



TC07163

**Appeal number: TC/2016/04373
TC/2016/05913**

VALUE ADDED TAX – MTIC fraud – whether or not trader in chain a fraudulent defaulter – held yes – whether or not appellant knew or should have known that transactions were connected to fraud – held not – appeal allowed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

BEIGEBELL LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE PHILIP GILLETT
IAN ABRAMS**

Sitting in public at Taylor House, London on 14 to 20 May 2019

Tim Brown, counsel, instructed by Appleton Richardson & Co, for the Appellant

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

DECISION

INTRODUCTION

1. This was an appeal against a decision of HMRC, notified to the appellant (“Beigebell”) in a letter dated 4 October 2016, to deny input tax credit of £144,628.40 for the VAT period 10/15. HMRC’s grounds for this decision were that Beigebell’s transactions in SD memory cards were connected with the fraudulent evasion of VAT and Beigebell knew or should have known of that fact.

2. Following the denial of input VAT in the decision of 4 October, HMRC notified Beigebell by letter dated 20 October 2016 that its VAT return for the period 10/15 had been amended and it had been assessed to VAT of £3,647.68 pursuant to s73 of the Value Added Tax Act (‘VATA’) 1994.

BACKGROUND

3. Beigebell registered for VAT, with the number 995 5982 37, with effect from 22 July 2010. It carries on business from Trident Court, 1 Oakcroft Road, Chessington, Surrey. Beigebell’s directors and shareholders are Mr Jack Orton and Mr Marcus Griffiths. Beigebell carries on business as a supplier of promotional merchandise, such as stickers, bags, T shirts, note books and mouse mats to companies such as McLaren, Triumph Motorcycles, Channel 4 and The Ritz. The transactions in memory cards with which this appeal is concerned were dealt with by Mr Orton alone.

4. The input, output and VAT figures for the Appellants trading in period 10/15 are as follows:

Output tax	49,827.21
Input tax	<u>190,807.99</u>
Net tax (credit)	<u>140,980.78</u>
Outputs	1,059,530
Inputs	956,090

5. The outputs figure for this quarter was more than double any other quarter in the previous three years and the inputs figure was likewise very significantly higher than that in previous quarters.

THE TRANSACTIONS

6. There was no disagreement between the parties as to the transactions involved and, from the evidence provided to us, we find the following as matters of fact.

7. Between 1 September 2015 and 8 September 2015 Beigebell made six purchases of memory cards from a single supplier, Online Distribution Limited (“ODL”), and sold these on in five deals to Hi View Trading SL (“HVT”) as set out as follows:

(1) Under invoice SI-1227233 (“Deal 1”) dated 1 September 2015, the purchase of 1,000 SanDisk 256GB SD cards (traced back to Shark Partners Ltd);

(2) Under invoice SI-1227344 dated 7 September 2015, the purchases of:

(a) 1,000 Samsung EVO SSDs (“Deal 2”) (traced back to a contra-trader, Askos Wolt LLP); and

(b) 550 SanDisk 256GB SD cards (“Deal 3A”) (traced back to a defaulting trader Raya International Ltd);

(3) Under invoice SI-1227360 dated 8 September 2015, the purchases of:

(a) 200 SanDisk 256GB SD cards (“Deal 3B”) (traced back to Askos Wolt LLP); and

(b) 500 SanDisk 512GB SD cards (“Deal 4”) (traced back to Askos Wolt LLP); and

(4) Under invoice SI-1227234 (“Deal 5”) dated 1 September 2015, the purchase of 1,000 SanDisk 512GB SD cards (traced back to Askos Wolt LLP).

8. The deal chains involved in the above transactions were as follows:

Deal 1

(1) Shark Partners Ltd sold the goods to SD 2013 Ltd,

(2) SD 2013 Ltd sold the goods to Online Distribution Ltd,

(3) Online Distribution Ltd sold the goods to Beigebell,

(4) Beigebell sold them to Hi-View Trading, and

(5) Hi-View Trading sold them to Kristos Sp. Zo.o., a Polish company.

(6) HMRC has been unable to trace the source of the goods acquired by Shark Partners Ltd

Deal 2

(1) Askos Wolt LLP bought the goods from Borough Brothers KFT, a Hungarian company,

(2) Askos Wolt LLP sold the goods to Global SFX Ltd,

(3) Global SFX Ltd sold the goods to Online Distribution Ltd,

- (4) Online Distribution Ltd sold the goods to Beigebell,
- (5) Beigebell sold them to Hi-View Trading, and
- (6) Hi-View Trading sold them to Tibizon company Sp. Zo.o., a Polish company.

Deal 3A

- (1) Raya International Ltd sold the goods to SD 2013 Ltd,
- (2) SD 2013 Ltd sold the goods to Online Distribution Ltd,
- (3) Online Distribution Ltd sold the goods to Beigebell,
- (4) Beigebell sold them to Hi-View Trading, and
- (5) Hi-View Trading sold them to Tibizon company Sp. Zo.o..

Deal 3B

- (1) Askos Wolt LLP bought the goods from Borough Brothers KFT,
- (2) Askos Wolt LLP sold the goods to Global SFX Ltd,
- (3) Global SFX Ltd sold the goods to Online Distribution Ltd,
- (4) Online Distribution Ltd sold the goods to Beigebell,
- (5) Beigebell sold them to Hi-View Trading, and
- (6) Hi-View Trading sold them to Occtanis company Sp. Zo.o., another Polish company.

Deal 4

- (1) Askos Wolt LLP bought the goods from Borough Brothers KFT,
- (2) Askos Wolt LLP sold the goods to Global SFX Ltd,
- (3) Global SFX Ltd sold the goods to Online Distribution Ltd,
- (4) Online Distribution Ltd sold the goods to Beigebell,
- (5) Beigebell sold them to Hi-View Trading, and
- (6) Hi-View Trading sold them to Occtanis company Sp. Zo.o..

Deal 5

- (1) Askos Wolt LLP bought the goods from Borough Brothers KFT,
- (2) Askos Wolt LLP sold the goods to Global SFX Ltd,
- (3) Global SFX Ltd sold the goods to Online Distribution Ltd,
- (4) Online Distribution Ltd sold the goods to Beigebell,

(5) Beigebell sold them to Hi-View Trading, and

(6) Hi-View Trading sold them to Occtanis company Sp. Zo.

9. The dates of the transactions executed by Beigebell are set out below. Again there is no dispute as to these dates.

Deal No.	Goods	Purchase Order	Invoice (from ODL)	Cash to ODL	Cash from HVT	Goods in	Goods out
1	1000 SanDisk 256GB	24.8.15	01.09.15	01.09.15	28.08.15	27.8.15	07.09.15
2	1000 Samsung 250 SSD	04.09.15	07.09.15	07.09.15	04.09.15	07.9.15	08.09.15
3a	550 SanDisk 256 GB	04.09.15	07.09.15	07.09.15	04.09.15	07.9.15	07.09.15
3b	200 SanDisk 256 GB	04.09.15	08.09.15	08.09.15	07.09.15	07.9.15	07.09.15
4	500 SanDisk 512 GB	04.09.15	08.09.15	08.09.15	07.09.15	07.9.15	07.09.15
5	1000 SanDisk 512 GB	24.8.15	01.09.15	01.09.15	28.08.15	27.8.15	07.09.15

THE LAW

10. The legislation governing the recovery of input tax is contained in ss24 and 25 of the VATA 1994 and in the VAT Regulations 1995. The right to deduct input tax is also set out in Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT.

11. There is no dispute in the current appeal as to the effect of this legislation and it is therefore unnecessary to repeat it in this judgement. However the fundamental principle which arises from it is that if a taxable person has incurred input tax that is properly allowable he is entitled to set it against his output tax liability and, if the input tax credit due to him exceeds the output tax liability, receive a repayment.

12. The ECJ has held that a taxable person who did not know and who had no means of knowing that his transactions were connected to fraud, should recover the input tax incurred in respect of his transactions: see *Optigen Ltd v Customs and Excise Commissioners* (C-354/03). However, in *Axel Kittel v Belgium* and *Belgium v Recolta*

Recycling (C-430/04 and C-440/04), the ECJ held that the contrary of this principle also applied to input tax claims where it said, at [56] to [59]:

“56. In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.

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

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

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

13. Accordingly, a domestic court must refuse the right to deduct input tax where a transaction is “connected with fraudulent evasion of VAT”, and this is something which the taxable person knew or should have known or had the means of knowing.

14. In *Mobilx and others v The Commissioners for HM Revenue and Customs* [2010] EWCA Civ 517 (“*Mobilx*”) The Court of Appeal (Moses LJ giving the judgment) considered what it described as two essential questions, at [4]:

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

15. On the first question, the Court concluded as follows, at [52]:

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

16. In relation to the second question, the Court stated as follows, at [53] to [56]:

“53. Perhaps of greater weight is the challenge based, in *Mobilx* and *BSG*, on HMRC’s denial of the right to deduct on the grounds that the trader knew or should have known that it was more likely than not that transactions were connected to fraud. The question arises in those appeals as to whether that is sufficient or whether, as Sir Andrew Morritt C concluded in *BSG*, the right to deduct input tax may only be denied where the trader knows or should have known that the transaction **was** connected to fraud. In short, does a trader lose his entitlement to deduct if he knew or should have known of a risk that his transaction was connected to fraudulent evasion of VAT? HMRC contends that the right to deduct may be denied if the trader merely knew or should have known that it was more likely than not that by his purchase he was participating in such a transaction. It contends that if it was necessary to show more than appreciation of a risk then the Court’s decision in *Kittel* would not represent a development of the law and would fail to achieve the objective, recognised in the Sixth Directive, to which the Court in *Kittel* referred at para [54].

54. As I have already indicated, the mere existence of that objective and the principle that Community law cannot be relied upon for fraudulent ends (eg, *I/S Fini H v Skatteministeriet* (Case C-32/03)) does not provide any justification for a general principle that any transaction connected with fraud is vitiated. Such an approach was rejected in *Optigen*.

