribution' in completing the transaction.

131. Mr Orton's explanation that Beigebell was taking the place of Beta Distribution ('**Beta**'), the employer of Patel at the time, to complete a Deal that Patel had set up was subjected to scrutiny in the light of the *Kittel* denial dated 4 August 2015, which was in relation to 17 transactions for the purchase of alcohol from a defaulting trader, Global SFX between May 2014 and February 2015. The total sum of input VAT denied was £252,515.80.

132. Global SFX was one of the traders upstream from Beigebell in the transaction chains (Deals 2, 3b, 4 and 5). The *Kittel* denial letter dated 4 August 2015 was issued 14 days before Patel introduced Orton to Matt Jones at ODL.

133. This part of the cross-examination culminated with Orton's reply that 'with the benefit of hindsight' Beta was not 'the legitimate company' he believed it was, but that at the time, he was given 'the reassurance that everything was fine', presumably he meant by Patel.

134. Orton reiterated that when Patel 'contacted [him] about a deal [Patel] was doing which involved a lot of different products', Patel told him that Beta could not supply the SanDisk products and thought that Beigebell might be able to do it. Orton said for two good reasons for stepping in for Beta: (i) it helps Beigebell; and (ii) it keeps customers happy.

Online Distribution's Company Documents

135. Orton was questioned on the due diligence he carried out in relation to ODL's company documents, and why a trader identified on the VAT certificate as a retailer of household electronic items should be selling Beigebell thousands of memory cards, and 'would have jumped out' as odd to a potential purchaser. Orton reiterated that the deal was already set up and the risk was low.

136. On ODL's credit limit of £27,000, Orton stated that Beigebell 'always credit check a supplier', to ensure that there are not any 'black marks' against the supplier. He was asked that the modest credit limit would be a good indicator that ODL was not a large company, so how Orton would know that ODL could afford to buy the goods to supply to Beiegbell, to which Orton replied: 'No, I would not have known.'

Stock offers and setting prices

137. There were two cycles of stock offers and purchase orders in the chain of ODL→Beigebell→HVT, and the exact descriptions and quantities matched up as follows:

(1) 24 August 2015, JO was offered stock by ODL (1000 x Sandisk 512GB and 1000 x Sandisk 256GB memory cards).

(2) 25 August 2015, JO offered and HVT agreed to buy 1000x Sankdisk 512GB and 1000 x Sandisk 256GB; (HVT emailed purchase orders; JO emailed proforma invoices).

(3) 3 September 2015, HVT sought further stock – 3000/4000 x Samsung 250GB.

(4) 3 September 2015, JO offered: (i) 1000 x Samsung 250 GB; (ii) 750 x Sandisk 256GB, and (iii) 500 x Sandisk 512 GB.

(5) 3 September 2015, HVT accepted offer of all stock by JO.

138. By way of illustration, the stock offers for the August transaction chains were communicated between the participants as follows:

(1) Online Distribution's stock offer to Beigebell

(a) By email dated 21 August 2015, ODL offered stock to Orton (email address from 'tradesale@saverstore.com'), saying as follows and attaching documents as below listed.

'As requested, please find attached our company documents.
We will have some stock available on Monday which we can offer to you.
Please could you forward your company documents for our records.'

(b) On 24 August 2015 at 14:25 hrs, ODL emailed Orton with its stock offer, namely:

'1000 x Sandisk 512gb Extreme Pro @ e395.65 + VAT
1000 x Sandisk 256 gb Extreme Pro @ e202.65 + VAT
All prices are exclusive of VAT and Carriage'

(2) On 25 August 2015, Beigebell's stock offer to Hi-View generated email exchanges:

(a) At 10:13 hrs, (without any intervening emails between the parties since 20 August 2015) Orton to Javier:

'Hi Javier, … I believe you are interested in purchasing the Sandisk 512gb Extreme Pro.

The price for a quantity of 1,000 would be €410.00, if this is agreeable then please let me know and I'll raise the official quote to get the order underway.'

(b) At 12:36 hrs, Javier to Orton:

> 'Thank you for your offer, we are interested in 500 pieces (SanDisk 512 GB Extreme Pro) but we have been paying €408 each.
>
> If it is possible for you to manage this price please accept this email as a confirmation of our intent to purchase the 500 pieces.
>
> We are interested also in 1000 SanDisk 256 GB Extreme Pro. Please can you give us a price?'

(c) At 16:15 hrs, Orton to Javier:

> 'I'm pleased to tell you that we have both the 512GB and 256GB in stock available to ship.
> Unfortunately I can't move on the price due to fixed nature of the products, so to confirm the prices would be as follows:
> 500 x Sandisk 512GB Extreme Pro – €410.00
> 1,000 x Sandisk 256 GB Extreme Pro – €210.00

(d) At 16:02 hrs (possibly due to time zone difference), Javier to Orton: 'Thank you for your email. Please find attached both PO' pertaining to the two purchases.

(e) At 17:10 hrs, Orton to Javier to thank for the orders and:

> 'Can I just check on the quantity as says 1,000 x 512 GB but you said you only wanted 500. Do you now ant 1,000?'

(f) At 16:25 hrs (time zone difference) Javier to Orton: 'Sorry Jack. Finally we go further with 1000 units.'

139. Against the email exchanges is Orton's witness statement at paragraph 19 on the 'deal'':

> '… [Patel] explained that as the deal had already been agreed, the prices had already been negotiated so were fixed. He said he would get his Customer (Hi-View) to give me a call and that he would send an email to introduce me to the distributor (Online Distribution).'

140. Mr Orton was cross-examined as to why Hi-View only asked for half of the quantity of stock (500 instead of 1000); and why this arguing of price if the deal had already been set up by Patel (with prices negotiated and fixed); and how the mismatch of order requests and stock offers eventually all lined up; and if the emails were supposed to demonstrate some form of price negotiation between Beigebell and HVT, that negotiation did not go very far. Mr Orton replied at one point during this part of cross-examination:

(a) '*As far as I know, the chain is already set up*'.

(b) In re-examination, Mr Orton said what he meant by 'the chain was already set up' was that 'the order, the supplier, the customer, were all ready to go'.

'Real reasons' for entering into the transactions

141. The term 'real reasons' was used in Mr Orton's evidence in relation to Beigebell becoming involved in the transactions, which can be summed up by the affirmative reply he gave to the question reflected back to him: 'So, you were being innocently parachuted in a tax loss scheme set up by other people?' The salient aspects of this part of his evidence are summarised as follows, with the answers to a particular question being grouped together where the replies are often interspersed between replies to a related question.

(1) Q: In what respect does he disagree with the first visit report by Officer Cole? A: 'it is accurate but written in a way that makes it sound worse than it was'; 'not word for word statements of what I said'; 'not facts but interpretation' [by Officer Cole].

(2) Q: What was the reason why Patel's employer not doing this deal? A: '*I would be guessing*'; then went on to say: 'Ricky told me that his company cannot sell SanDisk product into Europe'; that 'he had put a deal together but not allowed to sell SanDisk to the customer'.

(3) Q: If only one deal, why 6 consignments? A: 'at one point, more stock was available; asked if they wanted to buy, and they did'.

(4) Q: Were you doing Patel a favour, or was it beneficial for both of you? A: 'two-way street'; an initial deal though modest profit, (just over £7,000) increased the turnover, which makes us look better when we go in for tender for projects.

(5) Q: Did you tell Banks and Cole that 4 deals were introduced to you? A: No.

(6) Q: [contrast with replies given at the second visit] reference to 4 wholesale deals; that Ricky completed the deals, but that there was a 'conflict of interest' – so it was not a single deal? A: That was [HMRC's] write-up, not quoting me.

(7) Q: The 'conflict of interest' reason was not what you said at the first visit why SanDisk told Beta that they could not sell outside the UK. At the first visit, the reason was 'contractual restrictions', and at the second visit, it was 'conflict of interest'? Which was the real reason. A:' You are basing it on the reports'; 'like I said, the way they recorded them is different'; 'the reason given can all be on the same thing'; 'my friend Ricky said they can't sell to Spain – that didn't make it to the reports'.

Awareness of the 'grey market'

142. When asked about the grey market, Mr Orton replied: 'No, I don't believe I was aware of the concept of the grey market'. The transcript (SB/253/47) of Mr Orton's evidence at the 2019 hearing was then referred to, where his 2019 replies contradicted that at the re-hearing.

> Q: What about the grey market? A: I'm not really aware of how the grey market works.
> Q: You are aware there is something called the grey market, …? A: Yes.
> Q: They would not have to obey [the IT channel] model, would they? A: I don't believe so.
> Q: No. So why weren't Online Distribution and Hi-View part of the grey market? A: I don't know.
> Q: So they could have been? A: Possibly.
> Q: So why could they not deal with each other then? A: I'm saying it's possible.
> Q: According to channel ethics. A: I'm saying it's possible. I didn't know that was the case.

143. It was put to Orton that he was not telling the truth when he said that he was not aware of the grey market. In response, Orton said: 'maybe I had'; and then 'I didn't know what the grey market then – clearly I contradicted myself'; it was 'difficult to pin what my knowledge was at the time'; that he was 'not trying to mislead the Tribunal'. Mr Orton said he had worked for 'over 5 years' for Secon, and was asked whether he would have come across the grey market during that period. He said Secon was authorised by the vendor; 'I don't recall the term grey market being used'.

Trading relationship between ODL and HVT

144. Orton's statement at paragraph 35 featured repeatedly in the cross-examination, and is preceded by paragraphs 31 to 34 whereby Orton set out the emails on 24 and 25 August from Matt of ODL and with Javier of Hi-View. At paragraph 35 Orton has stated:

> 'I rang Matt to let him know about the two orders we had received and that we would be sending pro-forma invoices the following day. Matt said that in his experience with orders from Hi-View they would probably pay for the 256GB cards first then the 512GB cards later. This reassured me that they had done lots of similar business in the past as he knew their buying habits.'

145. At the re-hearing, Orton was questioned that ODL would only have known Hi-View's 'buying habits' if ODL had dealt with HVT. Orton disagreed and said: 'That's not what I meant'; 'I was being led by people – was new to it all – was following the lead kind of things'.

146. Mr Orton was then referred to his oral evidence in 2019 as recorded in the transcript, wherein he was cross-examined on the contrived nature of the appellant's appearance in the transaction chains between ODL and HVT, and the reference to HVT's 'buying habits' suggests that he was aware that ODL and HVT had traded with each other before Beigebell came on the scene. The following transcript excerpts were referred to at the re-hearing.

(1) On whether ODL and HVT were part of the grey market; A: 'Possibly'.

(2) Q: So why could they not deal with each other then? A: I'm saying it's possible. I didn't know that was the case.

(3) Q: You did not know one way or the other, so what was to stop them trading with each other? Certainly not channel model? A: Well, yes, that's what I – that's what I believe the deals – the deal and subsequent deals were.

(4) Q: Why? A: Because they were for – they were for – I'm trying to think how to say it. Because they were coming from – as far as I was aware, they were coming from SanDisk, therefore it would be a channel model situation.

(5) Q: But they weren't, they were coming from Online? A: Yeah, Online would be the distributor and SanDisk would be the vendor.

(6) Q: How did you know that? A: That's how it was explained to me by Ricky.

(7) Q: Ricky said that Online were a distributor, did he? But that is not in his letter? A: Ah, that is what I was aware of, so um – (SB/253/p48)

147. Mr Orton stated in at the 2019 hearing that he was led to believe by 'all parties' that ODL and HVT traded before:

(1) Q: Online Distribution knew and had traded with Hi View Trading, had it not? A: That's what I was led to believe.

(2) Q: Who were you led to believe that by? A: By all parties.

(3) Q: Did Ricky tell you that? A: I believe so. I couldn't be a hundred percent sure about Ricky but I definitely knew about Online and Hi-View knew each other from them. (SB1/253/p45/L10-18)

148. On further questioning (in 2019), Mr Orton sought to deny what he said earlier about having been led to believe by 'all parties' that ODL having traded with HVT.

> Q: When you became aware that they were trading with Hi-View – A: I did not become aware of that. Q: You did not? A: Well not trading directly. (SB/253/p47)

149. Mr Orton was cross-examined (in 2019) against what he had stated in his witness statement in relation to his knowledge of Hi-View's 'buying habits', and of ODL and HVT having 'done lots of similar business in the past': –

(1) Q: [reading from paragraph 35 of Orton's statement] "*Matt said that in his experience with orders from Hi-View, they would probably pay for the 256 cards first and the 512 cards later. This reassured me that they had done lots of similar business in the past as he knew their buying habits.*" – So you did know that they'd dealt with each other in the past? A: I haven't denied that.

(2) Q: You said earlier that they haven't dealt directly with each other? A: Yes.

(3) Q: Well, this contradicts that, doesn't it? A: Not necessarily.

(4) Q: They'd done lots of similar business in the past and he knew their buying habits? A: That doesn't mean that he was selling direct to them.

(5) Q: What else is it meant to mean? A: It could – well, that's not what I meant by that statement, that's saying that I'm aware that they have a business relationship and they know about each other.

(6) Q: They had done lots of similar business in the past and he knew their buying habits? A: Yes.

(7) Q: What are we meant to take from that, other than Hi-View had dealt with Online in the past? A: Well, I'm not saying that they dealt directly with them. I'm saying that in the supply of goods that Online have supplied a reseller, such as what we're acting at, and then on to Hi-View.

(8) Q: The problem is you've realised the difficulty that that statement causes you, doesn't it, because you know that that means that your presence in this chain was entirely superfluous and now you're trying to excuse what you've written there?

> 'A: Not at all, absolutely, no. I always knew that they – both companies were aware of each other and aware of their positions.' (SB/264/p89)

On 'channel model' explanation

150. At the re-hearing Mr Orton's explanation of the channel model being the impediment to Beta fulfilling the deal claimed to have been arranged by Patel in terms as follows.

(1) 'If you are in a channel model, the end-user [sic probably he meant vendor] would sell through a distributor and a reseller.'

(2) 'The distributor won't be able to ship out to the reseller part of the chain.'

(3) 'Beta as a reseller was constrained by SanDisk to sell the products outside the UK.'

(4) 'From when I was in IT, I knew about the channel model but not the grey market.'

(5) When asked who enforced the channel model, that it was not a government organisation, so how would a vendor allow their products to be sold only be authorised distributors/resellers, Orton did not answer the question directly, but went on to state: 'We are acting as a reseller in place of Beta.'

(6) It was pointed out to Orton that: (i) nobody had told him that Online Distribution had a relationship with SanDisk, (ii) ODL was 'a very small company' with a credit limit of £27,500, (iii) Beta was a 'massive company with a turnover of over £120 million', the question was then put to Orton whether he looked into how ODL (a small company) could possibly be an authorised distributor selling to Beta (a massive company). Orton did not have a cogent reply.

151. Orton was cross-examined on his 2019 evidence, wherein the operation of the so-called 'channel model' was the explanation why Beigebell got involved in the transaction chains.

(1) He was questioned on the alternative of trading in the 'grey market'.

(a) Q: … your second reason was the channel model. What is the channel model? A: Vendor to distributor to reseller to end user.

(b) Q: For what?A: For – well, can be for all sorts of things.

(c) Q: What about the grey market? A: I'm not really aware of how the grey market works.

(d) Q: You are aware there is something called the grey market, are you not? A: I have heard it before, yes.

(e) Q: You are aware that lots of companies in the IT industry operate within the grey market? A: Yes.

(f) Q: They would not have to obey that model, would they? A: I don't believe so.

(g) Q: No. So why weren't Online Distribution and Hi-View part of the grey market? […] A: Possibly. Q: So why could they not deal with each other then? A: I'm saying it's possible. (SB/253/p47-48)

(2) Orton's 2019 evidence on the validity of the 'channel model' explanation:

(a) Q: … so what was to stop [ODL and HVT] trading with each other? Certainly not channel model? A: Well, yes, that's what I – that's what I believe the deals – the deal and subsequent deals were.

