# TC03052

**Appeal number: TC/2011/06397**

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

**FIRST-TIER TRIBUNAL**
**TAX CHAMBER**

**JIM TONER & CIARAN DOHERTY**
**t/a**
**THE SOFT DRINKS COMPANY**

**- and -**

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

**TRIBUNAL: JUDGE J BLEWITT**
**MRS B TANNER**

**Sitting in public at Belfast on 21, 22, 23 and 24 January 2013 and Manchester on 1 February 2013**

**Mr T. Brown, Counsel for the Appellant**

**Mr P. Taylor, Counsel instructed by HM Revenue and Customs, for the Respondents**

## DECISION

### Introduction

1. This is an appeal against HMRC's two decisions contained in two letters to the Appellant dated 19 April 2011 ("the first decision") and 5 October 2011 ("the second decision") to refuse payment to the Appellant of input tax reclaimed on the Appellant's VAT returns for the periods 07/10, 08/10, 09/10, 11/10, 12/10 (the refusal contained in the first letter) and 05/10, 06/10, 07/10, 12/10, 1/11 and 3/11 (the refusal contained in the second letter). The total amount refused is £441,938.74. The disputed input tax was incurred in the purchases of soft drinks in respect of the first decision and soft drinks, razors and soap in respect of the second decision. It is the case for HMRC that the transactions were connected with the fraudulent evasion of VAT; a fact about which the Appellant knew or should have known. The Appellant maintains that it did not know and had no means of knowing that its transactions were connected with such fraud.

2. Mr Taylor of Counsel appeared on behalf of HMRC. Mr Brown of Counsel appeared on behalf of the Appellant. Both produced written submissions which set out the issues to be determined by us. We were also provided with a large number of lever arch files containing witness statements and documentary exhibits relied upon by both parties.

3. We heard evidence from the following witnesses:

- Mrs Heather Ann Arnold, an HMRC Higher Officer who took over responsibility of the extended verification of the Appellant's VAT returns ;
- Mr Ciaran Doherty, Director of Appellant Company;

Other witnesses who were not called to give evidence but whose statements stood as their evidence were:

- Mr Rod Stone OBE, HMRC Officer who provides an overview of the general nature and features of MTIC fraud;
- Ms Ceris Jones; HMRC officer assigned to defaulter Galore Limited ("Galore")
- Ms Anne Marie Brennan; HMRC officer assigned to defaulter Aeris Trading Ltd ("Aeris");
- Mr Harold Kenneway; HMRC officer assigned to defaulter Nicholas Distribution Limited ("Nicholas");
- Mr Kevin Birkin; HMRC officer assigned to defaulter Astontech Limited ("Astontech");

- Ms Patricia Westwell; HMRC officer assigned to defaulter Highgrove Limited ("Highgrove");

- Ms Monica Coker; HMRC officer assigned to defaulter Linkup Solutions Limited ("Linkup");

- Mr Olukemi Aian; HMRC officer assigned to defaulter New Trading World Limited ("NWT");

- Mr Mark Hughes; HMRC officer assigned to defaulter Eurolink Trading Limited ("Eurolink");

- Ms Margaret Clare Brown; HMRC officer assigned to defaulter Landmark Wholesale Limited ("Landmark");

**Issues**

4. On behalf of the Appellant Mr Brown accepted that HMRC had shown that a fraudulent tax loss existed in each of the supply chains and that the Appellant's transactions were connected with fraud.

5. The Appellant also subsequently withdrew its appeal against HMRC's decision that, in respect of 2 deals (deals 35 and 36) there had been no supply on the basis that no evidence was adduced by the Appellant to show that the goods had been imported into the UK.

6. The sole issue for us to decide in this case is whether the Appellant, through Mr Doherty, knew or should have known that its transactions were connected to fraud.

**Missing Trader Intra-Community Fraud: Legislation and Case law**

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

8. That the onus and burden of proof in this type of case rests with HMRC was confirmed by Moses LJ in *Mobilx Ltd and The Commissioners for Her Majesty's Revenue and Customs, The Commissioners for Her Majesty's Revenue and Customs and Blue Sphere Global Ltd, Calltel Telecom Ltd & another and The Commissioners for Her Majesty's Revenue and Customs* [2010] EWCA Civ 517 *("Mobilx")* (paragraph 81 and 82):

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

*But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant...Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed in Kittel, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was"*

9. It may assist in understanding the facts of this case to give a brief overview of Missing Trader Intra-Community Fraud, often referred to as "MTIC" fraud. In *HMRC and Livewire & HMRC and Olympia Technology Ltd* [2009] EWHC 15 (Ch) *at paragraph 1* Lewison J provided this clarification as to the different forms that MTIC fraud can take:

*"i) In its simplest form it is known as an acquisition fraud. A trader imports goods from another Member State. No VAT is payable on the import. He then sells on those goods to a domestic buyer and charges VAT. He dishonestly fails to account for the VAT to HMRC and disappears. The importer is labelled a "missing trader" or "defaulter".*

*ii) The next level of sophistication involves both an import and an export. A trader once again imports goods from another Member State. No VAT is payable on the import. Typically the goods are high value low volume goods, such as computer chips or mobile phones. He then sells on those goods to a domestic buyer and charges VAT. He dishonestly fails to account for the VAT to HMRC and disappears. The domestic buyer sells on to an exporter at a price which includes VAT. The exporter exports the goods to another Member State. The export is zero-rated. So the exporter is, in theory, entitled to deduct the VAT that he paid from what would otherwise be his liability to account to HMRC for VAT on his turnover. If he has no output tax to offset against his entitlement to deduct, he is, in theory, entitled to a payment from HMRC. Thus HMRC directly parts with money. Sometimes the exported goods are re-imported and the process begins again. In this variant the fraud is known as a carousel fraud. There may be many intermediaries between the original importer and the ultimate exporter. These intermediaries are known as "buffers". The ultimate exporter is labelled a "broker". A chain of transactions in which one or more of the transactions is dishonest has conveniently been labelled a "dirty chain". Where HMRC investigate and find a dirty chain they refuse to repay the amount reclaimed by the ultimate exporter.*

*iii) In order to disguise the existence of a dirty chain, fraudsters have become more sophisticated. They have conducted what HMRC call "contra-trading". The trader who would have been the exporter or broker at the end of a dirty chain, with a claim to repayment of input tax, himself imports goods (which may be different kinds of goods) from another Member State. Because this is an import he acquires the goods without having to pay VAT. This is the contra-trade. He sells on the newly acquired goods, charging VAT but this output tax is offset against his input tax, resulting in no payment (or only a small payment) to HMRC. The buyer of the newly acquired goods exports them and reclaims his own input tax from HMRC. Again there may be intermediaries or buffers between the contra-trader and the ultimate exporter. The fraudsters' hope is that if HMRC investigate the chain of transactions culminating in the export, they will find that all VAT has been properly accounted for. This chain of transactions has conveniently been called the "clean chain". Thus the theory is that an investigation of the clean chain will not find out about the dirty chain, with the result that HMRC will pay the reclaim of VAT on the export of the goods which have progressed through the clean chain.*"

10. It was confirmed in the cases of *Kittel v Belgium, Belgium v Recolta Recycling* [2008] STC 1537*("Kittel")*and *Mobilx Ltd (in administration) v HMRC* [2009] STC 1107 that there is no discretion on the part of the Authorities to withhold any tax repayment where the objective criteria for compliance with the VAT regime are met. However where a trader does not comply with the objective criteria because there is a fraud, that trader cannot recover any tax.

11. The case of *Kittel* extended the concept of knowledge to include a trader who should have known that there was a fraud and the test was further clarified and refined by Moses LJ in *Mobilx* at paragraph 24:

*"The scope of VAT is identified in Art. 2 of the Sixth Directive. It applies, in addition to importation, to the supply of goods or services effected for consideration within the territory of the country by a taxable person acting as such. A taxable person is defined in Art. 4.1 as a person who carries out any of the economic activities specified in Art. 4.2. Art. 5 defines the supply of goods and Art. 6 the supply of services. The scope of VAT, the transactions to which it applies and the persons liable to the tax are all defined according to objective criteria of uniform application. The application of those objective criteria are essential to achieve:-*

> *"the objectives of the common system of VAT of ensuring legal certainty and facilitating the measures necessary for the application of VAT by having regard, save in exceptional circumstances, to the objective character of the transaction concerned." (Kittel para 42, citing BLP Group* [1995] ECR1/983 para 24.)

And at paragraph 30:

*"...the Court made clear that the reason why fraud vitiates a transaction is not because it makes the transaction unlawful but rather because where a person commits*

*fraud he will not be able to establish that the objective criteria which determine the scope of VAT and the right to deduct have been met."*

12. The position was summarised by Lewison J in *Brayfal Ltd v HMRC* [2011] UK UT B6 (TCC):

*"While Brayfal's appeal has been making its way through the system, the law has been considered by the courts on a number of occasions. It finds its latest authoritative pronouncement in the decision of the Court of Appeal in Mobilx Ltd v HMRC* [2010] EWCA Civ 517. *This decision was handed down on 12 May 2010, a couple of months after the revised decision of the FTT. That case examined the ramifications of the decision of the ECJ in Axel Kittel v Belgium; Belgium v Recolta Recycling Joined Cases* C-439/04 *and* C-440/04 [2006] ECR 1-6161 *("Kittel"). What the Court of Appeal decided was:*

*A taxable person who knows or should have known that the transaction which he is undertaking is connected with fraudulent evasion of VAT is to be regarded as a participant and fails to meet the objective criteria which determine the scope of the right to deduct. (43)*

*The principle 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. (60)*

*The test is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". (59)*

*…Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focusing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed in Kittel, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was." (82)*

13. We followed the guidance of Christopher Clarke J in *Red 12 Trading Ltd v HMRC* [2009] EWHC 2563 (CH) that the purpose of having regard to the attendant circumstances and context of a transaction was in order to understand the true nature of the transaction, not to alter it (at paragraphs 109 – 111):

*"Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate,*

*from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and 'similar fact' evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.*

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

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

14. We therefore did not view each transaction in isolation as to do so would be an artificial exercise. In our view the surrounding circumstances of each transaction and the totality of the deals were relevant considerations. In considering the knowledge of the Appellant we only took account of information known to Mr Doherty at or during the relevant period; for that reason we were cautious when considering the generic information and opinions provided by Mr Stone as to MTIC frauds, nor did we attach any significant weight to evidence or opinions established with the benefit of hindsight.

15. We adopted the words of Moses LJ in *Mobilx* that the test should not be "over-refined":

*"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…such circumstantial evidence…will often indicate that a trader has chosen to ignore the obvious explanation as to why he was presented with the opportunity to reap a large and predictable award over a short space of time." (paragraphs 75 and 84).*

And agreed with Briggs J in the case of *Megtian Ltd v HMRC* [2010] STC 840 at 851*("Megtian")*:

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

*In the first place, Lewison J was, as he made very clear, addressing the question what had to be demonstrated against an honest broker who was not a dishonest co-conspirator in the tax fraud. In the present case, the tribunal's conclusion, after hearing oral evidence from and cross-examination of Mr Andreou, Megtian's shareholder and principal manager, was that Megtian knew that the transactions on which it based its claim were connected with fraud: see para 112 of the decision. Participation in a transaction which the broker knows is connected with a tax fraud is a dishonest participation in that fraud: see below…*

*Secondly, Lewison J acknowledged that in many if not most cases of contra-trading, the clean chain and the dirty chain were likely to be part of a single overall scheme to defraud the Revenue. As he put it, at [109]: 'Indeed it seems to me that the whole concept of contra-trading (which is HMRC's own coinage) necessarily assumes that to be so.'*

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

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

16. We reminded ourselves of the comments of Judge Bishopp in *Calltel Telecom Ltd v HMRC* [2007] UKVAT V20266 (at 52):

*"It is difficult to see how a trader, entering into a chain of transactions in which every trader accounts correctly for VAT (and which is not tainted for some other reason) could have the means of knowing that it is a device for concealing, or avoiding the consequences of discovery of, another, fraudulent, chain of transactions. Nevertheless it is, we think, possible that a trader could have the means of knowing that, by his*

*participation, he is assisting a fraud. Much will depend on the facts, but an obvious example might be the offer of an easy purchase and sale generating a conspicuously generous profit for no evident reason. A trader receiving such an offer would be well advised to ask why it had been made; if he did not he would be likely to fail the test set out at paragraph 51 of the judgment in* Kittel*."*

**Undisputed Background Facts**

17. Mr Doherty registered for VAT with effect from 28 March 2006 and traded from Unit 6 Rathmore Park, Derry. The main business activity was described on the VAT1 dated 13 February 2006 as *"wholesaling soft drinks"*. An estimated turnover was stated on the VAT 1 as £500,000 and the anticipated value of EU trade was nil.

18. HMRC received a request for Transfer of a Registration number on 16 March 2009 to change the legal entity to a partnership by transferring the VRN from Mr Doherty as sole proprietor to Mr Jim Toner and Mr Doherty as partners. The VAT1 signed by Mr Toner which accompanied the request showed that the VAT on purchases was expected to regularly exceed the VAT on taxable supplies and the reason given was *"Export to EEC"*. The estimated turnover was £2,000,000, purchases from other EU countries were not anticipated and the estimate for sales to other EU countries was £800,000.

19. Mr Doherty and Mr Toner signed a partnership agreement on 15 November 2011 (the commencement date being given as 6 April 2009) which apportioned 95% of the net profits and losses to Mr Toner and the remaining 5% to Mr Doherty. Mr Toner contributed £950 and Mr Doherty £50 of capital in cash and the day to day running of the company would be under the control of Mr Toner or his designate.

20. A change of address was notified to HMRC on 2 March 2009 from Unit 6, Rathmore Business Park, Derry to the Appellant's current trading address of Unit 18, Rathmore Business Park, Derry.

21. The following table shows a summary of the Appellant's turnover from 28 March 2006 to 30 September 2011:

| PERIOD | TURNOVER |
|---|---|
| 05/06 to 02/07 | £761,247 |
| 05/07 to 02/08 | £970,075 |
| 05/08 to 02/09 | £1,899,483 |
| 05/09 to 02/10 | £9,276,225 |
| 03/10 to 02/11 | £7,829,768 |
| 03/11 to 09/11 | £1,951,884 |

22. The total turnover from 28 March 2006 to 30 September 2011 was £21,630,932, 74% of which was achieved between 1 March 2009 and 28 February 2011.

23. HMRC conducted enquiries into the figures declared on the Appellant's VAT returns for the periods 05/10, 06/10, 07/10, 08/10, 09/10, 11/10, 12/10, 01/11 and 03/11 as the transactions were traced back to defaulting, missing or hijacked traders.

24. By Notice of Appeal dated 16 August 2011 the Appellant appealed against HMRC's first decision which refused payment of input tax reclaimed on the Appellant's VAT returns for the periods 07/10, 08/10, 09/10, 11/10, 12/10. The grounds of appeal can be summarised as follows: soft drinks were purchased from different suppliers, one of which was Irwin Enterprises Limited. The validity of Irwin Enterprises and all suppliers' VAT numbers was checked each month and more than adequate due diligence carried out. HMRC undertook a VAT inspection on Irwin Enterprises and the company was given "a clean bill of health". The Appellant is at a loss to understand how HMRC can assess that it knew or ought to have known that Irwin Enterprises was involved in a chain involved with fraudulent tax losses when HMRC itself was not aware of the link to fraud.