55. If HMRC was right and it was sufficient to show that the trader should have known that he was running a risk that his purchase was connected with fraud, the principle of legal certainty would, in my view, be infringed. A trader who knows or could have known no more than that there was a risk of fraud will find it difficult to gauge the extent of the risk; nor will he be able to foresee whether the circumstances are such that it will be asserted against him that the risk of fraud was so great that he should not have entered into the transaction. In short, he will not be in a position to know before he enters into the transaction that, if he does so, he will not be entitled to deduct input VAT. The principle of legal certainty will be infringed.

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

“The relevant knowledge is that *BSG* ought to have known by its purchases it was participating in transactions which were connected with a

fraudulent evasion of VAT; that such transactions might be so connected is not enough.””

17. The Court of Appeal concluded, at [59]:

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

18. The Court of Appeal also held that the tribunal should examine all the circumstances and consider a given transaction in the context of the other transactions conducted, and patterns that may exist. Moses LJ cited with approval the dictum of Christopher Clarke J in *Red 12 Trading Ltd v HMRC* [2009] EWHC 2563 at [111]:

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

THE FACTS

19. We received witness statements and oral evidence from Jack Orton, a director of Beigebell, Martyn Guest, the HMRC Officer responsible for Shark Partners Ltd, Shaheen Rehman, the HMRC Officer responsible for Beigebell, and Marva Harry, the HMRC Officer now responsible for SD 2013 Ltd. We also received a witness statement from Philip Adeleye, the HMRC Officer who was formerly responsible for SD 2013 Ltd. He has now retired and was not therefore present at the hearing.

20. We found all the witnesses who appeared before us to be honest and reliable witnesses. Mr Adeleye did not appear before us and he was not therefore subject to cross-examination. As such we are unable to give full weight to his evidence, but we do not believe this to be of any consequence, as explained below.

Evidence relating to Shark Partners Ltd

21. HMRC contended that Shark Partners Ltd was a fraudulent defaulter whereas Beigebell argued that although it had defaulted on its VAT liabilities it was not fraudulent.

22. Having considered the evidence presented to us we find the following as matters of fact as regards Shark Partners Ltd.

23. On 1 August 2014 an application was submitted to Companies House to register a new limited company in the name of Shark Partners Limited. The application was submitted by a Mr Javed Afzal Khan of 52 Hepworth Gardens, Barking, IG11 9BA. The director's date of birth was given as 27 February 1970 and his occupation given as 'director'. Mr Khan was also recorded as the sole shareholder at that time. The registered office address was 52 Hepworth Gardens, Barking, IG11 9BA

24. On 4 August 2014 a VAT1 (application for registration) was received from Shark Partners Ltd and on 11 August 2014 they were registered for VAT under VRN 191 9349 72.

25. Details stated on the VAT1 were:

(1) The Principal Place of Business was 52 Hepworth Gardens, Barking, IG11 9BA.

(2) The main business activity was stated as "Retail sale of food, beverages and tobacco predominating". The business activity description was given as "General store with predominant sale of food beverages or tobacco products (unlicensed) (retail)".

(3) The VAT1 advised that they were "intending to make taxable supplies in the future" and requested registration from 11 August 2014.

(4) The estimated value of supplies in the next 12 months was given as £110,000.

(5) There was no estimated trade with the EC expected in the next 12 months.

(6) The VAT1 was signed by Mr Javed Afzal Khan.

26. On 7 November 2014 a Termination of a Director Appointment (TM01) was received at Companies House confirming that Javed Afzal Khan would no longer be a director of Shark Partners Ltd from 7 November 2014. Also on 7 November 2014 an Appointment of Director (AP01) was received at Companies House to add a new director Mr Ratheesh Edayamparambath Satheesan. A change of registered office address (AD01) was also received at Companies House on 7 November 2014 confirming Shark Partners Ltd's new registered address as C/O Ratheesh, 18 Parker Street, Birmingham, B16 9AQ.

27. A letter was also sent from Mr Satheesan to the VAT Registration Unit dated 7 November 2014 confirming the change of PPOB to C/O Ratheesh, 18 Parker Street, Birmingham, B16 9AQ.

28. On 12 June 2015 the company's annual return was filed for the year ended 12 June 2015. The annual return records that the company's shareholding was transferred to Mr Satheesan on 7 November 2014.

29. On 15 July 2015 another change of registered office address (AD01) was received at Companies House. The new registered address was updated to 92 Vyse Street, Hockley, Birmingham, B18 6JZ.

30. Since becoming VAT registered Shark Partners Ltd has failed to submit any VAT returns. As no returns were filed central assessments were completed for each period between 11/14 and 05/15. The first of these assessments, for £232, was paid, but no payments have been made in respect of the other assessments.

31. An authorised unannounced visit was undertaken by HMRC officers on 13 July 2015 to the main business address (at the time) of Shark Partners Ltd: 18 Parker Street, Birmingham, B16 9AQ. The reason for the unannounced visit was because their VAT1 describes their main business activities as “retail sale of food, beverages and tobacco predominating” however checks by HMRC noted Shark Partners Ltd’s appearance in a transaction chain involving the purchase of SD memory cards from Fast Away Services Ltd in June 2015. Shark Partners Ltd had also not filed or paid any VAT returns since registration.

32. Officers of HMRC arrived at the business premises to find the address was a private dwelling. No response was received at this address so a standard 7 day deregistration letter was left. Also posted at the same time was a separate envelope containing the unannounced visit authority letter, factsheets 1a and 4 and a business card. After the unannounced visit the trader had until 20 July 2015 to respond to the deregistration letter. Mr Satheesan emailed Officer Kenrick on 15 July 2015 to advise him Shark Partners Ltd had changed their business address to an office at: Top Floor, 92 Vyse Street, Jewellery Quarter, Birmingham, B18 6JZ.

33. An announced visit was arranged for 20 July 2015 and an email confirmation was sent on 16 July 2015 advising Mr Satheesan that they would need to review his business records.

34. Officers Kenrick and Joiner conducted an announced visit on 20 July 2015 at the trader’s business premises. Mr Satheesan was issued with HMRC factsheet 1a (General information about Compliance Checks) and factsheet 3 (Visits by agreement or with advance notice). Mr Satheesan was interviewed by the officers and the main points emerging from that interview are as follows:

(1) Mr Satheesan advised that the previous director Mr Khan was a friend of a friend whom he had met once. He said that he purchased the company off him for between £3000 and £4000 and was repaying this in instalments. He could not provide an exact figure for the purchase price.

(2) Officer Kenrick asked what Mr Satheesan obtained for his money given that a company could be formed for far less than this. He confirmed that he bought this company to save time and the trouble of setting up his own company and getting it VAT registered.

(3) Mr Satheesan advised that he was initially going to trade in mobile phones and accessories however in February/March 2015 he decided to trade in memory cards.

(4) He said that his main supplier was Alan of Fast Away Services Ltd whom he had met through a friend of a friend in London in mid-April. He did not have any expense receipts for this meeting.

(5) His main customer was confirmed as Mr Momin of Askos Wolt LLP whom he had also met through a friend of a friend in Birmingham in April 2015. Mr Momin then introduced him to another customer, Mr Hendry of Presence Networks Ltd.

(6) When asked about the company's banking arrangements Mr Satheesan advised that they held a Euro account with a Latvian bank but could not recall the name of the bank or his account number because he'd forgotten his password. He said that he had met the bank manager at a Holiday Inn in Camden, London in May 2015. He said that the reason he'd opened a bank in Latvia was because UK banks would not give him an account.

(7) Mr Satheesan confirmed that the business had been funded mainly by his family with some money from himself.

(8) He also confirmed that he had a one year lease for his office and was paying £600 per quarter.

(9) Mr Satheesan said the company received and gave 90 days' credit on transactions which meant that he had yet to pay for or receive payment for any of the stock traded in by the company to date. The officers noted that Fast Away Services Ltd had a retention of title clause on its invoices which would appear to clash with 90 days' credit being given.

(10) The officers noted that the payment details on Fast Away Services Ltd invoices quoted an account number for Elite Top Trading Ltd at HSBC in Kowloon, Hong Kong. Mr Satheesan said that Elite Top Trading Ltd was an alternative banking platform.

(11) Mr Satheesan advised that he had examined his stock whilst it was in the freight forwarder Global Freight Systems Ltd. He did this for the first couple of deals and the freight forwarder could inspect the stock on his behalf.

(12) The officers discussed due diligence with Mr Satheesan. He advised that he'd visited his customers' and suppliers' places of business and he did Companies House searches. He did not do credit checks.

(13) Mr Satheesan said that he found customers first then sourced the stock from a supplier.

(14) VAT Notice 726 'How to spot missing trader fraud' was issued to Mr Satheesan and the officers advised how carousel and acquisition fraud worked.

(15) Invoices obtained from Shark Partners Ltd at the visit showed back to back deals with sales invoices to Presence Networks Ltd dated the same day as purchase invoices from Fast Away Services Ltd for the same goods.

(16) After HMRC had checked the purchase invoices from Fast Away Services Ltd it was apparent that they had entered an incorrect VRN on their invoices. The invoices showed the VRN: 150037753 however their actual VRN was: 150037749.

35. Following on from this visit a letter was sent to Shark Partners Ltd on 22 July 2015 advising on the risks associated with MTIC fraud, factors for Shark Partners Ltd

to look out for and details of how to validate the VAT details of any new or potential customers/suppliers.

36. On 31 July 2015 a letter was sent to Shark Partners Ltd to advise that Fast Away Services Ltd's VAT registration number had been cancelled with effect from 28 July 2015.

37. On 6 August 2015 a letter was sent to Shark Partners Ltd to advise that the company had been put onto HMRC's trader monitoring scheme. This meant that Officer Polly Smith would arrange a time to visit the company's premises and make arrangements for the company to provide HMRC with certain trading records on a monthly basis.

38. Officer P Smith's progress log records that she attempted to call Mr Javed Khan on 11 August 2015 to arrange a visit. No response was received, which was not surprising since Mr Khan was no longer involved with the company, but she left a message and on 12 August 2015 she spoke to Mr Khan who said that he had sold the business and did not have its contact details.

