Neutral Citation: [2024] UKFTT 00514 (TC)

Case Number:

TC09202

FIRST-TIER TRIBUNAL
TAX CHAMBER

Tribunal Hearing Centre
Royal Courts of Justice
Chichester Street
Belfast

Appeal reference: TC/2018/03576

VALUE ADDED TAX - FAST MOVING CONSUMER GOODS - Kittel denials - Did the appellant actually know of the connection to fraud? - No - Did the appellant have 'blind-eye' knowledge? - No - Should the appellant have known of the connection to fraud? - Yes - Appeal dismissed

Heard on: 27 November (reading day)
28 November 2023 - 30 November 2023
4 December 2023
31 January 2024
Judgment date: 6 June 2024

Before

TRIBUNAL JUDGE CHRISTOPHER MCNALL
TRIBUNAL MEMBER PATRICIA GORDON

Between

WHOLESALE DISTRIBUTION LIMITED

Appellant

and

THE COMMISSIONERS FOR
HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Kevin Magill BL KC, of Counsel

For the Respondents: Ms Joanna Vicary, of Counsel, instructed by HM Revenue and Customs' Solicitors' Office and Legal Services, VAT Litigation, Salford (with Mr Harrison Edmonds, of Counsel, also signing HMRC's Skeleton Argument)

DECISION

The Appellant's appeal is dismissed.

REASONS

1. This is an appeal against HMRC's decisions, each upheld at departmental review, to deny the Appellant's ('**WDL**') right to deduct input tax.

2. The decisions are:

   (1) A decision letter and Notice of Assessment dated 24 January 2018 in relation to £638,355.47 for the period 01/16;

   (2) A decision letter and Notice of Assessment dated 20 February 2018 in relation to £7,529,529.67 for the periods 04/16 to 07/17.

3. The total sum in dispute is therefore £8,167,855.44 (net of statutory interest) and is in respect of the periods 01/16 to 07/17 inclusive.

4. The appeal, as it now stands, concerns 1081 disputed deals involving the Appellant's wholesale purchase and sale of a variety of 'fast-moving consumer goods' ('FMCG') such as soft drinks, confectionery, batteries, and toiletries.

5. Unlike in some cases, HMRC does not dispute that the goods actually existed. The denials were on the basis that HMRC was satisfied that all the transactions were connected to a scheme to defraud HMRC of VAT, and that WDL either knew, or should have known, that this was the case: a so-called 'Kittel' denial, applying the reasoning (set out more fully below) in the well-known case of Kittel.

THE GROUNDS OF APPEAL

6. The Grounds of Appeal are:

   (1) The Appellant did not know of any VAT fraud having been perpetrated by any other businesses or companies;

   (2) There were insufficient grounds for concluding that he [sic] ought to have known of the same.

7. The 'he' refers to Mr Eamon Crothers. It is 'sic' because Mr Crothers is not the Appellant. WDL is. But the elision of his interests with those of the company is entirely understandable. Mr Crothers is, and at all material times was, the Appellant's sole director and controlling party. To all intents and purposes, he and the Appellant are alter egos: his knowledge is its; and vice versa. His evidence plays a very prominent and important role in this case.

BURDEN OF PROOF AND STANDARD OF PROOF

8. HMRC bears the burden of establishing that the conditions for the recovery of input tax are not met.

9. The standard of proof is the usual civil standard, namely the balance of probabilities, or whether something is likelier than not.

10. Whether the burden is discharged to the appropriate standard is addressed by looking at the entirety of the evidence, written, documentary, and oral.

11. The effect of judicial fact-finding was set out by Lord Hoffmann in *Re B* [2008] UKHL 35, as follows:

> "If a legal rule requires a fact to be proved (a "fact in issue"), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."

THE EVIDENCE

12. We had written evidence as follows:

(1) Officer Lisa Wilkinson, statements dated 30 March 2021 and 24 May 2022;

(2) Mr Eamon Crothers, witness statement dated 15 March 2022;

(3) Mr Gavan Murdock (Mr Crothers' accountant), witness statement dated 16 March 2022.

13. We heard oral evidence from the following witnesses, in the following order:

(1) Officer Wilkinson;

(2) Mr Crothers;

(3) Mr Murdock.

14. Officer Wilkinson is a long-standing officer of relevant experience. She had been involved with WDL from April 2012, as a monitoring officer, and in March 2014 became responsible for conducting the extended verification process. She undertook a number of visits and being in general contact with WDL. We had an excellent opportunity to assess the cogency of her evidence. She was cross-examined with charm and skill by Mr Magill. Her evidence was careful, and not argumentative or partisan. She made sensible concessions (for example, in relation to the content of deregistration letters). But, in summary, the principal thrust of her oral evidence, emerging repeatedly, was that she had tried to advise Mr Crothers and WDL, but that she did not run the business for him.

15. We heard Mr Crothers give evidence for several hours, spread over three days, and so we had an excellent opportunity to assess the cogency of his evidence. His witness statement stood as his evidence-in-chief and he was not asked any supplementary questions in chief. As is usual in cases of this kind, he was cross-examined in considerable detail about his business record, his trading relationships, and the denied deals. The cross-examination was searching and robust, but fair. Much of the substance of his evidence, both written and oral, was of an unsatisfactory character, for the detailed reasons which we shall set out below.

16. Mr Murdock's firm, which is an office of five staff, has been involved with the Appellant since November 2003 (when Mr Murdock witnessed the Companies House forms

appointing Mr Crothers and his wife as directors). It prepared the Appellant's VAT returns and Mr Murdock was a point of contact for Officer Wilkinson.

17. Mr Murdock's oral evidence was somewhat hesitant and lacked detail as to what tasks his firm had actually performed in relation to due diligence. This meant that his evidence on this point was of very limited value because, as he candidly accepted, he had not personally been involved with the due diligence, but had left this to be done by his associates, from whom there was no evidence.