(b) Q: Why? A: Because they were for – they were for – I'm trying to think how to say it. Because they were coming from – as far as I was aware, they were coming from SanDisk, therefore it would be a channel model situation.

(c) Q: But they weren't, they were coming from Online? A: Yeah, Online would be the distributor and SanDisk would be the vendor.

(d) Q: How did you know that? A: That's how it was explained to me by Ricky.

(e) Q: Ricky said that Online were a distributor, did he? Because that is not in his letter? A: Ah, that is what I was aware of, so um –

(f) Q: How did you become – A: So he must have told me, that's the only way I would have become aware of it. (SB/253/p48-49)

(3) If the 'channel model' explanation is to hold true, then Online Distribution would need to be an 'authorised distributor' of the SanDisk. It was put to Mr Orton as follows:

(a) Q: There is nothing in your conversations with Matt Jones about them being a distributor, is there? A: It's already implied by the fact that we've started the –

(b) Q: Why is it implied? Why are they not part of the grey market? A: Well, I don't know.

(c) Q: You do not know? A: No, that's not what I'm saying, I'm saying that, as it was explained to me. These were coming from SanDisk, therefore in my mind it was a channel. (SB/254/p49)

(4) Orton was pressed for the origin of his knowledge that Online Distribution was an authorised distributor in further questioning:

(a) Q: They weren't coming from SanDisk, they were coming from Online to Beta? A: Online to – no. Beta would be the reseller, so they'd be coming from SanDisk to Online to Beta to Hi-View –

(b) Q: Who told you that Online were a distributor, an authorised distributor of SanDisk? A: No-one told me that. [Q] No, it was implied.

(c) Q: Who implied it? A: It was implied by the fact that the deal was already ready to go, so.

(d) Q: … How does that implied they are an authorised distributor? Why could they not be part of the grey market? A: Because then the goods wouldn't be coming from SanDisk.

(e) Q: Who told you that SanDisk was suppling Online Distribution? A: Ricky told me that they were coming from SanDisk, that's why – that's the reason.

(5) Orton was pressed for what Patel was supposed to have made him aware:

(a) Q: So how did [Ricky] make you aware that SanDisk were supplying Online? How and when? A: I couldn't tell you a date and a phone call that he told me – when he explicit told me this information, but.

(b) Q: He told you that, did he, that Online were an authorised distributor for SanDisk? A: No, he didn't tell me that, but I was aware from what he said that the goods were coming from SanDisk.

(c) Q: … Who told you that SanDisk were the supplier to the authorised distributor Online? A: I very much doubt he used the word authorised distributor but he would have said that they were coming from SanDisk.

(d) Q: Earlier when I asked you the questions about what Ricky said, you could not remember, now on this very important point you are clear that he did say that the goods went from SanDisk to Online, or are you not, … (SB/254/50-51)

152. Mr Orton sought to explain variously his own evidence at the 2019 hearing and as to what he actually meant at paragraph 35 of his witness statement, such as:

(a) 'the words I say not to imply that they have dealt directly with each other';

(b) 'similar business' in the sense that there are entities in between them;

(c) 'that was what I was led to believe' that ODL and HVT 'traded directly' – but that was not what he said; that 'at no point' had he said that they traded directly '*in the same channel*';

(d) In response to the reply of not trading directly in the same channel, he was questioned on how the channel model applied to ODL (as vendor of the goods) and HVT (as end-user). A: ODL is the distributor and can't sell directly to an end user.

On contracting with Flights Logistics Global ('FLG')

153. On 20 August 2015, email exchanges to set up an account with FLG are referred to in cross-examination.

(1) At 16:45 hrs, Orton to FLG with the subject heading of 'Account Setup', attaching the completed application form.

(2) At 17:33 hrs, Susan Howlett, Customer Service Manager at FLG (based in Wokingham RG41 2RF) acknowledged the application, and asked: 'Can I ask if you have been dealing with anyone at Flight LG direct?'

(3) At 17:36 hrs, Orton replied: 'No, I've been put in touch with your company by our supplier, we're about to do a job with them that involves a joint delivery. They already use yourselves so have suggested we get an account set up with you to make things run smoothly.'

154. Email exchanges to obtain the required reference for Beigebell's supplier to set up an account with FLG were running in parallel on 20 August 2015 between Orton and Matt Jones, with the time and date on the email headers suggesting that Matt was in a different time zone.

(1) As noted on email header, sent by Orton on '*Thursday, August 20, 2015 6:50PM*' (different style of notation) to 'Matt (Trades Sales)' with the subject heading of 'Spain': 'Getting the Freight Account set up, what's the name of your company for reference?'

(2) From Matt (Trade Sales) at 20 August 2015 20:46 hrs to Orton: 'Use Create Leisure Ltd as a reference.'

(3) From Orton to Flight Logistics on 8 September 2015 stating that: 'without your help this project would have been a lot more complicated'.

Interposing as Create Leisure to set up account with Flight Logistics

155. It would appear that Orton then approached Flight Logistics to create an account using 'Create Leisure' as the reference. There followed email exchanges from the personnel in FLG and a 'Garry fun4kids' at Create Leisure:

(1) 28 August 2015, FLG emailed Garry Mills, director of Create Leisure advising that four boxes had been received and providing details. FLG emailed again shortly and said: 'I've just had Jack on the phone from Beige Bell, he said these cards are for him and will arrange the pickup. However, he said there should only be 1000 256gb cards. Garry, please can you confirm this with Jack as I don't know what our involvement should be on that side of things?'

(2) Garry Mills replied on the same date, saying: 'OK I'm not sure who that is. Just spoke to my supplier who ssaid that is another customer and not related to me …'

(3) 4 September 2015 at 16:17 hrs: Phil Smith, Manager at FLG to Garry:

> 'Who is this guy? I'm going to tell him to f*ck off. We do the chips for you as a favour (well £5 a pop) but there's no money in it for us at all to do his stuff. If he means anything to you then I'll consider it but if not then he's getting the tin tack. // Once people realise that we have ½ million quids worth sitting here every week, we'll get done over for sure, and that includes yrs [sic yours] so if you want yr [your] stock nicked, we'll carry on!'

(4) Tam Richmond, executive manager of Client Relationship management team was copied into the last email by Phil Smith to Garry, and Richmond wrote to Phil Smith at 17:05 hrs with the subject heading of 'Beigebell' as follows:

> 'I have told him [i.e. Orton] we have a minimum £125 as standard for handling each one of this sort of thing. We do it inexpensively as a favour for Create Leisure as their account has very significant other inherent value to us, but we cannot offer him the same.
>
> *He has set it up as Gary has basically told him to, and that we will do it on the same terms – is roughly what he said. …* (Emphasis added)

(5) Garry of Create Leisure replied to Phil Smith at 18:02 hrs, Richmond copied in:

> 'I have no idea who he is or who introduced him. //Nothing to do with me and I agree what you are saying about the value.// Sack him with my pleasure.'

156. Orton was cross-examined on the email exchanges and subsequent emails in relation to goods delivery as follows:

> Q: Create Leisure was provided by Matt Jones of ODL but nothing in the documents from ODL gave their name as Create Leisure.
>
> A: No. *I don't pay much heed to it*; Online Distribution or SaverStore being their retail operation; maybe this is another trade name; it is not significant to me. (Emphasis added)

Payment for goods before release

157. The following emails were referred to in the cross-examination of Orton in relation to Beigebell's orders being delivered to Flight Logistics directly before the receipt of payment for the purchase:

(1) On 26 August 2015 at 15:16 hrs, Orton emailed Javier: 'After speaking to Matt he tells me you are likely to pay for the 256GB ones first then the 512GB later, this is fine. We will ship goods once payment is received.' (This email would appear to be behind Orton's witness statement referring to being assured by Matt of HVT's 'buying habits'.)

(2) On 26 August 2015 at 17:19 hrs, Matt emailed Orton: 'Thanks for the orders we will send the stock tomorrow on a same day delivery to Flight Logistics'.

(3) On 27 August 2015 at 14:53 hrs, Orton to Javier at Hi-View: 'Just checking you got the pro-forma invoices yesterday? Do you know when payment will be made as the stock is waiting to be released.'

(4) On 27 August 2015 at 14:16 hrs, to Orton: 'Apologies for the delay I'm waiting to receive funds. … I can send over €150,000 now and make a balance payment tomorrow …' Orton replied at 15:23 to ask for €150,000 now and the balance the next day.

(5) On 27 August 2015 at 15:33 hrs, Javier wrote to advise that the cut-off time has lapsed for the day and 'will do this first thing tomorrow morning you will receive clear funds before 9am UK time.'

158. Email exchanges on 28 August 2015 between Orton and FLG that were referred to in cross-examination in relation to the payment of goods upfront before release are as follows:

(1) At 11:03 UK time, Orton to Javier as no payment received.

(2) At 10:42 hrs (Spanish time) Javier to Orton: 'Please find Swift Copy attached for €210,000 payment.'

(3) At 14:18 hrs (Spanish time) Javier to Orton: 'FYI the second payment for [proforma invoice number] has been paid….'

(4) At 13:21 hrs (Spanish time) Javier to Orton: 'Please, prepare the invoices for both orders and forward to us asap.'

(5) At 14:04 (UK time) FLG to Orton: 'All 4 boxes contain SD cards', which would appear to be a reply to Orton's enquiry (latter not included).

(6) At 14:04 (UK time) Orton to Javier:

> 'We are just preparing everything but we have a slight problem in that Matt from Saverstore has delivered the goods to Flight Logistics but we haven't been able to carry out a stock check on them.
>
> As you already have a business relationship with Matt, are you happy to trust that the goods he has delivered are correct? If so we can process everything, if not we will have to wait until we have confirmed the stock is correct.
>
> Please let me know urgently.'

(7) At 15:24 hrs (Spanish time) FLG to Orton: 'We really trust in Matt, for sure that his goods are correct. …'

(8) Beigebell's euro account bank statement shows two receipts from Hi-View on 28 August 2015 in the sums of €210,000 and €410,000. It was put to Orton that the transactions would appear to be 'contrived' given that at the point of receipt, Beigebell had not even seen the goods, let alone inspected them, the reply was: no – 'don't know what is unusual about it'; it was 'high value' and 'high volume'; 'everyone needs to be paid before stock is released'; 'no one is to receive credit'.

(9) It was put to Orton that the goods arrived for Beigebell, albeit at FLG, on 26 August 2015, and that was before Beigebell had paid Online Distribution, which meant Beigebell was receiving credit from ODL; Orton replied: 'No, we didn't release the goods until we had inspected it'.

On collection of goods and insurance

159. Another thread of email exchanges on 28 August 2015 relating to the collection and insurance for the goods was interspersed with the exchanges as concerns asking Hi-View for payment before release of goods. The email exchanges on collection and insurance include:

(1) At 12:26 hrs, Orton to Javier: 'I can confirm we have the cleared funds now. I think the quickest way for you to receive the goods is if you can arrange collection from Flight Logistics. Matt says you have done this previously – is this something you'd like to do?'

(2) At 12:41 hrs (Spanish time), Javier to Orton: 'We would rather the goods be delivered but if need to be we will arrange to pick up the goods.'

(3) At 13:06 hrs Orton replied: 'I would look into this and come back to you as soon as possible.'

(4) At 14:04 (UK time) FLG to Orton: 'All 4 boxes contain SD cards', which would appear to be a reply to Orton's enquiry (latter not included).

(5) At 17:26 hrs, Orton to Javier: 'we have processed everything and the goods will be ready for collection on Tuesday 1st September from Flight Logistics. Monday is a bank holiday'; the email continued by discussing insurance:

> We can't get the insurance to ship the goods to you so if it is possible for you to collect them that would be most appreciated.'

160. The Visitor Log to Flight Logistics recorded the name of Jack Orton visiting on 1 September 2015 at 09:00 hrs, and that would be to inspect the 4 boxes of goods that would form the contents of Deals 1 and 5. In his witness statement, WS/50, Orton states:

> 'I visited Flight Logistics at 9am on the 1st September where I was greeted by Tam Richmond, he showed me where the stock was and I proceeded to check the goods. I was concerned with checking that the correct quantity of goods were there and that they were manufacturer sealed. They were packed into large boxes with smaller boxes inside with the manufacturer's security seal on each box. I broke the seal on one of the box of each SD card type and inspected the contents. Each box contained the correct quantity of SD cards and each SD card was in a sealed blister pack. I was satisfied that the goods were correct and we could allow them to be collected.'

161. The next chain of emails between Orton and Javier was on 2 and 3 September 2015.

(1) 2 September 2015, at 11:42 Orton to Javier:

> 'I personally checked the stock yesterday and am pleased to confirm that it is all correct and ready for you to collect. The collection details are below:
>
> **Consignment**
>
> 4 x boxes total weight: 40.8kg Box sizes [etc.]
>
> **Collection address**
>
> Flight Logistics Group [in Wokingham]
>
> Once you have arranged the courier please let me know their details and the collection date so I can make sure the goods are ready for you.'

(2) 2 September 2015, at 14:53 hrs (Spanish time) Javier to Orton: 'following our telephone conversation I detail shipment delivery address' which was D&D Trading Warehouse in Poland. Javier impressed on the urgency of the shipment by adding:

> 'Please advise us when the shipment can be done due to our clients are asking for it. Dd [sic] Freight also has regular shipments from UK to Poland and may be able to expedite the delivery.'

(3) 2 September 2015, at 17:06 hrs Orton replied to Javier:

> 'I have spoken to Matt to try and find a good solution for you. Do you think it is possible for you to collect the goods then charge the delivery cost to us? That way you do not lose any money.'

(4) 3 September 2015, at 14:40 hrs Javier to Orton: 'We will collect all boxes in your Warehouse. We will use DD to collect the goods and will advise cost etc shortly.'

162. Orton was cross-examined in relation to the two parallel threads of email exchanges on upfront payment for goods and on forwarding of goods after payment, which included:

(1) Q: This was a deal supposed to have been set up, but no arrangement was made about delivery. A: when first spoken to, was under the impression that the goods would be delivered; was more concerned with the risk factor than the delivery arrangement.

(2) Q: How did Patel tell you about the processing of the goods? A: it was communicated to Matt that I would have nothing to do with delivery; the understanding was that goods would go from ODL to HVT but changed this after the orders had been changed; not particularly happy about the change.

(3) Q: Why would you need an account with FLG the day after you were introduced to Matt? A: that was on Matt's suggestion; probably over the phone; not familiar with this kind of detail.

(4) Q: It was highly trusting of Hi-View to pay upfront without knowing the seller of the goods. A: the mechanics and logistics are all the same; quite easy to accommodate; there was no additional difficulty.

(5) Q: Why did you get involved in the transaction if you didn't know how it worked? A: maybe it sounded very straightforward; very normal.

(6) Q: you got further involved with a business you knew nothing about? A: it started with Ricky, and we saw an opportunity before us, and we took it.

(7) It was reiterated that Hi-View had a trading relationship with ODL, and Orton replied: 'I never said it was Direct.' When it was put to him that 'we really trust in Matt' was an indication of the 'closeness' between Javier and Matt, Orton said 'yes'.

163. As to the insurance cover that Orton claimed Beigebell could not obtain to ship the goods to HVT, Orton was cross-examined as follows:

(1) It was put to Orton that if the deal had already been set up by Ricky, why was insurance not already in place; the alternative view is that Ricky did not set up anything at all, but to introduce you – so nothing effected by Ricky just introduction. Orton replied:

> 'As it turned out – as the process went on – it transpired that not all had been set up.'

(2) Q: you got further and further into this, confident that the transaction would go through without any difficulty. A: there was always hurdles – could not move money into the bank; with inspection of goods; €30,000 profit took 2 / 3 weeks of work.

(3) Q: the email saying that you sought to get insurance was just a lie? A: I did make some enquiry about insuring if were to do it again.

The changing accounts on insurance

164. Mr Orton had given three different versions on insurance at different junctures:

(1) In his email on 28 August 2015 to Javier, it was Beigebell 'can't get insurance to ship the goods' to ask HVT to collect the goods instead.