39. Because Officer Smith was unable to contact Shark Partners Ltd and no VAT returns had been submitted, an authorised unannounced visit was completed on 18 August 2015. The unannounced visit took place at Top Floor, 92 Vyse Street, Jewellery Quarter, Birmingham. There was no answer at 92 Vyse Street when the officers rang the bell for Shark Partners Ltd. After knocking and receiving no response, the officers left copies of a VAT deregistration letter under the door advising Mr Satheesan to contact HMRC within 7 days or Shark Partners Ltd would be removed from the VAT register.

40. There was no response from Shark Partners Ltd by 25 August 2015 so they were deregistered for VAT purposes and a letter was issued confirming their VRN had been cancelled. It was stated in the letter to contact HMRC within 30 days if they disagree with this decision.

41. On 1 September 2015 Officer Kenrick received an email from Mr Satheesan advising that he had checked his company's VRN with European validation and it said the number was invalid. He also advised that he had not received any contact in regards to any problems from HMRC.

42. Mr Satheesan then contacted Officer P Smith by telephone and arranged a VAT visit for 8 September 2015 to discuss getting his VRN re-instated.

43. Officers Smith and Nazir completed an announced visit on 8 September 2015 at Top Floor, 92 Vyse Street. The main points emerging from that meeting were:

- (1) The office was a small room with only a small window in the ceiling. The walls were plain with three photocopies of Sim card adverts on the wall, and the only furniture was a desk and two chairs. The only telephone appeared to be an internal phone to the door intercom.

- (2) Mr Satheesan was still adamant that he had not received the documents left by Officer Smith on her previous (unannounced) visit. Officer Smith advised she had pushed these documents under the door at these premises but Mr Satheesan still maintained he had not received these letters. He said he had phoned HMRC in response to another officer's contact.
- (3) Officer Smith asked what the main business activity was. Mr Satheesan advised it was currently the wholesale of SD cards but he planned to move into sales of PlayStations in the future as there was a good profit in this line.
- (4) Officer Smith asked for the VAT returns and advised that they were required along with full payment to HMRC as soon as possible. She noted that default surcharges may be applicable and would be calculated and advised by HMRC. Mr Satheesan advised that his accountant DB Advisors were dealing with the VAT declarations and they would be supplied shortly with full valid payment.
- (5) Officer Smith asked why the business bank account was located in Latvia. Mr Satheesan advised this was because UK banks didn't like the movement of high value transactions. The bank details were given as AS Latvia Pasta Banka. Swift LAPBLV2X IBAN – LV28LAPB00000 - 86053042. Mr Satheesan advised that this bank had been recommended by friends.
- (6) Mr Satheesan confirmed that his one current supplier was Grove Trading Ltd. He advised they had found them on the internet and had entered into a 90 day contract with them.
- (7) He had ceased to trade with his previous supplier Fast Away Services Ltd when they could not obtain enough supplies to meet demand. When asked how they found Fast Away, Mr Satheesan advised that it was through friends and the internet. He met the directors of Fast Away Services Ltd at a meeting at a warehouse in Heathrow but he had no evidence of this meeting.
- (8) In a 2 month period Shark Partners Ltd had 15 orders with Fast Away. He said that at the warehouse Fast Away had shown him their stock but no evidence of ownership. He had not checked the boxes for their contents.
- (9) Shark Partners Ltd had also dealt with Askos Wolt LLP and the contact was a friend called Suliman who was based in Kettering. Mr Satheesan stated that he had visited Kettering, but was unable to provide evidence to support this. Suliman had been a friend for a number of years but Officer Smith advised that it was still important to carry out checks as circumstances change.
- (10) Officer Smith advised Mr Satheesan on due diligence (supplier checks) and the need to obtain evidence to support business decisions taken. Mr Satheesan confirmed that he had entry to a secure warehouse and commercial checks consisted of Companies House checks only. He was advised by Officer Smith that these checks are not enough and a basket of evidence for each supplier is required.
- (11) Officer Smith issued Mr Satheesan with various letters and factsheets including –

- (a) FS1a General Information about compliance checks
- (b) FS3 Visit by agreement or with advance notice
- (c) FS4 Unannounced visits for inspection
- (d) FS7a Penalties for inaccuracies in returns and documents
- (e) FS9 The Human Rights Act and penalties
- (f) FS12 Penalties for VAT and Excise wrongdoings
- (g) Statement of practice “How to spot an MTIC Trader”
- (h) Public Notice 726: Joint and several liability for unpaid VAT
- (i) Deregistration letter (which had been issued on 25 August 2015)

(12) Officer Smith detailed the failure of Mr Satheesan to respond to the 7 day deregistration letter and the action HMRC had taken regarding cancelling the VRN. She advised that this raised a concern as to the delivery of post at the PPOB. Mr Satheesan confirmed that this was because he had been off work sick.

(13) As invoices appeared to cease from 25 August 2015 Officer Smith asked Mr Satheesan for firm evidence of his future intention to trade. This, along with completing all outstanding VAT returns and making full valid payments were critical in getting the VRN re-instated. Mr Satheesan confirmed that he had no firm intention to trade at this time.

(14) Mr Satheesan was advised not to use this VRN after the date of deregistration.

(15) Mr Satheesan also advised that the missing returns should be completed within a week.

(16) Mr Satheesan confirmed that stock was not delivered to his PPOB and was all kept at the warehouse. Officer Smith’s visit report records that this warehouse was organised by “Grove in Hull” through a company called “Venus” and Mr Satheesan advised that his customer wanted Venus to hold on to the stock.

(17) Mr Satheesan advised that Venus were responsible for the insurance of the stock.

(18) Officer Smith advised that the trading of Shark Partners Ltd (before de-registration) had caused concern at HMRC and they were now to be put under the trader monitoring rules. Mr Satheesan was advised by Officer Smith that she would stay in contact with him and wanted to know about his trading on a regular timely basis. She would visit monthly if trading was declared and a visit was thought to be appropriate.

(19) According to the visit report, Mr Satheesan showed the officers the invoices requested at the meeting and said he would email these to Officer Smith. On receipt of the email more supporting documents were requested. Mr Satheesan did not send in any supporting documents in regards to the deal chains for example, bank statements, transport documents, purchase documents

and sales from registration. These documents were requested again but were not forthcoming.

44. On 30 September 2015 Shark Partners Ltd were removed from the monitoring register as the trader had provided no evidence of their intention to trade.

45. Shark Partners Ltd never completed any of their missing VAT returns. This includes missing returns from the periods 11/14, 02/15, 05/15 and the final period.

46. On 19 April 2016 Officer Remilekun Ajayi raised a VAT assessment of £161,018 which was issued to Shark Partners Ltd on 23 April 2016 for their final VAT return period. This assessment was issued on the basis that the trader had failed to declare any of their sales to another UK company (SD 2013 Ltd) and therefore output tax was due.

47. Further investigations showed additional sales invoices from Shark Partners Ltd to Askos Wolt LLP where the output tax had not been declared. Assessments for the output tax on these invoices were raised on 30 November 2016 for £331,851 for the final VAT return and £610,586 for the 05/15 return and issued on 20 December 2016.

48. The Formal Assessment letter had been issued to Shark Partners Ltd on 30 November 2016. This letter included a schedule of the invoices covered by the Askos Wolt assessment.

49. These assessments remain unpaid so there is still a debt to HMRC regarding these transactions with SD 2013 Ltd and Askos Wolt LLP.

50. HMRC have received no appeals or any further contact from Shark Partners Ltd. The company has now been wound up and an Order of Court to wind up was issued on 27 February 2017.

SD 2013 Ltd

51. We also received evidence concerning SD 2013 Ltd, including the witness statement from Officer Adeleye and Officer Harry. There was however some misunderstanding between the parties as to their respective arguments as regards SD 2013 Ltd. HMRC contend that SD 2013 Ltd was a participant in the deal chain but did not argue that SD 2013 Ltd was a fraudulent defaulter.

52. In the circumstances, based on the evidence which we received, we find that SD 2013 Ltd was a participant in the deal chains for Deal 1 and Deal 3A but we make no finding as to whether or not it was a fraudulent defaulter, since such a finding is not part of HMRC's case.

Mr Orton and Beigebell

53. As stated above we received witness statements and oral evidence from Mr Orton, director of Beigebell, and Mrs Rehman, the officer of HMRC with responsibility for

the VAT affairs of Beigebell. Based on that evidence we find the following as matters of fact as regards Mr Orton and Beigebell.

54. Mr Orton's first full time job was as a payroll clerk at the age of 17, from there he was promoted into the Marketing Department and for the next seven years he worked in a various marketing roles, ending up at an IT Security reseller called Secon Solutions Ltd. Their business was selling on IT Security hardware and software solutions to other businesses, it was here that he gained knowledge of how the sales channel works in the IT industry.

55. He spent six years at Secon and moved on from Marketing to Operations, eventually becoming Operations Director.

56. Marcus Griffiths and Mr Orton founded Beigebell in July 2010. They have been friends from when Mr Orton was about 17 and had often discussed starting their own business together. They started the business with no outside backing apart from a small loan from a family friend which was repaid after six months. The company now employ six members of staff. The company started out mainly providing promotional merchandise but due to customer demand quickly expanded its scope to include all merchandise. It sources goods from all over the world but predominantly from the UK, Europe and China. The company has a full-time agent in China who is tasked with finding factories to produce any product it is asked for.

57. Over the last eight years of trading it has supplied hundreds of different products to a variety of different locations under varying terms. It works with a wide range of customers from household brand names to others that are not well known. Sometimes the products they supply are to be sold on at a profit, other times to generate income, and other times to be given away free. Mr Griffiths and Mr Orton pride themselves on running Beigebell with a strong moral and ethical foundation. They believe that their staff feel safe and supported and as such are very loyal. Building on this moral and ethical foundation, Beigebell also takes Charity very seriously. Since the company has been founded it has donated over £16,000 to charitable causes. In addition to this, in 2016 the company closed its offices for a day to send staff to help regenerate a local park.

58. Mr Griffiths and Mr Orton set the company up in a way that Mr Griffiths would be mainly responsible for bringing in sales and Mr Orton would mainly be responsible for the delivery of those sales and all other operational areas. However, it is a small company and their roles often cross over.