18. The Appellant did not require the following HMRC witnesses to be called (with the brackets being the company which that officer has reported on):

(1) Officer Ryan Coulter (Food and Drinks Hub (Scotland) Ltd);

(2) Officer Olubamidele Airen (Impact Traders Ltd);

(3) Officer Benjamin Livings (Dynamic Sourcing Ltd);

(4) Officer Vincent R'Rozario (Pound Plus Distribution Ltd);

(5) Officer Matthew Elms (Prime Merchants Ltd);

(6) Officer Deborah Thompson (Oldbury Trading Ltd)

(7) Officer Hawa Patel (Monarch Trade Solutions Ltd)

(8) Officer Riyaz Patel (Iceberg Traders Ltd)

(9) Officer Gareth Marklew (AK Prime Trading Ltd)

(10) Officer Rebecca Nunn (Buywize Drinks Ltd)

(11) Officer Jennifer King (Ave Brands Ltd)

(12) Officer Joanne Bannerman (Energized Sales Ltd)

(13) Officer James Gardam (Fantasia Trading Ltd)

(14) Officer Shaikh Malique (Sha Bros Ltd)

19. During the relevant period, Mr Crothers had had an assistant, Aislinn Laverty, but there was no written or oral evidence from her. She was first engaged (as a self-employed person) in mid 2016 - that is to say, during the period of the denied deals. Her role was described by Mr Crothers as 'finding out new clients, sussing out new clients and new suppliers, and just basically keep an eye on what was going on and do a bit of invoicing'. She was helping with paperwork because Mr Crothers was finding the workload, by that point (when WDL was turning over about £30m) too much. She was working for up to 30 hours a week. Ms Laverty was repeatedly referred to by Mr Crothers in his oral evidence as someone who (for example) would have performed VIES checks, and would have kept records, and would have known where those were. We were told that although she was no longer employed by the Appellant, Mr Crothers did 'see her about' and indeed had spoken with her over the weekend of the trial. His explanation as to why there was no evidence from her was that he did not 'think it was necessary' to call her.

20. The Court may draw adverse inferences from a party's failure to deploy forms of evidence which it could reasonably have been expected to adduce. Thus, in appropriate cases "a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in the action", unless a credible reason is given for the witness's absence: *Wisniewski v Central Manchester HA*

[1998] PIQR P324 at 340. As Lord Leggatt explained in *Efobi v Royal Mail Group Ltd* [2021] 1 WLR 3863 at §41, this is "a matter of ordinary rationality" and a feature of the process of a Court drawing inferences:

> "So far as possible, tribunals should feel free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole."

21. Here, Mr Crothers was in contact with Aislinn - he spoke to her during the course of the hearing when he was trying (belatedly) to find documents which (on his case) supported his argument. His explanation as to why he had not asked her to give evidence (he did not think it was needed) was extremely poor and simply not credible. The best explanation is that her evidence would not have supported the Appellant's case and that is the inference, such as it is, that we draw. However, it does not take things very far because the failure to call her is, in the overall scale of things, a self-inflicted wound by Mr Crothers, because it means that our assessment as to his business practices must repose, in very large measure, on the contemporary documents and on his oral evidence alone.

22. In his written evidence, Mr Crothers said that he also had assistance from one Kivena Farrell in 2017, but he had not called her either. She was engaged by WDL in 2017, and was working for up to 30 hours a week, performing similar tasks to Aislinn Laverty. But we do not know why she was not called, and so we decline to draw any inference adverse to the Appellant from its failure to have done so.

Documentary evidence

23. When it comes to documentary evidence, the position is not satisfactory.

24. One would have supposed that a trader of integrity, determined to prove that it neither knew nor had reason to suspect a connection to fraud, facing an input tax denial of this magnitude - several million pounds - would have left no stone unturned so as to produce documents and evidence which supported its position. But, for reasons which ultimately remain unexplained and unclear that did not happen here.

25. This emerged in the following ways.

The late-emerging VIES documents

26. Firstly - but only during the course of the hearing - some evidence was placed before us that the Appellant had - at least on certain occasions - checked, through the EU VIES system, that VAT numbers were valid. Print-outs had been kept of a series of VIES checks, although it was not clear by whom these had been done. These did not appear in the otherwise exceptionally voluminous bundles; there was no record of them in HMRC's careful and detailed meeting notes; nor in the correspondence; nor - perhaps most surprisingly - in Mr Crothers' witness statement. They emerged only of Day 3 of his oral evidence, following a search of his premises over the intervening weekend; found at the bottom of a drawer, and in response to an invitation from the Tribunal. There was simply no good explanation as to why

these had not been put into evidence sooner: they were obviously relevant, contemporaneous documents, from a third party (ie, the EU), and - to an extent - supportive of the Appellant's position. We remain baffled why Mr Crothers would not have considered it appropriate to have conducted a proper search before engaging in this lengthy appeal process.

The late-emerging DDX packs

27. The VIES checks were produced alongside a modest clutch of documents relating to diligence in relation to two suppliers - SHA Bros Ltd and Prime Merchants Ltd. These came from a firm called Due Diligence Express ('DDX'), which had been instructed not by Mr Murdock's firm but by Mr Crothers. It seems that these were copies of documents which existed in hard copy.

28. Mr Murdock's evidence, which we believed, that one of his associates had seen some packs and had described them packs as not 'up to standard'. Mr Murdock himself had seen some packs, in white covers, in his office, but could not remember how many - something in the region of ten - and he did not know in relation to which trader. He was not impressed by the packs. He remembered one with a picture of the exterior of some premises on it, and it being remarked 'that could have been anywhere', and he remembered the packs, when looked at, not being 'up to scratch'. We accept this evidence from Mr Murdock. It happens to accord with our own analysis, set out in more detail below, of the two DDX packs which we have seen. We also accept his evidence that the packs which he saw were only up to 6 pages long, and were certainly not as full as the two packs which emerged part-way through the trial. There is no explanation for the discrepancy.

29. Insofar as we are called upon to resolve the point, we prefer Officer Wilkinson's evidence, being recalled to give oral evidence specifically on the point, to Mr Murdock's, in that she had not been shown any DDX packs in meetings with Mr Murdock or WDL. In rejecting his evidence, we do not think that Mr Murdock was being untruthful: he accepted that his recollection as to meetings which took place more than five years ago was quite hazy. In contrast, Officer Wilkinson was very clear and sure ("I did not see any DDX folders in Mr Murdock's office full stop") that she had not seen the DDX packs placed before us (although she had seen others, for other traders whose deals were not in dispute) and we accept her evidence. It is consistent with our overall appraisal of her evidence, and is consistent with other contemporary documents. If she had been shown DDX packs for the suppliers of interest to her in this period (as she had been in other cases) we are sure that she would have made a note of it, and she did not.