(2) In his interview on 10 February 2016, he told HMRC that no insurance was taken out because it was assumed that the goods would be covered by Flight Logistics but he did not query this with Flight Logistics.

(3) Earlier in his evidence at the re-hearing, Orton had said as far as Beigebell was concerned, the goods were going to be moved direct from ODL to Hi-View, so insurance was not something Beigebell need to concern itself.

165. Mr Orton was questioned on his changing account on insurance as follows:

(1) Q: did you question why a Spanish company would ask a UK company to deliver to Poland? A: No, didn't question it; not alerted to it; didn't see anything strange for an EU country to warehouse in another EU country; the EU being a single market.

(2) Despite the email on Hi-View charging the delivery cost to Beigebell, Orton confirmed that Hi-View arranged for the transport in the end without charging Beigebell.

Arrangements for more deals

166. The foregoing communications that culminated with the email exchanges on 3 September 2015 to arrange the collection of the four boxes (being the contents for Deals 1 and 5, that of 1000x512 GB and 1000x256 GB SanDisks) were immediately followed by the chain of emails to arrange for more deals (Deals 2, 3a, 3b and 4).

(1) 3 September 2015 at 14:44 hrs (BST), Javier to Orton under the subject heading 'Looking for stock':

> 'We are looking for Samsung 250GB SSD.
> Do you have stock for 3000/4000 units?'

(2) 3 September 2015 at 14:47 hrs (BST), Orton to Matt forwarding Javier's email, with a question: 'See below, something you can do?'

(3) 3 September 2015 at 15:43 hrs, Orton to Javier:

> 'There is 1,000 in stock now, does this help? If so please tell me the price you have been buying them at so I can try and negotiate the price here.
>
> There is also some Sandisk left in stock if you want that as well? There are 750 x 256GB and 500x512GB.'

(4) 3 September 2015 at 17:18 hrs, Javier to Orton:

'We are interested in:
1000u Samsung SSD 250GB
750u SanDisk 256GB
500u SanDisk 512GB

Give us your best Price and we will go for it.'

(5) 3 September 2015 at 15:43 hrs, Orton to Javier giving the prices as follows:

1000u Samsung SSD 250GB: €93.19
750u SanDisk 256GB: €210.00
500u SanDisk 512GB: €410.00
If you want these available for collection along with the previous order please let me know and I can get the stock sorted out asap.'

(6) 4 September 2015 at 11:27 hrs (Spanish time) Javier to Orton:

'We have been looking at the prices that you have said to us about 1000 ssd 250gb 91€. It would be possible for you to lower the price to 90€?'

(7) 4 September 2015 at 11:19 hrs, Matt to Orton, subject: 'Amended stock offer':

'Sorry, I made a small pricing error.
Stock offer 04/09/2015

1000 x Samsung 250 Evo SSD Cards @ €88.15
500 x Sandisk 512 Extreme Pro Cards @ €395.65
750 x SanDisk 256 Extreme Pro Cards @ €202.65
All prices are exclusive of VAT and Carriage.'

(8) 4 September 2015 at 12:33 hrs, Orton to Javier, with Arvind at Hi-View copied in:

'Following my conversation with Arvind I'm happy to say we can get to a price of €91 for the SSDs. Please find the Pro-Forma invoices attached.
We have agreed that all the stock will be collected at the same time, including the previous Sandisk order.
I'm looking into the possibility of supplying another 500x Sandisk 512 GB but I'm afraid I won't be able to confirm this until Monday.'

(9) 4 September 2015 at 13:47 hrs (Spanish time), Javier to Orton, with Arvind at Hi-View copied in:

'Please find POs [purchase orders] attached.
We did 2 POs for SD 256GB. One 550u and other 200u.
Find also attached Swift Copy for 1000 SSD 250GB and 550u SD 256GB Transfer.
We will pay the balance on Monday.'

(10) 4 September 2015 at 13:15 hrs (UK time), Orton to Anil at ODL, with Matt copied in, (Anil would seem to be the contact dealing with the stock for these deals).

'We've been paid for the following: [ie. €206,500 per Swift Copy 04/09/2015]
1000 x Samsung 250 Evo SSD Cards (Note: I've agreed a price of €88.00 with Matt for these).
550 x Sandisk 256 Extreme Pro Cards
The client wants to pick them up from Flight Logistics on Monday along with the previous Sandisk order you delivered there, can you get this arranged? If you send me the invoices I can arrange the payment today and send you the proof like I did last time.'

(11) 4 September 2015 at 13:37 hrs (UK time), ODL to Orton, (no personal name mentioned in this email reply, just 'TradeSales' at ODL's email address.

> ‘Unfortunately the price is 88.15 …. We cannot move on this price as we are on very low margin.
> Hopefully next time we can do something to make it up.
> Also, we will get the stock to Flight Logistics on Monday.’

(12) 4 September 2015 at 15:38 hrs (UK time), Orton to Javier:

> ‘Thank you for the POs the stock should arrive at Flight Logistics on Monday morning, do you know what time DD will be arriving to collect the goods?
>
> If the payment for the 200x256 and 500x512 is cleared before the collection we can allow them to be released at the same time.’

167. Orton was cross-examined in relation to the arrangement for further deals as follows:

(1) At paragraph 31 of Orton’s witness statement, it is stated:

> ‘At this point I rang Ritesh as I wasn’t expecting a negotiation as he had told me the pricing was already agreed. Ritesh said that [Javier] was probably just trying to get a better price and that I should stick to the original price. He also said that if he wanted more stock then it would be advisable to do it at a similar margin.’

(2) Q: did Javier enquire Ricky in relation to the Samsung product? A: don’t know; he might have; don’t believe I spoke to Ricky about this deal.

(3) Q: Beigebell was simply forwarding requirement from HVT to ODL; another example of Beigebell being in the chain as Beigebell was prepared to disclose the customer to the supplier. A: no sign of this being in a ‘protected chain’.

(4) Q: But you don’t; the terms of art are vendor, distributor, and end-user. As to vendor, there was no relationship with Sandisk; Online was the distributor; Hi-View was an end-user – that has been accepted in evidence, so why couldn’t this be a grey-market deal with as many as possible of wholesalers? A: Possibly, but the assumption was that he [i.e. Ricky’s] was in a channel model transaction.

(5) Q: Why did you hold that assumption? A: That’s what I gathered from information gathered from Ricky. My own exclusive experience in IT trade did not extend to the grey market; no business in the grey market for Secon.

(6) Q: the director of Hi-View Arvid had a Wembley address, not Spanish anyway. At paragraph 67 of [Orton’s] witness statement: ‘*I actually had no intention of supplying any more products at this time as we were getting to the point where our cash flow would be too impacted whilst we were waiting for our VAT repayment.* But you went ahead with more stock offers: (i) the 3,000/4,000 Samsung became the 1,000 Samsung in Deal 2, (ii) the 750 Sandisk became Deals 3A and 3B, and (iii) the 500 Sandisk became Deal 4 – so coincidentally what you offered was exactly what Hi-View ‘wanted’? This was a company supposed to specialise in children stuff and fashion. Did you read the introductory letter? A: No, not sure.

(7) Q: the price negotiation form Javier’s €90 and yours €93.19 and eventually €91 was a ‘token negotiation’; the difference of €2,000 was ‘a drop in the ocean’ in a deal worth hundreds of thousand Euros. A: No, €2,000 is a lot of money.

(8) Q: the timing of the Swift Copy for payment by Hi-View of €206,500 was made on 4 September 2015, which was 3 days *before* the goods were with you. A: yes, that was the same principle as the previous deal; when the goods were not even delivered to Hi-View supplier.

(9) Q: Hi-View had only known you for less than a couple of weeks, and not even knowing if your supplier would have the goods – that seemed to be highly contrived? A: No, because we had been vouched for by Ricky and we are doing the same deal as we would with the supplier.

168. The next round of emails was concerned with the delivery of goods by ODL to Flight Logistics, and the collection of the goods by D& D Trading from Poland.

(1) 7 September 2015 at 08:01 hrs, Tradesales to Orton with Matt copied in:

> '… the following delivery will be with Flight Logistics by 12pm today.
> 1000 x Samsung SSD 250gb cards
> 550 Sandisk 256gb Extreme Pro Cards
> *Proforma for above already sent
>
> Also:
> 200 x Sandisk 256gb Extreme Pro Cards
> 500 x Sandisk 512gb Extreme Pro Cards
> *Awaiting PO for above'

(2) The Tradesales email is evidence that goods were delivered to Flight Logisitics before payment for the goods was received from Beigebell, or indeed before purchase order was received.

(3) The Visitor Log of FLG recorded Orton visited the premises on 7 September 2015 at 14:25 hrs, to inspect the contents of the further deals (2, 3A, 3B, and 4). In terms of timing, Beigebell had received the payment for these goods before it inspected the goods.

(4) On 7 September 2015, ODL sent Beigebell a proforma invoice for 200x256GB Sandisk and 500x512 GB Sandisk, totalling €286,026. A note below the bank account details for payment states:

> 'Goods remain the property of Online Distribution Limited until full payment has been received.'

(5) On 7 September 2015, Orton released funds from Beigebell's euro account in the amount of €206,500 to Online Distribution to cover the first part of the order as the funds for the second part had not been cleared. Orton's witness statement at paragraph 84 states:

> 'As the payment [from HVT to Beigebell] cleared too late to be able to make the onward payment to Online Distribution, I discussed the situation with Matt and he assured me that it wasn't a problem form his end and that we could allow Hi-View to collect the goods. I didn't have a problem with this as the risk was on his side not mine.'

(6) On 7 September 2015 at 18:09 hrs, Orton to Javier and Arvind:

> 'DD turned up in a car and couldn't fit all the boxes in it. We have let them take the 6 loose boxes of Sandisk SD Cards today and have kept the pallet of SSDs secure. They'll need to come back with a bigger vehicle to collect the SSDs [Solid State Disks].'

(7) On 8 September 2015, Online Distribution was paid in full by Beigebell.

(8) On 8 September 2015 at 11:16 hrs, Tam Richmond at FLG emailed Orton with the subject as 'Collection Sheets' and stated: 'As discussed please find the paperwork attached for the despatch to Poland.'

(9) The Packing List was dated 7 September 2015. The CMR accompanying the despatch to Poland was dated 8 September 2015, with Flight Logistics as the consignor, and DD Trading in Poland as the consignee; the consignment of 200 kg in weight was

the entire contents of all the Deals (save the 6 loose boxes of Sandisk SD Cards already collected on 7 September 2015).

169. Orton was cross-examined in relation to the inspection and despatch of the consignments on 7 /8 September 2015:

(1) Q: at the point of you going to inspect the goods on 7 September, who owns them? A: I would say Online Distribution because we haven't paid for them yet.

(2) Q: referring to the terms of payment of Online Distribution, it is specified that they retained title until they had been paid in full. But what happened was before Online Distribution had been paid, the entirety of Sandisk products in the 6 loose boxes had been given to HVT's courier? A: Not ideal; I had to clear with Matt to allow the goods to leave before being paid.

(3) Q: Is there any evidence of that call? A: [simply repeat assertion] I rang to get Matt's permission to let the goods go – yes. Don't see it as much risk because we had the money in our account to pay Online.

170. The CMR for the consignment was required to be counter-signed as proof of the goods having left the UK in order to zero-rate the supply. The counter-signature was missing until February 2016 when it was obtained to support the VAT repayment claim. Orton was questioned that he did not seem to be concerned with the missing counter-signature at the time. He replied: 'never had experience'; 'never seen a CMR'; 'didn't realise that was required'; 'first time we saw a CMR'.

171. Mr Orton reiterated towards the end of being cross-examined that he had 'absolutely no awareness' of MTIC fraud; that Beigebell had 'no need to take on the business'; it was not something 'we desperately need'; that he was 'not happy with the way it had gone'; that it was 'not worth the stress and hassle'. The last questions put to Orton in cross-examination were:

(1) Q: you worked in the IT industry, and MTIC being one of the easiest fraud for that industry. A: Never heard of MTIC fraud.

(2) Q: You thought there was no real risk, and that €30,000 looked pretty good? A: those are your words, not mine.

'The stable doors are kind of open'

172. Mr Orton was referred to the transcript of the 2019 hearing (SB/277/144) towards the end of his being cross-examined. He was asked by the Judge at the 2019 hearing the following:

> 'Q by Judge: … Obviously after this series of transactions, you refused further transactions, and I'd just like to understand why.
>
> A: I found this whole process very stressful, and not particularly pleasant. In the short term, we didn't have the cash flow to do any more anyway, but I'm not sure if we would have done any more after this, because it wasn't – wasn't as: what's the word … smooth as I would have liked.
>
> Q by Judge: Okay. I think Mr Puzey probably has, effectively, been suggesting to you that throughout this process there were one or two points of things that happened that should have rung alarm bells, if I can put it as politely as that. Were those the sorts to things that you had come to the conclusion that there were too many flashing lights going off, that it just wasn't comfortable.
>
> A: I think towards the end of it, with the whole delivery situation, yes, that didn't sit well with me, but at that point, the stable doors are kind of open.'

173. In respect of his evidence at the 2019 hearing, the last few questions in Orton's cross-examination were as follows:

(1) It was put to Orton that he concluded that the deals were 'doggy' and that they were 'connected with fraud', Orton denied that he bad any awareness of it being connected with fraud; that Beigebell had 'no need to take on the business'; that it was not something 'we desperately need'.

(2) It was put to Orton that he had worked in IT industry and would have gained some awareness of MTIC fraud, Orton stated: 'never heard of MTIC fraud'; the risk-award was not worth it.

(3) It was put to Orton that he thought there was 'no real risk' for earning €30,000; he replied: 'Your words, not mine.'

Officer Rehman's supplemental statement

174. Having read Mr Orton's witness statement of 20 March 2018, Officer Rehman's supplemental statement of 3 May 2018 contrasted certain aspects of Orton's witness statement ('**WS**'/paragraph number) to evidence available to HMRC, which are summarised as follows.

Contrast with responses at HMRC visits

175. The differences in the responses to HMRC from Orton's statement are noted below:

(1) At the second visit attended by Officer Rehman, that Orton did 'all the talking' and the visit report states that Mr Griffiths did not look into the deal as it was already set up. It is Rehman's evidence that Orton did not say to HMRC at the first and second visits that both Orton and Griffiths had spoken to Patel. This was contrary to what is stated at WS/17 that Orton and Griffiths both spoke to Patel on the phone a few times to reassure themselves, and obtained the reassurance from Patel that it was a straightforward order of the kind he was doing on a regular basis.

(2) At the February 2016 visit, Orton stated that the delivery arrangements and transporter was arranged by Hi View, contrary to what is stated at WS/23 that Orton called Online Distribution to confirm who had arranged transport to move the goods.

(3) There was no indication given at the time of HMRC's visits about 'responsibility of shipping', 'goods were too high value', 'minimising the risks' as stated in WS/23,24,47, 57. Furthermore, Orton said at the first visit that no credit offered on these deals as HVT paid upfront before he paid ODL, and could not see any risk.

(4) At WS/50 on a visit to Flight Logistics to check the stock. At the 10 February visit and subsequent emails to Orton, Griffiths, and Richardson (agent) dated 11 February 2015, no time or date or indication of what stock was checked was given.

(5) At HMRC's visits, there was no mention that Beigebell had looked into insuring the goods, and no written evidence has bene provided of any discussion about insurance. At the February 2016 visit, Orton said he assumed the goods would be covered by freight-forwarder's insurance but he had not checked this. This is contrary to what is stated at WS/55 regarding Orton's phone call to Javier of HVT who asked if Beigebell 'could arrange delivery', and Orton said he did not think Beigebell would be 'able to insure such high value items and that our items'.

(6) At both of HMRC's visits, Orton said he did not know the name of the director of Hi-View or who the director was, contrary to what is stated at WS/67, which refers to 'a few phone calls with Javier who was trying to negotiate the price and then his boss Arvind who introduced himself as a Director of the company'.

(7) At HMRC's visits, Orton admitted no real checks had been done on customers and suppliers, as no risk to Beigebell with upfront payments, which was contrary to what is stated at WS/92 that he 'had found the whole experience quite stressful due to the high value of the orders'.