59. As part of his responsibility for the delivery of orders a large part of his role is ensuring that those orders are delivered correctly, on time and to the desired specification. As their sourcing routes vary, this process can also vary from order to order. The company takes quality very seriously as if they deliver poor quality goods there can be cost/reputational effects. When the company is manufacturing the goods directly in the Far East Mr Orton will arrange an independent quality control inspection for each order and in the past he has flown out to China to conduct inspections himself.

60. For the majority of UK sourced goods, the company relies on its suppliers to conduct quality control checks as, if there were any issues, they would have a right of recourse to them, but occasionally they will also conduct their own checks if they feel it is necessary.

61. On 18 August 2015 Mr Orton received a phone call from Ritesh Patel, someone whom Mr Griffiths and Mr Orton have known for around 20 years. Mr Patel went to both their weddings and they used to go on holiday with him regularly when they were younger. They have a close group of 13 friends of whom Ritesh is one. They all socialise regularly with each other.

62. In the past Mr Patel has helped Beigebell gain orders through other businesses he has worked for. One of their first orders was for Quantum Corporation, which Mr Patel helped arrange by putting Beigebell in contact with the Marketing Manager. In addition, at one point in their early years of trading Mr Patel expressed an interest in investing in the company, but Mr Griffiths and Mr Orton decided that they did not need the investment.

63. In the phone call, Mr Patel explained that he had an order that he couldn't fulfil due to a restriction from the manufacturer on selling outside of the UK. He hadn't realised this restriction was in place and had already promised the customer (HVT) that he could supply them the goods. The order was for 1,000 SanDisk 512GB SD cards and was part of a much bigger order that he didn't want to fall apart so was looking for someone to step in to facilitate this part. He thought of Beigebell as he knew of Mr Orton's experience in the IT sector and that the company might be interested in improving its turnover figures.

64. Beigebell had never traded in SD cards before. It had traded in USB sticks but not memory cards. It had also acted as a middle-man between wholesalers, when it had bought and sold 500 Phablets.

65. Mr Orton said that he would need to discuss this opportunity with Mr Griffiths. Mr Griffiths and he discussed the order. They were both hesitant at first as it was a high turnover at a low profit, however from his previous roles at Secon Mr Orton had gained experience of how the sales channel works in the IT Sector and what Mr Patel was saying sounded plausible to him. He understood that the channel model in operation in the IT industry did not permit distributors to sell directly to end-users, and he believed that this was the situation in this case, as explained to him by Mr Patel. Beigebell would simply be replacing another company in a chain and this made sense to him.

66. Mr Griffiths and Mr Orton both spoke to Mr Patel a few more times on the phone to reassure themselves that there wasn't any risk, and Mr Patel gave them complete assurance that it was a very straightforward order, the type of which he was doing on a regular basis. Having received the assurances from Mr Patel, whom they had no reason not to trust, they decided that whilst the profit wasn't very big it would help bolster their turnover figures, which would help with things like tenders in the future. Mr Orton therefore called Mr Patel and told him that they had decided that they were

interested and they discussed how the deal would work. Mr Patel explained that as the deal had already been agreed, the prices had already been negotiated so were fixed. Mr Patel said he would get his customer, HVT to call Mr Orton and that he would send an email to introduce me to the distributor, ODL.

67. Beigebell did not make any payment to Mr Patel by way of commission for the introduction of these deals.

68. We did not receive a witness statement from Mr Patel. Mr Orton said that this was because he and Mr Griffiths had fallen out with Mr Patel as a result of this deal and that they no longer believed that what Mr Patel said was true. They had stayed friendly with Mr Patel for some time after the deal, in case his evidence might be helpful in any appeal against HMRC, but at one point, when they had decided not to continue the appeal, they challenged Mr Patel about his involvement, which resulted in a heated argument, and they were now no longer in touch with him.

69. Mr Orton said that one of the things which had upset him most about this deal was that a friend of 20 years' standing should have let them down so badly and had nearly destroyed their business and their livelihood.

70. Mr Orton and Mr Griffiths identified the potential risks to them as predominantly that the goods might not be correct or genuine. They would be paid by the customer before they were required to pay the supplier, and therefore was therefore no credit risk involved, but there might still be a problem if the goods were not genuine or did not exist.

71. It was normal practice for Beigebell that with the first order from a new customer they would be paid up-front, before the goods were delivered. This aspect of the deal was not therefore out of the ordinary for Beigebell.

72. Mr Orton then received a phone call from a man named Javier Sáenz, of HVT, in which they discussed setting up accounts. Mr Orton gave Mr Saenz his email address and, on 19 August 2015, Mr Saenz emailed Mr Orton his company information which included forms he asked Mr Orton to fill in. Mr Orton said he would fill in the forms as soon as possible and asked Mr Saenz to confirm the Invoice address, Delivery address, VAT number, Company number and Bank Details, which he provided the next day.

73. Mr Orton then checked the VAT number on the VIES VAT number validation website and it confirmed it was valid. Mr Orton completed some of HVT's forms, those relating to address and bank account details but he did not read and did not sign the attached Terms and Conditions for HVT which Mr Saenz had sent to him. His explanation for this was the Beigebell was the seller and therefore it was Beigebell's Terms and Conditions which should apply, although he agreed that he did not send a copy of these to Mr Saenz, which he said was his normal practice. There was a link on the face of Beigebell's standard order acknowledgement to its Terms and Conditions, although this link did not appear on the face of the invoices to HVT.

74. HVT's Terms and Conditions contained a specific statement that "The supplier acknowledges the risks of missing trader fraud." Mr Orton said that he did not read this and did not therefore enquire as to what it might mean. We accept this as factually correct.

75. On 19 August Mr Orton also spoke to Matt Jones at ODL on the phone. They discussed the order and the logistics of how it would be delivered. Mr Orton explained that Beigebell could not take on the responsibility of shipping the goods as they were too high in value so if the order was to proceed either Mr Jones would have to arrange delivery or HVT would have to collect. Mr Jones suggested that it would be easier if Beigebell set up an account at Flight Logistics as ODL already had an account there as well. In this way ODL could deliver the stock there and put it under Beigebell's account for HVT to collect.

76. Beigebell already had an existing relationship with a freight forwarding company, ISJ, but Mr Orton was happy to open a new account with Flight Logistics because he thought this would help the deal run smoothly and he did not want to be responsible for delivering the goods. He wanted ODL to be responsible for delivery and he considered that using their suggested freight forwarding agent was the best way of ensuring this.

77. On 20 August Mr Orton rang Flight Logistics to ask them about opening an account, and they directed him to their website where he downloaded the application form, filled it in and emailed it to them. Susan Howlett, of Flight Logistics, replied saying that the account was being set up and that they would confirm the account number. She also asked if Beigebell had been speaking to anyone at Flight Logistics to which Mr Orton replied that Flight Logistics had been recommended by their supplier. She asked for the supplier name. Mr Orton asked Mr Jones to provide his company name for reference, and Mr Jones told him to use Creative Leisure as a reference. Mr Orton I thought this was a strange because he did not recognise the name but assumed it was another alias as ODL also traded as SaverStore. He did not therefore question this.

78. On 21 August Mr Orton received company documents from ODL which included a Company Introduction, Change of Name and VAT Certification. They also requested that Mr Orton should send his company information to them. Initially Mr Orton just put the details in an email, but ODL asked for documentary proof which was sent on 24 August. On 26 August Mr Orton did a credit check on ODL through Creditsafe (which was his standard procedure) and this did not reveal any adverse problems. The credit limit shown on the credit check was for only £27,500, but Mr Orton was not concerned with credit limits because he knew that the order was on a pro-forma basis and that he would be receiving the goods before he would be required to pay for them. In addition, Beigebell was the purchaser and they would not therefore be exposed to any credit risk with ODL.

79. On 24 August Mr Orton spoke with Mr Jones and asked him to send him the pricing for the 1,000 x 512GBSD Cards. Later that evening Mr Orton received pricing for these and also 1,000 x 256GB SD cards. Mr Orton had not requested this

and therefore assumed it was a mistake by someone at ODL as it had not come from Mr Jones's email directly. On the morning of 25 August Mr Orton emailed Mr Saenz giving him the price for the 1,000 x 512GB SD cards at €410 each. Mr Saenz replied a couple of hours later saying he only wanted 500 SD cards and was looking to pay €408 per card and asked if Beigebell could meet this price. He also enquired about a price for 1,000 x 256GB SD Cards.

80. With the benefit of hindsight, this was clearly more than simple coincidence, and Mr Puzey suggested that this was deeply suspicious, but Mr Orton said that he did not find it particularly suspicious at the time.

81. At this point Mr Orton rang Mr Patel as he wasn't expecting a negotiation, because Mr Patel had told him that the pricing was already agreed. Mr Patel said that he was probably just trying to get a better price and that Mr Orton should stick to the original price. He also said that if Mr Saenz wanted more stock then it would be advisable to do it at a similar margin. Mr Orton rang Mr Jones to check if the price would increase due to HVT only wanting 500 x 512GB instead of 1,000, but Mr Jones Matt said he could keep his price to Beigebell the same so Mr Orton decided to do the same for HVT. He therefore emailed Mr Saenz explaining that he couldn't reduce the unit price but could do 500 x 512GB at €410 and that he could also supply 1,000 x 256GB at €210, precisely the same goods which had been offered to him by ODL the day before. HVT then emailed Mr Orton back with two purchase orders, one for 1,000 x 512GB and one for 1,000 x 256GB. Mr Orton questioned this as Mr Saenz had only asked for 500 x 512GB, but Mr Saenz replied saying they had decided to increase the quantity to 1,000.

82. Mr Orton therefore rang Mr Jones to let him know about the two orders he had received and that he would be sending pro-forma invoices the following day. Mr Jones said that in his experience with orders from Hi-View they would probably pay for the 256GB cards first then the 512GB cards later. This reassured Mr Orton that ODL and HVT had done lots of similar business in the past because Mr Jones knew their buying habits.

83. Mr Orton said that this did not worry him or cause him to question why Beigebell should be interposed between two parties who clearly knew each other well, and, in fact, it reassured him that the transaction would run smoothly because they knew each other so well.