The email and shredded documents

30. Alongside this is the absence of any good explanation for the failure to produce other contemporary records. Mr Crothers said that a lot of documents had been received by email, to an account to which he still had access, but, despite this being canvassed with him by the Tribunal in the course of his oral evidence, he did not seek (for example) to place emails before us from the likes of Dynamic Sourcing.

31. Mr Crothers also told us that he had shredded - that is to say, deliberately destroyed - his daybooks, diaries, and other documents in which details of the deals had been recorded at the time. He had not made any attempt to reconstruct these records. He sought to explain the destruction on the basis that no-one would have kept them for six years.

32. But Mr Crothers' evidence in this regard was entirely unconvincing:

(1) Because he had been advised by HMRC during a VAT visit as early as July 2009 to keep records for six years, and confirmed at a meeting in September 2013 that he was aware of that requirement;

(2) Because documents from 2016 and 2017 would, at the time the decisions under challenge in this appeal were made (January and February 2018) only have related to events and trades no more than a year or two previously, and in many instances much more recently;

(3) Moreover, and as set out below, a significant volume of documents are known to have been seized from Mr Crothers by the police in September 2017.

33. We are entitled to draw inferences from the absence of evidence which is said to have existed, and where Mr Crothers is the person responsible for its non-production. On the basis that Mr Crothers was telling the truth that such documents had existed, then we conclude that he had deliberately destroyed them, so as to keep potentially adverse evidence in them from coming to the attention of HMRC and/or this Tribunal.

Mr Crothers' arrest and seizure of documents

34. One further explanation was put forward for missing documents. This arises from the fact that Mr Crothers was arrested on 5 September 2017 in relation to money laundering (with a restraint order - a form of freezing order - having been made by the High Court of Northern Ireland on 4 September 2017) and the police had uplifted documents. The best evidence (see page 48 of File B) is that PSNI returned materials - coming to 35 lever arch files and a storage box of material in cardboard envelopes - to the Appellant on 18 October 2021; and a further 10 lever arches on 10 December 2021 (File B page 52). The latter contained deal sheets from October 2016 to July 2017.

35. It was suggested, albeit faintly, that the police might still have some documents, and that explained why Mr Crothers (against whom criminal proceedings were not pursued) did not have them. We reject that explanation - this appeal has been ongoing for a long time; there is no evidence that Mr Crothers' has been trying to retrieve documents from the police over and above those returned to him in October 2021; and in any event it is plainly inconsistent with Mr Crothers' own evidence, recorded above, that he had destroyed such documents as there were.

36. We should also add, for the avoidance of any doubt, that we do not draw any inference whatsoever - and certainly not one adverse to Mr Crothers - from the fact of his arrest or police involvement. As a matter of record, the police did not even submit a criminal investigation file to the Public Prosecution Service of Northern Ireland (the charging authority); and on 21 August 2021 the High Court discharged, with the consent of the Police Service of Northern Ireland and the Director of Public Prosecutions, the Restraint Order.

THE RELEVANT LAW

37. The relevant law as to the correct operation of the VAT regime is not in dispute.

38. Domestic legislation governing the recovery of input tax is contained in sections 24 – 26 of the *VAT Act 1994* and the *VAT Regulations 1995*. In general terms, if a taxable person has incurred input tax that is properly allowable, then 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, then he is entitled to a repayment.

39. When considering the denial of a claim to input tax credit where a transaction is alleged to be connected with fraud, the starting point is the judgment of the CJEU in the combined appeals *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (C439/04 and C-440/04). Where the tax authorities find that the right to deduct has been exercised fraudulently, those authorities are permitted to claim repayment of the deducted sums retroactively. 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 fraud must be regarded as a participant in that fraud (whether or not her profited from it).

40. In *Mobilx Ltd (in administration) v HMRC* [2010] EWCA Civ 517 the Court of Appeal considered in detail the "knowledge" element of the principles outlined in Kittel. It emphasised that the test in Kittel is simple and should not be over-refined. It embraces not only those who know of the connection but those who 'should have known'.

41. We have also found useful guidance in the following judicial pronouncements, which we have taken into account in reaching our decision in relation to the "should have known" issue:

(1) It is necessary to consider individual transactions in their context, including drawing inferences from a pattern of transactions, and 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: see *Red 12 Trading Ltd v Revenue & Customs* [2010] STC 589, at [109] to [111];

(2) In effect as a facet of the guidance given in *Red 12*, it is necessary to guard against over-compartmentalisation of relevant factors, and to stand back and consider the totality of the evidence: *Davis and Dann, and CCA Distribution Ltd v Revenue and Customs* [2017] EWCA Civ 1899.

(3) The Tribunal should take account of, but not focus unduly, on the question of whether the trader has acted with due diligence: Moses LJ in *Mobilx*, at [82];

(4) As stated by Briggs J (as he then was) in *Megtian Ltd v HMRC* [2010] EWHC 18(Ch), and approved by Arden LJ (as she then was) in *Fonecomp Limited v HMRC* [2015] EWCA Civ 39 at [37]

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

(5) The FtT's task is to apply the impersonal standard of the reasonable businessman to the facts which it finds, on the basis of the evidence which it has heard, as to the circumstances in which the taxpayer carried out the transactions in issue. Would the reasonable businessman have concluded that the taxpayer ought to have known that the only reasonable explanation for the transactions was that they were connected with fraud*: S&I Electronics plc v HMRC* [2015] STC 2076 at [64];

(6) The question of 'means of knowledge' involves the application of an objective test - namely whether, even if the taxpayer did not actually know that its transactions were connected with fraud, a reasonable businessperson with ordinary competence in its position would have known: *HMRC v Beigebell Ltd* [2020] UKUT 176 (TCC)

(7) The trader need not know the details of the fraud;

(8) The Tribunal is entitled to rely on inferences drawn from the primary facts: *Mobile Export 365 v Revenue and Customs* [2007] EWHC 1737 (Ch) at Para [20].

42. In an appeal seeking to challenge a decision on a 'Kittel' basis, four issues conventionally arise:

(1) Was there a tax loss? (Issue 1)

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

(3) If so, were the transactions which are the subject of this appeal connected with that evasion? (Issue 3)

(4) If so, did or should the Appellant have known that the transactions were so connected? (Issue 4)

43. HMRC bears the burden on all those issues. It is for HMRC to satisfy us, to the appropriate standard (namely, the balance of probabilities) as to each issue.