25. By Notice of Appeal dated 13 October 2011 the Appellant appealed HMRC's second decision which refused payment of input tax reclaimed on the Appellant's VAT returns for the periods 05/10, 06/10, 07/10, 12/10, 1/11 and 3/11 (the refusal contained in the second letter). The grounds of appeal reiterated those set out in the Notice of Appeal dated 16 August 2011.

**Transactions connected to fraudulent tax losses**

26. Although the Appellant did not dispute that HMRC had accurately traced its supply chains in each of the relevant periods to fraudulent tax losses, it may assist the reader if we briefly summarise those chains and the parties involved.

27. In the VAT period 05/10 15 deals were traced to fraudulent tax losses as follows:

- Deals 1, 2 and 6 to 13 were traced to the defaulter Nicholas Distribution Limited ("Nicholas Distribution");
- Deals 4, 5 and 14 were traced to the defaulter New Trading World Limited ("NTW"); and
- Deals 3 and 15 were traced to the defaulter Astontech Limited ("Astontech").

28. In the VAT period 06/10 19 deals were traced to fraudulent tax losses as follows:

- Deals 16 and 17 were traced to the defaulter Highgrove Upholstry Limited ("Highgrove");
- Deals 23 to 26 were traced to the defaulter Astontech; and

- Deals 18 to 22 and 27 to 34 were traced to the defaulter Nicholas Distribution.

29. In VAT period 07/10 12 deals were traced to fraudulent tax losses as follows:

- Deals 35 and 36 were traced to the defaulter Aeris Trading Limited ("Aeris"); and
- Deals 37 to 46 were traced to the defaulter Galore Trading Limited ("Galore").

30. In VAT period 08/10 9 deals were traced to fraudulent tax losses as follows:

- Deals 47 to 55 were traced to the defaulter Galore.

31. In VAT period 09/10 13 deals were traced to fraudulent tax losses as follows:

- Deals 56 to 68 were traced to the defaulter Galore.

32. In VAT period 11/10 6 deals were traced to fraudulent tax losses as follows:

- Deals 69 to 74 were traced to the defaulter Galore.

33. In VAT period 12/10 4 deals were traced to fraudulent tax losses as follows:

- Deals 75 and 76 were traced to the defaulter Link Up Solutions Limited ("Link Up").
- Deals 77 and 78 were traced to the defaulter Eurolink Trading Limited ("Eurolink"); and

34. In VAT period 01/11 5 deals were traced to fraudulent tax losses as follows:

- Deal 79 was traced to the defaulter Eurolink;
- Deals 80 to 82 were traced to Link Up; and
- Deal 83 was traced to Landmark Wholesale Limited ("Landmark").

35. In VAT period 03/11 10 deals were traced to fraudulent tax losses as follows:

- Deals 84 to 93 were traced to the defaulter Landmark.

*The Appellant's Supplier: Irwin*

36. The Appellant's supplier in all of the deals relevant to this appeal was Irwin. More will be said about the relationship between the Appellant and Irwin later in this decision however it may assist at this point to provide an overview of Irwin and its associated companies.

37. Irwin was formed on 2 June 2005. The director shown at Companies House is Mr Damian Dynes who became a director on 1 December 2008 after the previous director, Ms Niamh Irwin resigned.

38. For reasons that will become apparent, the person who appeared to HMRC to be in charge of the daily running of the company was Mr Feargal Keenan. Mr Keenan had previously been a director of Diamond Marketing Limited; a company which supplied the Appellant during 2009 and about which more will be set out in due course.

39. Irwin rented an office in Armagh and storage facilities at a business trading as Derry Refrigerated Transport. The owner of the latter company is Mr Patrick Derry, Mr Keenan's cousin.

40. Prior to 19 May 2009 Irwin was registered for VAT at 41A Mahon Road, Portadown. A visit to the premises by HMRC revealed that the building was an outhouse which the resident of 41 Mahon Road stated was rented by her brother, Mr Allen, to Mr Keenan.

41. At a visit by HMRC officers on 13 March 2009 Mr Dynes told HMRC that he had become a director of the company in 2008 and that this type of business was new to him. HMRC officers noted that Mr Keenan answered all of their questions and seemed to effectively run the company. In addition to other matters, HMRC officers discussed MTIC fraud at the meeting and Public Notices 725, 726 and leaflet "How to spot missing trader fraud" were issued. Mr Keenan told HMRC officers that he had not visited his customers' premises but relied on verification of VAT numbers. Mr Keenan also stated that Irwin's 2 main suppliers were Simply Direct in Dublin and M2 Services in Crossmaglen. HMRC visited Mr Donal McDonald who ran M2 and were informed that M2 had never traded with Irwin although Mr McDonald did know Mr Keenan.

42. At a further visit by HMRC on 15 September 2010 Mr Keenan again answered the officers' questions and records were uplifted in order to reply to a Mutual Assistance request from the Irish Authorities. It was confirmed that Mr Dynes remained the sole director of the company but that Mr Keenan acted as manager and dealt with the daily operations of the business. Mr Keenan explained that due to difficult personal circumstances, namely a divorce, he did not wish to become a director at that time. He stated that funding was provided by his father who had had injected £100,000 into the business. HMRC officers also discussed Irwin's non-compliance with HMRC's request that VAT numbers be checked at Wigan; Mr Keenan stated that checks would be undertaken in the future although in fact Irwin did not undertake checks until 1 February 2011.

43. Mr Keenan stated that there was always an end user for the goods and that the company did not deal in goods which were nearing their sell by dates. He stated that the company was keen to avoid any connection to fraud although he appeared to officers to have a limited knowledge of Irwin's customers and suppliers. Mr Keenan also informed officers that his suppliers were paid in cash; the money was handed to

the lorry driver using a password and no receipt was received as the transactions were carried out on trust.

44. Irwin purchased either directly from a number of UK suppliers who were defaulting, missing or hijacked traders or from Yasmin or Goldstar who in turn purchased from defaulting traders.

45. At a meeting on 29 February 2012 at which HMRC officers, Mr Keenan, Mr Dynes and Irwin's accountant were present, it was put to Mr Keenan that according to Irwin's records, there were 4 lorry loads of goods delivered on the same day which would have meant that in excess of £800,000 in cash was received on those days. Mr Keenan confirmed that this was correct and stated that the cash came from "sales".

46. Examination of the company's bank account records of cash withdrawals showed references to suppliers after the dates on which Irwin had purported to stop trading with them. Mr Keenan stated that the withdrawals possibly related to arrears of payments.

47. Mr Keenan was asked about payments made to one of the Appellant's customers; Swift. He stated that they were repayments of a loan made by Swift as a result of a long standing friendship between Mr Keenan's partner's (Ashling Mullen) father and Mr Paul Martin's father.

48. Anomalies in Irwin's due diligence were highlighted by Mrs Arnold in her written witness statement. We will not outline each discrepancy but by way of example, the Certificate of Registration supplied by Irwin in respect of its supplier Eurolink showed a registration date of 1 March 1994 which was over 2 years before the date on which the company registered for VAT.

49. Irwin was wound up on 8 November 2012.

*Gary Chambers*

50. At a visit to Irwin on 15 September 2010 HMRC officers were told that the vehicle used by the company for transporting goods was hired from City West Transport Limited ("City West"). Mr Keenan stated that the driver was supplied with the lorry. The driver was Mr Gary Chambers.

51. HMRC enquiries revealed that Mr Chambers was a director in Navan Wholesale along with Mr Keenan and Niamh Irwin. He was also a former director and company secretary of Irwin.

52. At a visit to Ulster Metal Refiners Limited, HMRC officers were informed that Mr Chambers had been an employee since 2010 and that City West hired the same vehicle as that hired to Irwin. Ulster Metal Refiners were also a customer of Irwin which sold to Swift and Paradox. On the majority of occasions that the Appellant supplied goods to Paradox, the same lorry was used and Mr Chambers was shown as the driver. Payments from Irwin and Ulster Metal Refiners to City West were confirmed by City West.

53. City West informed HMRC that Mr Chambers had been employed for approximately 10 years by Mr Convery (a director of City West) in a previous business but that he (Mr Chambers) was not employed by City West. The certificate of motor insurance for the lorry used by Mr Chambers showed that the vehicle was registered to Mr Convery's son in law and that hire of the vehicle was specifically excluded by the insurance policy. HMRC spoke to Mr Convery's son in law in February 2012 at which point he stated that he was aware that Mr Chambers had used the vehicle but had not been aware until 2 weeks earlier that hire of the vehicle was excluded by the insurance policy.

54. At a meeting with HMRC on 29 February 2012 Mr Keenan was questioned regarding the lorry hire. He stated that the lorry was not hired from a company called City West but that City West was paid to deliver the goods. Invoices obtained by HMRC from City West show that the lorry was hired which confirmed what the company had told HMRC officer Mr Wilkinson. The company had also stated that the lorry was hired out with half a tank of diesel and had to be returned the same way. Mr Keenan told officers he knew nothing about this which led to HMRC querying why the driver (a Mr Gary Chambers) would have borne such an expense which would surely be due from Irwin.

55. Mr Keenan also stated that Irwin did not pay the driver, Mr Chambers. When it was put to Mr Keenan that City West had confirmed to Officer Wilkinson that it did not pay Mr Chambers, Mr Keenan stated that he was paid by Irwin as a casual labourer.

*Signature Wholesale Limited ("Signature")*

56. Signature did not trade with the Appellant during the periods in this appeal however the company's connection to Mr Keenan is relevant as background information.

57. HMRC officers made an unannounced visit to the company's principal place of business on 25 February 2011. The premises, a dwelling in a residential area, appeared unoccupied. A letter was left stating that the company would be de-registered unless contact was made with HMRC within 7 days.

58. Following contact with an employee at the company, a meeting was arranged for 16 March 2011. Present at the meeting was the director, Ashling Mullen, and an employee Ms Hilley. Mr Keenan was also present and informed HMRC officers that Ms Mullen, his fiancé, had requested that he attend the meeting.

59. It was established at the meeting that Ms Mullen was a former freelance makeup artist who was dealing in soft drinks, Duracell batteries and razors. The reason given for the change of careers was the recession.

60. HMRC obtained information that Signature was purchasing from defaulting traders; all of its deals from UK suppliers were traced back to a tax loss. There were also credits into Signature's bank account from Swift, which was neither a customer nor supplier of Signature at the relevant time. In a letter dated 7 November 2011

Signature confirmed that the credits related to a loan and a copy of the loan agreement dated 2 September 2011 was provided to HMRC. It showed a loan for £200,000 and was signed by Ms Mullen and Mr Martin of Swift.

61. HMRC queried the loan agreement which made no reference to a rate of interest or date for repayment of the capital. In 2012 (which we note is outside the period with which we are dealing) Mr Keenan told HMRC officers that at that point only interest payments had been made; he acknowledged that this would make the loan expensive (as on the interest payments alone, if the loan was not repaid by 2 September 2012 the interest repaid would amount to £88,000) and stated that the terms of the loan would have to be renegotiated.

62. By 30 January 2012 Mr Keenan had taken over the directorship of Signature and Ms Mullen had resigned although a FAME report dated 8 March 2012 showed Ms Mullen as director, executive contact and 100% shareholder.

63. The Appellant validated Signature's VAT number at Wigan in December 2011. The Appellant's records for the period 12/11 showed purchases totalling £52,436 from Signature between 21 December 2012 and 29 December 2012 (3 deals). Mr Keenan told HMRC officers at their visit in February 2012 that sales from Signature to the Appellant had also taken place in January and February 2012. Mr Keenan stated that he had been contacted by Mr Doherty who was sourcing stock; he clarified that Mr Doherty had not contacted Irwin but rather Mr Keenan personally and that was how the trading began.

64. Signature applied to have its VAT number cancelled on 2 April 2012. The request which was signed by Mr Noel Conn on behalf of Mr Feargal Keenan stated that the company ceased to trade on 31 March 2012. Signature was de-registered with effect from 1 April 2012.

*Diamond*

65. Mr Keenan was a director of Diamond which was a supplier to the Appellant prior to Irwin.

66. In August 2008 Mr Keenan applied for Diamond to be de-registered and requested that the cancellation be backdated to 1 March 2008. The application was granted.

67. Between 1 March 2008 and August 2008 Diamond had traded with the Appellant and had raised invoices charging VAT. This information was not declared to HMRC when the request to de-register was made; instead the company stated that trading had ceased on 1 March 2008.

68. In June 2009 the Appellant was informed that Diamond had been de-registered at the time when VAT invoices were issued to it and as a result, HMRC assessed the Appellant. The Appellant appealed against the assessment and its advisers, McCambridge Duffy wrote to HMRC on 10 July 2009 stating: "*I believe one way or another a fraud has been perpetrated on our clients using the VAT system. A material aspect in the case must be the date you were notified of the de-registration and if it is*

*the case that you were notified after the dates of the invoices I feel it is up to your office to deal with Diamond Marketing Ltd and make a refund of the VAT involved"*. The assessment was ultimately withdrawn, although there was no evidence before us as to the reason behind HMRC's decision.

*The Appellant's Customers*

*Paradox*

69. Paradox registered for VAT in January 2010. The directors are Mark Murray and Judy Hughes (who is also company secretary). Paradox declared despatches to UK traders which were de-registered within a short time of the trading taking place.

70. HMRC noted that despite the company's short trading history it was able to find high value customers with apparent ease as shown by the table below:

| Quarters | Trader | Value of Acquisitions | De-registration date |
|---|---|---|---|
| 03/10<br>06/10 | A C I Services Ltd | £193,980<br>£447,801 | 9 July 2010 |
| 06/10<br>09/10 | Tyber Transport Ltd | £715,069<br>£429,515 | 1 March 2009 |
| 09/10<br>03/11 | Silhouette Business Solutions Ltd | £458,163<br>£1,028,748 | 30 January 2011 |
| 03/11 | Tristar Services Ltd | £126,932 | 1 April 2011 |
| 06/11<br>09/11 | Bounty Wholesale Limited | £778,188<br>£1,832,802 | 6 October 2011 |

*Swift*

71. Mr Paul Martin was the company secretary of Swift. He told HMRC officers that he had known Mr Toner for 7 to 8 years and had contacted him regarding building up a business relationship. Mr Martin said that he was not well acquainted with Mr Docherty and that trade had been initiated by the Appellant offering stock of toiletries and soft drinks.

72. Swift's bank statements showed payments from Irwin to Swift as follows:

- £50,000 on 23 March 2009;

- £50,000 on 5 October 2010;
- £50,000 on 21 December 2010;
- £100,000 on 10 March 2011; and
- £100,000 on 18 March 2011.

A payment of £50,000 is shown as being made by Swift to Irwin on 15 April 2009.

73. Swift also received payments with the narrative "Yasmins Imports" despite having never declared Yasmins Import and Export Limited ("Yasmins") as a UK customer to HMRC. The payments received were as follows:

- £117,875 on 22 November 2010;
- £100,000 on 1 February 2011;
- £38,000 on 8 February 2011; and
- £110,000 on 8 February 2011.

74. HMRC officers were informed by Yasmins that the payments represented commission/loan agreements from Swift and invoices and loan agreements were provided to HMRC to support the assertion.

*Other suppliers in the chains of transactions*

*Galore*

75. HMRC Higher Officer Ceris Jones provided an unchallenged witness statement which outlined the VAT affairs of Galore.

76. Galore was incorporated at Companies House on 1 May 2008 and the company requested voluntary VAT registration with effect from 6 May 2008. The Director of Galore was Mr Faaraz Butt who resigned on 28 January 2010. On the same date Mr Aneil Singh was appointed. Ms Jones noted that Mr Butt and Mr Singh have the same date of birth (19 March 1983) and that checks made on HMRC's direct tax systems revealed no traced of a Mr Singh with that date of birth.