84. Mr Orton's understanding was that in the IT business channel model distributors were not allowed to sell to end-users and therefore the interposition of other parties was normal. He did not however have any evidence nor any way of knowing that HVT was an end-user, or indeed that ODL was a distributor, let alone an authorised distributor, apart from its name. He simply believed that it was quite possible that the channel model prevented ODL selling directly to HVT, and did not ask any further questions. This approach was reinforced by the fact that the deal had been introduced to him by Mr Patel, a friend of 20 years' standing, who had brought them other deals in the past, which had worked out well. He therefore had no reason to distrust Mr Patel's assurance that the deal would be fine.

85. Mr Orton did not know or have any evidence as to whether or not ODL and HVT were part of the “grey” market.

86. On 26 August Mr Orton sent Mr Saenz two pro-forma invoices along with Beigebell’s Euro bank account details. Shortly afterwards Mr Orton sent Mr Jones two purchase orders, which stated that the price included onward delivery. Mr Jones replied, confirming that the stock would be delivered to Flight Logistics the next day.

87. ODL’s pro-forma invoices carried a reservation of title clause but this did not concern Mr Orton because he understood that Beigebell would not be required to pay for the goods until he was satisfied with the goods.

88. On 27 August Mr Orton emailed Mr Saenz to check he had received the pro-forma invoices and asking when he would be making payment. Mr Saenz replied that he didn’t have the funds to make the payment that day but that it should come though on 28 August. Mr Orton emailed Mr Jones to inform him of this. On the morning of 28 August Mr Saenz emailed Mr Orton to say he had made a payment of €210,000 and attached a payment confirmation. Shortly after receipt of this payment Mr Saenz called Mr Orton and said that they were arranging the second payment and that it would be with them later that day. The second payment arrived a few hours later. Mr Orton emailed Mr Saenz to confirm this and that the goods would be available for HVT to collect from Flight Logistics. Mr Saenz emailed back saying they would prefer the goods to be delivered but if needs be they could collect them. Mr Orton called Mr Jones to let him know that Beigebell had received the first payment and that the second one would be clearing later that day. Mr Jones then said that he would send them the pro-forma invoices from ODL, which arrived shortly after. Mr Orton then received an email from Mr Saenz informing him that the second payment had been made and that he would send the proof of payment as soon as possible. He followed that up with another email asking for the invoices.

89. Mr Orton then called Flight Logistics to check that the goods had been delivered and asked them to confirm what they had received. Mr Orton received an email from Justin Thomas at Flight Logistics saying that there were 4 boxes of SD cards, so Mr Orton emailed Mr Saenz to say that the goods were ready to collect but that he hadn’t had a chance to do a stock check on them. From previous conversations Mr Orton was aware that Mr Saenz had dealt with Matt in the past so he asked him if he was happy to trust that the goods were correct, since otherwise he would need to check the goods himself. Mr Saenz replied saying that he had full trust in Mr Jones and that he was sure the goods would be correct and attached the proof of payment.

90. Mr Orton took Mr Saenz’s confidence in the supplier as a good sign that the orders were legitimate and that the stock would be as it was supposed to be, however he still wanted to check the goods himself before making any payment because this was what concerned him most as regards any potential risk to Beigebell. He therefore rang Mr Jones and informed him that he wouldn’t be making a payment for the goods until he had checked the stock himself and that he wouldn’t be able to do this until Tuesday due to the fact that it was a bank holiday on the Monday. Mr Jones was not happy and said that he would get into trouble for delivering the goods without

payment but Mr Orton said this was the only way he would be able to proceed as he was not willing to take the risk of releasing the goods without checking them first.

91. As it was too late on Friday to get to Flight Logistics in time Mr Orton arranged to go and inspect the stock on Tuesday 1 September. Both the customer and the supplier agreed to wait for this to be done which further reassured Mr Orton. He therefore emailed Mr Saenz telling him that the goods would be ready for collection on 1 September but that he wouldn't be able to insure the goods for transit so it would be appreciated if he could collect them.

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

93. Mr Orton created the collection paperwork and left it with Tam Richmond to get signed when the goods were collected. After completing the stock check and releasing the goods for collection Mr Orton then arranged payment to ODL on the afternoon of 1 September. The payment consisted of sending €619,000 from Beigebell's Euro account and €98,960 (£72,663.19) via the company's Currency Trader World First account. The payment was split as the company did not have enough in its Euro account as the payment from HVT was not enough to cover the payment due to ODL because the goods were zero rated for VAT. On 2 September Mr Orton emailed Mr Saenz with consignment details and a collection address so that he could arrange collection. He also attached invoices in lieu of the previous pro-forma invoices. He also received two tax invoices in lieu of the previous pro-forma invoices from ODL. He had a subsequent phone call with Mr Saenz during which he asked if Beigebell could arrange delivery. Mr Orton said he didn't think that he could as he wouldn't be able to insure such high value items and that Beigebell's terms were either that ODL would deliver or that HVT would collect.

94. Mr Saenz then emailed Mr Orton with a delivery address in Poland and mentioned that they used a freight forwarder who did regular deliveries from the UK to Poland that he might be able to use. Mr Orton replied saying that he was discussing the situation with Mr Jones to find a solution. There were a few phone calls back and forth with Mr Jones. Mr Orton wasn't happy as he had said from the outset that if they were going to accept the orders he did not want to get involved with delivery, because of the potential risk involved in shipping such high value goods. Mr Jones suggested that he ask HVT to collect the goods and charge the delivery cost to Beigebell and the company could then charge it on to him. Mr Orton was content with this solution.

95. The next day (3 September) Mr Saenz replied to an earlier email indicating that they would use D&D Freight to collect the goods and would advise the cost. Mr Orton left it there as he already had agreement from Mr Jones that ODL would cover the cost.

96. Later on the 3 September Mr Orton received an email from Mr Saenz asking if Beigebell could source some additional stock of 3,000 to 4,000 Samsung 250GB SSDs. He forwarded the email to Mr Jones and asked him if he was able to source these. Mr Jones called back a little later and indicated that he had 1,000 in stock and asked if Mr Orton had a target price. He also informed Mr Orton that there were some additional SD cards available. Mr Orton therefore emailed Mr Saenz and explained that he could only supply 1,000 SSD units and asked him what price he was looking to purchase the SSDs for. He also informed him about the additional SD card stock in case he was interested in them. Mr Saenz emailed back asking for the best price Beigebell could do on all the products and Mr Orton then called Mr Jones who said that he could do the SD cards at the same price as before and the SSDs at €88.00.

97. Mr Orton emailed Mr Saenz giving him the same prices he had offered previously on the SD cards and a price of €93.19 for the SSDs. He put a higher mark up on the SSDs as the unit prices were much less than the SD cards. On 4 September Mr Orton received an email from ODL confirming the prices that Mr Jones had given him but indicating there had been a small error and the SSD price was actually €88.15.

98. In the meantime Mr Orton had a few telephone calls with Mr Saenz who was trying to negotiate the price and then with his boss Arvind who introduced himself as a director of the company. They wanted to pay €90 for the SSDs, so Mr Orton reduced the price to €91 as that gave a similar margin to the other products. After further negotiation by email they agreed on a price of €91 for the SSDs along with the original pricing on the SD cards on the basis that these new orders would be collected with the previous orders. Arvind also asked Mr Orton if he could supply an additional 500 x SanDisk 512GBSD cards on top of this order. Mr Orton said he would look into this and get back to him.

99. Mr Orton said that at this point he actually had no intention of supplying any more products as it was getting to the point where Beigebell's cash flow would be too heavily impacted whilst they were waiting for the VAT repayment.

100. Mr Orton then emailed Mr Saenz confirming everything, attaching Beigebell's pro-forma invoices, and Mr Saenz emailed back with four purchase orders for the stock and confirmation of payment for all of the 1,000 x SSDs and 550 x 512GB SDs. Mr Orton assumed that they had split the orders like this for their own internal use, which he didn't consider to be a problem as all the goods and values matched his three pro-forma invoices. Mr Saenz also indicated that the remaining balance would be paid the following Monday.

101. Mr Orton informed ODL of the situation and they said they would be happy to deliver all the stock on the following Monday so it could be collected then, providing all the payments had been received. Mr Orton questioned the price difference on the

new orders as he felt that they should honour the price that Mr Jones had originally given him but they said they couldn't, which he accepted.

102. Mr Orton therefore emailed Mr Saenz, thanking him for the order and letting him know that the goods would be available to collect on Monday but that he wouldn't be releasing the second part of the order if payment had not been received. He followed this up with another email telling Mr Saenz that they shouldn't attempt to collect the goods before 11am and to use the reference ORD001013 when collecting for security. He also rang Flight Logistics to inform them of the situation and the reference number.

103. After confirming the orders on the phone with Mr Jones he received a pro-forma invoice from ODL which was incorrect. He emailed them back telling them what should be on it. They apologised and re-issued the invoice. As he had by then received confirmation of the payment from HVT he arranged the Currency Exchange part of the payment to ODL on 4 September so it would clear on time. This was €33,029 (£24,271.75). Mr Jones agreed that all the stock for the new orders would be delivered to Flight Logistics on Monday 7 September where he would be able to inspect it again before releasing the rest of the payments.

104. On the morning of 7 September Mr Orton received an email from ODL informing him that all the stock would be delivered by 12pm that day. Mr Saenz then emailed him with confirmation of payment for the second part of the order. ODL then emailed the pro-forma invoice for the second part of the order. Mr Orton called Flight Logistics and asked them to call him once the stock had been delivered, and they informed him at about 12pm that they had received 2 boxes. Mr Orton called and emailed ODL as he didn't think the full delivery had been made, and they informed him that the delivery was being made in two parts and the second part would be there by 2pm. Mr Orton called Mr Saenz to let him know of the delay and that the goods couldn't be released until he had confirmed them so they would need to delay collection. Mr Orton attended Flight Logistics on the afternoon of 7 September to check the additional stock that had been delivered. He performed the same check as he had done previously and was satisfied that the goods were all genuine and present. He then released the funds from Beigebell's Euro account in the amount of €206,500 to ODL to cover the first part of the order as the funds for the second part hadn't cleared in Beigebell's account yet.