Reverse charge enquiry calls omitted in timeline

176. In the timeline at Orton's statement (WS/30-36) setting out the events from 'the morning of 25 August' when he emailed Javier with the price for 1,000x512 GB cards at €410 per piece to the point of sending Javier two proforma invoices on 26 August 2015, Officer Rehman highlighted that Mr Orton failed to mention that he telephoned HMRC on 25 August 2015 to enquire if SSDs were subject to a reverse charge.

Documents mentioned in WS not produced to HMRC

177. There are two sets of documents mentioned in Orton's witness statement which have not been produced to HMRC.

(1) It is reiterated that no inspection reports have ever been provided, despite being requested on multiple occasions (email of 22 December 2015, and 11 February 2016), while WS/50 has referred to the inspection in descriptive detail.

(2) At WS/51, Orton states: 'I created our collection paperwork and left it with Tam Richmond to get signed when the goods were collected'. It is not specified what is meant by 'collection paperwork'. Officer Rehman expects the 'collection paperwork' to include transport documents, release notes, evidence of check, and such collection paperwork was not produced to HMRC, nor does it appear to have been included in the bundle.

HMRC'S CASE

178. The appellant's wholesale purchase of goods for export in period 10/15 inclusive have been traced through transaction chains to tax losses. It is the respondents' case that those tax losses were not the result of business failure or other innocent explanation but were instead fraudulent in nature. The transaction chains have been traced onwards from Hi-View to three different Polish traders, all of which have 'gone missing' and/or failed to notify the Polish authorities of their whereabouts or trading.

179. The respondents' primary case is that Mr Orton, and therefore the appellant, knew these transactions were connected to fraud because the circumstances point logically and inexorably to that conclusion. HMRC rely on the following circumstances that there was an overall scheme to defraud the Revenue.

(1) This is a classic MTIC fraud with a zero-rated despatch so that there can be a reclaim of VAT from HMRC, and the position of the trader making the reclaim is pivotal; it must be a *credible* reclaiming party, otherwise the money doe not come into the fraud.

(2) The credible reclaiming party must not be like Online Distribution, which was on had numerous transactions found to be linked to tax losses; that is why Online Distribution was not making the reclaim because they are 'marked man'.

(3) Beigebell was brought in as the new party not 'tainted' by previous tax losses, but that does not mean that they are an 'innocent dupe'.

(4) The broker trader in a transaction chain is one who knows exactly: (i) who to buy from, (ii) whom to sell to, and (ii) the what and (iv) the when of the transaction.

(5) The purchases from one single supplier ODL are sold onto Hi-View (director in Wembley North London), to sell on to 3 Polish companies. Patel's claim that Hi-View would sell to people like Tesco is at odds with the fact that Hi-View had been in existence

for 6/7 months only at the time of these transactions. That Hi-View is not an established trade with a pedigree, or a multi-national retailer which would be selling to Tesco, is within the appellant's means of knowledge; something it should have known.

(6) In the clean chain, the contra-trader (Askos Wolt) balanced goods from the dirty chain, and that is not coincidental but a classic trait of an MTIC fraud. Contra-trading involves a small cast of fraudulent actors, and it has been proved beyond doubt by the parallel chains involving Create Leisure.

(7) What we see was a fraudulent scheme with Beigebell and Create Leisure being interchangeable in the place of the broker.

180. The real question is what the appellant knows about it. Patel is said to be an old friend, was a 'good friend'. Is it credible that they are so very good and so very old friends that Patel was able to hoodwink them entirely to participate in a single deal, and then tempted them into other transactions? Mr Orton is an 'astute' businessman; he attained position of responsibility in a large organisation; he set up in business and built up a successful business; he is not a fool, but insisted that he had been duped. HMRC rely on all the circumstantial evidence put forward by Officer Rehman, namely:

(1) All the deals were back-to-back, which is a classic feature of MTIC fraud.

(2) Beigebell as the new trader should make the most money, with its profit margin at 3.23% in the transaction chains for Deal 1 was higher than the other traders, and subsequent deals stayed at the same mark up, while no value was added by Beigebell.

(3) The deals were out of line with Beigebell's normal trading practice, which according to Mr Griffith, would have involved scoping exercise, careful liaison with suppliers and customers, and a typical project would take weeks or months to complete.

(4) The size of the deals was significantly larger and different from what Beigebell's normal range of transactions.

(5) The deals were all structured in a different currency, even when the sole supplier ODL was in fact a UK company.

(6) It goes to the heart of Mr Orton's credibility that:

(a) It was never explained why Patel should ring Orton to discuss Beigebell going into the deals and not Griffiths, who is the director normally deals with sales.

(b) At the first visit in December 2015, Orton stated to HMRC that Patel was with CMS Peripherals and introduced Beigebell to four wholesale deals; that CMS could not do the deal as the goods were outside what CMS normally deal in.

(c) At the second visit in February 2016, Orton stated to HMRC that Patel introduced Beigebell to four wholesale deals, and that Patel had completed these deals but Beta could not sell on the products due to 'conflict of interest'.

(d) In Orton's witness statement, there is no mention of deals having been completed, and at paragraph 31 the reference to price negotiation does not refer to a deal being set up either.

(e) In evidence, Orton is now saying that Patel had set up one deal (not four wholesale deals), and that Orton went on to strike the other deals.

(7) It is submitted that being presented with 4 or 5 deals would look more suspicious than just one deal, and that is the reason what Orton is saying now differs from what he stated to HMRC in December 2015 and February 2016.

181. It is submitted that Patel introduced Beigebell to ODL and HVT by Patel, and not to trading partners whose deal(s) were 'closed' with Beta Distribution.

(1) There has been no documentary evidence to indicate that Beta Distribution had anything to do with these deals at all. Patel's claim that he had retained print-outs of documents 'in a box in his attic' is a 'strange way to treat one's former employer'.

(2) The tax loss letter served on Beta Distribution on 4 August 2015 for trading in wholesale alcohol involving its supplier Global SFX called into question why a computer wholesaler should be dealing with alcohol in excess of £1 million.

(3) Patel could not explain why Beta should be trading in alcohol linked to tax loss, and it called into question Patel's account of him working for a large IT specialist company.

182. Mr Puzey's submissions on Patel's evidence are as follows:

(1) With reference to Mr Orton's reply: 'I don't know where the truth really lies' when being cross-examined on Hi-View's email to open an account with Beigebell, in which Hi-View made no reference whatsoever of a deal having been pre-arranged by Patel, Mr Puzey submits that the appellant has put forward Patel as a witness, and that witness is supposed to be telling the truth. It is not open to Mr Orton to cast doubt on the evidence given by a witness called by the appellant.

(2) Further, it is not clear as to what the appellant's position is regarding Mr Patel's evidence: whether to accept Patel's evidence, or to call a halt to his evidence; whether to put Patel's evidence forward as given, or to bring Mr Patel back as a witness to complete his evidence.

(3) In fact, Patel's evidence was 'singly unimpressive'. For instance, Patel gave the figure of US$ 220,000 for 1,000 SanDisk 512GB (Deal 5), which means a unit price of US$220, and the exchange rate in August 2015 was $1 to €0.89. Deal 5 was transacted at unit price €415. Patel was therefore either mistaken or not telling the truth; he was either wrong or lying. It is not credible that Patel was putting together a much larger deal for Hi-View at a unit price of €415.

(4) Further, Beta Distribution did not feature in these chains at all; it was not in Create Leisure chains, and not in Beigebell's chains. The explanation that Patel had put together a deal which Beigebell is not credible.

(5) Patel was put forward as a witness for the appellant at the re-hearing, and has lodged a witness statement asking to be accepted as a statement of truth. The appellant is therefore saying that Patel is telling the truth. This is a 'reversal' of the appellant's position in the 2019 hearing, when Mr Orton was recorded to have stated in evidence:

> '… I showed [Patel] everything that HMRC had sent to us and said: look, how can what you'll be saying be true if all this is happening? And I – he didn't really have an answer for it but he didn't at the same time tell me anything different, so I don't have a definitive …I don't know for sure what his involvement is.'
>
> 'I believe that, yeah, [Patel] has misled us but I don't know to the extent of how – what he's misled us. I don't know if he's just trying to cover up a small thing or a big, you know, or if he's completely – he could be completely involved, for all I know.' (SB/247/22-25)

(6) Patel was asked to put forward an account by letter in February 2016. In the 2019 hearing, Orton's position was that 'I don't believe his account'; and yet the appellant decided to call Patel in the retrial in 2022, whose evidence was aborted in mid-hearing.

(7) It is submitted that a party is not entitled to call a witness in order not to believe him. Looking at Patel's evidence in the round, it is 'unbelievable', 'incredible'. It is clear that Patel was not telling the truth. A party in litigation calls a witness to make a positive case of truth, not to make a negative case of untruth. In the light of Orton stating in the 2019 hearing: 'Well, I didn't believe him [Patel]' (SB/248/26), it is a 'puzzlement' why Mr Patel's evidence was called.

183. Mr Puzey submits that there were the means of knowledge for the appellant to know that its transactions were connected with fraudulent evasion of VAT as demonstrated by:

(1) The appellant's varying accounts of the insurance position for the consignments.

(a) On 10 February 2016, Mr Orton told HMRC that no insurance was taken out as that he assumed Flight Logistics would insure the goods.

(b) In Orton's witness statement (paragraph 49), it states: 'I emailed Javier telling him that the goods would be ready for collection on 1st September but that we wouldn't be able to insure the goods for transit so it would be appreciated if he could collect them'.

(c) In evidence, Orton said Beigebell was not involved with the transportation of the goods at all, and the insurance matter was between Online and Hi-View, whereby the goods would go straight from ODL to HVT, with ODL delivering the goods to Flight Logistics to be collected by DD Freight.

(2) It is submitted that Orton knew that ODL and HVT had traded with each other. The question arose to an intelligent man with commercial experience such as Mr Orton would be why Beigebell was needed in these chains if ODL and HVT knew each other already.

(3) It is submitted that Beigebell did not take the requisite precaution of due diligence.

(a) Mr Orton stated that he did not read the terms and conditions of Hi-View since there was 'no commercial risks' with being paid upfront. Would an intelligent man simply ignore the terms and conditions of the company it is selling to?

(b) It was only in the course of the enquiry that Beigebell gathered a copy of the VAT registration of Online Distribution. ODL's VAT certificate declared itself to be a retailer of household appliances. The purpose of the VAT registration certificate was to demonstrate the fact that the trader was registered to trade in the category according to its SIC code.

(c) The due diligence documents forwarded by Online did include ODL's VAT certificate (even if not the registration letter), which likewise stated the business activity to be that of a retailer of household electrical appliances. It would have been obvious to ask why Online was acting as a distributor (not a retailer) on products that did not fall into its self-declared category, and the flashing light should go as to why Beigebell should be supplied by this company.

(d) The information was ignored that if the domestic rate of trading in SD cards would be between US$200,000 to 220,000 for 1,000 SanDisks GB512, then it was unbelievable that the whole chain of events should be transacting at a much higher unit price of € 415.

(4) The objective features of the transactions were outwith Beigebell's normal trading activities, and it was fundamental to the viability of these transactions that input VAT was reclaimed.

(5) It is submitted that Orton's assertion that he was unaware of MTIC fraud is not credible. Mr Puzey refers the Tribunal to the transcript of the 2019 hearing in his closing submissions (SB/255), wherein Orton confirmed that he was responsible for raising the invoice for the supply of Phablets in which it is stated that 's55A VAT applies'. Section 55A VATA reads as follows: '*Customers to account for tax on supplies of goods of a kind in missing trader intra-community fraud*'; that Orton stated as having 'followed the instructions' on 'the HMRC website'; that Orton was handed the Public Notice 735 on the Reverse Charge, and acknowledged in his 2019 evidence that he had 'seen' the Public Notice, and had 'looked at this information' when the customer (of the Phablets) asked Beigebell to look into it, and he replied: '*I did look at this page*' of the Public Notice which from transcript (SB/256/57) read out to Orton in evidence :

> 'Q: First sentence under 1.1 [of the Public Notice on the Reverse Charge]:
>
> "The VAT domestic reverse charge procedure is an antifraud measure designed to counter criminal attacks on the UK VAT system by means of sophisticated fraud. This notice explains the VAT reverse charge procedure applying to the supply and purchase of the specified goods and services."

(6) As to the transcript of Orton's 2019 evidence on the Grey Market (SB/253/47) on which he was cross-examined at the re-trial: Q: *You are aware that lots of companies in the IT industry operate within the grey market?* A: *Yes*, it is submitted that it is not surprising since Orton has worked in the IT industry for some 6 years before Beigebell.

(7) These factors mount up and call into question the appellant's (Orton's) denial that he had awareness of MTIC fraud. HMRC's primary case is that the appellant had actual knowledge that its transactions were connected with the fraudulent evasion of VAT, and that HMRC have proved it to be the case on the balance of probability.

184. In the alternative, the respondents submit that the appellant should have known of its transactions being connected with fraud because the circumstances, as known to Orton in particular, permitted no other reasonable explanation. HMRC's secondary case is that the appellant should had known that such a connection was 'the only reasonable explanation'. It is submitted that the level of knowledge and experience for a finding of constructive knowledge is by reference to the objective standard of the reasonable competent director: Lewison LJ in *Livewire*. That is to say, if a reasonable competent director would have concluded from all the circumstances that the only explanation for the transaction was connected with fraud, then the test is met, regardless of the subjective attributes of the director involved.

APPELLANT'S CASE

185. The appellant submits that there is no direct evidence on which the Commissioners can rely to prove its knowledge of the transactions being connected with fraud. Further, the appellant 'vehemently denies the accusation'.

186. As to constructive knowledge, the Tribunal may consider whether the only reason for the transactions is that they were connected with fraud, or that the circumstances of the transactions can reasonably be regarded as having an explanation other than a connection with fraud.

187. The ultimate question is not whether the trader exercised due diligence but rather whether he should have known that the only reasonable explanation for the circumstances in which his transaction took place was that it was connected to fraudulent evasion of VAT: *Mobilx* at [75].

188. Mr Brown's specific responses to HMRC's closing submissions are as follows.

(1) On reverse charge – that the invoice for the supply of phlabets with the reference of s55A VATA was not put to cross-examination for Orton to explain whether he had read the public notice. This issue is not in HMRC's skeleton argument; it is 'not a new ground of evidence', but 'an evidence of fact'.

(2) On Beigebell's supplies – contrary to HMRC's 'constant assertion' that the appellant dealt solely with promotional items, there are invoices to evidence that it dealt with a wide range of products as shown by invoices which the Tribunal was referred to:

(a) 21/07/2015: Black Phablet with Earphones USB cables, black cover batter user manual, gift box packing – 500 in quantity; total £51,570; (Reverse Charge £10,350);

(b) 09/09/2015: Balti Dishes – 364,000 @ £0.515; net total £46,865 plus VAT;

(c) 04/10/2017: Universal Travel Mate Adaptors (with personalisation 3-colour branding to one side); 300 @ 5.35 each;

(d) HB3/3544 – a listing of merchandise items including phablets (turnover of £69,000), balti dishes (imported from India turnover £212,335);

(e) The point of submission is that around the same time, the appellant was making supplies of non-promotional items according to the schedule at HB3/3544, and that being the 'correct evidence of Mr Griffiths'; (Mr Brown's submission is that Mr Griffiths 'mistook that the invoices [on p3544] to be in 2017')[6].

(3) On Patel's evidence – no adverse inferences should be drawn on Patel's evidence; that the appellant called Patel because if he was not called this time, then adverse inferences might have been drawn following what was put to Orton at the 2019 hearing. Referring to the transcript excerpts:

'Q: [Patel] took the decision jointly with you to enter these deals? A: yes.