77. The main business activity specified on the VAT1 was "wholesale clothing. Textiles, clothing, footwear and leather goods; wholesale of." The estimated annual turnover was £450,000 with estimated sales to other EC member states of £100,000 and estimated purchases from other EC member states being £100,000.The principal place of business was the director's home address.

78. During a visit by HMRC on 9 May 2011 Galore was said to be trading in digital photo key rings and photo frames, Wii accessories, wicker baskets and clothing

sourced from China and the Far East by the associate company Majestique Trading Limited. At no point during this visit did Galore declare any trading in drinks.

79. An unannounced post registration visit was requested on 25 October 2010 after Mrs Arnold obtained information that Galore were making large supplies of soft drinks to Irwin Enterprises Enterprises Limited in September 2010. HMRC's databases indicated that despite such trade Galore had not submitted VAT returns and had unpaid VAT assessments dating back to 31 March 2009.

80. Ms Jones and another HMRC officer, Mr Ellis, made the unannounced visit on 27 October 2010. Initially the company premises could not be located and a Royal Mail employee who was present stated that the business address of 52 – 54 Wellington Road, Dewsbury was actually numbered 5 and 5a and that although there had been a company called Galore at the premises they had "gone away". A sign in the window of the premises showed that the property was to let and two contact numbers were provided. Ms Jones telephoned the numbers and was informed by a female that the premises were unoccupied and belonged to her father, Mohammed Idrif. Further inquiries with Mr Idrif and the agent on behalf of Mr Idrif revealed that the previous tenants had been evicted as they had "allowed someone to use the premises for fraudulent purposes". The agent stated that the premises had never been rented to Galore or Mr Aneil Singh.

81. Following Mr Singh's non-attendance at a meeting with HMRC on 14 October 2010 de-registration action was taken by HMRC.

82. It was noted by HMRC that Galore was the main supplier to Irwin from June 2010 which coincided with the de-registration of Nicholas Distribution. HMRC submitted that this was not merely coincidence but rather the deliberate replacing of one de-registered one trader with another (which was subsequently de-registered) by Irwin and part of an overall fraudulent scheme.

83. From VAT period 03/09 Galore failed to submit VAT returns and did not pay the assessed VAT liabilities. Galore was de-registered on 23 November 2010.

84. On 15 June 2011 Ms Jones wrote to Galore to inform the company that an assessment had been raised for £112,739 for VAT period 06/10, £462,759 for VAT period 09/10 and £276,520 to cover the final VAT period 1 October 2010 to 23 November 2010.

85. On 22 June 2011 a notice of assessment was issued to Galore in the amount of £577,391 plus default surcharges for periods 06/10 and 09/10 in the sums £11,273.90 and £69,413.85 respectively. The total amount owed by Galore on the statement of account was £946,948.11. The assessment was raised on the grounds that invoices had been raised by Galore to Irwin Enterprises showing output tax due.

86. No response was ever received by HMRC from Galore either in response to the assessments raised or the compulsory de-registration of the company. The assessments remain outstanding.

87. Ms Jones concluded that the actions of Galore and its director were a deliberate attempt to defraud HMRC and that the company had no intention of accounting for its VAT liabilities.

*Nicholas Distribution Ltd*

88. HMRC Higher Officer Harold Kenneway's witness statement provided information about Nicholas Distribution which was identified as a missing trader in the supply of soft drinks to Irwin Enterprises Limited.

89. Nicholas Distribution was incorporated as a private limited company on 24 March 2009. The original business address in Worksop was the home address of the director Benjamin Mark Nicholas. On 11 March 2010 the address was changed on Companies House records to 27 Cows Rakes Lane, Rotherham and on the same date Andrew Phillip Parker was appointed as director and Benjamin Mark Nicholas terminated his directorship.

90. The VAT1 submitted electronically stated the main business activity was "General distribution/buying and selling – agents involved in the sale of a variety of goods". Mr Nicholas had requested that the registration take effect from 27 March 2009. The estimated taxable supplies over the following 12 months was £1,200,000. The actual turnover for the first 7 months trading taken from the submitted 05/09 Return and completed 08/09 and 11/09 returns held in the company's records was £3,542,160. Mr Kenneway noted that in the first 7 months of trading, Mr Nicholas, a twenty year old male, was able to achieve a turnover which was almost 3 times his estimated annual turnover declared on the VAT1.

91. On 5 June 2008 the business address changed to an address in Chesterfield and on 19 November 2009 a fax was received by HMRC advising that there was a new business address in Coleraine. The fax, which was sent from Portrush Library, Co Antrim, also advised that a new landline telephone number and bank account details would be active from 4 December 2009.

92. Mr Kenneway made an unannounced visit to the new Coleraine address on 25 February 2010. The premises had a sign above the entrance stating "Nicholas Distribution". The property was locked and men working nearby advised that the sig had only been erected recently and they were no aware of a business actually trading from the premises. Mr Kenneway was given the name of the landlord to contact.

93. Mr Kenneway met with the landlord, Mr Ivan McGrotty who stated that Nicholas Distribution had not started trading but the relevant individuals were Ben Nicholas and Patrick (surname unknown) who had a contact address in Chesterfield.

94. The landlord gave Mr Kenneway access to the premises in order to leave a letter for the company. He noticed that the warehouse was empty except for a new PVC office with toilet facilities. The office was equipped and appeared functional.

95. Mr Andy Parker contacted Mr Kenneway on 4 March 2010 and advised that he had taken over the company from Ben Nicholas. A visit was made to the premises on

15 March 2010 whereupon Mr Parker stated that he had been the director since 1 January 2010 and that there were no other directors or employees. Mr Parker stated that he had been a window cleaner with his own business, which he had sold, and that he had ceased working as a window cleaner in September 2009. He stated that he had met Ben Nicholas through a friend in November 2009 and he had agreed to buy the company. Mr Parker could not recall how much he had paid but it was "£4,000 or £5,000". He advised that no stock was ever delivered to the premises but all went directly from his supplier to his customer and that he was the middle man.

96. Mr Parker stated that he rented a villa in Garvagh; he did not know the address but stated that it was near the motorway. Mr Kenneway challenged this information as there is no motorway near Garvagh to which Mr Parker stated that perhaps the villa was in Coleraine. He then telephoned "Patrick" for the address and explained that Patrick was a chap who he had met in a bar in Coleraine and they now rented a house together. Mr Kenneway asked if Patrick was involved in the business and was advised that he was not and that Mr Parker did not know Patrick's surname.

97. The address was eventually found in a file amongst the business records. Two months' rent had been paid and Mr Kenneway noted that it appeared to be a tourist board property which appears on the "Discover Northern Ireland" website as a 17th century dwelling available for holiday lettings on a 2 night, 3 night or weekly basis.

98. Mr Parker advised that the main business activity was the sale of soft drinks and that the company had only one customer – Irwin Enterprises – and one supplier – RNP (UK) Limited. HMRC did not receive any invoices in respect of supplies from RNP (UK) Ltd or any other supplier after 8 March 2010 despite repeated requests. A visit was made to RNP (UK) Ltd's address on 8 June 2010. It appeared that the company had not traded at the address since August/September 2009. No forwarding address was held by HMRC or the company's former accountants and it was classified as a missing trader. Mr Kenneway was therefore unable to trace the deals after 8 March 2010 beyond Nicholas Distribution which he considered as the defaulter trader.

99. Mr Kenneway questioned Mr Parker regarding his income from window cleaning. Mr Parker said he had sold the business in 2005 and had kept working until 2009. When asked about his Self Assessment Tax Reference Mr Parker stated that he had been window cleaning in Spain and therefore had not made tax returns in the UK. He stated he had returned to the UK in November 2009 whereupon he met Mr Nicholas and bought Nicholas Distributions.

100. After a quick review of the purchase and sales invoices, Mr Kenneway informed Mr Parker that the business did not appear viable as his overheads exceeded his profits; trading from 1 January 2010 showed a gross profit of £837 which was not enough to meet the rent on his home address or the lease on the business premises. Mr Parker thanked the officer and stated that these were issues he needed to consider.

101. Subsequent enquiries by HMRC revealed that although a Self Assessment record was held for Mr Parker, no income was declared for the relevant years, which

indicates that Mr Parker either had no income or had failed to declare it. If he had no income, Mr Kenneway queried how he could afford to purchase Nicholas Distribution.

102. Nicholas Distribution was not compliant in that only one return was submitted during the whole 15 months of trading. Requests for records went unanswered and assessments that were issued were not paid. Mr Kenneway noted that Mr Parker had no background experience of the soft drinks industry or wholesaling but the company, which was relatively new, managed to turnover millions of pounds.

103. Mr Kenneway formed the view that the premises did not have the appearance of being used on a daily basis; there was no source of heat and Mr Parker was only at the premises on one of the occasions upon which Mr Kenneway had called. Mr Parker appeared unfamiliar with the business despite stating that he had been running it since January 2010; he could not work the photocopier, did not know his address and was surprised when Mr Kenneway found Mr Nicholas' passport in the photocopier.

104. Among the records seen by the officers at their visit on 15 March 2010 were 2 completed returns for the periods 08/09 and 11/09 which were outstanding. Mr Parker agreed to submit the returns to HMRC however he failed to ever do so.

105. It was noted by HMRC that Nicholas Distribution was Irwin's biggest supplier between January and June 2010. The company was de-registered on 21 June 2010 yet Irwin carried out one deal after this date without checking the validity of the company's VAT registration with HMRC. It was also noted that Nicholas Distribution was based in premises adjoined to RNP prior to moving to Northern Ireland.

106. Mr Kenneway established from Nicholas Distribution's sales invoices uplifted from Irwin Enterprises that Nicholas Distribution had raised a number of invoices charging VAT and had failed to account for the VAT to HMRC. Although Mr Parker had stated that all of his goods were supplied by RNP (UK) Ltd, other than the supply invoices uplifted at the visit on 15 March 2010, no further supply invoices were supplied to HMRC by Nicholas Distribution and consequently Mr Kenneway assessed Nicholas Distribution as a defaulter. The assessments were not paid and in November 2011 the debt was with HMRC's Insolvency Unit. Mr Kenneway also arranged for assessments to be issued to RNP (UK) Ltd based on the supply invoices from Nicholas Distribution and in respect of which RNP (UK) Ltd had submitted no VAT returns.

107. As at 7 November 2011 Nicholas Distribution was in the process of being wound up.

*Astontech*

108. HMRC Officer Kevin Birkin's witness statement set out information pertaining to Astontech.

109. Astontech was incorporated at Companies House on 6 August 2009. At the date of incorporation there were 3 company officials; Mr Darren Symes, Paramount

Properties (UK) Ltd and Mr Gary Watkins. All 3 were directors. On the same date as the company was incorporated, Mr Symes and Paramount Properties (UK) Ltd both resigned as directors. On 14 January 2010 Mr Richard Andrew Ferguson was appointed as a director.

110.Mr Birkin noted that Paramount Properties (UK) Ltd holds 46 current directorships and 94 previous directorships. In most instances date of appointment and resignation are the same. Similarly Mr Symes holds 176 live directorships and 273 previous directorships and the dates of appointment and resignation were, in most instances, the same. Mr Birkin concluded on the basis of this information that both Paramount Properties (UK) Ltd and Mr Symes acted as company formation agents at the time of their appointments as directors of Astontech.

111.Mr Watkins remained as a director until the dissolution of the company. Mr Ferguson resigned as director on 12 March 2010.

112.On 12 October 2010 HMRC Officers Laura Hartell and Diccon Wood attended at the company's premises which were "an orange fronted shop signed internet learning café." The shop was closed and no opening times were displayed.

113.Astontech was dissolved on 29 March 2011 having failed to submit any annual accounts to Companies House or Corporation Tax returns to HMRC.

114.Ms Lisa Phillips completed the declaration of truth on the electronically submitted VAT1 and declared herself as director. The main business activities were described as "Business consultant, all aspects of starting a business". The estimated turnover was declared as £45000. On 1 September 2009 the company advised HMRC that the services supplied were "business consultancy, helping people organise their business from advice on website design, domain name, advertising and logistics through to personnel".

115.The first VAT return due for the period to 10/09 remains outstanding as does the second VAT return for the period 01/10.

116.The VAT return for 04/10 was submitted on 27 May 2010 and showed outputs of £13,200 and inputs of £11,105.

117.The VAT return for 07/10 was submitted on 24 August 2010 and showed outputs of £198,767 and inputs of £187,703.

118.A visit was undertaken by HMRC officers in order to obtain information regarding invoices and payments between Astontech and Yasmins, in particular 2 sales invoices Yasmins had issued to Irwin Enterprises which, when queried by HMRC, were said by Yasmins to have been sourced from Astontech.

119.The visit took place on 12 October 2010. HMRC officers met the owner and manager of the internet learning centre, Mr Mumtaz Ali, who stated that he rented out office space to assist with funding the learning centre and that he had a rental agreement with Mr Gary Watkins for 1 year. The space rented by Mr Watkins

comprised of an office with a desk, computer, telephone, 3 chairs and shelves containing a printer and fax. Mr Ali advised that the office was also used by the learning centre for meetings and that he had not seen Mr Watkins for a number of weeks. The HMRC officers left a letter for Astontech advising that the company would be de-registered from 12 October 2010 if no contact was made by 19 October 2010.

120.On 14 October 2010 an email was received from the company, signed off by "Gary". It advised that Gary was in South America attempting to "source wood for work" but was due to return to the UK on or about 25 October 2010. Mr Birkin noted that there had been no indication that Astontech ever traded in wood or products which require wood.

121.HMRC wrote to Astontech on 21 October 2010 advising that an officer would attend at the company's premises on 2 November 2010 and that the company had been de-registered as there had been on evidence that the business was operating on the initial visit by HMRC.

122.A response was received from Gary by email on 26 October 2010. It acknowledged the letter dated 21 October 2010 and queried the de-registration and asked for immediate reinstatement.

123.On 2 November 2010 HMRC officers telephoned Astontech on the number contained on its sales invoice to advise that they were running late for the meeting with Mr Watkins. Mr Ali answered the call which was transferred to Astontech's office and stated that Mr Watkins was not at the office nor had he been for several weeks. The officers attended the premises and observed a card on the door to the office which stated "Astontech Ltd – Not available until further notice". A letter was left by the HMRC officers advising that the company would remain de-registered as no company officials had been present at the appointment.

124. A number of sales invoices issued by Astontech to Yasmins were obtained by HMRC in addition to further invoices issued by Astontech from representatives of a company called Xperteze Ltd. It was established that the sales invoices far exceeded the figures declared by Astontech on the VAT returns submitted. Consequently assessments were raised for the periods 01/10 in the sum of £40,439.93, 04/10 in the sum of £382,723.98 and 07/10 in the sum of £477,077.61.

125.HMRC databases show that Mr Gary Watkins has had no employment since 2004 and has been in receipt of various benefits since 2006.

126.Mr Birkin noted that the sale of goods which led to the Appellant flowed through the same chain of companies as follows:

Astontech – Yasmin – Irwin Enterprises – SDC (the Appellant) – Swift.

HMRC submitted that given the connection (via the loan) between Yasmin and Swift, there was no apparent reason why the two companies could not trade directly and that

the seemingly unnecessary involvement of other traders in the chain was designed as part of an overall fraudulent scheme.

127.To date Astontech has not appealed the assessments which remain unpaid.