APPROACH TO THE EVIDENCE AND FINDINGS OF FACT

44. Officer Wilkinson gave evidence for HMRC in relation to this Appellant's supplies to a company called Lynton Exports (Alsager) Ltd, in its appeal before the Tribunal, heard in March and April 2022, released on 20 July 2022, and reported at [2022] UKFTT 224 (TC). The Kittel denials in that case amounted to about £4.4m, in respect of the VAT periods 11/15 to 10/16, and related entirely to supplies to Lynton from WDL: see Para 16[5]. Lynton's trades with WDL ceased shortly after Lynton was given a tax loss letter relating to its purchases from WDL. Lynton accepted that all those trades could be traced to transactions connected with fraudulent evasion of VAT, but did not accept that it knew or should have known of such connection.

45. The Tribunal there (Judge Peter Kempster and Mr Bayliss) emphasised, quite properly, the need for "sufficient cogent evidence", and for HMRC to go beyond "concerns and suspicions", but needing to advance "probative evidence". The Tribunal remarked that it is possible to infer relevant facts from circumstantial evidence, but that circumstantial evidence (i) must exist; and (ii) must be presented in a credible and persuasive form: see Para [24(3)]. Ultimately, on its consideration of the evidence in that case, and for the reasons set out in Para 42(3) of its decision (including HMRC's acceptance, after hearing evidence, that many of the fraud 'flags' described in HMRC's literature were not in fact present) the Tribunal allowed Lynton's appeal against the Kittel denials.

46. We do not read anything controversial or novel in what the Tribunal said in Lynton (which does not bind us). It is important to make it clear that the Tribunal's findings in Lynton were findings of fact, binding only in that appeal, and that allowing Lynton's appeal against the Kittel denials does not mean that the Appellant's appeal here must automatically be allowed.

47. "Circumstantial" evidence is still an admissible species of evidence, of evidential value and weight, and, as evidence, needs to be considered as a whole. In considering this evidence,

we should take care not to restrict ourselves to considering each piece of evidence alone and in isolation from the others. This is because circumstantial evidence is not a chain, where a break in one link breaks the chain, but is a cord: one strand of the cord might be insufficient to sustain the weight, but three stranded together might be sufficient: see *R v Exall* (1866) 4 F&F 922, per Pollock CB, approved by the Upper Tribunal in *HMRC v CCA Distribution Ltd* [2015] UKUT 513 at Para [91]. The whole can end up stronger than the individual parts.

48. On the basis of the evidence and submissions which we have heard, we make the following findings of fact.

THE APPELLANT

49. WDL was is a one-man company, incorporated in 2003. At all relevant times, it had a sole director, which is Mr Crothers. He is also the person with significant control. It has been registered for VAT since 2003. From the very beginning, it traded in fast moving consumer goods such as soft drinks, confectionery, batteries and toiletries. It was always, on the face of it, a successful business. Even in its first year, it turned over just under £600,000. From an early stage - about 2005 - it began to be in a repayment situation in terms of VAT.

50. WDL is based in Northern Ireland, with its registered address on Church Street in the town of Warrenpoint. It shares that address with a convenience store called 'The Kabin', which also belongs to and is run by Mr Crothers. He sometimes serves behind the counter there, and is assisted by a team of staff.

51. WDL essentially operated through Mr Crothers on his mobile phone. It did not advertise, nor did it have any regularly updated website. It did its business without written contracts and often - as the acronym FMCG suggests - on a fast-moving basis, with consignments of goods being bought by WDL and sold by WDL on the same day. On at least some occasions, Mr Crothers did not see those goods: he believed that so many pallets of them existed, in such-and-such a place, and, when paid by his buyer, would release the details of where they were to be found, and authority for his buyer to deal with them. None of that is especially unusual in a business which, in effect, a wholesale brokerage.

52. WDL did not have any storage facilities at Church Street. Instead, it used John Crilly Transport Ltd ('**Crilly**'), also based in Warrenpoint, or Fisher Logistics ('**Fisher**'), based in Oldham in the north of England.

53. We were not provided with and did not hear any evidence from any director or employee of Crilly or Fisher, and so we do not know anything from anyone at Crilly and Fisher as to each firm's arrangements for the storage, handling, or insurance of goods belonging to its clients generally, or to WDL in particular. Accordingly, on these matters, we are left with Mr Crothers' evidence, which in many instances was vague and, in our view, not reliable.

54. WDL's turnover (net of VAT) in the years preceding the denied deals was:

(1) 11/2012 to 10/2013 - £5.904m

(2) 11/2013 to 10/2014 - £1.905m

(3) 11/2014 to 10/2015 - £5.762m

55. WDL's turnover (net of VAT) in the years affected by the denied deals was:

(1) 11/2015 to 10/2016 - £31.476m

(2) 11/2016 to 07/2017 (part year) - £11.889m

56. From these figures, it will be seen:

(1) Even in unchallenged years, before the years in dispute in this appeal, WDL, using its resources - Mr Crothers and a mobile phone - was capable of achieving a turnover of almost £6m;

(2) In 2016, there was a striking leap in turnover, which increased by over £25million (equivalent to approximately £480,000 a week);

(3) The significantly enhanced turnover, in comparison with a non-challenged year, was maintained into 2017.

57. It has to be asked as to how this striking increase in turnover in 2016 (maintained, albeit to a lesser extent in 2017) came to be accomplished, given that Mr Crothers' essential business model - him doing deals over the phone - remained unchanged. There is no reliable evidence that Mr Crothers worked any harder, or improved his skills as a businessman, or by some endeavour or activity on his part happened to strike on a source or sources of supply, not hitherto known to him through his years of undoubted experience in the FMCG business, capable of generating such increased turnover. The evidence as to increased turnover is really one as to increased supply, which is actually diversification of supply, with such diversification being achieved largely through dealings with entities whose deals led to VAT fraud.

58. The increased turnover figure is so striking that it would be entirely reasonable to have expected Mr Crothers to be able to have given a clear, comprehensible, and compelling answer as to how it came about: especially since what is at stake in this appeal - namely, the £8m denials - is so high. But he was wholly unable to do so. Such evidence as he did give was not consistent. Initially he sought to explain the increase by saying that he was dealing in higher-value products. But this does not stand up in the light of what is known as to the composition of the deals - that is to say, the things actually being bought and sold. There is no identifiable change in those which would satisfactorily explain the increase in turnover from about £6m to over £30m. He then changed tack to say that he was simply 'busier', and that he had just had 'more business'. But, again, this is a weak explanation where the business model, and the person doing the business, remain essentially unchanged. The inference is that there is a hidden factor: the most obvious one being that Mr Crothers and WDL had become entangled in a VAT fraud dependent on increase in turnover.