Q: So why is he not here to give evidence? […] A: I mean, its – if it was required, I guess my barrister would have said he needs to give evidence.' (SB/242/4)

'Q: There is no witness statement from Ricky. Why is that? A: I don't know.' (SB/246/17)

(4) Mr Brown invites the Tribunal to accept Patel's evidence that he left Beta Distribution in January 2016, which explained why his letter provided to Orton in February 2016 was not on headed paper from Beta Distribution.

(5) Referring to HMRC's visit report of Beta Distribution on 16 May 2011, in which it is stated that Beta was a customer of Online Distribution; the ODL supplied to Beta but that was in 2009.

(6) As to the short space of time between the four purchases sold on as 'six lots', Mr Brown submits that this was 'not the usual case of MTIC fraud', and that there was no overall scheme to defraud HMRC by attaching 'labels' of the roles played by Online as the 'buffer trader' or Beigebell as the 'broker trader'.

(7) The 'reasonable explanation' is that the appellant believed Patel, and why the deal was set up could not be sold to Hi-View due to IT Channel ethics.

[6] The schedule gives a listing of supplies with reference number, product, supplier location, delivery location, credit terms, and notes as headings. In fact, there is no way to confirm which year did the supplies take place on the face of this schedule.

189. On Mr Orton's credibility, it is submitted that Orton is 'completely reliable and truthful'.

(1) Whether one deal or 4 deals were set up by Patel – that should not be allowed to call into question the credibility of Mr Orton.

(2) On insurance where three different positions had been stated by Mr Orton:

(a) On 25 August 2015 – that was when the transactions began; and that was Orton's understanding that goods were to be transported by ODL as related to Hi-View by Orton and that Beigebell would not want to be responsible for insurance;

(b) On 7 September 2015 – that was when the transactions were concluded; and goods were collected on 8 September;

(c) In February 2016 to HMRC – that was 5 months after the conclusion of transactions and Orton said that Flight Logistics were responsible as at that point the goods were in Flight Logistics' premises for over a week.

(3) That it was Orton's evidence that there was one transaction set up by Patel followed by 3 other transactions; this was the position and independent of Patel's evidence.

(4) Referring to Orton's email to Javier on 25 August 2015 in which Orton said, 'I believe you are interested in purchasing Sandisk 512gb Extreme Pro' followed by giving the quantity of 1,000 at €410, it is submitted that is evidence that there was one deal having been set up as the email made no mention of other products.

(5) As to ODL being monitored by HMRC and was a 'marked man', Mr Brown submits in the form of a rhetorical question: 'Would a trader knowingly conduct VAT fraud under the nose of HMRC?'

190. In rebuttal of HMRC's submission that there was an overall scheme to defraud the Revenue, Mr Browns submits that:

(1) From Orton's answers, 'it is plain that he did not know Hi-View and Online traded directly'; that Online and Hi-View traded directly 'has to come from Ms Boyko's evidence'.

(2) Mr Brown highlights Boyko's evidence in relation to ODL's VAT returns for 02/15 where the EC Acquisition tax was only at £998, which could not have been supplies to Hi-View in terms of volume.

(3) That Hi-View only began trading in February 2015, and the SCAS report on Hi-View submitted that 'no evidence of fraud at that stage'.

(4) The (small) delays with Hi-View paying Beigebell are relied upon to dismiss HMRC's case that these are back-to-back transactions, and Mr Brown submits that it was 'inconclusive of three of the payments, and not the case in the other three'.

(5) There were negotiations on prices: (a) one being from €93 to €90 and settled at €91; and (b) the offer at €410 with Hi-View asking for €408 and it was settled at €410.

(6) It was not true that Hi-View got what it wanted, as illustrated by the fact that Hi-View wanted 3,000 to 4,000 of Samsung 250GB SSD, and Orton asked ODL what it could do, and the stock available was; (a) 1,000 x Samsung 250; (b) 750 x Sandisk 256 GB; and (c) 500 x Sandisk 512GB.

(7) Mr Brown submits that Hi-View did not get what it wanted; it was offered the stock, which it accepted and bought when it wanted.

(8) A second example concerns Orton checking with Javier (in their email exchanges of 25 August 2015) whether Hi-View wanted 1,000 x512 GB Sandisk instead of the 500 pieces as per its initial response to the stock offer.

(9) That Orton's evidence was that there was no agreement of delivery, and submits by way of a rhetorical question: 'Is that really the behaviour of somebody who knows what's going on?'

(10) As to the connection with 'Create Leisure', Mr Brown submits that the appellant accepted that at or around the same time there were same deals involving Create Leisure but that 'the only connection with Create Leisure was to open Flight Logistics account'.

191. Mr Brown's closing submissions concludes on a 'summary on knowledge':

(1) There is no evidence that the appellant knew it was involved with VAT fraud: *Davis & Dann UT*.

(2) Even if the appellant had 'suspected of it', 'the *only reasonable* explanation' was as given by Orton that he believed Beigebell was stepping in to complete the deal set up for Beta which Beta could not complete due to IT channel ethics.

(3) *Davis & Dann CoA* at [65]: 'The question is whether or not a reasonable person mindful of those circumstances ought to have concluded that the Transactions were connected with fraud. What matters is the perspective of the person alleged to have such knowledge.' This is not an objective standard, and that is why the UT remitted the case to the Tribunal for a retrial.

(4) One of the circumstances to be taken into account is that Orton had never been found to have been involved in transactions connected with fraud.

(5) It depends on the Tribunal making a finding of fact to that effect; and that it is not just 'a reasonable person test', but requires the 'assessing of all circumstances' to find Orton's lack of knowledge as a fact. In this respect, the Tribunal is not to take into account all of the following:

(a) The length of the deal chains;

(b) Whether there was an end-user/manufacturer/ other than the present trading parties with the appellant – that of ODL and HVT;

(c) The mark up of any of the parties in the chains;

(d) The speed of those other transactions in the chain, other than Beigebell's transactions with its immediate trading partners;

(e) The use of the Lavian Bank by the other traders in the transactions;

(f) The extent of due diligence done by Beigebell on ODL or HVT.

(6) Orton's explanation is sufficient to satisfy that those companies did exist in the transactions for a good reason. The appellant relies on the following:

(a) HVT's letter of introduction states it deals in Technology.

(b) Worthington's evidence is not 'expert evidence', and the appellant does not need permission to call his evidence: *Libra Tech Limited v HMRC* [2013] UKFTT 180 (TC); *Megantic Services Ltd v HMRC* [2013] UKFTT 492 (TC); *Elbrook Cash & Carry* [2018] UKFTT 0252 (TC); *Singleton Birch Ltd v HMRC* [2021] UKFTT 0440 (TC).

(i) Worthington's evidence is based on his experience of the Channel Model in the IT industry, and is to be treated as 'facts from his point of view', and it lends credibility to Orton's evidence.

(ii) Worthington's evidence does not comment on the appellant's transactions as to whether or not they fall into the channel model.

(c) The lack of inspection report is 'a small point', while the significant fact is that Orton went to inspect the goods on two occasions. At this juncture Mr Brown refers to SB/269[7] (*not put to Orton either in examination in chief, cross-examination, or re-examination*) where the transcript records Orton being cross-examined why he took upon himself to inspect the goods at FLG when Beigebell is known to 'use third party inspection services for your other goods'. Orton replied: 'Some of our other goods, the ones that are made in China, because we're not there'.

(d) Even if there was an overall scheme to defraud the Revenue, 'the appellant did not play ball' because these were not 'seamless transactions' in which all parties in the game played ball. There was problem affecting each of the 4 purchases. And why? Because the appellant did not know.

(e) If the appellant did not know, it could not be said that the appellant ought to have known, if one looks at the factual evidence.

HMRC's reply to the appellant's closing submissions

(I) Patel's evidence

192. Mr Puzey addresses specifically Patel's evidence, which is summarised as follows:

(1) It is no clearer now as to what the appellants position is as regards Patel's evidence, whether: (a) to accept Patel, but call a halt to his evidence, or (b) to put his evidene forward, and to bring Mr Patel back to complete his evidence.

(2) A witness cannot be rescued from cross-examination by the party calling him.

(3) The 'very ambivalent attitude' of the appellant toward Patel is to be noted:

(a) The appellant served a letter of February 2016 by Patel at the first hearing;

(b) At the first hearing, Orton told the 2019 tribunal that he did not believe Patel;

(c) At this hearing, the appellant has served a witness statement as a statement of truth by Patel, and putting him forward as a witness of truth;

(d) The appellant then sought to call a halt to Patel's evidence;

(e) Mr Brown is 'taking the blame on his shoulders' why the appellant itself is withdrawing Patel from evidence.

(4) The appellant has taken 'the pragmatic course of bringing [Patel's] evidence to a halt to limit damage'; the appellant would seem to be saying: 'yes we can believe Patel but spare him from further cross-examination'.

(5) To stop Patel's evidence is a matter for the tribunal, and not a matter for Mr Brown. It is rather difficult to having withdrawn Patel for the Tribunal's further consideration.

[7] On this page of transcript, Orton was recorded to have stated: 'Didn't take any photographs'; 'I didn't make a written record, but I was there to satisfy myself the goods were correct'.

(II) ODL's VAT returns as evidence of EC acquisition

193. The table drawn up by HMRC to summarise ODL's VAT return entries shows the VAT declared by ODL on EC Supplies to be £998 (02/15), and £285 (05/15) and nil for the subsequent quarters 08/15 to 02/16, while in the period 08/15 there was £16,310 declared for EC Acquisitions. When it cannot be established whether the figures declared by ODL can be relied on, and who these EC acquisitions were from, the basis of Mr Brown's submissions 'can only go so far'.

(III) What was the number of deals set up by Patel

194. Orton stated at the first interview on 10 December 2015 that there was one deal, and in the second interview on 10 February 2016, there were 'deals' (in the plural) being set up by Patel. HMRC's case is as stated in the skeleton argument at [36]: '*Plainly these were not deals that had been "set up" by Mr Patel because the Appellant itself initiated the sale*'. The respondents are not saying that we know the truth, but are entitled to point out the inconsistencies, and how that affects the credibility of the appellant.

(IV) Disregard factors pointing to a fraudulent scheme

195. The appellant has asked the Tribunal to disregard facts such as no end-user, and no manufacturer were involved in these chains, and factors as concerns mark-up, and the speed of other traders' transactions in the chains. The respondents cannot suggest that the appellant was aware of those factors, and we do not so suggest.

196. However, the broad point is that where we have a fraudulent scheme, that fact is *relevant* to the appellant's knowledge. It is submitted that for a fraudulent scheme to work, the appellant has to know about it, or at least to turn 'a blind eye'.

(V) Worthington's evidence

197. The appellant has clarified that Worthington's evidence is not put forward as expert evidence but to speak of his experience within the authorised distribution channel. However, since Orton has stated that he cannot say if Online Distribution was an authorised distributor and Hi-View an end-user, then Worthington's evidence is simply irrelevant.

(VI) Reverse charge

198. As to the transcript excerpts of Orton's evidence at the first hearing on the inclusion of s55A VATA on the face of the invoice for the supply for the phablets was not put to him in cross-examination at this hearing, Mr Puzey submits that the evidence at the first hearing was given on oath and 'admissible' as such as evidence and there is no need to go over everything covered last time for admissibility this time.

199. Mr Puzey highlights that Mr Brown has likewise referred to transcript evidence from the 2019 hearing at SB/269 in his submissions regarding inspection report, without such parts of the transcript having been specifically put to the witness.

200. Mr Puzey points out that it is 'interesting' that Mr Orton said (at the re-hearing) that he knew nothing about MTIC fraud, yet he should ring HMRC to ask if the SD cards are covered by the reverse charge. The Commissioners' reference to the transcript excerpts at SB/255-6 on what Orton stated in 2019 on being cross-examined on the reverse charge is to highlight the inconsistency of Orton's at the re-hearing with what was stated in 2019 (SB/255/55-57):

> 'Q: … If we look at paragraph 1.1 [of Public Notice 735]: what this notice is about. This is the information that you looked at?
>
> A: Yes, I have seen – I have looked at this information when I was –
>
> Q: When you were preparing this invoice, or before you prepared it?

A: Before we – when the customer asked us to look into it, I did look at this page.

Q: First sentence under 1.1:

"The VAT domestic revere charge procedure is an antifraud measure designed to counter criminal attacks on the UK VAT system by means of sophisticated fraud. This notice explains the VAT reverse charge procedure applying to the supply and purchase of the specified goods and services."

So if you would have read this, you will have been aware that the reverse charge was intended to counter VAT fraud in certain specified goods, including electronic items. Is that right?'

201. In respect of Mr Orton's evidence on the reverse charge being inconsistent, Mr Puzey makes the following submissions:

(1) That Orton's 2019 evidence was that he had done research on the reverse charge is relevant to actual knowledge, and was expressly referred to Public Notice 735 on the Reverse Charge, with paragraph 1.1 of the Notice having been read out to him as per transcript. This is relevant evidence of actual knowledge, while the appellant has asserted that there is no evidence of actual knowledge.

(2) Secondly, Orton stated at this hearing that he knew nothing about MTIC fraud, 'never ever heard of it', that inconsistency 'goes to the heart of the credibility test'.

(3) As to constructive knowledge, Mr Puzey paraphrased the appellant's case as: 'We don't know anything about MTIC fraud, and we should not have known about MTIC fraud'. It is submitted that the appellant's argument of 'means of knowledge does not hold together' by asserting that there is no evidence on either limb, on actual knowledge, or means of knowledge.

(VII) Actual knowledge test

202. The transaction chains in this appeal were not out of the blue; they did not come about by accident but relevant to actual knowledge.

(1) Exactly the same chains existed with the broker as Create Leisure, or in contra-trading chains where there were two brokers.

(2) The point should not be accepted that factors that point to an overall scheme to defraud should be disregarded. The fact that the transactions were all happening 'so swimmingly' is indicative that it was a scheme.

(3) The appellant found itself dealing 'seamlessly' with other traders in products it never dealt with in such short space of time, in manner not consistent with how it normally traded, with people it never traded before, cannot be disregarded.

(4) If you found you are in a scheme, what explanation you are to make of it?

(5) The appellant must have known because of all the circumstances that point to the existence of a scheme, whilst it is not necessary that the appellant knew of all the details of the scheme: *Megtian* at [37]-[38].

DISCUSSION

Burden of proof

203. The burden of proof of all four elements of the *Blue Sphere* test rests on HMRC, and to the ordinary civil standard of the balance of probabilities. Whilst the respondents bear the burden of proof, it is to be noted that:

(1) HMRC do not have to prove that the appellant knew or should have known either the details of the fraud or the identities of the fraudulent defaulters: *Megtian* [38].

(2) HMRC do not have to prove that those at the appellant who undertook or supervised the transactions were dishonest: *Citibank* at [90].

204. In relation to the *Blue Sphere* test, what HMRC are required to prove is that there is a prima facie case for the four elements, and if the appellant advances a positive case to the contrary, the burden is then on the appellant to adduce evidence that supports its positive case. Beigebell is making a positive case that the 'channel model' was the credible explanation and the reasonable explanation for the appellant becoming involved in the fraudulent transactions. To that end, the appellant bears the burden to prove its positive case to the requisite standard.

205. The need for the appellant to prove its positive case is made clear by the Upper Tribunal in *Fairford* where it is held that once an issue has been raised by HMRC based on some obtainable facts, an appellant taxpayer is required to defend its position, or risk an adverse finding against it.

> '[48] … 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.'

Appellant's positive case/ no adverse inferences

206. The appellant seeks to make the positive case that it was an innocent party without any actual knowledge that its transactions were connected with fraud. In this respect, the appellant's case draws no distinction between actual and constructive knowledge. No separate arguments distinct from those made in relation to actual knowledge have been advanced to suggest that the appellant ought not to have known that its transactions were connected with fraud. The appellant's case would seem to be that it had neither actual nor constructive knowledge, and the latter is a corollary premised on the submissions that it had no actual knowledge that its transactions were connected with fraud.

207. In closing submissions, Mr Brown urged on the Tribunal not to draw adverse inferences from Patel's evidence. He submitted that at the first hearing, the Commissioners asked why Patel was not called as a witness. If Patel was not called this time, Mr Brown said that it might have opened to adverse inferences being drawn. Mr Brown apologised for the 'mis-communication' as regards Patel's availability, which he said was 'entirely down to [him]'.