*Linkup Solutions Ltd*

128.HMRC Officer Monica Coker details in her witness statement that the company was incorporated on 5 October 2007. The VAT1 signed by Rizvan Ahmed Khan declared the main business activity as "Business Management Consultancy" and requested that registration commence from September 2009.

129.On 11 May 2010 HMRC received 2 faxed documents from Linkup. The first one stated that the company's new address was "the rear, 567-585 Barking Road, London" and the second was a Companies House form AD01 Change of registered office address. Both were signed by the director Mr Khan.

130.On 4 November 2010 a form appointing Mr Syed Sajahd Shah as director from 6 August 2010 was electronically submitted to Companies House. On 8 November 2010 a handwritten copy of the same form was filed at Companies House showing Mr Shah as director from 16 August 2010.

131.On 8 February 2011 documents filed at Companies House showed that Mr Khan resigned as company secretary and director as of 12 December 2010.

132.A visit by HMRC officers took place on 9 February 2011 for the purpose of inspecting of the company's records to verify that it had sold various quantities of coke, diet coke, Fanta orange cans and sprite to Irwin Enterprisess during December 2010. The traders based at the premises were called Simple Claims Ltd and Simple Self Drive; both of which had no known connection to Linkup. The HMRC officer was informed that Linkup had occupied the rear of the property but had left in December 2010.

133.On 10 February 2010 HMRC wrote to Linkup to advise that the company's VAT registration would be cancelled with effect from 9 February 2011.

134.On 1 March 2011 Linkup were informed by letter that HMRC had decided to assess the company in the sum of £32,091.71. The letter was returned to HMRC marked by Royal Mail that no such address existed.

135.On 18 March 2011 HMRC raised the assessment referred to at paragraph 90 above which was issued to the company's registered office.

136.On 4 July 2011 HMRC officer Coker was asked to consider additional invoices issued by Linkup; 6 for the sale of copper cathodes to London Demolition (UK) Ltd and 36 for the sale of soft drinks to Irwin Enterprises. The invoices to London Demolition (UK) Ltd amounted to £2,124,003.89 and the invoices for the sale of soft drinks to Irwin Enterprises which took place between October 2010 and December 2010 amounted to £708,995.80 including VAT of £121,165.96.

137. Following a number of letters being sent by HMRC to Linkup, a telephone call was received from Mr Khan on 11 November 2011. He stated he was no longer involved with Linkup. On 17 November 2011 Mr Khan confirmed to HMRC that he had bought the company with a friend from Companies House in 2010, that the main business activity had been general commodities such as rice and flour and that the company had never traded in soft drinks or coke. Mr Khan stated that he had resigned as director on December 2010. He would not provide HMRC with the name of his friend with whom he had bought the company although he stated that his friend was still connected to the company.

138. On the same date HMRC received a telephone call from Mr Syed Shah who stated that he had been the victim of identity fraud. He stated that he had never been involved with Linkup and that he had contacted the police about his stolen identity.

139. No VAT returns were rendered to HMRC by Linkup during the period of its VAT registration from 1 March 2009 until 9 February 2011. Furthermore, there was no evidence that the company had ever traded in "Business and Management Consultancy".

140. Companies House information showed that the company's turnover rose from £104,000 in October 2008 to £2,385,635 in October 2010. HMRC Officer Coker noted that signatures which appeared on documents purported to be signed by Mr Khan differed from documents which could reasonably be assumed to have been signed by Mr Khan. In addition, the invoices to Irwin Enterprises showed VAT calculated at 20% when the rate during December 2010 was 17.5% from which Ms Coker inferred that the person who had issued the invoices was unaware of the VAT rate. Further anomalies in Linkup's invoices indicated to HMRC that the documents were produced at different times and possibly by different people.

141. As of 14 March 2012 Linkup had not appealed any of the assessments raised against it. HMRC Officer Coker concluded that the actions of the person behind the company indicated no intention at any time of paying VAT due.

*Aeris Trading Ltd*

142. Aeris was incorporated as a private limited company on 9 March 2010 by Mr Fazlul Hoque, who was the sole company officer and shareholder. The main business activity was described on the VAT1 as the wholesale of soft drinks. Registration was requested from 1 April 2010 and the principal place of business was shown as the director's home address of Flat 3, 2A Yonge Oark, London.

143. Clarification as to the Company's trading was provided by Mr Hoque on 4 May 2010 in which he stated "we deal in wholesale goods and earn profit by making deals over the phone & email. Goods are shipped from seller's warehouse directly over to buyers." A letter of introduction from a German registered Wholesaler was the only documentation provided in support of the Company's trading activity.

144. No trading accounts or returns have been filed for Aeris at Companies House and the Company was dissolved on 1 November 2011. Checks on personal tax records

held for Mr Hoque confirm 1 employment record from 14 October 2008 to 10 March 2010 for which the only pay and tax details held show payment of £2,865 in the year ended 5 April 2009. This was supplemented by a claim for Job Seekers Allowance which commenced on 30 January 2009 and an approved training course between 22 February and 19 March 2010. Pay and tax benefits for the year ended 5 April 2010 were shown as £156.16.

145.Despite Aeris having failed to declare any trading income, information received by HMRC indicated that the company made supplies of soft drinks and consumables such as Dove soap. A company called Borelers Ltd told HMRC in a telephone call on 20 July 2010 that its sole supplier was Aeris. 28 invoices provided to HMRC by Borelers Ltd showed net sales from Aeris to Borelers of £992,142.07 between 9 and 23 July 2010. Borelers Ltd's due diligence pack on Aeris also revealed an undated letter in which Aeris requested payments due to them be made to a third party; Sub Trading.

146.HMRC were unable to make contact with anyone at Aeris either by letter or in a visit to the premises. The company was informed by letter dated 30 July 2010 that its registration number had been cancelled as of 30 July 2010.

147.HMRC attempted to contact Mr Hoque at 2 separate addresses obtained from credit information on an Experian report. The first was a block of flats at which there was no answer. The second was also a residential address at which the occupant stated she had lived for 2 years and had never heard of Aeris.

148.Additional information was obtained by HMRC using the VAT Information Exchange System (VIES) which stored the sales figures of supplies made by businesses to customers in other member states recorded on EC Sales lists and which is shared with EC authorities. 2 Cypriot companies, Quetta Developments Ltd ("Quetta") and VMarow Ventures Ltd ("VMarow") recorded combined sales to Aeris of £2,332,547 in July 2010. Quetta's bank statements were obtained which showed no payments from Aeris recorded however there were payments shown from Sub Trading, the company which Aeris had told Borelers to pay on its behalf. Payments from Sub Trading to Quetta exceeded £3,500,000 and exceed the sales recorded by Quetta to Aeris. The absence of independent documentation to support the movement of goods raised the Cypriot Authorities doubts as to whether the transactions had occurred.

149.HMRC Officer Brennan noted that within 12 weeks of signing the VAT5, Aeris had issued sales invoices to Borelers and Goldstar Trading (Euro) in excess of £1,500,000 over a period of 12 days between 2 and 29 July 2010. Goldstar Trading (Euro) advised HMRC that is ceased trading from 30 August 2010. Borelers advised HMRC that is ceased trading on or about 23 August 2010 after just 4 months. Officer Brennan concluded that neither company could support genuine trading on such a scale and that their roles appeared to have been to facilitate fraudulent transactions.

150.On 23 May 2011 Officer Brennan wrote to Aeris to advise that an assessment would be issued based on the sales invoices issued in the name of Aeris to Goldstar Trading (Euro) Ltd, VMarow and Borelers.

151.A notice of assessment in the sum of £462,017.00 was issued to Aeris on 7 June 2011. No appeal was lodged against the assessment which remains unpaid.

152.A revised notice of assessment in the sum of £229,034.73 was issued to Aeris on 8 February 2012 to rectify an error contained in the notice dated 7 June 2011.

153.Officer Brennan concluded that Aeris was not set up as a genuine business but rather to facilitate fraudulent trading and the evasion of VAT.

*Highgrove Upholstry Ltd ("Highgrove")*

154.HMRC Officer Patricia Westwell became the allocated officer for Highgrove on 14 February 2012 when the previous case officer became unavailable due to illness.

155.Highgrove was incorporated on 8 February 2000. On 22 January 2008 Mr Anwar Patel was appointed director, replacing Mr Ayub Patel. On the same date Mr Mubarek Patel was appointed company secretary.

156.Highgrove was dissolved at Companies House on 15 March 2011.

157.Mr Ayub Patel completed the VAT1 on 1 April 2000. The stated main business activity was upholstery manufacturer based in Blackburn.

158.HMRC were informed by Mr Ali of Conjoin Limited that it had purchased goods from Highgrove to the value of approximately £2,000,000 and that he had been instructed to make third party payments to Sub Trading. Sub Trading was registered at Companies House on 11 July 2009; its director was Mr Abdul Wahid. The company did not register for VAT and failed to submit any accounts to Companies House. Sub Trading was dissolved on 22 February 2011.

159.On 1 July 2010 HMRC officers visited Highgrove and spoke with Mr Anwar Patel, the director, and Mr Sajid Patel, the manager. Both denied any knowledge of Mr Amir Patel, the contact name at Highgrove given by Mr Ali at Conjoin Limited.

160.Mr Anwar Patel told the HMRC officers that no trade was currently being undertaken and Mr Sajid Patel confirmed that the intention was to diversify into food, drinks and toiletries. HMRC advised that as the company was not trading, it would be de-registered for VAT with immediate effect.

161.At a visit by HMRC officers to Conjoin Ltd, invoices from Highgrove to Conjoin Ltd were obtained showing sales totalling £4,050,773.07.

162.As HMRC had been informed at the visit on 1 July 2010 that Highgrove had not been trading, HMRC concluded that the company's VRN had been hijacked and on 27 May 2011 an assessment was issued in the sum of £654,414 on the "Taxable

Person purporting to be Highgrove Upholstery Ltd". The assessment was amended on 16 February 2012 to the sum of £603,218.

163.Subsequently HMRC was provided with invoices issued by Highgrove to Goldstar Trading and as a result a further assessment in the sum of £25,550.89 was raised which included the invoices for 2 of the Appellant's broker deals in June 2010 in which Highgrove was identified as the defaulter. Due to clerical error this assessment was amended on 16 February 2012 to £25,520.89.

164.Officer Westwell concluded that the hijacking of Highgrove's VRN indicated fraudulent intent by the individual who carried out the hijack.

*New Trading World Limited ("NTW")*

165. NTW was incorporated on 28 April 2009. It was dissolved on 7 December 2010.

166.The VAT1 submitted and signed by Mr Michael Paul Weir as director on 10 August 2009 declared the business activity as the wholesale of foods and beverages. Mr Weir subsequently clarified that the company would be trading from his home address via email, telephone and internet. He stated that the company was a wholesale company buying and selling a large quantity of food and drinks and he hoped to move into a warehouse "very soon". Mr Weir also stated that the company "may import gods from the EU" if stocks were "cost effective". NWT was registered for VAT with effect from 1 August 2009.

167.On 11 December 2009 a centrally issued assessment was raised in the sum of £1,444 for the period 1 August 2009 to 31 October 2009 as the 10/09 return was not submitted. The VAT return submitted for the period 01/10 was a nil return.

168.HMRC attempted to contact the company on a number of occasions in April 2010 in order to verify various transactions undertaken however no contact was made and no response received to the messages left. Consequently the company was de-registered with effect from 1 August 2009. A further attempt was made to contact Mr Weir on 12 October 2010 following receipt by HMRC of an information request from Dutch authorities however the telephone number no longer worked. HMRC contacted the company's authorised agents who stated that there had been no contact with the company since the VAT registration number was given to the company and that the agent was owed money for its work on the application. No forwarding address had been left for NWT.

169.Diagrams produced by HMRC in this case showed that Swift sold to NWT. Swift also purchased goods which had been sold by NWT earlier in the chain, but which were not sold directly to Swift.

170.An assessment was issued to NWT in the sum of £992,857.36 in respect of invoices raised by the company which were not declared to HMRC. Further transactions were subsequently identified involving Quetta and Swift, from which Officer Aina (the case officer for NWT) concluded that NWT never intended to declare any sales and that its actions were a deliberate attempt to defraud HMRC.

*Eurolink Trading Limited ("Eurolink")*

171.Eurolink was incorporated on 14 March 1994 and registered for VAT with effect from 17 February 2005. The VAT1 was submitted by the director Mr Louca Christos and the main business activity was given as "sale of beers, wines, minerals within the UK and in Europe."

172.HMRC visited the company's principal place of business on 13 October 2010. The company had allegedly supplied soft drinks to Irwin Enterprises between November 2009 and April 2010 with VAT totalling £534,466.38. Mr Louca stated that Eurolink had not entered into any deals with Irwin Enterprises. When HMRC made comparisons between Eurolink's VAT certificate and the copy held by Officer Barry Hughes, it was apparent that the copy held was a fake. Consequently Officer Hughes concluded that the invoices provided by Officer Arnold had not been issued by Eurolink but rather by someone purporting to be Eurolink.

173.On 16 March 2011 Officer Hughes issued an assessment in the sum of £642,109.85 to the Taxable Person purporting to be Eurolink Trading Limited and a dummy VAT number was created for this company.

174.On 20 May 2011 a further assessment was issued in the sum of £64,064.49.

*Landmark Wholesale ("Landmark")*

175.Landmark applied for VAT registration in June 1998 as a cash and carry. The application was signed by Mr Andrew Mark Thewlis and the effective date of registration is 19 July 1998.

176.Landmark is a trading group which facilitates the supply of branded food and drink bought from the manufacturers to its members at discounted prices. There are 15 company officers including Mr Thewlis and Gurdashan Singh Wouhra. The company was incorporated on 17 May 1960 and has a taxable turnover of £121,320,000.

177.Landmark came to the attention of HMRC in February 2011 because Irwin Enterprises had requested verification of its VAT registration number through HMRC's Wigan office. A visit was made by HMRC to Landmark on 14 February 2011. Mr Thewlis (company secretary) and Mr Mark Cornwall (management accountant) stated that they had never heard of Irwin Enterprises nor were they aware of any approach made by the company to Landmark. HMRC officer Margaret Brown was informed that the company name had been used to perpetrate fraud in that individuals had set up accounts in the company name in order to obtain goods under false pretences without payment being made.

178.Officer Brown concluded that Landmark was not involved in MTIC fraud but that the company name was being hijacked.

179.At a later visit to landmark by HMRC it was established that no trade with Irwin Enterprises had taken place. Mr Thewlis was shown a picture of Mr Wouhra from

Irwin Enterprises' due diligence and he stated that he did not recognise the male in the picture as one of the directors of Landmark. Mr Thewlis and Mr Cornwall also confirmed that the sample of invoices purported to have been issued by Landmark to Irwin Enterprises ("the purported invoices) had not in fact been issued by Landmark.

180.Officer Brown noted that there were anomalies in the purported invoices when compared with those from Landmark, such as the numbering sequence which, on the purported invoices, bore no relation to the system used by Landmark. Furthermore, the goods on the purported invoices were not of the type usually traded by Landmark. Further documents provided by Landmark confirmed that Mr Wouhra's name had been used to obtain fuel cards and finance.

181.Officer Brown concluded that the VAT registration number of Landmark had been hijacked. HMRC raised an assessment issued to the Taxable Person purporting to be Landmark Wholesale Limited for £858,796.69 on 28 July 2011. She concluded that the invoices provided to HMRC by Irwin Enterprises were never issued by Landmark and that an individual claiming to be Mr Wouhra had represented himself as the real Mr Wouhra for the purpose of obtaining goods and services by stealing the identity of the director Gurdashan Singh Wouhra using a false passport.