59. As to the Denied Deals (and the total input tax denied):

(1) There were 59 in 01/16 (£638,355);

(2) There were 125 in 04/16 (£1,507,927);

(3) There were 170 in 07/16 (£1,822,711);

(4) There were 238 in 10/16 (£1,905,357);

(5) There were 205 in 01/17 (£864,666);

(6) There were 175 in 04/17 (£1,021,744);

(7) There were 109 in 07/17 (£407,123).

60. These accounted for the following percentage of the total input tax sought by the Appellant:

(1) 97.3% in 01/16;

(2) 99.04% in 04/16;

(3) 98.9% in 07/16;

(4) 100% in 10/16;

(5) 100% in 01/17;

(6) 98.03% in 04/17;

(7) 99.1% in 07/17

61. From this, it will be seen, empirically, that the overwhelming preponderance (ie, almost all of it) of the Appellant's trades in these seven successive quarters are challenged by HMRC on the basis that they are connected to fraud in circumstances where WDL knew or ought to have known of the connection. In relation to two successive quarters, all of the Appellant's trades (ie, every last one) are challenged. It is proper, in the overall weighing-up exercise, to have regard to these figures.

SELLERS TO THE APPELLANT

62. In 518 of the denied deals (or about 48% of them) the Appellant purchased directly from the following (ordered in terms of earliest deal date), who are all alleged to be defaulting traders:

(1) Dynamic Sourcing Ltd (one deal only - Deal 85 in 04/16)

(2) Monarch Trade Solutions Ltd (30 deals between 07/16 and 04/16)

(3) Buywize Drinks Ltd (170 deals between 10/16 and 03/17)

(4) AK Prime Trading Ltd (44 deals in 01/17)

(5) Energized Sales Ltd (196 deals between 02/17 and 07/17)

(6) Ave Brands Ltd (71 deals between 04/17 and 07/17)

(7) Fantasia Ltd (6 deals in 07/17).

63. Ordered in terms of number of deals (most to fewest):

(1) Energized Sales Ltd (196 deals between 02/17 and 07/17)

(2) Buywize Drinks Ltd (170 deals between 10/16 and 03/17)

(3) Ave Brands Ltd (71 deals between 04/17 and 07/17)

(4) AK Prime Trading Ltd (44 deals in 01/17)

(5) Monarch Trade Solutions Ltd (30 deals between 07/16 and 04/16)

(6) Fantasia Ltd (6 deals in 07/17)

(7) Dynamic Sourcing Ltd (one deal only - Deal 85 in 04/16)

64. HMRC also rely on direct purchases from the following, who are not alleged to be defaulting traders, but who have all been deregistered on the grounds of abuse and connected with the fraudulent evasion of VAT:

(1) SHA Bros Ltd (deregistered on 15 August 2016)

(2) Prime Merchants Ltd (deregistered on 28 October 2016)

(3) Whitmount Ltd (deregistered on 3 July 2017)

65. HMRC also rely on indirect purchases from the following, who are said to be defaulting or hijacked traders:

(1) Food and Drinks (Hub) Scotland Ltd (01/16);

(2) Impact Traders Ltd (01/16 to 10/16);

(3) Oldbury Trading Ltd (07/16) (involved in 2 deals)

(4) Pound Plus Distribution Ltd (08/16 - 01/17) (150 deals).

BUYERS FROM THE APPELLANT

66. HMRC allege that, in relation to the denied deals, the Appellant repeatedly sold to:

(1) Lynton Exports (Alsager) Ltd (01/16 to 10/16);

(2) Epoipo Ltd (10/16 - 07/17);

(3) Others, albeit on a lesser scale, but including well-known retailers such as Brakes and Henderson Food Services.

Issue 1 - Was there a tax loss?

67. The Appellant does not concede that there was a tax loss, and does not advance any positive case itself that there was no tax loss, but puts HMRC to proof. HMRC have to prove this issue on the balance of probabilities.

68. The Tribunal released Fairford-type directions on 23 May 2019, approved subject to contrary application by the Appellant within 14 days. No such application was made. A purported response was received on 21 July 2022, which prompted an application by HMRC for an unless order, which HMRC then withdrew on 1 August 2022. Eventually, on 19 September 2022, the Appellant confirmed that it did not require the attendance of 15 HMRC officers, and that any inferences to be drawn from the statements of those officers "is entirely a matter for the Tribunal".

69. The answer is yes, there was a tax loss.

70. This is set out in the unchallenged written evidence of Officer Wilkinson, in her first witness statement at Paragraphs 72 to 214 inclusive:

(1) 7 of the Appellant's 10 direct suppliers are defaulter traders;

(2) Of the other 3 suppliers, 2 (SHA Bros and Whitmount) were VAT deregistered on abusive grounds, being denied the right to deduct input tax of about £15.4m (Whitmount) and £11.4m (SHA Bros). Both companies appealed the decisions to deny input tax, but both appeals were withdrawn and the companies liquidated;

(3) The remaining company, Prime Merchants, was registered in October 2016, and dissolved in January 2018, owing about £800,000 to HMRC.

71. We accept this evidence, and find accordingly.

Issue 2 - Did that loss result from fraudulent evasion?

72. The Appellant does not concede this point, does not advance any positive case itself, but puts HMRC to proof. HMRC have to prove this issue on the balance of probabilities.

73. The answer is yes, the tax loss resulted from fraudulent evasion.

74. This is set out in the unchallenged written evidence of Officer Wilkinson, in her first witness statement at Paragraphs 72 to 214 inclusive. We accept that evidence.

Issue 3 - Were the transactions subject to the appeal connected with that evasion?

75. The Appellant does not concede this point, does not advance any positive case itself, but puts HMRC to proof. HMRC have to prove this issue on the balance of probabilities.

76. The answer is yes, the transactions subject to this appeal were connected with that evasion.

77. This is set out in the unchallenged written evidence of Officer Wilkinson, in her first witness statement at Paragraphs 72 to 214 inclusive. We accept that evidence.

Issue 4 - Did the Appellant know or should it have known that the transactions were connected with fraud?