105. At this point Mr Orton was not happy about the situation as he knew D&D Freight were coming to collect the goods but that he hadn't received full payment for them. He also knew that there wouldn't be time to make the payment to ODL even if the money did clear in his account. This situation was resolved as the payment cleared into Beigebell's account shortly afterwards. However, as the payment had cleared too late for him to be able to make the onward payment to ODL, he discussed the situation with Mr Jones and he assured Mr Orton that it wasn't a problem from his end and that we could allow HVT to collect the goods. Mr Orton didn't have a problem with this as the risk was on ODL's side not his, but he did not obtain written or email confirmation from Mr Jones that he was happy for the goods to be released.

106. Later that day D&D arrived to collect the goods however they did not have space to collect the pallet of SSDs because they had arrived in a car. However, Flight Logistics allowed them to take the SDs as they had space for them. Mr Orton emailed Mr Saenz and Arvind to inform them of this and one of them called him back to say that they would arrange for D&D to return the following day to collect the rest. On 8 September D&D returned and collected the remaining goods.

107. Tam Richmond from Flight Logistics emailed Mr Orton the signed collection paperwork consisting of the CMR and Beigebell's signed Packing Lists. Mr Orton thanked Tam for his help as it had been quite a stressful period and he was glad it had all been completed without any issues. There had been some confusion over who was paying for the storage as ODL had said it would be on their account initially but as the project progressed it was clear that wasn't the case. Mr Orton felt he could have refused to pay anything but he didn't feel that was fair as Freight Logistics had been very helpful so they agreed on a payment of £125 to cover the storage costs.

108. Mr Orton emailed the three tax invoices in lieu of the previous pro-forma invoices to Mr Saenz and, later that day, ODL sent over two tax invoices in lieu of the previous pro-forma invoices. After the goods had been collected Mr Saenz emailed Mr Orton to ask if he had taken any pictures and confirmation of the quantities despatched, but Mr Orton replied saying that he hadn't taken any pictures but he attached the signed delivery paperwork showing the quantities collected.

109. This concluded the business and, as far as Mr Orton was concerned, everything was fine, although he had found the whole experience quite stressful due to the high value of the orders. The next day he received another enquiry from HVT for some more SD cards. Mr Orton replied saying that he would look into it but he said he was just being polite, and that he had no intention of supplying any more stock as he had too much cash flow tied up in the VAT reclaim to divert any more of their cash flow.

110. A couple of days later Mr Orton told them he couldn't help. A few days later he received another enquiry from HVT for some more SD cards and Drones. For the same reasons as above he excused himself from being able to supply them. In verbal evidence he also said that he had found the whole experience very stressful and was starting to see warning signs that this was not the sort of deal he should be involved with. As he said, "I think towards the end of it, with the whole delivery situation, yes, that didn't sit well with me, but at that point, the stable doors are kind of open."

111. Mr Orton repeatedly said under cross-examination that he had no knowledge of MTIC fraud until a meeting with HMRC some months after these transactions had been carried out. We accept this as factually correct.

112. Some time previously Beigebell had bought and sold some Phablets and the sales invoice for these goods showed that they were treated as falling within the domestic reverse charge provisions contained in s55A VATA 1994. The invoice carried the statement "reverse charge: S55A VATA 1994 applies". HMRC suggested that this meant that Mr Orton must have read Public Notice 735, which sets out the relevant provisions, and which, at paragraph 1.1 contains the statement "The VAT

domestic reverse charge procedure is an anti-fraud measure designed to counter criminal attacks on the UK VAT system by means of sophisticated fraud.” Mr Puzey suggested that Mr Orton must therefore have read PN 735, from which he would be aware of MTIC fraud.

113. Mr Orton said that he had not read PN 735 thoroughly. He had only implemented the domestic reverse charge procedure because his customer had told him that he should. He had therefore contacted HMRC by telephone, who had confirmed that the Phablets would indeed be subject to the reverse charge, and had referred him to PN 735. He had therefore read sufficient of PN 735 to enable him to put the correct statement on the invoice but had not read any further and had not bothered to find out why the provision had been introduced. This did not therefore indicate any prior knowledge of MTIC fraud. We accept this as factually correct.

114. Interestingly, prior to entering into the transactions we are now considering, Mr Orton rang HMRC to check whether or not SD cards fell within the ambit of s55A. He was assured that they did not, but it demonstrates that he did recall his dealings in Phablets and the domestic reverse charge provisions. This does not in our view mean that he was aware of MTIC fraud, but it does show that he remembered his experience with the reverse charge provisions and that he had carried out some form of risk assessment and had done more than the “basic checks” which are referred to elsewhere.

115. Beigebell submitted the VAT repayment return for the period ending 10/15 on 17 November 2015. Following an extended verification of Beigebell’s 10/15 return HMRC (Mrs Rehman) decided to deny Beigebell the right to deduct input tax on the transactions as she considered they were connected with the fraudulent evasion of VAT and that Beigebell knew or should have known that this was the case.

116. The “pre cred” HMRC Officer Martin Banks was responsible for checking the repayment claim submitted in November 2015. Pre-cred officers check any repayment returns that are flagged internally for further investigations. Officer Banks called Mr Orton and requested paperwork to support the deals. Mr Orton supplied paperwork by email on 3 December 2015. Following an exchange of emails about the exchange rate used for the VAT calculation, Officer Banks advised Mr Orton, on 8 December 2015, that he would like to visit Beigebell’s premises and would be accompanied by Officer Paul Cole.

117. On 10 December 2015, Officer Banks and Officer Cole conducted a joint visit of Beigebell’s registered office at 1 Oakcroft Road, Chessington KT9 1BD. The key points emerging from the HMRC notes of this meeting are:

(1) Officer Cole stated that he had grave concerns regarding the four purchases from ODL of SSDs and SD cards, which appeared to have been tainted by MTIC Fraud for the following reasons:

(a) The deals were passed over to Beigebell by a friend, Ritesh Patel from CMS Peripherals, as his company could not proceed with the deal.

(b) The products were purchased from ODL and sold to a Spanish company but the goods were actually sent to Poland.

(2) Mr Orton admitted that these transactions were much larger and different from anything they had done before.

(3) Mr Orton admitted that they had not done any real checks on the customers and suppliers but said they were content as they were paid up front.

(4) 2% profit was made on these transactions and he conceded it was an easy deal for a quick profit.

(5) The customer paid first before Beigebell had to pay the supplier.

(6) MTIC fraud was explained by Officer Cole as well as the principle of 'knew or should have known'. He explained that if the transactions were found to be connected with fraud after looking at all the relevant evidence then HMRC had the power to deny the repayment.

(7) Mr Orton denied having any prior knowledge of MTIC fraud.

118. Some of the detail as to what was said by Mr Orton at this meeting, specifically as to the employer of Mr Patel, was later contradicted by other statements made by Mr Orton. HMRC produced evidence from their PAYE records that Mr Patel was not employed by CMS at the time of the transactions and by that time was in fact employed by Beta Distribution, which is the company name that Mr Orton mentioned at the second interview. Mr Orton blamed poor memory or simple lack of clarity but we were not convinced that these inconsistencies undermined Mr Orton's evidence significantly.

119. On 10 December 2015, following the meeting, Mr Orton emailed Officer Banks attaching bank statements and a CMR that had been requested at the meeting.

120. Following the meeting, Officer Cole recommended that Beigebell's returns be subjected to Extended Verification checks. Extended Verification Checks involve checking the veracity of high risk repayment claims to ensure that they are not traced to any fraudulent deals and tax losses. They involve tracing the whole deal chain from inception to the last trader. As part of the verification of deal chains, HMRC officers collect deal documentation. The documents collected from each individual trader in a transaction chain are collated and presented as "deal packs".

121. Beigebell was notified on 15 December 2015 of HMRC's decision to withhold payment until checks had been satisfactorily conducted into the transactions under appeal and on 17 December 2015 Mrs Rehman emailed Mr Orton to advise that she was the allocated officer and would be dealing with the inquiry. However, this email bounced back as undeliverable and therefore, on 17 December 2015 Mrs Rehman telephoned and spoke to Mr Orton. She informed him that she would be conducting the checks into the 10/15 VAT return. Mr Orton was concerned that the delay would cause him cash flow problems and wanted to know how long would the enquiries take, but Mrs Rehman did not give a time scale and mentioned that he could apply for hardship.

122. On 18 December 2015 Mrs Rehman emailed Mr Orton and confirmed that the repayment for the 10/15 VAT period could not be released until her enquiries were concluded. She referred him to the Factsheet Fs2b on Securities which could be found on HMRC's website. She emailed Mr Orton on 22 December 2015 with some queries regarding clarification on the deals and Mr Orton responded on 23 December 2015. Mrs Rehman wrote to Beigebell to arrange a visit to its business premises as part of the extended verification checks in a letter dated 19 January 2016 and on 22 January 2016 she wrote to Mr Orton regarding their recent discussions.

123. On 25 January 2016 Mr Griffiths telephoned Mrs Rehman reiterating Beigebell's cash flow problems and on 28 January 2016, Mr Orton emailed her noting that she had mentioned in her discussion with Mr Griffiths that she was still awaiting some information. She replied on 3 February 2016 to advise that she would like information about how Beigebell instructed Flight Logistics regarding the deals. She also requested copies of any due diligence paperwork on Beigebell's supplier or customer. As an upcoming meeting was scheduled, she said that the information could be provided at that meeting.

124. Mrs Rehman first visited the trader on 10 February 2016 along with Officer Jason Harris and thereafter a further and final visit was undertaken on 21 June 2016. At the visit on 10 February 2016, Mr Orton, Mr Griffiths and Beigebell's external accountant, Mark Richardson attended. They discussed the trading in the 10/15 period and, at this visit, Mr Orton was asked again about due diligence. He said:

- (1) He carried out credit checks which came back as low risk.
- (2) He checked his customer's VAT number on a European website.
- (3) He dealt with a Javier Saenz at HVT but did not know his position in the company.
- (4) He did not know who his customer's directors were.