**Findings on whether there was a fraudulent tax loss connected to the Appellant's transactions**

182. We accepted the unchallenged evidence that the Appellant's transactions which are the subject of this appeal were traced back to tax losses and we were satisfied that the manner in which the tax losses were occasioned were designed to facilitate the fraudulent evasion of VAT.

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

183. The principal evidence on behalf of HMRC came from Mrs Arnold who provided detailed reasons for HMRC's decision to deny the Appellant's repayment claim in her statements dated 22 March 2012, 31 May 2012 and 11 January 2013. We will not simply repeat the contents of those statements but will summarise the salient parts together with the responses on behalf of the Appellant.

***Awareness of MTIC fraud***

184. Letters were issued to the Appellant on 5 October 2010, 28 October 2010, 30 November 2010, 31 January 2011 and 3 March 2011 to inform it that verification of the Appellant's returns had revealed that tax losses had been established. Mrs Arnold was adamant in her oral evidence that she had made it clear to the Appellant that the chains under investigation were those which involved Irwin, albeit this was not specified in writing until March 2011, and she stated that bearing in mind that the majority of the Appellant's supplies came from Irwin it should have been clear to the Appellant that the tax losses related to the deals involving Irwin.

185. From June 2010 HMRC declined to make VAT repayments to the Appellant save for two payments yet Mrs Arnold noted that the Appellant continued to trade with Irwin until February 2012. HMRC submitted that given the financial difficulties experienced by the company it lacked credibility that it continued to trade with partners in the same manner as had led to repayments being withheld.

186. Mrs Arnold added that the Appellant had been made aware of MTIC fraud at a visit by HMRC in March 2009 and 28 January 2010. Notice 726 had also been issued on 2 June 2010. HMRC noted that Mrs Arnold's first visit to the Appellant took place on 23 June 2010 but it had been accepted in a letter from the Appellant to HMRC that: *"regarding the March 2009 visit to TSDC both Ciaran Doherty and Jim Toner accept that MTIC was discussed. Indeed this was the first time this was brought to their attention.*

187. Mr Doherty accepted that the letter from HMRC in March 2011 put the Appellant on notice that tax losses traced could relate to deals which involved Irwin. He stated that although Mr Toner was the majority shareholder, it was he (Mr Doherty) who carried out the day to day operations of the company and made the decision as to who to trade with. He stated that there had not been any discussion with Mr Toner as to whether to stop trading with Irwin when repayments were withheld and stated (day 4 page 20):

*"…we contacted Irwin Enterprises, Feargal Keenan, when we got this letter, and I actually listed the invoices which you said there was tax losses on. Now, Feargal Keenan assured me that from the end letter, this letter to -- this letter had come out, he had actually changed supplier, so he had, and he had carried out all the proper due diligence on new suppliers that he had done, and I have no reason not to disbelieve Feargal Keenan, as all the transactions we carried out has been done… Feargal has always been very reputable, he is massively known in the trade and everything else, so he is -- every meeting I had with him, he was always well-dressed, had a nice car, so I had no reason not to believe him when you are supplying and he was still supplying soft drinks throughout the trade."*

188. Mr Doherty denied being knowingly involved in fraud and stated he did not understand what, if anything, Mr Keenan had involved the Appellant in and had not spoken to Mr Keenan about HMRC's decision to withhold the Appellant's repayments. He stated that Mr Toner had never discussed MTIC fraud with him and that he had no understanding of it until it was explained by Mrs Arnold. Mr Toner's witness statement reiterated that set out in Mr Doherty's witness statement, namely that before the transactions in question "warnings were non-existent" and Mr Toner had no understanding of the concept of MTIC or carousel fraud.

***Due Diligence***

189. Mrs Arnold's witness statement detailed HMRC's enquiries into the Appellant's due diligence on its supplier (Irwin) and customers (Swift and Paradox).

190. Initially it was believed by HMRC that the Appellant's due diligence was limited to the following items:

- Irwin: a copy of the director's passport, a letter from the director regarding delivery, a letter from the director regarding compliance with HMRC legislation, a WebCheck printout, a set of accounts and Europa checks.

- Paradox: copy of Ms Judy Hughes' passport, copy driving licence of Mr Mark Murray, a letter from HMRC to Rachel Ellis, copy of the short term business premises lease, a letter from the company's accountant, CRO printout, a set of accounts, photographs and Europa checks.

- Swift: Certificate of Incorporation, Certificate of status as a Taxable Person, letterhead including contact details and VAT number, bank details, copy passport of Paul Martin, CRO printout, set of accounts, photographs and Europa checks.

191. On 4 November 2010 Mrs Arnold wrote to the Appellant detailing the items held by HMRC and requesting any other due diligence held by the Appellant on Irwin, Paradox, Swift and its other suppliers and customers. Further records were provided to HMRC and by letter dated 21 December 2010 Mrs Arnold requested that the Appellant confirm that all due diligence documents had been provided to HMRC. The Appellant replied by letter dated 12 January 2011 in which it stated that *"we can neither confirm or deny that you have all the available due diligence on Irwin Enterprises, Swift Valley and Paradox but in the absence of replies by Revenue Commissioners in relation to Swift Valley and Paradox, we would doubt that you have all available due diligence."* Further clarification was sought by Mrs Arnold which led to further due diligence documents being provided by the Appellant on 16 June 2011 in respect of all of its suppliers and customers save for, as noted by Mrs Arnold, Navan Wholesale which was a customer of the Appellant and a company in which Mr Keenan was a director.

192. Mrs Arnold noted that the due diligence documents provided in respect of Irwin did not include any credit checks, although the Appellant had stated that such checks were carried out. HMRC also highlighted the fact that the Europa checks carried out by the Appellant provided limited information and that the Appellant made its first check with Wigan to validate VAT numbers on 7 July 2011 despite having been requested to make such checks on 2 June 2010.

193. Mrs Arnold also highlighted the fact that had the Appellant investigated the company, for example by way of a FAME or Experian report, it would have been apparent that it had one shareholder and was controlled by Mr Malachy Keenan. The company accounts dated 30 June 2010 did not indicate the company's business activities and the coding indicated that the business was wholesale of sugar, chocolate and sugar confectionary. Details of Irwin's "Company Trade Classification" at Companies House indicates *"business of bakers and manufacturers of plain and fancy bread, cakes, tarts, confectioners"* as compared with the trade classification contained

on the VAT Registration Certificate which states *"wholesale fruit and vegetable juices, soft drinks and confectionary."*

194. Mrs Arnold stated in evidence that HMRC had informed the Appellant that its deals involving Irwin had traced back to tax losses yet the Appellant continued to trade with the company and accepted Irwin's assurance that every effort had been made to ensure the validity of its suppliers. In cross examination, Mrs Arnold maintained that the Appellant was fully aware that Irwin was the only supplier with which it was concerned; it being the only supplier linked to the Appellant's repayment claim.

195. HMRC contended that given the Appellant's experience of an assessment which was raised as a result of Diamond backdating its de-registration, the Appellant had failed to take reasonable steps in relation to its due diligence on Irwin; another company linked to Mr Keenan.

196. In respect of Paradox, Mrs Arnold noted that despite the fact that the company was relatively new, the Appellant failed to carry out any credit checks but was content to sell goods in excess of £800,000 to it in the first six months of 2010.

197. As to the photographs provided, Mrs Arnold highlighted that they showed no more than a sign on the unit.

198. Mr Toner's witness statement explained that he has known Mr Doherty since the start of his trading days at J T Sweets (which bought and sold confectionary) and when Mr Doherty began trading in 2006 Mr Toner told him to use his suppliers and customers.

199. Swift was one of the customers known to Mr Toner when he traded as JS Sweets, although the companies in fact never traded. Photographs provided by the Appellant showed Mr Toner standing beside lorries of goods, however Mrs Arnold noted that HMRC have never been provided with photographs of either Mr Martin, Mr Murray or the inside of Swift's premises.

200. Mrs Arnold concluded that the Appellant's due diligence in respect of each company was a "box-ticking exercise."

201. The witness statements of Mr Doherty and Mr Toner set out how the Appellant met its trading partners. In respect of Swift, Mr Toner re-established contact when he became involved with the Appellant Company. Swift were well known in the industry as a wholesaler and after a number of visits to the director's office by Mr Toner and Mr Doherty, combined with the due diligence documents obtained, Mr Doherty believed that sufficient checks had been undertaken.

202. In respect of Paradox, neither Mr Toner nor Mr Doherty could recall how contact was first made however Mr Toner had visited the business address which he told Mr Doherty was more than adequate. Mr Doherty explained that *"he had been involved in another business and said he had recently started up a soft drinks*

*company. We were all new at one point and we don't hold any prejudice against new companies".*

203. As regards Irwin, Mr Toner had known Mr Keenan for many years. Both Mr Toner and Mr Doherty's witness statements set out that they had *"no hesitation"* in buying from him; *"he was a well-known figure in the industry. He was always smartly dressed in a suit and always professional."*

204. Mr Toner visited Irwin's office and warehouse many times and told Mr Doherty that the office was a serviced office block. Irwin did not have a warehouse but it used a freight company to receive goods. Mr Doherty found that the facility was very professional and gave him no cause for concern. In oral evidence Mr Doherty explained that he believed Mr Keenan was the sales representative and that he had met Mr Dynes who stated he did not have much experience (day 4 page 66):

*"Mr Keenan was my main point of contact the whole time. I met Damien on a couple of occasions, but any dealing with the business, no matter what it was, was it sales, was it purchasing, was it paying a bank transfers, it was all Mr. Keenan I done it through.*

*JUDGE BLEWITT: So, really, you are not in a position to know whether Mr. Dynes had much involvement or little involvement, because all of your contact was with Mr. Keenan?*

*A. Yes."*

205. Mr Doherty explained that Mr Toner would make the initial contact with trading partners (day 4 page 66):

*"JUDGE BLEWITT: And can you perhaps recall an example of a business partner Mr. Toner met and how you then came to speak to them and trade with them?*

*A. Swift Valley would have been one that Mr. Toner met, and, through dealings and everything else, I would have went down into Swift Valley's office and met Paul Martin after that.*

*JUDGE BLEWITT: So Mr. Toner would go out and meet them and make initial contact?*

*A. If it is a customer that we are thinking about taking on, he would actually carry out with some of the checks, like check it's a business, that they have a warehouse, they maybe have a forklift for offloading soft drinks, photographs of their passports, and stuff like that, take it back to the office.*

*JUDGE BLEWITT: But then would you go and meet them yourself?*

*A. Yes, I would have met them myself*."

206. Mr Doherty stated that the Appellant did not obtain reports such as a FAME report for any of its suppliers and he was not aware that such reports were available. He stated that he was not aware that Mr Keenan's father was the executive contact for Irwin and had provided the company with funds.

207. Due diligence was *"more about getting the feel for a person, seeing how they operate, did they know much about the business…. it's roughly on meeting people, getting a feel for them, what experience you think they know on the business and how they portray, you know, how they go on, how they act, price wise and everything, that they know."* and that Mr Keenan *"was a sales rep but we knew he had a vast amount of experience in the soft drinks industry."*(day 3 page 95 and 96).

208. Mr Doherty stated that the reason for not carrying out credit check was: (day 3 page 96):

*"When I started business, if you were to do a credit check on myself – I had no previous businesses or anything else -- I had a low credit score. So I would have, and I wouldn't -- not only that, the experienced trader like Savage & Whitten, Coca Cola, Britvic, Automatic Retailing, they took me on board when I just started off the business. So, these are all people who are well known in the industry, well experienced. And surely, if they had have done a report on me, it would have come up roughly the same."*

209. Mr Doherty explained that Wigan checks were not conducted as the advice provided by HMRC to the Appellant was to verify the VAT numbers of new suppliers and customers. He stated that Europa checks were carried out on a transaction by transaction basis but Wigan checks were only undertaken for new trading partners after the Appellant became aware that HMRC recommended such checks.

***Diamond Marketing***

210. HMRC relied on the assessment raised against the Appellant (which was subsequently withdrawn) as part of its case. Mrs Arnold noted that the Appellant could only have been aware that the assessment was a result of invoices raised after the effective date of the company's de-registration either from HMRC or Diamond itself. She found it surprising that in spite of the letter from the Appellant's accountant which asserted that a fraud had been perpetrated against the Appellant, it nevertheless traded with Irwin, a company with close connections to Mr Keenan.

211. Mr Doherty explained that he had met Mr Keenan in his role at Diamond through Mr Toner. He stated that an assessment in the sum of £28,000 had been raised against the Appellant following the backdated de-registration of Diamond. He stated: (day 4 transcript page 27)

*"After the letter had went, I phoned Feargal Keenan and says, "Feargal, they have raised an assessment here on us for £28,000 from Diamond Marketing," I said, "something to do with backdating the deregistration." And he says that it was a mistake on his part and he will be -- after the telephone conversation that he would be getting on to HMRC to get the matter resolved. Shortly after that, we received a letter*

*from HMRC stating we were getting £28,000 refunded to us. Now, after that, I took the letter down to Daniel. Both me and Daniel looked at the letter and thought that is a matter resolved, Mr. Keenan must have sorted it out with HMRC, because it states on the letter that, legally, we weren't entitled to the money, and then after HMRC had given us back the money, we thought the matter was resolved, we couldn't -- there was no other explanation for it.*

*Q. Well, how did Feargal Keenan resolve it? What did he do?*

*A. I don't know. He told me he was getting it resolved, so I, automatically, once HMRC pays the money back --*

*Q. Well, did you ask him what had he done?*

*A. No, we continued on business –"*

***Loans***

212. The Appellant had financed its business without the use of loans or overdrafts until 22 July 2010 at which point payments of £49,974 and £50,000 were paid into the Appellant's bank account. Mrs Arnold explained in her witness statement that the loan was initially purported to have come from McCambridge Duffy; the Appellant's accountants. Mrs Arnold exhibited a letter from the Appellant to HMRC which stated that there had been no loan agreement in place but instead a gentleman's agreement regarding the loan. Mrs Arnold noted that there was no written agreement as to how or when the loan would be repaid or the rate of any interest payable and added in her oral evidence that she had been provided with no evidence from the Appellant to show that the loan has been repaid.

213. The letter to Mrs Arnold, which Mr Doherty accepted in his oral evidence had been signed by him, was dated 30 June 2011 and stated:

*"In relation to the loan from McCambridge Duffy, there is no loan agreement. There is a gentleman's agreement between both parties."*

214. In Mr Doherty's second witness statement dated 18 December 2012 he explained that the Appellant was "*running very low on cash*" and initially the company's accountants McCambridge Duffy had been approached for a loan as Mr Toner had known the owner for a significant number of years. It was suggested by the accountants that all other avenues should be exhausted and that led to the Appellant approaching Swift as Mr Toner had known the director for 20 years. Swift agreed to provide a loan and the accountants assisted by forwarding the funds through McCambridge Duffy to the Appellant.

215. The Appellant exhibited a letter during the hearing which we agreed to admit despite the late stage of proceedings. The letter was from McCambridge Duffy to the Appellant's legal representatives dated 19 December 2012 and it confirmed that McCambridge Duffy had not been in a position to provide the Appellant with a loan but it acted as an intermediary by receiving the funds from Swift and forwarding them

to the Appellant *"upon the signing of the loan agreement"*. The letter stated that Mr Martin of Swift had requested that the loan went through McCambridge Duffy as *"it made it more formal"*.