78. This is the true heart of this appeal.

79. The answer turns on careful examination of the facts, and especially Mr Crothers' state of knowledge: what he knew; when; and how; and what he should have known.

VAT AWARENESS

80. This is not a blank canvas. Between 18 April 2012 and 1 November 2017, the Appellant had 13 MTIC 'visits', some unannounced, from HMRC Officers. Of those, 9 were carried out, face to face, at the Appellant's address. 4 were on the phone.

81. In April 2012, WDL was identified by HMRC as a potential new MTIC trader.

82. The first visit took place on 18 April 2012. It was carried out by Officers Wilkinson and Heatley. They met Mr Crothers and his then-accountant. MTIC fraud was explained and VAT Notice 726 and the leaflet 'How to spot missing trader fraud' handed over. We accept Officer Wilkinson's evidence that the overall purpose of this engagement was education, in terms of informing Mr Crothers - both orally and in writing - of what MTIC fraud was, and advising him and giving him suggestions as to how he could protect himself from becoming involved in it. We accept her evidence that it was never HMRC's role - whether at that meeting or subsequently - to run the Appellant's business for it, nor to tell Mr Crothers (in the sense of ordering or directing him) how to run his business. How the business was run and how the trades were done always remained a matter for Mr Crothers and him alone.

83. Following that meeting, an MTIC awareness letter was sent to WDL dated 20 April 2012. HMRC's note of the visit on 18 April 2012 was sent on 27 April 2012. No corrections were suggested.

84. Very shortly after that, namely on 2 May 2012, HMRC initiated a process of extended verification of the Appellant's VAT return for 03/12.

85. On 25 October 2012, HMRC visited the Appellant's accountants' officers and there interviewed Mr Crothers for about 1 hour. Officer Arnold's contemporaneous note, which we accept as accurate, records that she stressed the importance of due diligence checks for suppliers and customers.

86. There was another visit in October 2012 regarding a VAT repayment of £137,000 for period 09/12, which was subsequently released.

87. In June 2013, a VAT assessment for about £20,000 was issued against WDL, on the basis that WDL had failed to provide suitable evidence of dispatch from Cyprus to Ireland. That assessment was paid.

88. An unannounced visit took place in July 2013, in relation to deals with A S Sales. Mr Crothers was asked if he wanted MTIC fraud explaining to him again, and declined. Officer Arnold's note, which was not challenged, records that she told Mr Crothers that a customer suggesting a supplier or a supplier recommending a customer could be an indication of MTIC fraud ("why would the parties not just trade with each other?").

89. We are satisfied, and accept HMRC's evidence, that Mr Crothers knew that he needed to satisfy himself that his trades were part of a genuine supply chain, and that MTIC fraud could affect any standard-rated product, including those which he was trading in.

90. The Appellant was subject to monitoring by HMRC under the 'Continuous Monitoring Project' from August 2013 onwards.

The 2013/14 denials

91. In September 2013 HMRC, alongside a visit on 17 September 2013, undertook an extended verification of WDL for periods 07/13, 08/13 and 10/13. HMRC warned the Appellant that MTIC fraud was continually mutating and "one of the consequences of this is that the nature of fraudulent transaction chains becomes more and more complex". At that meeting, Mr Crothers confirmed that he had received and read Notice 726.

92. In May 2014, HMRC wrote to WDL that the majority of deals in 07/13 and 08/13 had been traced back to tax loss. The claimed repayments (coming to about £240,000) were initially withheld, but then released to WDL, without prejudice, in June 2014. That was because HMRC was ultimately unable, due to a 'blocking buffer' in the supply chain to fully trace those deals back to tax losses.

93. The situation, when it first arose, was very serious. HMRC were withholding repayment of almost quarter of a million pounds. If the withholding were persisted in, that would doubtless have had a serious effect on the Appellant's cash flow and its business overall. Moreover, when the Appellant was first told the withholding was because transactions were believed to trace back to a tax loss, Mr Crothers could not have known whether he would ever actually end up getting the withheld money. He knew that, if he did not, it would have been down to issues with his supply chain.

94. In those circumstances, it is therefore striking that there is no evidence of Mr Crothers or his accountants (all of whom had been advised only about two years previously of MTIC fraud) reaching out to explore with their direct HMRC contact, Officer Wilkinson, whether there was anything different which Mr Crothers could or should have been doing to avoid becoming involved in tax fraud in relation to these particular transactions, or to safeguard the Appellant more generally in the future. We agree with Officer Wilkinson that this episode was a 'good early indicator' for the Appellant to review the adequacy of its own arrangements. However, and unfortunately, it did not seem to have had this effect: instead, and as the overall tenor of his evidence made clear, the eventual release of the repayments to the Appellant seems simply to have given rise to, or fed into, Mr Crothers' belief that his commercial practices were acceptable.

95. In July 2014, Officer Wilkinson wrote to the Appellant about VAT fraud, and the use of third party banking platforms. Annexe A of that letter reiterated that approaches from newly established or recently incorporated companies with no financial or trading history; new companies managed by individuals with minimal experience and knowledge of trading in the sector; significant increases in the volumes and values of trade, with no apparent commercial

driver, were all examples of previous indicators of MTIC fraud, and were still to be taken into consideration when the Appellant was conducting its 'Know your Customer' checks.

Deregistration letters

96. Between August 2012 and November 2018, WDL received 22 de-registration/veto letters from Wigan. It is a fair point that none of these letters said that the deregistrations were because of MTIC fraud. On the other hand, the obvious context is the integrity of the VAT system. Mr Crothers was only being sent these letters because he had at some time asked Wigan to validate that VAT number, or the trader had asked Wigan about WDL - that is to say, in both cases, the deregistrations were of entities with which WDL had traded or had intended to trade.

97. Looked at in the round, we find that Mr Crothers was aware, throughout this entire period, and certainly once he had received the first few of these letters, that his counterparties, taken generally (and not just those whose deals are the subject matter of this appeal) were active in a field which was open to deregistration action by HMRC, where one of the reasons for deregistration - whether stated or not - was connection to fraud. Receipt of the letters and what they would have connoted to a prudent trader, operating in this market, and armed with this knowledge, is therefore part of the overall picture - but, given the absence of express reference to MTIC, and the possibility of deregistration for other (and innocent) reasons (such as dissolution of a company, or death of an individual trader) is of limited weight.