208. In *Wisniewski* Brooke LJ addressed the issue of adverse inferences by referring to a line of authority which shows:

> '… that if a party does not call a witness who is not known to be unavailable and /or who has no good reason for not attending, and if the other side has adduced some evidence on a relevant matter, then in the absence of that witness a judge is entitled to draw an inference adverse to that party and to find that matter proved.' (p337)

209. Brooke LJ continued by citing *McQueen v GWR* (1875) where Cockburn CJ had said:

> 'If a *prima facie* case is made out, capable of being displaced, and if the party against whom it is established might by calling particular witnesses and

> producing particular evidence displace that prima facie case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury and not a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced, it would not displace the prima facie case. But that always presupposes that a prima facie case has been established; and unless we can see our way clearly to the conclusion that a prima facie case has been established, the omission to call witnesses who might have been called on the part of the defendant amounts to nothing.'

210. The principles on drawing adverse inferences are set out at p340 of *Wisniewski*:

> 'From this line of authority I derive the following principles in the context of the present case:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, then if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.'

211. We accept Mr Brown's submissions that no adverse inferences should be drawn in relation to the appellant having called Mr Patel as a witness. We have regard to the challenge to Mr Orton at the first hearing as concerns the absence of Patel as a witness, and in seeking to make a positive case, the appellant therefore considered it apt to call Patel's evidence.

212. Having called Patel as a witness, it is highly unsatisfactory that his evidence was aborted during cross-examination. Mr Brown took on the responsibility of 'miscommunications' that was ostensibly the reason for Patel aborting his evidence, whilst the respondents submit that the appellant had called a halt to Patel's evidence to limit the damage.

213. From the disparity between the two sessions of Patel's evidence, and the clear message from the Video Hearings officer on the day that Patel's connection signal was very strong, we infer that the apparent disconnection failures that caused his screen to freeze or to black out were not the real cause of Patel failing to complete his evidence. It is not necessary for us to find the true cause, whether it was due to miscommunications, or Patel's unwillingness and reluctance to assist the appellant's case as a witness. The appellant has called Patel as a witness to prevent adverse inferences being drawn, and Patel did lodge a witness statement and gave oral evidence, albeit incomplete.

214. In these circumstances, apart from not drawing any adverse inferences from the aborted evidence, we consider the fair course of action is to admit Patel's evidence as given to the extent it has been adduced in our findings of fact. Before we make our findings of fact, we pause to set out our evaluation of the evidence that has been put in front of us by both parties.

Evaluation of evidence

Transcript from the 2019 hearing

215. The parties have lodged the transcript of the 2019 hearing as a supplemental bundle of evidence for the re-hearing. There is no application from either party that any part of the transcript should be expunged for the purposes of the re-hearing. Specific excerpts of the transcript have been referred to in cross-examination at the re-hearing, while other excerpts are referred to in parties' closing submissions without the particular excerpts having been put to a witness in cross-examination.

216. Mr Brown has raised objection to Mr Puzey's reference in closing submissions to the passages of Orton's 2019 replies when being cross-examined on the Public Notice 735 on Reverse Charge. I understand Mr Brown's objection to be that paragraph 1.1 of Public Notice read out at the 2019 hearing had not been specifically put to Orton in cross-examination at this hearing, and the Commissioners are not entitled to draw on Orton's replies at the 2019 hearing as indicative of his state of knowledge on MTIC fraud.

217. We accept Mr Brown's objection that Mr Orton's 2019 replies on the Public Notice 735 cannot be held as indicative of Orton's state of knowledge, which is the substantive issue for which the Commissioners bear the burden of proof. However, we also acknowledge Mr Puzey's rebuttal that his reference in closing submissions to Orton's 2019 replies is for the purpose of highlighting the inconsistency in Orton's oral evidence between the two hearings, and that there was evidence of actual knowledge in that regard.

218. The Tribunal is mindful of Mr Brown's valid objection, and has taken Mr Puzey's submissions on this point as no more than a contrast to highlight what Mr Orton stated in 2019 and at this hearing. On one level, the transcript is no different from other documentary evidence lodged for the re-hearing, and is a record of what was stated in witness evidence in 2019. The hearing in 2019 took place four years after the transactions in question, and the re-hearing was six and a half years after those transactions in August/September 2015. The witness evidence at the 2019 hearing was undoubtedly closer in time to the actual transactions, and is a fact that we bear in mind when evaluating Mr Orton's evidence.

Conspicuous absence of documentation on deal(s) set up

219. In *Wetton v Ahmed*, the Court of Appeal stated that the trial judge was entitled to assess the credibility of a witness's oral evidence by reference not only to contemporaneous documents, but also by reference to the absence of those documents. Arden LJ said at [14]:

> 'In my judgement, contemporaneous written documentation is of the very greatest importance when assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can be checked against it. It can also be significant if the written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw references by its absence.'

220. When we stand back and look at the totality of evidence, what is conspicuous by its absence is the contemporaneous documentation of the deal (even if not deals) alleged by the appellant to have been set up by Patel on behalf of his employer, to obtain supplies from ODL for onward resale to Hi-View. The positive case made here is that Beigebell was innocent in being involved in the transaction deals that turned out to be connected with fraud. The central pillar in the appellant's evidence to construct its positive case of innocence is that there was this one deal which had already been set up by Patel, a trusted friend at the time.

221. Putting aside the inconsistency in the statements uttered by Mr Orton at different junctures as to whether Patel had set up only one deal or four deals, the central pillar in Mr Orton's evidence was that Patel had set up a deal which Beigebell took over at the last minute. If such a deal had been set up and was passed on to the appellant, in the ordinary course of event, one would expect to see some kind of contemporaneous documentary trail to impart the details of the deal to Beigebell. Rule 27 of the Tribunal Procedure Rules 2009 provides for each party to provide the list of documents on which it intends to rely.

222. In our judgment, it is not unreasonable to expect such documentation would have been in existence if a deal had been set up by Patel, and some form of contemporaneous exchanges of the deal details would have been in the appellant's possession to facilitate the appellant to take over the deal. No such documentation has been produced. The only reference of the existence of such documentation was in Patel's evidence when he claimed that he had kept copies in his attic. The appellant, being the party adducing evidence to support its case of deal(s) having been set up, is responsible for its non-production.

223. If such documentation to evidence the deal (or deals) having been set up was extant, it would have been reasonable for Patel to provide the details when introducing Matt Jones to Orton in August 2015. It is peculiar that when Patel provided the letter in February 2016 in response to Orton's request after HMRC's second visit to Beigebell, no such documentation was furnished by Patel if he had retained copies in his attic as he claimed in evidence.

224. The complete absence of any contemporaneous documentation to evidence any deal (or deals) having been set up is not just a lacuna in the body of evidence adduced for the appellant, but represents a gaping hole in the edifice of factual matrix upon which the appellant is trying to construct its case of innocence. As Arden LJ observed, the documentation is conspicuous by its absence and the judge may be able to draw references by its absence.

Inferences drawn by its absence

225. If there had been any deal set up by Patel, we have not seen any evidence to that effect. As it stands, the only contemporaneous record of Patel's involvement in the alleged deal(s) is the email of 19 August 2015 when Patel put Jack Orton in touch with Matt Jones of ODL:

> 'Jack meet Matt // Matt met Jack// Jack can let Matt know the best number and time to talk about <u>these deals</u>' (underlining added).

226. We give more evidential weight to the above email for its contemporaneity, than to the varying versions proffered subsequently during HMRC's visits or in oral evidence by Orton or Patel. From this email, we make the following observations:

(1) Patel introduced Jack Orton and Matt Jones to each other in this email.

(2) No reference was made of *a* deal (in the singular) having been set up by Patel, as asserted by Orton.

(3) Instead, Orton was to contact Matt Jones to discuss 'these deals' (in the plural).

(4) The choice of the word '*deals*' in the plural was not incidental; we infer that Patel was aware of there being more than one deal to be transacted.

(5) Nor was the choice of the word '*these*' to qualify 'deals' incidental. As a part of speech, 'these' is the plural form of the determiner adjective for '*this*', which is '*used to identify a specific person or thing … being indicated*' or '*referring to a specific thing just mentioned*' (Oxford English Dictionary). We infer that Patel was aware that Orton and Jones would understand what he meant by '<u>*these*</u> deals', as being *specific* to what had been mentioned to either of them.

227. Juxtaposing the conspicuous absence of any documentation of a deal having been set up by Patel, and the only contemporaneous document to indicate Patel's involvement in the 'Jack meet Matt' email, the inference we draw is that there was no deal (or deals) having been set up by Patel to pass on to Beigebell.

228. The inference we draw that there was no deal having been set up by Patel to pass on to Beigebell is fortified by the anomalies from statements made by Mr Patel in different contexts.

(1) Patel's evidence stated the deal(s) to be in a different currency, in US dollars and not of Euros. If Patel had indeed set up a high-value deal for hundreds of thousands Euros, when the trading partners at either end were only transacting in Euros, it is odd that his evidence should refer to a different currency altogether.

(2) Patel gave US$200 to US$255 as the unit price for the deal of 1,000xSanDisks 512GB, which was in great contrast to the €410 per piece that was transacted as noted by Mr Puzey who put the question forward to Patel in cross-examination. Even if we were to consider the possibility that Patel's given answer was referential to 1,000 SanDisk Extreme Pro 256GB (instead of 512GB), which was transacted at around €200 per unit (see §81) and would equate more closely to the US$200 to 255 per unit, it was an altogether different currency when all transactions had been consistently dealt in Euros.

(3) When Patel was asked to provide a letter to HMRC in February 2016, he focused on Hi-View as the trading partner in this supposed deal that he had set up, but there was no equivalent contemporaneous email from Patel to Hi-View as a trading entity already known by Patel, (as the 'Jack meet Matt' email written by Patel to Matt Jones of ODL).

(4) Patel did not mention the directors' names he dealt with at Hi-View although he stated that he knows them; nor did he name any of the contact persons such as Javier Saenz, Gursharan Jhookie as its CEO, or Billy J, who was consistently copied in Javier's emails to Orton.

(5) Patel's letter of February 2016 was not on any headed paper, nor did he respond to Orton's specific question as regards Patel's position in Beta Distribution. Patel did not refer to CMS Peripherals either, although he did refer to 'various positions within the IT distributors' he had been employed in.

(6) Companies House records show that Mr Patel is not listed as a director of Beta Distribution Plc, CMS Peripherals Ltd, or CMS Distribution Ltd (formerly named CM Peripherals), which suggest that Mr Patel was an employee of these companies.

(7) The most significant anomaly in Patel's letter provided in February 2016 is that he claimed he '*had a call from SanDisk the supplier who informed me that our contract was to supply UK customers only*'. This claim had no factual basis in relation to the trading parties in the deals supposed to have been set up by Patel, since the immediate supplier of the SanDisk SD cards was Online Distribution, which was in turn supplied by SD 2013 or Global SFX in all the deals. SanDisk simply did not appear in the supply chains, so it is incredible that SanDisk would have called Patel regarding these deals, or that there would have been a contract between SanDisk and Mr Patel, or Patel's employer, whether it was Beta Distribution or CMS Peripherals.

229. From obtainable facts, and inferences drawn from the conspicuous absence of contemporaneous documentation to evidence any deal having been set up by Patel, we make the principal finding of fact that *no deal* had been set up by Patel, prior to Beigebell's involvement in 'these deals'.

230. The principal finding of fact is contrary to the central pillar relied upon by the appellant. The whole edifice of the appellant's innocence was predicated on a deal (or deals) having been set up by Patel, which Patel's employer could not fulfil due to channel ethics. Without this foundational fact that there was a deal already set up by Patel which Beigebell simply took over at the last minute, the appellant's positive case of innocence crumbles.

231. Given that the appellant has failed to prove, on the balance of probabilities that there had indeed been a deal (or deals) set up by Patel, the channel ethics explanation is rendered completely irrelevant. In other words, since we cannot make a finding of fact that there had been deals set up by Patel, there would have been no need for Patel to produce a channel ethics explanation. Whilst it is unnecessary for the Tribunal to consider whether the channel ethics explanation is credible, for completeness, we will consider the channel ethics explanation in the process of evaluating the witness evidence adduced for the appellant.

Evaluation of witness evidence

Patel's evidence

232. The evidence emanating directly from Patel consists of: (a) the contemporaneous email of 'Jack meet Matt' of 19 August 2015, (b) the letter provided in February 2016, (c) the witness statement of 11 March 2021, and (d) Patel's oral evidence at the re-hearing.

233. Of the four items from evidence emanating from Patel, we have accorded most weight to the 'Jack meet Matt' email for its contemporaneity, and for its significance in relation to the inference drawn from the conspicuous absence of any other contemporaneous documents emanating from Patel.

234. In the light of our foregoing conclusion that no deal had been set up by Patel, the substance of Patel's letter provided in February 2016 (item (b)) appears to be entirely dubious. This letter would appear to be the first time the channel ethics explanation was mooted, and in this letter, Patel made some factually unsubstantiated claims that:

(1) Patel received a call from SanDisk – but SanDisk was factually not in any of the transaction chains.

(2) Patel was asked by Hi-View to find a partner – but there was no evidence of any pre-existing trade contact between Patel and Hi-View, and as a matter of fact, Hi-View introduced itself to Beigebell to open an account, and was not introduced by Patel.

(3) If Patel could help find a partner who could supply these products at the *agreed* margin as Hi-View had already pre-sold the goods – but the email communications between Orton and Hi-View did not evidence any margin was *agreed* nor Hi-View having already pre-sold the goods (given the mismatch in the quantity requests).

235. The appellant's evidence has been consistent that Patel did not receive any monetary reward from these deals. However, it is also the appellant's case that Patel presented Beigebell with these deals on the pretext of channel ethics thwarting Patel's completion of these deals. In a nutshell, Beigebell's case of its innocence in being involved in these deals is premised on Patel having duped Orton with the channel ethics explanation for thwarting Patel's sales efforts.

236. If Patel's involvement did not extend to setting up a deal (or deals) for Orton to take over, it calls into question whether the channel ethics explanation would have originated with Patel. That is to say, if Patel did not set up any of these deals in the first place, why would Patel need to give a channel ethics explanation as thwarting these deals for Beigebell to become involved?

237. Orton's evidence kept referring to trusting Patel, and in that trust of Patel lay his own innocence. When Patel was asked to provide the February 2016 letter by Orton, it was to introduce the channel ethics explanation into the documentary evidence that would come to be

relied upon to construct the case of the appellant's innocence. Since the appellant's innocence is predicated on having been duped by Patel, what Patel was asked to provide in the February 2016 letter was in effect admitting to having duped Orton with the channel ethics explanation into these fraudulent deals.

238. When Orton was asked in 2019 why Patel was not called as a witness, his reply was: 'I'm not sure the account he has given is true' (SB/246/19). When Patel was called as a witness for the re-hearing, Patel was asked presumably to give evidence to support the appellant's case of innocence, which effectively would have required Patel to admitting he had been a liar, a deceiver, for bringing 'the first part of these deals to [Beigebell]' (Orton: SB/246/18) on the false pretext of channel ethics. It is an invidious position for a witness to hold; that is to come to a trial as a witness of truth knowing that ultimately, he had to admit to have been a liar, a deceiver in order to make his evidence effective for the party which had called him.

239. Our primary finding of fact is that there was no deal having already been set up by Patel; hence, the channel ethics explanation had no relevance to Beigebell being in these transactions. Furthermore, the validity of the channel ethics explanation hinges on SanDisk being in the transaction chains, and as SanDisk was not in any of the deals, the channel ethics explanation has no factual basis whatsoever. The explanation was a fabrication right from the beginning, and Patel, or whoever was the original source of the explanation, knew of its fabrication.