216. In his oral evidence to the Tribunal, Mr Doherty explained that (day 3 transcript page 139):

*"when we got this loan we were actually on our knees in business…Once we got the decision letter in from Mrs Arnold that she was withholding our money, we went to our accountant, who Jim would know personally, the actual owner, Colm Duffy, to…borrow money. We went to the bank to try and borrow money. And we knew Swift Valley was a big player…Daniel out of McCambridge Duffy carried out checks on him and you can see his cash flow…and it was then we approached him and asked him for the money. We told him our situation. We actually thought it would only be a few months we could repay the money back. We never thought it would come to something like this."*

217. Mr Doherty confirmed that the loan had not been repaid and the Appellant had stopped trading with Swift in August 2010.

218. Mr Doherty was unable to say whether, with the benefit of hindsight and looking at matters objectively, he accepted that Swift providing loans to Irwin, Signature, Yasmins and the Appellant was unusual.

219. In his oral evidence Mr Doherty did not agree that the letter to Mrs Arnold dated 30 June 2011 was misleading or an attempt by the Appellant to conceal its connection to Swift and the loan. Mr Doherty explained that he understood a gentleman's agreement to mean *"when parties agree to, like in this case, we got a loan of money, to pay the money back."* Mr Doherty was aware of the letter to Mrs Arnold but stated that it had been written by Daniel at McCambridge Duffy and therefore he could not comment on the phrase used. Mr Doherty was shown the loan agreement between Swift (day 3 transcript page 128) :

*"Q. It's a loan agreement, isn't it?*

*A. It's a gentlemen's agreement --*

*Q. It's a loan agreement, isn't it?*

*A. Well what you would call a loan agreement and I would call a gentlemen's agreement --*

*Q. It tells you what the interest rate is; it's 20 percent rate. It says a minimum repayment by way of interest is going to be £20,000, do you agree?*

*A. That's what it says here in the letter, yes.*

*Q. It says the duration is 12 months, doesn't it?*

*A. Back then when it was signed, yes, it was 12 months.*

*Q. It's a loan agreement, isn't it?*

A. *Well if that's what you want to call it..*

*Q. Well what do you want to call it then, that document, Mr.Doherty?*

*A. A gentlemen's agreement, I would call it; we agreed.*

Q. *Are you saying that's not a loan agreement?*

*A. I would say it's a gentlemen's agreement so I would.*

*Q. …Are you saying that that is not a loan agreement?*

*A. Well I would say it was a loan, yes.*

*Q. So you are agreeing it was a loan agreement?*

*A. According to this paper, it was a loan, yes.*

*Q. So you knew that on the 30th June 2011, your representatives were writing a letter on your behalf to HMRC which said there is no loan agreement?*

*A. No, that's Daniel's wording on it. It had nothing to do with me at the time."*

220. Mr Doherty was cross examined as to why the Appellant had failed to inform HMRC that the loan was made by Swift rather than McCambrigde Duffy:

*"Q. Do you agree that that letter is positively misleading?*

*A. Once again, all I can say it was Daniel's wording on it. I had no --*

*Q. Why is it you will not answer a simple question, Mr. Doherty? Do you agree that that letter is positively misleading?*

*A. I don't know what you want me to say. All I can say is it was a letter that came from McCambridge Duffy answering the questions. Daniel --*

*Q. Do you agree that the impression it creates is that the money was provided by McCambridge Duffy?*

*A. McCambridge Duffy had taken part when we went got the loan done up, so...The money came through McCambridge Duffy, that's correct.*

*Q. But that's like saying if I send you a cheque, which goes into your bank account and you then take the money out of the bank and I have actually loaned you the money, that's like saying NatWest have lent me the money.*

*A. McCambridge Duffy --*

*Q. Which is absolute nonsense, isn't it?*

*A. It's not. McCambridge Duffy handled the dealings on the loan for us, so they did. They done the due diligence on the loan. They done the e-mails back and forth which we sent to the HMRC. They took part on it and the loan came in through them."*

***Insurance***

221. The Appellant provided HMRC with an insurance policy from Alliance with cover of £250,000 for soft drinks, toiletries and cleaning products. Mrs Arnold noted that the policy appeared adequate for the goods while in transit but noted that Mr Chambers had not been covered for use of the lorry used to move the goods.

***Swift***

222. The Appellant's customer Swift purported to sell goods to a company called Galaxy. HMRC received information that the goods were not delivered to Galaxy but instead to various addresses in the UK and 12 Portadown Road, Hockley, County Armargh. HMRC officers visited a company called Mid Ulster Wholesalers Ltd (Mid Ulster) whose main supplier was Irwin. Its warehouses were said to be at Portadown Road, County Armagh and were owned by Glenwood Property Services Ltd of which Mr Damian Dynes was a director. Delivery notes obtained by HMRC from a company called Must Connect showed a delivery address of 12 Portadown Road, Hockley and the notes were signed by Mr Dynes. HMRC officers visited 12 Portadown Road which was in fact a care home which confirmed that it did not deal in soft drinks.

223. Mrs Arnold identified a number of the Appellant's invoices which pre dated Irwin's invoices to the Appellant. The Appellant's accountants had explained that: *"The Soft Drinks Company can issue a sales invoice to a customer before the date on the purchase invoice as the company keeps in regular contact with its' suppliers and is aware of stock level and prices on a daily basis. Therefore when the company receives an order from a customer the company can use this date as the sales invoice date and at that point orders the goods from its supplier. The company does not have any control over the date that its supplier puts on the purchase invoice date."*

224. Mrs Arnold also exhibited a spread sheet which showed invoices issued by Swift to Galaxy but delivered to Irwin. The spread sheet also showed that goods for which Irwin invoices the Appellant were later sold by Swift to Galaxy and that the goods were delivered back to Irwin rather than Galaxy. Mrs Arnold noted that from the invoices issued it appears that either goods purchased by the Appellant and sold to Swift were returned to Irwin through a defaulting chain or that goods which had originated with Swift were sold straight back to Swift. By way of example, Invoice 00398 from Irwin is dated 14 October 2009 and has a net value of £161,280. On 7 October 2009 the Appellant issued an invoice (19955) to Swift for Gillette Mach 3 with a value of £165,376. Swift invoiced a company called Galaxy for that quantity of goods on 19 October 2009 and the goods were delivered to the Hockley address.

225. Mrs Arnold concluded that on any view there had been a tax loss in the UK via Galaxy and that this was an indication that none of the traders were acting independently. She agreed in cross examination that the Appellant had no control over Swift, but noted that it was the Appellant's choice to trade with Swift despite limited due diligence.

226. As regards trading with Swift, Mr Doherty was questioned as to how it came about that Swift purchased razor blades and soap from it(day 4 page 14):

*"Q.how did it come about that Swift came to you about buying Dove soap, because you are a soft drinks merchant?*

*A. Yes, well by the stage with the Dove soap and the razor blades, and stuff, was about -- we were supplying Swift with soft drinks, and we had meetings with them in his office and our office and he was telling about other products that he was interested in that he actually – and everything else, and if you go to Irwin Enterprises, just their invoice, it actually states on it that they do…all these sort of products, and we actually put a phone call in to Feargal and asked him, "Could you source any of these products? We are actually interested in moving them." We actually gave them the products they were actually interested in buying, and that is how that actually started.*

*Q. But why they -- why would they ask you about buying soap when you are not a soap distributor?*

*A. I don't know. They could have asked anybody. It was the -- actually a list of products that they were actually interested in.*

*Q. Did it not surprise you that they -- that Swift approached you to sell them soap when there are millions of other people in the world who make a business out of selling soap?*

*A. Swift Valley are a massive business, they buy from an endless amount of traders, so they could have asked – they could have given a list to all their suppliers and asked them could they supply these goods, so it mightn't have been just specifically Soft Drinks Company."*

***Tom O'Connor***

227. In 2009 Irwin and the Appellant sold to a customer called Tom O'Connor. Mrs Arnold queried why Tom O'Connor would purchase from the Appellant, which sourced the majority of its goods from Irwin, rather than purchasing all of its goods from Irwin directly despite information obtained by HMRC which revealed that Mr O'Connor had informed Revenue Commissioners in Ireland that he had previously purchased from Irwin and Mid Ulster Wholesalers but later dealt solely with Mr Toner at the Appellant Company. Mr O'Connor state that he met Mr Keenan at football matches and initially met Mr Dynes of Irwin but had only purchased from Mr Toner. Tom O'Connor was de-registered from 1 February 2010; noted by Mrs Arnold to be the month that the Appellant began selling to Paradox.

***Back to Back transactions, Pattern of trading and Turnover***

228. HMRC submitted that the fact that the transactions took place on a back to back basis and the Appellant was never left with unsold stock, was suggestive of the contrived nature of the deals.

229. Mrs Arnold did not accept that the Appellant's trade was conducted in line with normal wholesale practice on the basis that the goods passed through chains of up to 4 traders and none of the loads were ever split. None of the goods in the deals relevant to this appeal were traced back to the manufacturer or an authorised distributor.

230. Mrs Arnold highlighted the volume of goods sold as unusual; for example almost 1 million bars of soap were sold in 3 months. Mr Toner was recorded as saying to HMRC at a visit in January 2010 that the Appellant had *"sold enough Dove soap to wash the whole of Ireland"* from which Mrs Arnold inferred that the Appellant had been aware of the implausibly high volume of goods sold. Mrs Arnold confirmed in her oral evidence that such high volume sales had not been the pattern of the Appellant's trading until it began trading with Irwin, Swift and Paradox yet the Appellant had failed to question why this was possible over such a short period.

231. HMRC relied on the patterns seen in the deals chains as indicative of fraudulent trading; where the Appellant's customer was Swift there is a trader between Irwin and the defaulting or missing trader, save for one deal with Galore. Where the Appellant's customer is Paradox there is no trader between Irwin and the defaulting or missing trader.

232. Mrs Arnold noted that although Mr Toner had previously been VAT registered in a business selling soft drinks, the turnover of the businesses was wholly dissimilar; the VAT returns for J T Sweets showed an average monthly turnover of just under £20,000 over a 2 year period to July 2004. By contrast, the Appellant's monthly turnover from March 2009 (when Mr Toner became a partner) to February 2011 was £712,750.

233. The increase in the Appellant's turnover from £984,191 in 2008 to £9,818,361 in 2010 was achieved with little apparent expense to the Appellant; expenses rose by approximately £70,000, wages by approximately £16,500 and advertising expenses, which had been £4,122 in 2008, were £1,587 in 2010.

234. Mr Doherty agreed that the Appellant's turnover increased dramatically when it began a model of trading which involved purchasing from Irwin and selling to Republic of Ireland traders such as Tom O'Connor, Swift and Paradox. He disagreed that the increase was too good to be true and stated that (day 4 page 53) *"it was down to getting good business contacts and everything else."*

235. Mr Doherty stated that the Appellant had recently built up its trade to a £4,000,000 turnover with approximately 200 customers but he did not accept that the only reasonable explanation for the significant turnover made from trade with Irwin, Swift and Paradox was that it was linked to fraud.

236. He stated that the Appellant did not undertake checks that would have enabled the Appellant to compare the profile of its supplier with the level of trade. Mr Doherty explained that there was a level of trust between the Appellant and its trading partners which meant that they would not be missed out of a transaction, for example by Irwin directly supplying Swift, and that relationships with customers and suppliers built up over time. He agreed that in a business world companies can be ruthless, and stated (day 4 page 72): *"it happens every day, cut and thrust, everybody pinches a penny"* but that this did not happen when the relationships were built up, although Mr Doherty did not explain how this issue was overcome at the start of the Appellant's trading relationships.

***The "no supply" deals***

237. Mrs Arnold had queried why the Appellant's invoices for 2 deals were dated 5 July 2010 when the CMRs were dated 11 June 2010 and 18 June 2010, to which the Appellant had responded that this was how business worked in the real world. Mrs Arnold noted that Goldstar and Aeris who featured in the chain had invoiced on 6 July 2010 and Irwin had invoiced on 7 July 2010. The CMRs show that the supply was made from a Cypriot company, Quetta, and delivered to Swift. HMRC submitted that the CMRs must have been drafted in Cyprus in order to accompany the goods by sea and Mrs Arnold questioned how Quetta knew to send the goods to Swift and why Swift raised a purchase order on 2 July 2010 when, on the face of the CMRs, it had already purchased the goods from the Appellant. Mrs Arnold explained in her oral evidence that she had considered all possibilities but that the only reasonable explanation was that each trader in the chain knew that a false invoice chain had been created which would lead to a tax loss with VAT unpaid by Aeris and a repayment to the Appellant.

238. In his oral evidence Mr Doherty stated that he believed that the CMRs were not the correct documents for the particular transaction which had only become apparent to him during the hearing despite the fact that the Appellant had produced the documents to HMRC in response to request for evidence to support its assertion that the goods had landed in in the UK and therefore Irwin were entitled to charge VAT on the supply to the Appellant:

*"A. To my knowledge, I don't think this is the correct CMRs to do with that deal.*

*Q. It's just a coincidence then, isn't it, that one is for Red Bull, a lorry load, and the other one it for Dove, the best part of a lorry load?*

*Q. So when did you speak to Mr. Martin about these being the wrong CMRs?*

*A. I think I spoke to him when Mrs. Arnold asked us to clarify our actual transport for the goods that we transported to them.*

*Q. Did you say "You have given us the wrong CMRs?"*

*A. I had never seen them before so I wasn't too sure. I had never seen a CMR so I wasn't sure if it was the right one or the wrong one.*

*Q. But it's many, many, many months ago since these CMRs were presented, were sent by your firm to HMRC. What I'm asking you is -- well, I'll break it down. On how many occasions have you spoken to Mr. Martin about these being the wrong CMRs?*

*A. I'm not sure to be perfectly honest.*

*Q. When did you realise they may be the wrong documents?*

*A. Actually here, to be perfectly honest with you, I thought this can't be right, it wouldn't have been that.*

*Q. When you say "here", you mean here in this Tribunal in Belfast this week?*

*A. That's correct.*

*Q. So the first time you have worked out that these may be the wrong documents, you are saying, is here this week?*

*A. Yes.*

*Q. You are saying you found out for the first time yesterday that these may be the wrong CMRs, yeah?*

*A. That's correct, yeah.*

*Q. Swift Valley Trading, are they still open for business?*

*A. Yes.*

*Q. Have you phoned them up?*

*A. No.*

*Q. So you have not asked Mr. Martin to come to this Tribunal and explain what happened?*

*A. No.*

*Q.You put an order in with Irwins for the Red Bull and the Dove Soap?*

*A. Yeah.*

*Q. And you have lost £18,000 on the deal, 18 and a half thousand pounds on the deal plus the profit you made on the gross, the markup?*

*A. We haven't lost anything yet. It's up to the Tribunal to decide.*

*Q. It's not on your case. It's pretty simple whose fault it is. It's Irwin's fault, isn't it?*

*A. I can't answer whose fault it was or who -- as far as I am concerned, I carried out the deals the way we normally conduct every other bit of business that we do, and I'm not sure if it was right or if it was wrong, but that's what the Tribunal will decide if it's right or wrong."*

239. Mr Doherty went on to explain in his oral evidence that Irwin had been instructed to deliver the goods to Swift on the Appellant's behalf.

*"I haven't been given any money back in any of this and as far as I was concerned, I asked Mr. Keenan to deliver the stuff to Swift Valley. Swift Valley received the stock and I thought the transaction was complete."*

***Payment Terms and Contracts***

240. HMRC relied on the absence of formal written contracts or terms and conditions between the Appellant and its supplier or customers as an indication that the Appellant was aware that the deals were contrived.