VAT Notice 726

98. The Appellant was supplied with VAT Notice 726, initially at the meeting with HMRC on 18 April 2012, and was repeatedly referred to it. Insofar as it remained in dispute at the hearing, we accept HMRC's evidence, in preference to that of Mr Crothers, that he was given and had explained to him VAT Notice 726.

99. Whilst it is true that the March 2008 edition of Notice 726 refers to 'specified goods' and does not refer expressly to the sort of goods which Mr Crothers was trading in, the overall tenor of the notice - as set out in its Section 6 ("Dealing with other businesses - How to ensure the integrity of your supply chain") clearly concerns the need for traders who are VAT registered to act to protect the integrity of their supply chain so as to avoid becoming involved in VAT fraud. The wording is clear (see Section 2.3):

> "[MTIC] fraud relies heavily on the ability of fraudulent businesses to sell goods or services to other businesses that are complicit in the fraud, prepared to turn a blind eye, or not sufficiently circumspect about their trading connnections...".

100. VAT Notice 726 gives fair warning that those who knew or had reasonable grounds to suspect that, in their supply chain, the VAT on the supply of goods would go unpaid, could be held jointly and severally liable for the VAT loss.

101. We reject any suggestion that a legitimate business dealing in soft drinks or confectionery would, on reading Notice 726, assume that its contents had no relevance to its trade, and we respectfully disagree with the Tribunal in Lynton that the Notice is irrelevant and that no inferences can be drawn about WDL's behaviour from the fact that it was given it. The Notice should not be read as if it were a statute. The Notice is a practical educational tool, alerting VAT-registered traders to the risk of VAT fraud, and giving them useful guidance. Morever, we are satisfied that HMRC's contemporary note of its MTIC visit on 18 April 2012 is accurate, and that Officer Heatley explained to Mr Crothers and his accountant

at the time (a Ms McGivern) that, although soft drinks were not one of the commodities mentioned, nonetheless "the questions contained in Notice 726 were very useful for a trader to consider when drawing up meaningful due diligence procedures".

102. Very shortly after that meeting, on 20 April 2012, HMRC's Specialist Investigations Unit sent the Appellant an 'MTIC Awareness Letter', warning it that MTIC fraud "may involve all types of VAT standard rated goods ...".

'How to spot missing trader fraud: A quick guide to helping you protect yourself or your business from organised criminals"

103. Mr Crothers accepted that he was given the leaflet 'How to Spot Missing Trader Fraud', and that this was explained to him. Unlike VAT Notice 726, no criticism can be advanced that the leaflet applies only to certain specified goods because it is not so confined. That leaflet warned traders to use their common sense and to be suspicious of newly established or recently incorporated companies with no financial or trading history; of contacts with a poor knowledge or the market and products; of unsolicited approaches from organisations offering an easy profit on high-value or volume deals for no apparent risk; repeat deals at the same or lower prices and small or consistent profit; and entities trading from residential or short-term lease accommodation or serviced offices.

104. Several of these warning signs are present in this case, as shall be set out in more detail below.

105. In the leaflet, HMRC warned VAT registered traders to know their suppliers; to satisfy themselves that a deal looks and feels genuine; and exhorted them to check the integrity of their customers and suppliers, and 'the commercial viability of the transaction'. It warned that businesses can be targeted and drawn into fraud if they do not take appropriate care.

"We bring the stuff into the yard. That's our diligence"

106. Mr Crothers' entire approach to due diligence can be summarised and captured by the above expression. The expression is not ours. It is entirely his own expression, being the answer which Mr Crothers gave, towards the end of his oral evidence. He said:

> "[...] We bring the stuff into the yard. That's our diligence. Our diligence is we bring the product into the yard, the product is there, the product is live, the product can be seen, and the product is paid for by me through my bank to whoever I am buying it from."

107. This speaks for itself. Ms Vicary described this as a 'self-designed test'. We agree. If the goods arrived, then Mr Crothers was frankly indifferent to who his seller was, their bona fides, or whether his supplier was engaged in tax fraud. The other side of the coin was that, if he was paid for the goods, he was similarly indifferent to who his buyer was, their bona fides, or whether his buyer was engaged in tax fraud.

108. This attitude - which is entirely ill-conceived on Mr Crothers' part, and which has directly led to this Appellant facing assessments of over £8m - underpinned and explains what actually happened.

109. It is important to record that the above evidence - which was given with naked candour and without any intention to mislead - was not a one-off or stray comment otherwise inconsistent with the weight of the evidence. It was a pervasive attitude which emerged repeatedly in his oral evidence and it was consistent with many of the things which, on clear

(indeed, unchallenged) evidence, he repeatedly did. It was consistent with the weight of the evidence.

110. By way of illustrations:

(1) The Appellant bought from suppliers before undertaking an EU VIES check as to whether the VAT number which they had given was a valid one. On the available evidence, we do not accept that VIES checks were routinely done for each trading counter-party. We reject Mr Crothers' oral evidence that there "must have been" another file, or other files, in some unknown location, and not located, in which other VIES checks were kept;

(2) The Appellant did not validate all VAT numbers with HMRC's Wigan facility. In relation to some suppliers it never sought any validation at all. Hence, Mr Crothers' written evidence, in his witness statement (which he confirmed were his words), that he could "confirm that WDL [...] used this facility for each of the traders in the impuged period" was neither true nor accurate. Mr Crothers' explanation of this was that he "assumed" that Wigan would have been approached for each trader. We assessed this evidence as improvisatory and unsatisfactory and we reject it;

(3) Where such a validation had been sought, the Appellant nonetheless bought from some suppliers before getting validation of the VAT number from Wigan;

(4) The Appellant continued to buy from some suppliers despite being expressly told by HMRC that all his purchases from them traced back to tax fraud;

(5) The Appellant bought from some suppliers even after he had been notified by HMRC that they had been de-registered for VAT.

111. In VAT terms, and the right approach to the risk of being involved in VAT fraud, this could almost be described as a short catalogue of exactly what not to do.

112. Taken individually, none of these are things which a sensible trader, guarding appropriately against the possibility of becoming involving in VAT fraud, would have done. For a trader to have engaged in all of them is extremely striking and raises serious question marks as to that trader's integrity and diligence. Regarded as a species of evidence, even if circumstantial, these plait the strands together into a strong evidential rope winding around the Appellant's dealings.