Worthington's evidence

240. The reason for calling Worthington would be to lend credence to the channel ethics explanation as thwarting the alleged deal(s) set up by Patel. To that end, however, it is unclear how Worthington's evidence would assist the appellant's case of innocence. Mr Worthington was not called as an expert witness, and he had quite correctly refrained from making any direct assessment whether the channel ethics explanation was credible given the factual matrix of the deals. Nor should the Tribunal attempt to apply what Mr Worthington stated as a witness of fact to the facts in question to adjudge whether the channel ethics explanation was so highly convincing as to make Orton being duped by Patel eminently understandable.

241. Online Distribution was not an authorised distributor as confirmed by Officer Boyko's evidence, which meant channel ethics simply did not apply to the transactions in question. Further, and taking Orton's evidence on its own terms, *viz*. he could not say if ODL was an authorised distributor and Hi-View an end-user, then Worthington's evidence was irrelevant.

Griffiths' evidence

242. Whilst we have no issue with Mr Griffiths' credibility as a witness, his evidence is of limited relevance to the substantive issue in this appeal, since it is not Mr Griffiths' state of knowledge that is attributable to the appellant company for the purposes of the *Kittel* test. There is no dispute between the parties that for the purposes of the *Kittel* test, it is Mr Orton's state of knowledge which is attributable to the appellant by the ordinary principles of attribution.

243. Insofar as Mr Griffiths' evidence is relevant to the substantive issue under consideration, it is in highlighting the abnormality of the transactions in question, which were not dealt with by Mr Griffiths who would be the person who would have dealt with the sales in the normal course of business.

244. Finally, we do not find Mr Griffiths' evidence reliable to the extent that he sought to assert that he had spoken to Patel on a few occasions to reassure himself. He was unable to give any particulars as to what he tried to ascertain with Patel to reassure himself, and his evidence in this respect would seem to be at odds with what HMRC were given to understand during the first two visits as highlighted in Officer Redman's witness statement (see §174(1)).

Orton's evidence

245. In evaluating Mr Orton's evidence, we give more weight to the contemporaneous records, and the email exchanges in the course of conducting the transactions. In considering whether Mr Orton was a reliable or credible witness, we have regard to the numerous inconsistencies in his evidence, and one cohort of inconsistences serves well for illustration.

(1) HMRC's first visit report recorded Orton as saying that Patel '*introduced*' Beigebell to 4 wholesale deals. The choice of word 'introduced' would most likely to have been Orton's, and indeed 'introduced' accords more closely to the context of the 'Jack meet Matt' email of 19 August 2015, in which Patel used the term 'these deals' to refer to the wholesale deals in the plural.

(2) However, in HMRC's second visit report recorded Orton as saying that Patel 'had completed these deals' on behalf of Beta Distribution. There were two significant changes to the factual content: (a) from 'introduced' the deals to 'had completed'; (b) CM Peripherals changed to Beta Distribution.

(3) What is there in the name of Patel's employer? It seems to us, that if there were indeed deals completed for Beta Distribution that Beigebell took over, it would not be unreasonable to expect Orton to have the correct employer's name right at the start, since Patel's employer was allegedly the trading party in these completed deals.

(4) The conspicuous lacuna in Orton's evidence is that he had not in his possession any documentation of these deals allegedly completed for Patel's employer to show. If Orton was indeed taking over the four wholesale deals completed by Patel, it would not be unreasonable to expect that he would have asked for the details of the terms and conditions of these deals so that he knew what he was taking over; and the name of Patel's employer would surely have featured in the documentation.

(5) The vague term 'conflict of interest' was given by Orton at HMRC's second visit why the completed deals were aborted by Patel's employer, which was then elaborated into the channel ethics explanation first mooted in Patel's letter of February 2016. If Orton had been duped into entering these deals because he found Patel's channel ethics explanation so convincing, it is peculiar that this very specific explanation by reference to 'channel ethics' was not provided at the first HMRC's visit. An innocent party who had been duped by a specific explanation framed by reference to 'channel ethics' would most likely have remembered the specific term than the mere phrase 'conflict of interest'.

(6) At the 2019 hearing, Orton's evidence was that all the deals had been set up by Patel and that Beigebell was drafted in to complete the deals due to channel ethics issues.

(7) At the re-hearing, Orton's oral evidence was that there was ***one*** deal (not four as stated to HMRC) having been completed by Patel, and admitted to being responsible for the other deals after the initial deal.

246. There are other inconsistencies in Mr Orton's evidence, such as the changing accounts on the insurance position for the goods: (a) 28 August 2015 email to Hi-View: Beigebell 'can't get insurance to ship the goods'; (b) 16 February 2016 to HMRC – no insurance was taken out as Orton assumed the goods were covered by Flight Logistics; (c) in evidence at re-hearing – insurance not a concern for Beigebell as goods being moved direct from ODL to Hi-View. It is not that any one of these positions were implausible as concerns insurance, but it undermines the credibility and reliability of Mr Orton's overall evidence as a whole.

247. The changing account of the insurance position is to be considered in conjunction with the dearth of documentation in relation to Beigebell's contractual arrangements with Flight Logistics, and the supposed 'collection paperwork' created by Orton has never been produced.

248. The cross-examination of Orton on the insurance position eventually led to his admission at the re-hearing that: '*As it turned out – as the process went on – it transpired that not all had been set up*.' In terms of timeline, this admission of what transpired as the process went on would have been back in August/September 2015, and yet Mr Orton's evidence (subsequent to this realisation at the time) continued to assert that there had been a deal (or deals) set up by Patel which Beigebell took over. In short, Mr Orton's evidence contradicted itself on the assertion that there had been a deal/ deals set up by Patel.

249. The transcript of the second telephone call to HMRC by Orton to enquire whether SD memory cards come under the reverse charge is clear evidence that Orton did make the enquiry at the relevant time specifically in relation to the product that was concerned in the fraudulent transactions. In the application to lodge further documents for the re-hearing, Mr Orton sought to refer to his enquiry phone call on the reverse charge relied upon by HMRC as being in relation to a different customer Servium, and exhibited the emails with dates from June 2015 (§18(1)). The application was made before the transcript of the *two* phone calls was produced by HMRC, since only Officer Redman's summary of the first phone call was included in the 2019 Hearing Bundle. It is disturbing to note that in the appellant's application, part of Mr Orton's additional evidence was in fact to assert that the enquiry on reverse charge was for a different supply, and totally unrelated to the transactions on the SD memory cards.

250. Apart from the enquiry to HMRC to clear the reverse charge position on SD memory cards, from the contemporaneous exchanges of emails, after Patel's 'Jack meet Matt' email, Orton demonstrated initiative, agency, in his communications with Matt of ODL, Javier of Hi-View, and Flight Logistics. The email exchanges evidence Orton fixing the unit price, going between ODL and Hi-View to confirm the quantities of stock, checking on the 'trading habits' of Hi-View with Matt of ODL,. chasing for settlement of invoices from Hi-View, looking into insurance position, arranging 'collection' of consignment direct from Flight Logistics. From these email communications with the trading parties and freight forwarder, Orton was firmly in the driving seat moving the transactions forward; he was not a passenger being carried along in these deals allegedly already set up by Patel.

251. Given the foregoing, we find Mr Orton to be neither credible nor reliable as a witness. Overall, his evidence lacks integrity due to inherent contradictions, and unreconcilable inconsistencies on alleged key facts. Fundamental to the appellant's case of innocence is the assertion that Patel had set up a deal (or deals) which Beigebell took over. For the reasons stated, having taken into account the totality of evidence, we have made a finding of fact contrary to the appellant's asserted fact, and the corollary that Mr Orton had been duped into these fraudulent deals by Patel cannot be established either.

Whether actual knowledge

Attribution of knowledge

252. Mr Orton, as the director of the appellant, undertook, and was responsible for the transactions that are subject to the *Kittel* denial. The appellant does not dispute that Mr Orton was the principal as concerns the relevant deals, and it is Mr Orton's state of knowledge which is attributable to the appellant company for the purpose of the *Kittel* test.

253. As set out above, we reject the positive case of innocence being advanced for the appellant. The issue turns on the evidence of Mr Orton and his explanation for the circumstances of these transactions. To determine the appeal, it remains to be considered whether the respondents have discharged the burden that the appellant had actual or constructive knowledge that the transactions in question were connected with fraud.

Kittel test of state of knowledge

254. The case law principles as concerns the state of knowledge in a *Kittel* denial which are relevant to our consideration are as follows.

(1) The '*means of knowledge*' as expounded in *Mobilx:*

> '[51] … in *Optigen*[8], the Court ruled that despite the fact that another prior or subsequent transaction was vitiated by VAT fraud in the chain of supply, of which the impugned transaction formed part, the objective criteria, which determined the scope of VAT and of the right to deduct, were met. But they limited that principle to circumstances where the taxable person had "no knowledge and no means of knowledge" (at [55]). The Court must have intended *Kittel* to be a development of the principle in *Optigen*. *Kittel* is the obverse of *Optigen*. The Court must have intended the phrase "knew or should have known" which it employs in §59 and §61 in *Kittel* to have the same meaning as the phrase "knowing or having any means of knowing" which is used in *Optigen* (at [55]). (Underlining added)
>
> [52] If a taxpayer has the means at his disposal of knowing that his purchase he is participating is 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 criteria which must be met before his right to deduct arises.' (Emphasis added)

(2) In *Mobilx*, Moses LJ addressed the substance of what a trader knew or should have known in order to found a *Kittel* denial:

> '[56] … 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 [*Blue Sphere*]:-
>
> > "The relevant knowledge is that [Blue Sphere] 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." [*Blue Sphere* at [52]] (Emphasis added)

(3) The '*only reasonable explanation*' principle as concerns the state of knowledge is stated by Moses LJ in *Mobilx* in terms as follows:

> '[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*.' (Emphasis added)

[8] C-354/03 *Optigen Limited v Customs and Excise Commissioners* [2006] ECR I-483. The ECJ's judgment in *Optigen* was handed down on 12 January 2006 by the third chamber of the court, four out of the five judges of which heard the case of *Kittel* and handed down their judgment six months later, on 6 July 2006. Moses J observed at [21] of *Mobilx* that it is not surprising that the court's reformulation of the questions in *Kittel* and its answers depended strongly on its approach in *Optigen*.

(4) Moses LJ continued in *Mobilx* to distinguish the nuanced state of knowledge in circumstances which the *Kittel* principle does not extend to cover.

> '[60] … *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.' (Emphasis added)

(5) In assessing whether the trader's knowledge met the 'no other reasonable explanation' standard, the Tribunal is to consider all the circumstances: *Davis & Dann* –

> '[65] … The question is whether or not a reasonable person mindful of those circumstances ought to have concluded that the Transactions were connected with fraud. What matters is the perspective of the person alleged to have such knowledge. A finding of knowledge to the no other reasonable explanation standard can accordingly be reached irrespective of whether the other parties the Transactions were in fact fraudulent.'

255. The Tribunal hearing the case will be entitled to rely on inferences drawn from the primary facts established by HMRC to determine whether the Appellant had actual or constructive knowledge of its transactions being connected with VAT fraud. From the approach taken by Clark J in *Red12* at [109] to [111], which was approved by the Court of Appeal in *Mobilx* at [83], it is clear that the Tribunal should not unduly focus on whether a trader has acted with 'due diligence', but should consider the totality of the evidence, including circumstantial and 'similar fact' evidence. On the question of proof, the guidance from *Mobilx* is as follows:

> '[82] … Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected with fraudulent evasion of VAT. …'

Due diligence checks

256. Mr Orton admitted to HMRC that there had been 'no real checks' carried out on Beigebell's supplier and customer, because there was no immediate risk given that Beigebell was paid upfront. However, we do not consider that the exclusive focus on the elimination of the financial risk of non-payment by a customer to be a reasonable explanation of the lack of due diligence. In fact, there are obvious pointers of anomalies of ODL and Hi-View that should have alerted to a potential trading partner of the unexplained circumstances of the transactions.

257. We have regard to the numerous means of knowledge available to the appellant as set out in Mr Puzey's closing submissions (see §183). Apart from exchanging basic VAT information, there was no evidence of any questions having been asked by Beigebell regarding the actual details of the deals, such as terms and conditions, returns policy, insurance specifications, level of cover in transit and at freight forwarders. In the context of our primary finding of fact that no deals had been set up by Patel for Beigbell to take over, we find therefore that Mr Orton had no basis to rely on the foil of Patel as a trusted friend to absolve himself of the obligation to carry out the requisite due diligence.

258. We conclude that the due diligence carried out by Beigbell on ODL and Hi-View to be woefully inadequate, especially in view of the obtainable facts that (a) Beigebell had no previous experience trading in these commodities; (b) the deals were high-volume, high-value transactions; (c) ODL and Hi-View had not hitherto traded with Beigebell.

259. There were numerous obvious pointers of inexplicable anomalies of the two entities in these deals as trading partners to alert an experienced businessman such as Mr Orton of the irregularities of these deals. Mr Brown has referred to *Mobilx* at [82] as suggesting that the Tribunal should not unduly focus on whether a trader had acted with due diligence. We do not consider that *Mobilx* at [82] means that the Tribunal should ignore the role of due diligence. Rather, *Mobilx* at [82] is making it clear that even if a trader has carried out due diligence by asking appropriate questions, the due diligence measures do not exempt the trader from also having to pay heed to the circumstances that would point to the contrivance of the transactions.

Circumstances indicative of contrivance of the transactions

260. We find that there were circumstances that pointed inexorably to the contrivance of the transactions. One such example is the various trade names being tendered by Matt Jones of ODL to Orton, as Tradesales, Saverstore (which Orton himself used in email see §158(6)), but Orton was totally nonchalant as concerns the various trade names used by ODL, and was unconcerned when he was directed by Matt Jones to use 'Create Leisure' to open an account with Flight Logistics. When asked why he would use 'Create Leisure' with no questions raised, he replied: '*I don't pay much heed to it*; Online Distribution or SaverStore being their retail operation; maybe this is another trade name; it is not significant to me' (§156).

261. The nonchalant attitude to the changing trade names of ODL is to be considered against the due diligence documentation ostensibly being relied on by Orton in verifying the entity as Beigebell's supplier. We also have regard to the following circumstances that pointed to the contrivance of the transaction chains in question.

(1) *Departure from the appellant's normal trade practice and pattern* – the appellant's business was in fact the sale of promotional merchandise. The memory card purchases boosted its turnover in VAT period 10/15 to a level well beyond what it had ever attained before, and ensured a £30,000 net profit for a little over two weeks' work by one person.

(2) *Lack of contracts* – Orton admitted that no contracts were signed because the deals were put together by Patel. Given our finding of fact that there had been no deals set up by Patel, the lack of contracts without raising any concerns for Orton is inexplicable. Formal written contracts would be part and parcel in genuine commercial transactions to safeguard the parties in relation to returns or exchange policy, to transfer of ownership, payment and delivery terms, and contingencies in failure of performance. The transactions were all of sizeable value, and the absence of contracts cannot be sufficiently explained just because the upfront payments from Hi-View meant that there was no financial risk to Beigebell, as asserted by Orton.

(3) *Terms of conditions from Hi-View* – these were produced to HMRC after the initial visits, but do not appear to have been signed by Beigebell at the time, nor were they mentioned by Orton during the visits.

(a) Paragraph 7.2 requires Hi-View's supplier (i.e. Beigebell) to arrange for transport of the goods and insure the goods from despatch; Beigebell did neither.

(b) Paragraph 9.1 requires Hi-View's supplier to obtain and supply a written acknowledgement from the freight-forwarder that the goods concerned exist, are in his possession, and are currently he property of the Supplier and that he has full title of the goods'. There is no evidence of such written acknowledgement.

(c) In any event, Beigebell only paid ODL after it had been paid by Hi-View, so would appear not to have title of the goods at the time when it sold the goods to Hi-View, which was another anomaly.

(4) *Currency of the deals* – the deals were all conducted in Euros , even when the traders such as ODL and Beigebell were UK based.