125. Mrs Rehman noted that this was different to his earlier response at the 10 December 2015 meeting when he had said that "no real checks on customers or suppliers were conducted" but they were content because the money was paid upfront.

126. Mrs Rehman confirmed that she was not aware of any evidence to suggest that Mr Orton knew who was supplying ODL or to whom HVT was selling.

127. At this visit Mr Orton confirmed that no contracts were negotiated as the deals were put together by Mr Patel and that no insurance was taken out because he assumed the goods would be covered by the freight-forwarder but had not actually checked this. There was some inconsistency between the notes of the two meetings and Mr Orton's subsequent witness statement as to whether or not Mr Patel had only put together the initial deal or whether he had referred to more than one deal. Mr Orton was unable to clarify this but we do not regard it as significant.

128. Mr Orton described the goods being delivered to Flight Logistics' warehouse and he was asked to provide further paperwork in this respect. He confirmed that he was paid upfront and that in Beigebell's normal merchandising business they offered

their customers 30 days credit. He provided a copy of an invoice from the merchandising business which Mrs Rehman considered was quite detailed compared to the invoices for the SD cards. However she acknowledged that she knew very little about SD cards and did not realise that the description provided on the invoices was precise and complete.

129. Mr Orton said that delivery and transportation arrangements were made by the customer. It was pointed out to him that the copy of the CMR provided on 10 December 2015 and the delivery notes provided on 23 December 2015 did not necessarily show that the goods had left the UK because the CMR was not signed at the point of delivery. Mr Orton said he had not made any further enquiries but had emails from his customer which he would forward.

130. Officer Harris explained MTIC fraud and the Kittel principle again to Mr Orton, and pointed out that these transactions appeared to have no end user (an indication of carousel fraud in the mind of HMRC) and had many other MTIC indicators.

131. On 11 February 2016 Mrs Rehman emailed Mr Orton and Mr Richardson requesting further information. She asked for the dates and times that Flight Logistics was visited, whether Mr Orton had noted and retained serial numbers of goods at his visit, whether any inspection reports were sent to the customer, evidence of communication between Beigebell and its supplier, customer and freight forwarders, evidence that the goods left the UK and confirmation of receipt, and copies of the amended invoices showing the VAT in pounds sterling.

132. On 11 February 2016 Mr Orton wrote to Mr Patel asking for details as to how and why Beigebell had become involved in these transactions and for as much detail about the deals as possible. Mr Patel replied on 17 February 2016 explaining that:

- (1) He had dealt with HVT for many years and had supplied them with peripheral storage products to resell.
- (2) Prior to the deals SanDisk had called him and advised him that he could not supply the SanDisk products to Europe as there was a clause in the contract which only allowed him to sell products to UK customers.
- (3) HVT then asked him if he could help find a partner who could supply these products at the agreed margin as they had already pre-sold the goods.
- (4) He said that his supplier could not sell directly to HVT “due to the channel model that exists and channel ethics.”
- (5) He had approached Beigebell because they had a longstanding relationship and he understood Beigebell was looking to grow its revenue streams.

133. We consider that we should place little weight on this evidence because Mr Patel did not appear as a witness and we considered that we could not rely on anything he said. In addition, this related to Mr Orton’s knowledge after the transactions had taken place, and was not therefore directly relevant to whether or not Mr Orton knew or should have known what he was getting into. It does however cast

some light on what Mr Patel may have said to Mr Orton at the time he was introducing these deals to Beigebell and to that extent is consistent with what Mr Orton said Mr Patel had said to him.

134. On 16 February 2016, Mr Richardson responded to the email. He noted that he was looking forward to receiving the notes of the meeting and said they would revert once all relevant information had been ascertained.

135. On 24 February 2016 Mrs Rehman wrote to Mr Richardson enclosing a copy of the notes of Officer Harris of the meeting, as requested and on 7 March 2016 an email was received from Mr Richardson attaching a bundle with all the paperwork requested.

136. On 20 April 2016 the first tax loss letter was issued regarding invoice SI-1227233. This letter advised Beigebell that this transaction commenced with a defaulting trader resulting in a loss to the public revenue. On 5 May 2016 a tax loss letter was issued for Invoices SI- 1227234, SI-1227344 and SI 1227360. This letter advised Beigebell that these three transactions were part of transaction chains connected with a fraudulent VAT default. For invoice number SI-1227344 HMRC stated that only the 1,000 units of Samsung EVO 250GB SSDs had been connected to this chain.

137. On 12 May 2016 Mrs Rehman received a letter from Beigebell's agent, Mr Richardson, dated 10 May 2016 querying the tax loss letters. The letter raised issues such as the agent's belief that the SI-1227344 invoice did not cover the 1,000 units of the Samsung EVO 250GB SSDs. He was also concerned about Beigebell being placed on the monitoring programme and the speed of HMRC's decision-making.

138. On 19 May 2016 Mrs Rehman wrote back in response to Mr Richardson. She said that she had relied upon the accuracy of the invoices provided by his client and clarified that HMRC had issued tax loss letters as a result of tracing the deal chains. She said that only once the verification process was complete could HMRC determine the validity of the repayment claim. She also requested a further visit on 26 May.

139. On 24 May 2016 a letter from Mr Richardson dated 20 May 2016 was received in response to her letter dated 19 May 2016. He criticised HMRC for the length of time the process was taking and said his clients would allow a further visit only if there were to be no further discussions about the 10/15 period. He said 26 May was not possible due to prior commitments and asked for another date after 30 May.

140. On 24 May 2016 a final tax loss letter was issued for invoice SI-1227344 in respect of the 10/15 VAT return. This letter identified that the invoice had been traced to a tax loss in respect of the 550 SanDisk 256GB memory cards. On the same date Mrs Rehman received Mr Richardson's letter above querying her findings. On 9 June 2016 she responded to Mr Richardson's letter of 20 May 2016 and explained that Beigebell was placed on the monitoring programme in order to mitigate the risk of MTIC fraud both to HMRC and to Beigebell. She said she was satisfied that the

transaction chains were adequately traced. She noted that no accusations had been levelled at Beigebell throughout the investigation.

141. She proposed 21 June as a meeting date and on 21 June 2016, Officer Harris and Mrs Rehman met with Mr Orton. Mr Griffiths was not present as he was busy in the office. Mr Orton advised that there had been no changes to trading since the last meeting and no SSDs had been bought since the 10/15 period. All goods were branded merchandise imported direct from manufacturers or distributors. They discussed MTIC fraud and the progression of the repayment claim, and HMRC stated that the four transactions were all linked to missing traders/defaulters. She confirmed that Beigebell would be notified by letter of the final outcome once her enquiries were concluded. HMRC requested further information about Beigebell's trading which would be emailed and on 8 August 2016 an email was received from the agent which was treated as a complaint by HMRC. He said that a notable time period had elapsed and had continued to disadvantage his client. This complaint is not relevant to our decision.

142. A decision letter denying the VAT repayment was issued on 4 October 2016. The decision letter records that of £144,628.40 of claimed input tax on the four purchases of SDs in the 10/15 period was denied on the grounds that the transactions were connected with the fraudulent evasion of VAT and Beigebell knew or should have known this was the case.

143. On 20 October 2016 an assessment letter was issued due to the adjustment to the 10/15 VAT return. The letter records that instead of a VAT credit of £140,980.78 for the period, there was now an amount of £3,647.68 due.

144. Mrs Rehman carried out various enquiries of the Polish, Hungarian and Spanish tax authorities through what are known as SCAC enquiries. These revealed that the Polish authorities regarded the Polish companies in the chain as defaulters and that the Hungarian authorities regarded Borough Brothers kft as a defaulter, but the response from the Spanish authorities showed no such conclusions, although we note that HVT had only been operating for a comparatively short time at the time the enquiry was made.

DISCUSSION

145. There are two key issues before us:

- (1) Was Shark Partners Ltd a fraudulent defaulter or merely an incompetent defaulter, and
- (2) Did Beigebell know or should have it known that the transaction it was entering into were part of a scheme to defraud HMRC.

146. We were also given evidence as to the nature and status of SD 2013 Ltd but HMRC did not argue that SD 2013 Ltd was a fraudulent defaulter, merely that it was complicit in the deal chains. We do not therefore need to address this further.

Shark Partners Ltd

147. Both parties accept that these five/six deals were part of a series of contrived transactions in which there were tax losses.

148. It is also accepted by both parties that Shark Partners was a defaulter and did not meet its VAT liabilities as assessed by HMRC. The question therefore is whether or not Shark Partners was fraudulent. If it was not fraudulent then HMRC would be unable to deny the repayment of VAT to Beigebell under the *Kittel* principle in respect of Deal 1.

149. The test of dishonesty has been discussed in a number of cases. Mr Brown referred us to the normal list of cases, including:

Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378, and

Barlow Clowes International Ltd v Eurotrust International Ltd [2005] UKPC 37

150. Mr Brown did not mention the case of *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67, but we consider that this case may be helpful in drawing together the principles set out in *Royal Brunei* and *Barlow Clowes* and we therefore refer to it below.

151. In *Royal Brunei* Lord Nicholls, at page 10, describes dishonesty as follows:

“Honesty has a connotation of subjectivity, as distinct from the objectivity of negligence. Honesty, indeed, does have a strong subjective element in that it is descriptive of a type of conduct assessed in the light of what a person actually knew at the time, as distinct from what a reasonable person would have known or appreciated. Further, honesty and its counterpart dishonesty are mostly concerned with advertent conduct, not inadvertent conduct. Carelessness is not dishonesty. Thus for the most part dishonesty is to be equated with conscious impropriety. However, these subjective characteristics of honesty do not mean that individuals are free to set their own standards of honesty in particular circumstances. The standard of what constitutes honest conduct is not subjective. Honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. If a person knowingly appropriates another’s property he will not escape a finding of dishonesty simply because he sees nothing wrong in such behaviour.”