241. HMRC also submitted that, bearing in mind the absence of evidence of credit checks made by the Appellant, the fact that payment was only made to Irwin after the Appellant was paid by its customer was indicative of the fact that the deals were pre-arranged.

**The Appellant's Submissions**

242.The Appellant's position was helpfully set out in written submissions. We do not intend to repeat the same in any detail; the summary that follows is simply designed to provide an overview.

243.It was submitted that the frauds in this appeal do not display contrivance at every level and are purely acquisition frauds.

244.Mrs Arnold for HMRC accepted that goods supplied by Irwin and sold by the Appellant to UK traders including Lynas Foods, a large company in Northern Ireland which supplies shops and restaurants, were traced back to defaulters which indicates that the Appellant had control over which companies goods were sold to and the deals were not contrived. On that basis, HMRC have not eliminated all reasonable explanations for the Appellant's entering into their transactions and it cannot be said that the Appellant knew or ought to have known of the connection to fraud.

245.The Appellant traded similar types of goods in loads which were not split with legitimate traders such as Lynas Foods in the same period and the recent turnover figures indicate that trading is reaching similar levels to 2010/11. Multiple purchases of full loads in a short space of time were not uncommon in 2010/11 and is not uncommon in the present day. The supplies to Swift and Paradox were no different to those to Lynas Foods and other customers save that the goods did not pass over the border. Consideration should be given to the multiple full loads made in 2012 in assessing whether the Appellant's purchase of multiple loads from Irwin is indicative of knowledge of fraud.

246.The Appellant had known Mr Keenan for many years and trusted him as a supplier. Previous transactions had taken place with Mr Keenan without difficulty and therefore the question of due diligence is academic. Nevertheless, the Appellant carried out due diligence on Irwin which was sufficient to satisfy Mr Doherty. The lack of a FAME report is not evidence of knowledge when viewed against the long standing history with Mr Keenan and such a report would only have provided comfort to the Appellant by confirming the correct name and address of the business.

247.HMRC had reviewed the Appellant's due diligence in June 2010 and therefore cannot now assert that the documents were not adequate having failed to raise this as an issue in 2010. Due diligence was carried out on both Swift and Paradox.

248.As the assessment raised against the Appellant in respect of its transactions with Diamond was withdrawn without reasons being given, the Appellant was entitled to accept Mr Keenan's explanation that it had been a mistake on his part which was resolved.

249.The letters sent to the Appellant regarding tax losses on 5 October 2010, 28 October 2010, 30 November 2010, 9 December 2010, 31 January 2011 and 10 February 2011 did not clearly state that the losses related to purchases from Irwin. When this became clear, following HMRC's letter dated 3 March 2011, the Appellant contacted Mr Keenan who advised that he had changed suppliers. This was also confirmed to the Appellant in a letter dated 13 May 2011.

250.The Appellant insured the goods and cannot be held responsible for the lack of insurance for the vehicle used to transport the goods which was hired to and paid for by Irwin.

251.Negotiations took place with suppliers and customers, although prices could be fixed for up to 6 weeks. The mark up obtained by the Appellant was reasonable; in 5 transactions which involved Yasmins, Yasmins made the largest profit which is not indicative of MTIC trading. The documents which purport to show Swift provided funding to Yasmins are dated 9 February 2011 which postdates the relevant period. Furthermore the director of Yasmins had stated that payments to Swift were commission payments rather than loan payments as suggested by HMRC. The payments made by Swift to various traders occurred after the Appellant's transactions in this appeal.

252.The loan document exhibited is a Promissory Note and not a loan agreement; the difference between which Mr Doherty was unaware. It is therefore not surprising that Mr Doherty did not want to accept the document as a loan agreement.

253.If the Appellant had been missed out of a transaction between Irwin and Paradox, the former would only have sold to Paradox at, arguably, a couple of pence more which adds little by way of income. Furthermore, if such an event occurred, Irwin and Paradox would have lost the trust of the Appellant and the latter would take its business elsewhere, at a loss to Irwin.

254. The opinion evidence adduced by HMRC, in particular that of Mr Stone and Mrs Arnold, should be entirely disregarded, as should factors which were beyond the Appellant's knowledge such as mark ups and financial arrangements between other parties.

255. The onus rests with HMRC to show what information further checks made by the Appellants could have revealed.

256. The Appellant relies on JDI Trading v HMRC [2012] UKFTT 642 (TC) in support of its alternative argument that the Appellant was an innocent dupe in the fraud (at paragraph 208):

*"Clearly this is not an archetypal MTIC case concerning an inexperienced trader with no prior knowledge or understanding of the market in which he operates who seizes what is perceived to be an opportunity to make a substantial and effortless financial gain. In contrast, in this case, Mr Cuthbertson and the directors of JDI have many years experience in, and knowledge of, the mobile phone industry and the amount at stake, although not insubstantial, is modest when compared to the sums involved in many other MTIC cases."*

It was submitted that the Tribunal should take account of Mr Doherty and Mr Toner's many years of experience in the industry in assessing whether the Appellant was innocently caught up in a contrived carousel fraud.

257. There is no single set of fact which demonstrates that the Appellant knew of the connection to fraud and there is insufficient evidence to prove that the Appellant knew or ought to have known that the only reason for its transactions was that connection.

**Submissions of HMRC**

258. It was the case for HMRC that all of the deals in question were connected with the fraudulent evasion of VAT and that the Appellant knew of the connection, or should have known of it.

259. Inter alia, HMRC relied on the Appellant's continued trading with Irwin despite having been assessed in the sum of £28,000 arising from its deal with Diamond, a company connected to Mr Keenan.

260. The loan from Swift lacked commerciality given that there was a risk the Appellant would default on the loan due to financial problems. Furthermore, that Swift has taken no action to recover the debt indicates that the Appellant was aware of the fraud it was participating in, or at the very least should have put the Appellant on notice of the same. The Appellant's letter to HMRC which stated that there was no loan agreement was misleading and an attempt to conceal its connection to Swift via the loan. It lacks any commercial reality that a customer would provide funding to its supplier and fail to enforce recovery of the debt. The letter adduced during proceedings from McCambridge Duffy which stated that Swift had provided the loan was not supported by oral evidence by anyone from the organisation nor was the

author of the letter revealed. The production of the letter so late in proceedings is indicative of the Appellant being forced to reveal the true source of the loan as its position otherwise, in the absence of any documents relating to the loan, was untenable. HMRC submitted that the only conclusion to reach is that the Appellant was aware that the loan from Swift was cogent evidence of its knowledge of the fraud and hence it attempted to conceal the fact.

261. The level of trading and turnover was too good to be true and put the Appellant on notice that it was connecting itself to fraud.

262. CMRs show that goods were delivered from Quetta in Cyprus to Swift (and therefore were purchased by Swift) prior to the date on which the Appellant had sold them. Mr Doherty tailored his evidence to explain this discrepancy in the documentation by stating that he had only recently realised that the CMRs produced by the Appellant must not relate to the deal in question. Furthermore, the chronology does not withstand scrutiny in that the CMRs must have been completed prior to the Appellant being in a position to instruct Irwin to arrange for the goods to be delivered to Swift. It therefore follows that the documents were created to provide the false impression that a purchase and sale of goods had taken place in order to assist the Appellant's repayment claim.

263. Mr Doherty's evidence was vague, lacked credibility and was not supported by other witnesses. When questioned as to why his first witness statement was almost entirely identical to that of Mr Toner, Mr Doherty had denied being presented with a draft to sign or having read Mr Toner's statement and stated that the similarities were coincidental. Mr Doherty's evidence that deals were negotiated was unsupported by documentary evidence or evidence from the Appellant's trading partners. HMRC highlighted Mr Doherty's attitude to Mr Keenan, who he did not criticise or attribute blame to either in respect of the assessment raised as a result of Diamond's de-registration or the loss of approximately £18,000 which arose from the goods from Quetta not being docked in the UK, as evidence of the Appellant's knowledge that its deals were fraudulent. Mr Doherty had no credible reasons for trusting Mr Keenan and failed to make any meaningful evaluation of his character. Despite accepting in oral evidence that he was aware that the tax losses identified by HMRC related to the deals with Irwin, Mr Doherty continued to trade with the company until February 2012. The explanation that he had been informed by Mr Keenan that Irwin had changed its supplier lacked credibility and the Appellant failed to take any steps to ensure that such was the case. Mr Doherty claimed that he controlled the day to day running of the Appellant Company yet there was no evidence that the Appellant gave any consideration as to whether to continue trading in the same manner after its repayment claims were denied.

**The Decision**

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

231. In reaching our decision we considered the oral and written evidence of all of the witnesses together with the submissions of Counsel on both the evidence and the law. We disregarded the opinion evidence of Mr Stone whose statement was prepared with the benefit of hindsight and contained information of which the Appellant would not be aware. We did not exclude the opinions expressed by Mrs Arnold, as suggested by the Appellant, as to do so would exclude the officer's basis for the decision against which the Appellant appeals, however we treated the weight to be attached to that evidence as a separate issue, and a matter upon which we made findings of fact having assessed the evidence.

*Witnesses Credibility*

264. We found Mrs Arnold to be a credible witness whose evidence, both written and oral, we found as a fact was reliable. In our view Mrs Arnold presented as a witness who had taken the utmost care to deliver a thorough analysis of all aspects of this case.

265. In contrast we found Mr Doherty was vague, unconvincing and at times untruthful. We bore in mind that people tell untruths for a variety of reasons and it was not a factor that led us to reject his evidence in its entirety but we found as a fact that it affected his credibility and the reliability of his evidence. We found as a fact that he knew very little detail about the transactions which are the subject of this appeal or the Appellant's trading partners. Mr Doherty's assertion that it was he, rather than Mr Toner, who took charge of the day to day operations of the Appellant Company did not withstand scrutiny under cross examination and we were left with the clear impression that he was not the driving force behind the Appellant's activities at the time of the relevant transactions.

266. We should note at this point that Mr Toner did not give oral evidence to the Tribunal due to medical reasons. We considered his statement dated 5 April 2012, which was effectively an identical statement to Mr Doherty's first witness statement (of which we make no criticism of either Mr Toner or Mr Doherty having concluded that this was more than likely a result of the statements being prepared by legal representatives) and found that it provided little detail on relevant issues such as the relationship between Mr Toner and Mr Keenan which led to trading between the parties. We concluded that without the opportunity to assess Mr Toner as a witness or consider his response to challenges to his witness statement, the statement provided little assistance to us in determining the issues in this case.

***Awareness of MTIC Fraud***

267. We did not accept Mr Doherty's assertion that he was not aware of MTIC or carousel fraud at the relevant time. Mr Doherty, who was clearly an intelligent man, had traded successfully in the industry since 2006 and we inferred from this that he must have had significant knowledge of the sector. The Appellant had accepted in writing that MTIC fraud was discussed at a meeting with HMRC in March 2009, prior to the visit by Mrs Arnold in June 2010 when Mr Doherty stated that he had first

become aware of MTIC fraud. The letter specifically states, regarding MTIC fraud, that *"…indeed this was the first time that this was brought to their attention"*.

268. In those circumstances we were satisfied that the Appellant was aware of the existence and characteristics of fraud within the industry and we concluded that this was a relevant factor to take into account in assessing the manner of the Appellant's trading.

***Due Diligence***

269. We found as a fact that the Appellant failed to carry out any meaningful due diligence such as would satisfy a reasonable businessman that the parties with which the Appellant traded were legitimate.

270. Mr Keenan had been known to Mr Toner for a significant period of time however there was no evidence before us as to the circumstances in which they had met or developed a trading relationship. We found that the written evidence of both Mr Toner and Mr Doherty which stated that *"he was a well-known figure in the industry. He was always smartly dressed in a suit and always professional"* was a wholly superficial basis upon which to assess any trader with whom such significant volumes of trade were conducted. Indeed, there was no evidence before us from which it could be concluded that Mr Keenan was *"well-known"* for legitimate rather than illegitimate reasons.

271. The due diligence documents obtained in respect of Irwin lacked substance and Mr Doherty accepted that information, such as that found on a FAME report, had not been obtained.

272. We considered what was known by the Appellant about Mr Keenan at the relevant time. The Appellant's trading with Diamond, of which Mr Keenan was a director, had led to an assessment in the sum of £28,000 being raised against the Appellant as a result of Diamond's de-registration being backdated. We acknowledged the fact that the assessment was subsequently withdrawn, but it is the Appellant's actions, or lack thereof, in respect of this issue which are both relevant and telling. The Appellant's accountants alleged that the Appellant had been a victim of fraud in respect of the assessment. The only reasonable inference to be drawn is that Diamond was the party allegedly acting fraudulently. Mr Doherty's actions were limited to speaking to Mr Keenan who assured him that it was a mistake which would be resolved. Mr Doherty's evidence on the matter was vague which led us to question whether Mr Doherty had, in fact, been the person who dealt with this issue. Accepting that he had been, he appeared to have taken Mr Keenan at his word and when the assessment was withdrawn he assumed that Mr Keenan had settled matters with HMRC. We found it implausible that any reasonable businessman would continue trading without making detailed enquiries with HMRC or Mr Keenan (a man known to Mr Toner for 20 years) as to why the assessment was raised and subsequently withdrawn particularly given the cost of the potential consequences to the Appellant until the assessment was withdrawn.

273. We also noted that the Appellant was content to enter into transactions with Irwin despite the fact that Mr Dynes, the director, had limited experience in the industry. It appeared that the Appellant failed to question Mr Dynes' involvement in Irwin and dealt solely with Mr Keenan. We found as a fact that any legitimate businessman would have queried Mr Dynes' role and undertaken meaningful due diligence to satisfy himself as to the veracity of the company. We found as fact that Mr Doherty's evidence that Mr Keenan was a "sales representative" did not sit well with other aspects of Mr Doherty's evidence, namely that Mr Keenan took responsibility for all aspects of the transactions undertaken with Irwin and we were satisfied that the Appellant was aware that Mr Keenan was, in reality, running Irwin. In those circumstances, the Appellant's failure to query the role of Mr Dynes was a matter which we would not expect of a reasonable trader.

274. We noted that Mr Doherty's main point of contact at Irwin was Mr Keenan and the impression given by his evidence was that Mr Keenan was responsible for the running of the company, which seemed to us at odds with his description of Mr Keenan as a "sales representative." We formed the impression that Mr Doherty went to great lengths not to attribute any fault to Mr Keenan, for example in respect of the assessment raised as a result of Diamond's de-registration or the "no supply" deals; as regards the latter, Mr Doherty's evidence was that he had been told by Mr Keenan that the goods in deals 35 and 36 had docked in Belfast however it was subsequently accepted by the Appellant that there was no evidence to support this assertion and therefore no evidence that Irwin was entitled to charge VAT on the supplies to the Appellant. The abandonment its appeal in respect of this issue (which relates only to deals 35 and 36) clearly has financial consequences for the Appellant. We found Mr Doherty's attitude in failing to blame Mr Keenan or take action to seek compensation despite his evidence that the possible consequences of this appeal would mean *"I will lose everything"* was indicative of the contrived nature of relations between the Appellant and Mr Keenan.