(5) *Length of the supply chains* – the goods were continually traded on as wholesale transactions without any end user or retailer appearing in the long supply chains; the long supply chains do not make normal business sense, and Mr Worthington's evidence confirms as much. Beigebell was aware of the continually wholesale nature of the transactions from ODL to Beigebell to Hi-View, which was in stark contrast to Beigebell's merchandise business supply chain, which consists of manufacturer to Beigebell to end user.

(6) *Insurance cover* – Beigebell did not seem to have arranged for any insurance cover for the high-value goods in these fraudulent transactions, in contrast to the robust insurance procedure in operation for the appellant's merchandising business. For such high value commodities Beigebell could be expected to cover itself adequately in case of any eventuality. The reason for not obtaining insurance cover for these transactions was suggestive that Beigebell was given assurance that it would be guaranteed payment.

(7) *Mark ups* – as emphasised by HMRC, a much larger mark-up was applied by Beigebell (3.23% in Deal 2 and 3.62% in all other deals) in contrast to the margins for the buffer traders in the defaulter deals (ranging from 0.5%, 0.95% and 1.01%), and in the contra deals, 0.25% for the contra-trader, 1.19% for Beigebell's customer, and 1.62% for first line buffers. There is no obvious commercial reason for Beigebell's mark up being about 3 times that of the other traders in the chains, when all UK-based wholesalers were competing in the same market and when Beigebell was not adding any value to the products in the transactions. The consistency of higher mark-up by Beigebell regardless of the product being sold supports the view that these were not commercial transactions.

(8) *Payments for purchases* – the appellant's euro account bank statement shows that Hi-View paid Beigebell on 28 August 2015 and 4 September 2015, days before the goods were collected by D&D Trading Poland on 7 and 8 September 2015, while ODL was paid 1-4 days after Beigebell was paid. Hi-view took a high risk to pay upfront before the goods were dispatched, given that it had never traded with Beigebell before.

(9) *Inspections* –records of Orton signing into Flight Logistics on 1 and 7 September 2015 are produced, but no inspection reports, or any description of the products for his own records have been produced. Further, Orton had never traded in these goods before, it is unclear how he would be able to verify the state of the goods without previous experience. HMRC also question why Flight Logistics would allow for traders to come in and open boxes without any records being kept of these actions since it could have consequences for their reputation as a freight forwarder.

(10) *Delivery of goods* –Beigebell never took delivery of the goods from ODL, and never arranged for onward delivery of the goods to its supposed customer, Hi-View. The goods were delivered to Flight Logistics by ODL, and in turn collected by D&D Trading. Further, Beigebell did not despatch the first order immediately, and all deals went in one go in the end, which suggests that Beigebell knew at an early stage that there would be a number of transactions with Hi-View.

(11) *Goods shipped direct to Poland* – Beigebell's direct customer Hi-View was supposed to be based in Spain, but Hi-View never took delivery of any of the goods. Beigebell was fully aware of the stock in every single deal was taken direct to Poland.

(12) *CMR form and delivery notes* – The CMR form, signed at collection, has been produced but it was not signed on delivery. The delivery notes were requested only after

the denial of the repayment and not at the time goods were delivered. Mr Orton did not request evidence of delivery, saying that because Beigebell had already been paid. However, this did not explain why he did not want to check that Beigebell had fulfilled its obligations as the supplier to Hi-View.

An orchestrated scheme to defraud

262. The deal chains had many features in common, and these features are not associated with genuine commercial dealings, and are indicative of a scheme in operation. The features we have regard to include: (a) in every chain, the immediate entity with which the appellant traded with was Online Distribution, (b) apart from the defaulting trader at the end of the chain, the entities in Deal 2 were identical to those in Deal 3B; (c) the entities in Deal 3B were identical to Deals 4 and 5; (d) Deal 1 and Deal 3A differed in the entities at the commencement and the end of the respective chains; the buffer and broker chain were identical in Deals 1 and 3A. (e) Beigebell, acted as the broker in each of the five chains

263. The deal chains in question were all back-to-back in nature, with high volume of goods in exact quantity and exact stock description being moved down the chains in quick succession. Some of the deal chains in question involved contra-trading, which as Hildyard J in *Edgeskill Ltd v HMRC* [2014] UKUT (TCC) described at [3], 'is a sophisticated stratagem calculated to disguise or camouflage Missing Trader Inter-Community Fraud ("MTIC fraud" or "carousel fraud")'. The more sophisticated the strategy, the more heavily orchestrated and efficient a fraudulent scheme is, and the more likely it is that each party knew its role therein.

264. This is a case where there was an orchestrated scheme to defraud the Revenue, and Beigebell acted as the broker in these deal chains. In *Pacific Computers* where HMRC had relied on meeting the burden of proof on the fourth element of the *Blue Sphere* test by reference to the level of orchestration, the Upper Tribunal observed as follows:

> '[76] HMRC's closing submissions invited the FTT to find that the evidence showed that the level of orchestration in the deal chains was very high. It was then submitted that two questions arose: *first, how did the orchestrators of the fraud manage it so well, and secondly how likely was it that an orchestrator of such a fraud would involve an unknowing party and why?* The submission was that the only way in which the orchestrators of such a fraud could ensure a carousel pattern and speed was to tell each party from whom to purchase, to whom to sell and at what price. It was argued that the carousel, circularity and timings that occurred simply could not have happened without that level of instruction. It was further submitted that, because a fraudster would wish to retain control of the component parts of such a fraud, *it was highly improbable that an orchestrator of such a fraud would involve an unknowing party*.' (Italics added)

MTIC awareness and the reverse charge enquiry

265. Mr Orton asserted that he had no awareness of MTIC fraud, and such an assertion was made in the context of his work experience in the IT industry for a considerable period, of his awareness of IT channel ethics but not of the grey market, of his awareness of the reverse charge in relation to an earlier supply of phablets, but not the SD cards. He also sought to dissociate his reverse charge enquiry phone call to HMRC referred to at the 2019 hearing from the supply of SD cards in the deal chains by applying to lodge a second witness statement in which this reverse charge enquiry phone call was specifically addressed.

266. However, Mr Orton's attempt to dissociate the reverse charge enquiry phone call from the SD cards fraudulent transactions is completely overturned by the production of transcript recording his second phone call to HMRC, which conclusively establishes the link between the 25 August 2015 phone call enquiring on the reverse charge with the supply of SD cards.

267. As Mr Puzey submits, it goes to the heart of Mr Orton's credibility whether such an assertion of complete ignorance of MTIC fraud is credible. We do not find Mr Orton's assertion of ignorance of MTIC fraud credible. The fact that Mr Orton had the foresight to make the reverse charge enquiry phone call on SD cards is indicative of *awareness* of MTIC fraud, although we do not equate an awareness of MTIC fraud as synonymous with actual knowledge that the transactions being undertaken were connected with MTIC fraud.

268. What we find from the reverse charge enquiry specifically on SD cards is that Mr Orton had awareness of MTIC fraud. We also find that the enquiry phone call demonstrates Mr Orton's acumen as a businessman, competent and with foresight, able to take timely, pre-emptive, and proactive measures as required by a situation if he so applies his mind to do so.

Conclusion on actual or 'blind-eye' knowledge

269. In the High Court decision of *Megtian*, Briggs J referred to *Arif (t/a Trinity Fisheries) v HMRC* [2006] EWHC 1262 (Ch) at [22], where Lewison J pertinently stated:

> '… [In relation to] the evaluation of circumstantial evidence, Pollock CB famously likened circumstantial evidence to strands in a cord, one of which might be quite insufficient to sustain the weight, but three stranded together might be quite sufficient (*R v Exall* (1866) 4 F&F 922). Thus there can be no valid criticism of a tribunal which considers that one piece of evidence, while raising a suspicion, is not enough on its own to find dishonesty; but that several such pieces of evidence, taken cumulatively, lead to that conclusion.'

270. After careful consideration of the totality of the circumstantial evidence, we conclude that there is sufficient weight from the cumulative effect of the evidence that HMRC have met the burden of proof that Mr Orton had actual knowledge that the transactions undertaken by Beigebell were connected with fraud. It is unnecessary to establish that Mr Orton knew the details of the transaction chains upstream and downstream or which other entities were involved, as observed by Brigg J in *Megtian*:

> '[37] … in 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.'

271. Brigg J referred to blind-eye knowledge as a form of knowledge. It is apt to cite what Lord Scott stated in *Manifest Shipping Company v Uni-Polaris* [2001] UKHL 1 for a definition:

> '[112] "Blind-eye" knowledge approximates to knowledge. Nelson at the battle of Copenhagen made a deliberate decision to place the telescope to his blind eye in order to avoid seeing what he knew he would see if he placed it to his good eye. It is, I think, common ground – and if it is not, it should be – that an imputation of blind-eye knowledge requires an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence. Lord Blackburn in *Jones v Gordon* (1877) 2 App Cas 616, 629 distinguished a person who was "honestly blundering and careless" from a person who "refrained from asking questions, not because he was an honest blunderer or a stupid man, but because he thought in his own secret mind – I suspect there is something wrong, and if I ask questions and make farther inquiry, it will no longer be my suspecting it, but my knowing it, and then I shall not be able to recover". Lord Blackburn added "I think that is dishonesty".'

272. Mr Orton had repeatedly asserted that he had no actual knowledge of the transactions being connected with fraud, and that Beigebell had no good reason to participate knowingly in these fraudulent transactions for the sake of €30,000 profit. We also have regard to what HMRC recorded in their first interview of Orton in December 2015, when Officer Cole stated in the report that Orton 'readily admitted' that he had done 'no real checks', that 'these transactions were different and much larger than anything' Beigebell had done before, and it was 'an easy deal for a quick profit' (§73).

273. While Orton has sought to challenge Officer Cole's report with his application to lodge a second witness statement, the wording of the report of these factual admissions being readily given by Orton, paradoxically lends some credence to Orton's lack of actual knowledge in contrast to his outright denial of MTIC awareness, or his assertion of innocence as being duped by the fabricated explanation of channel ethics. It is a paradox because on one interpretation, a person with actual knowledge that the transactions were connected with fraud *probably* would not have admitted to HMRC readily in the first instance that 'no real checks' were done, and the transactions being wholly different from and larger than the normal trade, and conceded to it being 'an easy deal for a quick profit'.

274. If we were to consider the argument that no one with actual knowledge of the transactions being connected with fraud would have taken the risk of losing £144,628 for the sake of €30,000 quick profit, that argument in itself has some force in suggesting the absence of actual knowledge. The foregoing, however, leads us to the inevitable conclusion that Mr Orton had blind-eye knowledge as defined by Lord Scott, which approximates to knowledge, and that there was an amalgam of suspicion that certain facts may exist and a decision to refrain from taking any step to confirm their existence.

275. We consider Mr Orton to be a competent, knowledgeable, and experienced businessman. It is probable that Mr Orton, on the basis of having been introduced to these deals by Patel, found the pretext to put the telescope to the blind eye, and ignored all signs that warned him of anomalies. We find therefore that even if Mr Orton had no actual knowledge of the transactions being connected with fraud, he had blind-eye knowledge of such connection. By Mr Orton's own admission to the trial judge in 2019: 'towards the end of it, with the whole delivery situation, yes, that didn't sit well with me, but at that point, the stable doors are kind of open.' In conclusion, we find Mr Orton to have actual or blind-eye knowledge that the transactions undertaken by Beigebell were connected with fraud.

Whether constructive knowledge

276. The state of knowledge apposite to the *Kittel* test 'embraces not only those who know of the connection but those who "should have known"'. In *Megtian* Briggs J articulated the differences between the two different states of mind designated as 'knew' and 'ought to have known' in the following terms:

> '[41] … although the phrase "knew or ought to have known" slips easily off the tongue, that when applied for the purpose of identifying the state of mind of a person who has participated in a transaction which is in fact connected with a fraud, it encompasses two very different states of mind. A person who knows that a transaction in which he participates in connected with fraudulent tax evasion is a participant in that fraud. That person has a dishonest state of mind. By contrast, a person who merely ought to have known of the relevant connection is not dishonest, but has a state of mind broadly equivalent to negligence.'

277. In Mr Orton's witness statement, he referred to being assured Matt Jones of ODL of the 'buying habits' of Hi-View (§144). It was another instance which illustrates Mr Orton's ability to exercise foresight in finding out what he considered to be important, that Beigebell would

be paid upfront by Hi-View. However, the ascertainment of Hi-View's buying habits from ODL should have made him question why it was necessary for Beigebell to be inserted between ODL's supply to Hi-View. Whilst Orton was keen to be assured by ODL of Hi-View's buying habits, he did not question why ODL was not supplying Hi-View directly, and instead, would allow the additional stage of trading for Beigebell to mark up the goods by more than 3%.

278. Aside the fact that ODL and Hi-View had traded before, circumstantial factors as set out above indicative of the contrivance of the transactions were all means of knowledge available to Mr Orton to discern that the transactions in question were so devoid of commercial reality that the 'only reasonable explanation' was that they were connected with fraud.

279. We have made findings of fact that there were no deals set up by Patel for Beigebell to take over, and that the channel ethics explanation was a fabrication first mooted in Patel's February 2016 letter provided to Orton on request. So, when Mr Orton was entering into the transactions at the time, there were no deals and there was no channel ethics explanation on the one hand, and there were means of knowledge available to him on the other hand which Mr Orton had failed to deploy.

280. In conclusion, the orchestration of the deal chains in question was at such a level that Mr Orton should have known that 'the only reasonable explanation' was that the transactions were connected with fraud, even if we have not been able to conclude that he knew that the transactions were so connected. HMRC have met the burden in relation to the 'only reasonable explanation' standard as set out in *Davis & Dann*, and we find that if Mr Orton had deployed the means of knowledge available to him, he 'should have known' that the only reasonable explanation for the transactions in question was that they were connected with fraud.

DISPOSITION

281. The transactions as detailed at §72 were connected with fraudulent evasion of VAT, and this was a fact that the Appellant, Beigebell Limited, (through the knowledge of Mr Jack Orton as its director) both knew and should have known. The appeal is accordingly dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

282. 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.

DR HEIDI POON
TRIBUNAL JUDGE

Release date: 03rd APRIL 2023

ANNEX I

The authorities lodged are listed chronologically with their short case references in brackets.

(1) *Georgiou (t/a Mario's Chippery) v C&E Comrs* [1996] STC 463 ('***Georgiou***')

(2) *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 ('***Wisniewski***')

(3) *Livewire Telecom and Another v HMRC* [2009] EWHC 15 (Ch)

(4) *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (Case C-439/04 & C-440/04) [2008] STC 1357 ('***Kittel***')

(5) *Blue Sphere Global Ltd v HMRC* [2009] EWHC 1150 (Ch) ('***Blue Sphere***')

(6) *Red 12 Trading Ltd v HMRC* [2009] EWHC 2563 (Ch) ('***Red 12***')

(7) *Mobilx Ltd (in administration), Blue Sphere Global Ltd and Calltel Telecom Ltd and Another v HMRC* [2010] EWCA Civ 517, [2010] STC 1436 ('***Mobilx***')

(8) *Wetton v Ahmed* [2011] EWCA Civ 610 ('***Wetton v Ahmed***')

(9) *HMRC v Fairford Group* [2014] UKUT 0329 (TCC) ('***Fairford***')

(10) *Edgeskill Ltd v R&C Comrs* [2014] STC 1174 ('***Edgeskill***')

(11) *S&I Electrical plc v HMRC* [2015] UKUT 0162 (TCC) ('***S&I Electrical*** ')

(12) *Davis & Dann Ltd & Anor v HMRC* [2016] EWCA Civ 142 ('***Davis & Dann***')

(13) *HMRC v Pacific Computers Limited* [2016] UKUT 350 ('***Pacific Computers***')

(14) *HMRC v Citibank NA, E Buyer UK Ltd* [2017] EWCA 1416 (Civ) ('***Citibank***')

(15) *Synectiv Ltd v HMRC* [2017] UKUT 0099 (TCC) ('***Synectiv***')

The additional authorities referred to in the decision are:

(16) *Megtian Ltd (in administration) v HMRC* [2010] EWHC 18 (Ch), [2010] STC 840 ('***Megtian***')