152. In *Ivey*, Lord Hughes said, at [62]:

“The test now clearly established was explained thus in *Barlow Clowes* by Lord Hoffmann, at pp 1479-1480, who had been a party also to *Twinsectra*:

“Although a dishonest state of mind is a subjective mental state, the standard by which the law determines whether it is dishonest is objective. If by ordinary standards a defendant’s mental state would be characterised as dishonest, it is irrelevant that the defendant judges by different

standards. The Court of Appeal held this to be a correct state of the law and their Lordships agree.””

153. Lord Hughes further explains in *Ivey*, at [74]:

“The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual’s knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest.”

154. We are therefore instructed by Lord Hughes that:

- (1) First we must ascertain the actual state of the individual’s knowledge or belief as to the facts, and
- (2) Then, when once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people.

155. Unfortunately, in this case we received no evidence from the director of Shark Partners as to what he knew or what he believed and can only therefore work by inference from the facts which we have found. The full facts are set out above and form an essential part of our thinking, but the key facts in our view are:

- (1) Mr Satheesan said that the previous director Mr Khan was a friend of a friend whom he had met **once**.
- (2) He purchased the company for between £3000 and £4000, probably around the time of the notification of the change of director, which was dated 7 November 2014.
- (3) He was repaying the purchase price in instalments.
- (4) **He could not provide an exact figure for the purchase price.**
- (5) When asked what Mr Satheesan had obtained for his money given that a company could be formed for far less than this, he said that he bought this company to save time and the trouble of setting up his own company and **getting it VAT registered.**
- (6) When asked about the company’s banking arrangements Mr Satheesan advised that they held a Euro account with a Latvian bank but **could not recall**

the name of the bank or his account number because he'd forgotten his password.

(7) He said that he had met the bank manager at a Holiday Inn in Camden, London in May 2015.

(8) He said that the reason he'd opened a bank in Latvia was because **UK banks would not give him an account**.

156. In our view, all these facts lead us inevitably to the conclusion that Mr Satheesan intended from the very beginning to avoid being noticed or scrutinised by HMRC. He paid £3,000 to £4,000 for a company which could be formed for far less, even though he was still paying this off in instalments. This implies that he did not have this much cash easily available, and that this was not an insignificant sum for him. To pay a significant sum of money just to avoid the time and trouble of forming a company and getting it VAT registered does not make sense.

157. In our view, the reason he was prepared to pay so much over the odds was to obtain a VAT registration, which he suspected might have been refused had he applied for a VAT registration himself.

158. He had also opened a bank account in Latvia because, he said, UK banks would not give him an account. His rationale may again have been to stay under the HMRC radar, but there may also have been a good reason why UK banks would not give him an account. In either case this does not present a picture of an unblemished character intending to set up a legitimate business in full view of HMRC.

159. Mr Brown suggested that the fact that HMRC raised very large VAT assessments may have frightened Mr Satheesan to such an extent that he decided to disappear rather than attempt to challenge the assessments. We do not accept this as the likely explanation. In our view it was always Mr Satheesan's intention to disappear as soon as HMRC had caught up with him.

160. Mr Brown also suggested that the fact that Mr Satheesan contacted HMRC on more than one occasion when he was threatened with the cancellation of his VAT registration should lead us to the conclusion that his intentions were honourable. Again we do not accept this as the likely explanation. In our view this looks like the actions of someone determined to protect the VAT registration for which he had paid so handsomely.

161. The logical conclusion from all the evidence was that Shark had sought to keep its activities hidden away from the attentions of HMRC. It had filed no returns, had paid no assessments other than a small initial assessment, and had failed to provide documentation to support its transactions. It had dealt with another missing trader, Fast Away Services. In all the circumstances, the natural and logical conclusion is that Shark failed to account for VAT deliberately, dishonestly and fraudulently.

162. In conclusion therefore, for the above reasons, we find that on the balance of probabilities Shark Partners was a fraudulent defaulter.

Beigebell and Jack Orton

163. The question as regards Beigebell, as embodied by Mr Orton, was whether or not he knew or should have known that he was entering into transactions which were connected with fraud.

164. We have found as a matter of fact that Mr Orton had no knowledge of MTIC fraud before the meeting with HMRC on 10 December 2015. He had not been warned by HMRC as to what he should be looking for and he did not therefore possess the basic tools to spot an MTIC fraud other than his general experience as a businessman. Of course, this experience might not enable him to spot an MTIC fraud as such, because he had no knowledge of what an MTIC fraud might entail, but it should have given him the ability to identify when a deal did not look right, employing the traditional adage which all experienced businessmen know: “If something looks too good to be true then it probably is.”

165. I have set out parts of the relevant case law above, but I will repeat some elements of it here for ease of reference. In *Mobilx*, Moses LJ considered what he described as two essential questions, at [4]:

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

166. On the first question, Moses LJ concluded as follows, at [52]:

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

167. Moses LJ concluded, at [59]:

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

168. In *Davis & Dann Ltd v HMRC* [2016] EWCA Civ 142, a case decided after *Mobilx*, Arden LJ, at [4], elaborated on these words:

“4. It was common ground that in order to show that the respondents ought to have known of the connection between their purchases and Leeming's fraud, HMRC had to reach a high hurdle under EU law of showing that they ought to have known that the only reasonable explanation for the transactions was that they were connected to a VAT fraud: see *Mobilx Ltd v HMRC* [2010] STC 1537 per Moses LJ at [59]. I will refer to this level of knowledge as knowledge meeting “the no other reasonable explanation standard”.”

169. Arden LJ went on to say in *Davis & Dann*, at [64] and [65]:

“64. Contrary to Mr Scorey's submission, the last sentence (of [52] in *Mobilx*) does not say that a taxpayer who fails to make inquiries does not have the knowledge which meets the no other reasonable explanation standard. On the contrary he holds that he may have knowledge to that standard if he fails to make those inquiries.

65. In my judgment, the consequence of HMRC's decision not to allege fraud against Bristol, CEMSA and GR Distributions was that it was no part of their case that those parties were fraudulent. However, in assessing whether the respondents' knowledge met the no other reasonable explanation standard, the FTT still had to go on to consider all the circumstances. The question is whether or not a reasonable person mindful of those circumstances ought to have concluded that the Transactions were connected with fraud. What matters is the perspective of the person alleged to have such knowledge. A finding of knowledge to the no other reasonable explanation standard can accordingly be reached irrespective of whether the other parties to the transactions were in fact fraudulent.”

170. Further, at [68], she says:

“But that was not the role of the allegation of prior knowledge. The fact that the respondents had prior knowledge was one of the factors which had to be taken into account when the FTT assessed what a reasonable person ought to have known about any connection with fraud.”

171. To deal with the last point first, we take this to mean that whether or not Mr Orton had prior knowledge of MTIC fraud is only one of the factors we should take into account. The fact that he did not have prior knowledge, as we have found, does not exonerate him from the allegation that he should have known.

172. We turn therefore to the contention that Mr Orton did know that Beigebell was entering into transactions in connection with fraud.

173. Mr Orton has been consistent in his denial of this allegation and we have seen no evidence which proves or even suggests that he did in fact know that the

transactions which Beigebell entered into were part of a series of transactions designed to defraud HMRC of VAT, even on the balance of probabilities.

174. We therefore find that Mr Orton did not know that these transactions were connected with fraud before he entered into them.

175. The more difficult question is whether or not he should have known. Did he have the means of knowledge available to him but failed to deploy those means?

176. There is no doubt in our minds that by the time he had completed these six purchases and five sales he realised that these transactions were not the sort of thing he should have become involved in. As he said at the end of giving his evidence, when asked if had seen too many warning signs: “I think towards the end of it, with the whole delivery situation, yes, that didn't sit well with me, but at that point, the stable doors are kind of open.” In other words, when he had completed the transactions and looked at them as a whole, he realised that something was not right and decided that he would not participate in further transactions. The warning signs were there, but he says that he did not put them together until the transactions were finished.

177. Importantly he did not participate in any further transactions of this nature, even though they were offered to him.

178. The test put forward by Arden LJ in *David & Dann* seems to us to encapsulate the question we should be asking. She refers to it as the “no other reasonable explanation” standard.

179. She also says that when evaluating the facts against this standard:

“The question is whether or not a reasonable person **mindful of those circumstances** ought to have concluded that the transactions were connected with fraud. What matters is the perspective of the person alleged to have such knowledge.”

180. We consider that Mr Orton is a reasonable person. He is not, we consider, a reckless individual. He is still quite young and he might be accused of a certain naivety in his dealings with Mr Patel, but he is fundamentally, in our view, a sensible businessman with sound moral standards. We think therefore that we may use him as a suitable surrogate for the hypothetical reasonable man suggested by Arden LJ in *Davis & Dann*.

181. In addition we should note that he had been acquainted with Mr Patel for 20 years and counted him a close personal friend. He therefore trusted what he was told by Mr Patel. Given their lengthy relationship, and the fact that Mr Patel had brought Beigebell good deals in the past, he had no reason to doubt that these transactions would also prove to be good for Beigebell. He certainly had no reason to believe that he was being set up as the fall guy in an elaborate VAT fraud.

182. We must however ask ourselves if Mr Orton's behaviour passes the "no other reasonable explanation test".

183. Mr Orton explained to us that he had worked in the IT sector previously and was aware of the channel model operating in that sector. That model may not make total sense to us but its existence was not challenged by HMRC and no evidence was presented to us to undermine its existence. His alternative reasonable explanation for these transactions therefore was that, under the IT sector channel model, distributors were not allowed to sell directly to end-users. The interposition of third parties was therefore not unusual. He did not test whether or not HVT was an end-user or if ODL was a distributor for these purposes. He felt that he did not need to check this. All he knew was that the interposition of third parties in an otherwise complete deal chain was not unusual in the IT sector and that his long term friend had given him a rational explanation for the transactions.

184. He did therefore, in our view, have an alternative reasonable explanation for the transactions and his behaviour does therefore fulfil the "no other reasonable explanation" test proposed by Arden LJ.

185. In summary therefore we find that Mr Orton, and therefore Beigebell, did not know and should not have known that the transactions were connected with fraud when he entered into them.

DECISION

186. For the reasons set out above therefore we decided that the appeal should be ALLOWED.

187. 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.

**PHILIP GILLETT
TRIBUNAL JUDGE**

RELEASE DATE: 29 MAY 2019