275. The due diligence on Swift and Paradox was equally lacking in substance and we found as a fact that the documents produced by the Appellant would have provided little in the way of assurance to the Appellant that the companies were legitimate. There was no evidence before us as to the basis upon which the Appellant had assessed either company as a suitable trading partner. In respect of Paradox (a relatively new company) we found Mr Doherty's evidence that the Appellant did not reject trading partners on the basis of a limited trading history lacked commercial credibility; we were satisfied that whilst the Appellant may have traded with such a company, a reasonable businessman would in such circumstances have made meaningful enquiries to ensure the veracity of the company, which the Appellant had failed to do. We noted Mr Doherty's evidence that Mr Toner made initial contact and thereafter Mr Doherty would meet the relevant company officials. There was little information in Mr Toner's witness statement as to the enquiries he conducted in respect of either company. Swift was "well-known" in the industry and another of Mr Toner's contacts from his earlier trading as J T Sweets and a visit had been made to Paradox. Given the amount of transactions conducted with the 2 companies we found as a fact that there was no evidence before us, oral or documentary, upon which the Appellant could have satisfied itself as to the veracity or otherwise of the companies.

276. We found Mr Doherty's evidence that due diligence was *"more about getting a feel for the person"* lacked any commercial acumen. There was no meaningful evidence that the Appellant knew its trading partners to any degree such as would satisfy it that the companies were trading legitimately.

277. We concluded that the due diligence carried out by the Appellant was no more than window dressing and that the documents obtained were inadequate for the purpose of ensuring that Irwin, Swift and Paradox were legitimate companies. The Appellant took no meaningful precautions as would be expected of a reasonable businessman entering into transactions of the type that the Appellant did such as would protect it against involvement in fraud. We concluded that the only reasonable explanation for the Appellant's failure to conduct due diligence of substance was that it was aware of the contrived nature of the deals.

***Swift***

278. The crux of HMRC's submissions on this issue was that none of the traders in the chains, including the Appellant, were acting independently. As urged on behalf of the Appellant, we were cautious in our approach to this matter as it is possible that a trader can act independently but be manipulated by traders around it which position themselves so as to facilitate fraud. For that reason we did not conclude that the Appellant knew of the fraud and its participation in it on this matter alone. We did however note that had the Appellant conducted efficient due diligence on Mr Dynes, it would have discovered his directorship of Glenwood Property Services Ltd which, in our view, would have led any reasonable trader to question why he was also a director of a company involved in soft drinks. We also noted the Appellant's failure to query why Swift approached it, a soft drinks company, with a view to purchasing Dove soap. We found Mr Doherty's evidence on the point unconvincing and we concluded that this was an indication of knowledge or, at the very least should have put the Appellant on notice that the transactions into which the Appellant entered were contrived.

***Tom O'Connor***

279. We accepted HMRC's argument that the Appellant was able to replace its customer Tom O'Connor with apparent ease following de-registration, after which it traded with Paradox. Whilst this was, in our view, a matter which any legitimate trader would have queried, we were not satisfied that this matter viewed in isolation could lead us to conclude that the Appellant knew or should of known that by this fact its transactions were connected to fraud.

***Loans***

280. We noted that the loans made by Swift to traders other than the Appellant were made after the periods with which we are concerned and we were not satisfied that these were matters that would be known to the Appellant. Although the loans indicate that various other traders referred to in this appeal were not at arm's length, we found

that this did not assist us in determining the knowledge or otherwise of connection to fraud of the Appellant.

281. That said, the Appellant's loan from Swift was a matter of significance for a number of reasons. The first relates to the lack of disclosure to HMRC regarding the loan. It was quite clear that the Appellant had initially indicated to Mrs Arnold that the loan had come from its accountants McCambridge Duffy and that no loan agreement existed but rather a "gentleman's agreement". The Appellant did not clarify that the loan in fact came from Swift until Mr Doherty provided a second witness statement dated 18 December 2012 which explained that Swift had been approached as Mr Toner who had known the director for a number of years and the funds were transferred from Swift through McCambridge Duffy to the Appellant. A legal document was also provided which set out the terms of the loan.

282. No reasonable or credible explanation was forthcoming from Mr Doherty as to why this information was adduced so late in the proceedings; indeed Mr Doherty remained adamant to a degree that the loan had come from McCambridge Duffy as it had transferred the funds. In our view this was entirely misleading and an untenable position for the Appellant. Mr Doherty's explanation as to the meaning of a gentleman's agreement and the legal document exhibited lacked any credibility. Irrespective of whether the document was a loan agreement or promissory note, the fact remains that a formal agreement existed, which was not the impression initially given by the Appellant to HMRC, an impression which we were satisfied was deliberately made. We also found as a fact that his explanation that the accountant had written the letter (which implied that there was no agreement and that the loan came from McCambridge Duffy) which Mr Doherty accepted was signed by him, was an attempt to minimise responsibility for the false impression created. Having formed this view, we queried why the Appellant would go to such lengths to avoid setting out the true position clearly. We concluded that the only reasonable explanation is that the Appellant was aware of the contrived nature of the deals and Swift's involvement in the fraud and was attempting to distance itself from other traders which the Appellant was aware were acting as part of an overall scheme to defraud the Revenue.

283. We found as a fact that the loan from Swift lacked commerciality given the financial difficulties which led the Appellant to seek the loan and the fact that its supplier purportedly provided the loan irrespective of the likelihood of the Appellant defaulting. Our conclusion that the loan was part of the contrived nature of the transactions was strengthened by the fact that Swift has taken no action to recover the debt which we found was indicative of the Appellant's relationship with Swift from which we inferred knowledge on the Appellant's part that it was participating in an overall scheme to defraud the Revenue. We concluded that at the very least the actions of Swift lacked commercial credibility and would have put any reasonable trader on notice that its transactions were connected to fraud.

***Insurance***

284. Mr Chambers was not insured to drive the lorry used to transport the goods. However we noted that the information pertaining to Mr Chambers was gathered from

Mr Keenan and companies with which the Appellant did not trade. In those circumstances we were not satisfied that this provided any indication of knowledge or mean of knowledge of fraud in respect of the Appellant.

***Back to Back transactions, Pattern of trading and Turnover***

285. We did not accept that the Appellant's back to back trading of itself was indicative of knowledge or means of knowledge of fraud. However, we found as a fact that the volume of goods traded by the Appellant with Irwin, Swift and Paradox was unusually high in comparison with the Appellant's trading prior to the relevant period and its trading with other companies. The volume of trade, combined with the consistent profits made and significant increase in turnover was simply too good to be true and a matter which any legitimate trader would have queried. That the Appellant failed to so do, was in our view indicative of its knowledge that the transactions were contrived.

286. We reached this conclusion having carefully considered the level of trading undertaken by Mr Doherty from his commencement in 2006 as compared with the rapid and significant increase when Mr Toner became involved in the company. We could not understand why Mr Doherty, who must have noticed the difference in volume of trade and trading partners, did not question why this was. We found Mr Doherty's evidence that it was *"just down to getting good business contacts"* unconvincing given that his turnover increased so dramatically upon the involvement of just 3 trading partners as compared to the level of turnover prior to that. Whilst we accepted that the Appellant's turnover in recent months has increased, we noted that at the time of the hearing it had not reached the heights which it had in the period with which we are concerned and it the number of customers now used (about 200) highlighted the difference in the Appellant's trading all the more.

287. We considered the Appellant's submission that goods which were traced back to defaulting traders had been supplied by Irwin and sold by the Appellant to UK traders such as Lynas Foods. In our view these transactions are distinguishable in that they did not cross the border and consequently had no bearing on the Appellant's repayment claims unlike its transactions with Swift and Paradox.

288. The Appellant traded similar types of goods in loads which were not split with legitimate traders such as Lynas Foods in the same period and the recent turnover figures indicate that trading is reaching similar levels to 2010/11. Multiple purchases of full loads in a short space of time were not uncommon in 2010/11 and is not uncommon in the present day. The supplies to Swift and Paradox were no different to those to Lynas Foods and other customers save that the goods did not pass over the border. Consideration should be given to the multiple full loads made in 2012 in assessing whether the Appellant's purchase of multiple loads from Irwin is indicative of knowledge of fraud.

289. We noted that in 5 deals Yasmins made the largest profit. Given that Yasmins and Swift had an arrangement, which appeared to begin in October 2010, in which Swift provided Yasmins with funding and the profits were shared equally, HMRC

invited us to infer that Yasmins higher profit in these deal was a result of this arrangement. We could not be satisfied on the evidence before us that this was the case although we found as a fact that a reasonable inference to draw was that Yasmins increased profit was linked to an overall scheme in which it and Swift were not at arm's length or trading independently. However we found that Yasmins' profit was not a matter about which the Appellant would necessarily be aware and in those circumstances we confined ourselves to considering the Appellant's profit. In every deal the Appellant consistently made a profit and we found as a fact that its ability to do so without any apparent added value lacked commercial reality and was indicative of the contrived nature of the deals. We were satisfied in those circumstances that the Appellant's apparent failure to query why such profits were consistently made was indicative of its knowledge of such a fact or, at the very least a matter which would have put a reasonable businessman on notice that the deals were connected to fraud.

290. We rejected Mr Doherty's explanation as to why his customers and supplier did not deal directly with each other as unconvincing and evasive. Mr Doherty failed to provide an explanation as to why, when its trading partners were new, there would be any reason for them to conduct transactions that included the Appellant. We found as a fact that his explanation that trust was built up over time which in turn meant that the Appellant would not be cut out of deals lacked commercial rationale in the real world and instead was indicative of the contrived nature of the deals whereby the Appellant was a participant in the chains, able to make consistent profits, apparently without adding any value to the goods traded. We rejected the submission on behalf of the Appellant that by "cutting out the middle man" i.e. the Appellant Irwin would only have sold at a couple of pence more than it did to the Appellant; on the evidence before us the increase in Irwin's income if the Appellant had been missed out of the transaction would have been in the region of 25p per case which amounts to approximately £750 for every consignment of 3,120 cases which cannot be said to be a small increase to turnover.

***"No Supply" Deals***

291. We found that the evidence which had related to the issue of no supply (the appeal against which was later abandoned by the Appellant) was relevant to the issue of knowledge or means of knowledge. We rejected as implausible and untruthful Mr Doherty's evidence that the wrong CMRs had been produced in support of its VAT repayment claim for the 2 deals on 5 July 2010. The CMRs were provided to HMRC long before the appeal hearing and we found it wholly implausible that Mr Doherty only realised during the proceedings that they may be the incorrect documents. We were satisfied that Mr Doherty was attempting by his evidence to explain a discrepancy in the documentation which significantly undermined the Appellant's case. Our view was strengthened by the fact that, accepting for the moment that Mr Doherty was correct, no action was taken to rectify the alleged mistake from which we concluded that Mr Doherty was aware that the invoices false and there was little that could be done to rectify the situation.

***Payment Terms and Contracts***

292. There were no written agreements regarding matters such as the date and method of payment and return of goods. In our view this was implausible for a legitimate trader seeking to minimise exposure to risk. We found as a fact that this manner of trading was not commercial reality and would have put any reasonable businessman on notice that the trade was not legitimate. Bearing in mind the prevalence of MTIC fraud, we found it implausible that the Appellant's supplier would rely not only on the Appellant but also other traders unknown to the supplier further down the chain in respect of payment. This was a risk which an independent businessman would not take and we inferred from this evidence that it was an indication that the chain of transactions were fraudulently manipulated.

***The Appellant as a victim of fraud***

293. We rejected the submission on behalf of the Appellant, relying on *JDI Trading v HMRC* [2012] UKFTT 642 (TC) that the Appellant was an innocent dupe in the fraud. We were satisfied that the Appellant was an experienced trader aware of the prevalence of MTIC fraud in the industry and to find that the Appellant was a victim of fraud would be to ignore the clear and obvious indicators set out above which lead to the only reasonable conclusion that the Appellant knew, or at very least should have known, that its transactions were connected to fraud.

294. We also considered the submission on behalf of the Appellant that in order to find against the Appellant in this appeal, HMRC must prove that all other reasonable explanations for the Appellant entering into the transactions have been eliminated. We respectfully rejected this submission and agreed with the Tribunal in GSM Export (UK) Limited [2012] UKFTT 744 (TC) in which Judge Nowlan stated:

*"The point in issue appears to have been whether Lord Justice Moses had sought to modify the Kittel test such that it would only be satisfied if the Appellant knew or ought to have known that there was no other reasonable explanation for the transactions than connection to fraud, so that critically if there were two reasonable explanations for the transactions (one being connection to fraud and another being a perfectly legitimate grey market transaction), then the appellant's appeal should succeed because the Crown would not have established that connection to fraud was the only reasonable explanation. There was another legitimate explanation which was also tenable.*

*It seems perfectly obvious to us that this is not what Lord Justice Moses meant, or indeed what he said. The reference to "reasonable explanation" emerged in the part of the decision where Lord Justice Moses was considering whether the Crown had to establish knowledge or means of knowledge to the effect that the transactions* ***were connected to fraud****, or whether it was sufficient for the Crown to show that the transactions* ***were more likely than not*** *to have been connected to fraud. Whilst the clear answer to this was that the former had to be demonstrated, the subsequent reference to "the only reasonable explanation for the transactions being connection to fraud" appears to have been intended as a sensible paraphrase…It was not intended to provide appellants with the available argument that if they could show that some other reasonable explanation for the transactions was tenable, their appeal*

*should inevitably succeed. If an appellant could assert some other reasonable explanation, then the appellant might sustain his appeal by showing that the Crown could only establish, at best, the insufficient* ***"more likely than not"*** *conclusion. But if the Crown could establish knowledge or means of knowledge in any other way, then the appeal should still fail."*

295. To ensure fairness to the Appellant, we nevertheless considered whether there was any other reasonable explanation for entering into the transaction. Save for being innocently duped, no other reasonable explanations were put forward and for reasons already stated we did not accept that the Appellant was a victim in the fraud. In our view regard must be had to the word "reasonable"; any other explanation no matter how tenuous will not suffice. On the evidence available to us, we were wholly satisfied that the only reasonable explanation for the Appellant entering into transactions, which by their nature and manner were clearly linked to fraud, was that its awareness of contrivance.

**Conclusion**

296. We should note that the evidence in this case was voluminous and the matters set out above are not an exhaustive list of all that we heard and read. In reaching our decision we took into account all of the evidence, both oral and documentary.

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

298. We did not focus unduly on the issue of due diligence, and we took into account all of the surrounding circumstances in reaching our decision as to whether the Appellant knew or should have known that each of its transactions were part of an artificial scheme. We found that some reasons carried more weight than others and we did not base our decision solely on one reason but rather the cumulative effect of our findings viewed in totality.

299. In doing so, we concluded without hesitation that the Appellant, through Mr Doherty should have known that its transactions were connected to fraud.

300. We were satisfied that some of the matters highlighted in this decision pointed towards knowledge on the part of the Appellant. It was also our view that there were matters upon which Mr Doherty was genuinely unable to comment but which would have put any reasonable trader on notice that its transactions lacked commerciality. We concluded that Mr Doherty was aware that aspects of the Appellant's trading could not possibly be, and therefore were not, legitimate but that his role in the fraud had been such that he was unaware of particular details. This corroborated our earlier impression that Mr Doherty's role had not been as involved as he attempted to impress upon us. It is not a requirement of the test laid down in *Mobilx* that all aspects of a fraud must be known by a trader nor indeed that the trader's knowledge must be particularised. In those circumstances we must conclude that the Appellant, through Mr Doherty had actual knowledge that its transactions were connected to fraud and

that, by its purchases, it was taking part in transactions connected with the fraudulent evasion of VAT.

301. HMRC has proved that the Appellant's means of knowledge was such that the transactions fell outside the scope of the right to deduct input tax. Accordingly we found that the decision of HMRC to deny the Appellant's input tax was correct and is upheld.

302. The appeal is dismissed.

***Costs***

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

304. 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.

**J BLEWITT**
**TRIBUNAL JUDGE**

**RELEASE DATE: 19 July 2013**