113. Alongside and bolstering Mr Crothers' blase attitude was another, which emerged extremely clearly in the course of his oral evidence. This was that, unless he was expressly told by HMRC not to trade with a particular person, then trading was allowed. He was sharply critical that HMRC - which had issued a VAT number to a trader and which had validated it through its Wigan office - could then (to paraphrase) turn around and impugn a transaction with that trader on the basis that it was connected to a tax loss occasioned by fraud.

114. As far as we could tell, this attitude was genuinely held by Mr Crothers. It was expressed to us so fluently and forcibly that we did not think that it was evidence which was improvised, or invented just for the hearing. But this approach is completely wrong, for a number of reasons.

115. It was not HMRC's task, or Officer Wilkinson, or any its other officers dealing with Mr Crothers, to do the Appellant's due diligence for it, or to decide for the Appellant who to trade with. The Appellant was Mr Crothers' business; not HMRC's. Mr Crothers was its director

and manager; not Officer Wilkinson or any of her colleagues. HMRC can educate, and in this case we are sure was trying to do so. But - put very bluntly - it was always down to Mr Crothers whether he was prepared to be educated. As part of this education, HMRC gave him advice - repeatedly - as to the circumstances in which he was to consider proceeding with caution, in case the transaction happened to be connected to VAT fraud. But Mr Crothers was simply not listening to what he was being told.

116. The fact that the Appellant had been trading in more or less the same way since 2003, and had never had a claim for repayment refused before, became irrelevant once Mr Crothers knew about, but chose not to apply or follow, the guidance set out in the MTIC leaflet, or MTIC warning letters, or VAT Notice 726 (all of which, when it comes to the steps which a prudent trader should take in mitigating or extinguishing the risk of being involved in VAT fraud, are to like effect). Hence, Mr Crothers ran a clear, identifiable, risk - which had been pointed out to him frequently - that HMRC would decline the Appellant's claims to recover the input VAT.

117. Notably, it cannot be ignored that this risk was not theoretical. The Appellant had already had a close brush with it in 2014, until Officer Wilkinson, confronted with a blocking buffer and an inability to reconcile certain transactions, decided to release the withheld repayments. That experience should have been a learning experience for the Appellant. It does not seem to have been. It is impermissible speculation whether the circumstances giving rise to this present appeal would ever have come about had the Appellant heeded the warning which that experience should have given him.

118. But, having had that experience, it is striking that the Appellant did not seem to learn anything of benefit from it, but, in broad terms, carried on trading in the same way - something which has led directly to this appeal.

119. Insofar as it was contended that Mr Crothers' views as to the propriety of his commercial conduct were shared by his accounant Mr Murdock, this is not a case about Mr Murdock or his views. There is no evidence of Mr Murdock trying to encourage WDL to take a different approach to diligence or to assuring itself of the integrity of its counterparties. We are bound to say, given our impression of Mr Crothers' character, and of the tenacity with which he held his views about diligence, we are extremely doubtful whether Mr Murdock, even if he had tried, could have influenced Mr Crothers to change his practices.

120. Apart from some criticism of Mr Murdock's firm not always providing monthly deal summaries as promptly as she would have liked, which had resulted, after some emails, in a Schedule 36 notice, Officer Wilkinson accepted that she had good lines of communication with Mr Murdock, and that his firm did not place obstacles in HMRC's way. His firm - as was clear from Mr Murdock's evidence - was a small firm, which did not have a delegated member of staff to deal with HMRC's requests for information about WDL, and which, when asked by HMRC, depended on getting information from Mr Crothers. Mr Murdock accepted, fairly, that there were delays in responding to direct requests from HMRC - sometimes several months - but we do not consider that these were part of any plan on his part, or on the part of his firm, to frustrate HMRC's inquiries into WDL. Sometimes the delays were the result of tax deadlines; and sometimes just the result of pressure of other work in a small firm with modest resources, with 400-500 clients, having to deal with voluminous and complex inquiries for one of them. We also accept Mr Murdock's evidence that a lot of the letters sent by HMRC to Mr Crothers and not copied to Mr Murdock were not shown by Mr Crothers to him.

VIES checks

121. Eventually, in the additional disclosure, evidence was provided by Mr Crothers that VIES checks had been done for some suppliers. Indeed, repeat checks were done for Whitmount (13 between 13 April 2014 and 25 August 2016); Sha Bros (8 checks between 27 March 2015 and 11 August 2016); and Prime Merchants (2 checks on 29 August 2016 and 4 September 2016). This demonstrates that someone - most probably Aislinn Laverty - was conducting and refreshing checks on the authenticity of the VAT numbers. But it is striking that this exercise was only being conducted for certain suppliers, who were not defaulters. In relation to the seven defaulter suppliers, there is no evidence of any VIES check at all for 4 of them, and a single check (in two instances - Ave Brands and AK Prime) after trading had already begun for the other 3.

122. Credit must be given for the VIES numbers which were checked in advance of beginning trading. But nonetheless checking a VIES number, in and of itself, was not sufficient to guard against fraud. It simply told the Appellant whether that the VAT number was a valid number or not.

Wigan validation

123. "Validation" of numbers with HMRC's Wigan office ('Wigan') was something which the Appellant was advised by HMRC to do, and which, it is clear, was sometimes done - at least in relation to some counterparties.

124. But it was not done for all of them. It was not done for Dynamic, Monarch, or AK Prime. Therefore, we do not accept Mr Crothers' written evidence that WDL 'used this facility for each of the traders in the impugned trading period': it did not.

125. The lack of importance, to the Appellant, of the Wigan process as a means of guarding this business against becoming involved in VAT fraud is clearly demonstrated by the fact that the Appellant, on many occasions, bought from someone before even approaching Wigan for validation; let alone waiting for the answer.

126. It was striking that Mr Crothers was, time and time again, prepared to venture tens of thousands of pounds on deals with persons without even knowing, beyond their own say-so, whether they were in good standing with HMRC. It was an entirely cavalier, blase, approach to 'diligence'.

127. Credit must be given for the Wigan checks done in advance of beginning trading. But nonetheless checking a VAT number with Wigan, in and of itself, was not sufficient to guard against fraud, and it never has been.

128. Wigan letters say:

> "This confirmation is not to be regarded as an authorisation by this Department for you to enter into commercial transactions with this trader. Any Input Tax claims you make may be subject to subsequent verification".

129. The Appellant always knew this. It was made clear as early as the MTIC letter sent on 20 April 2012:

> "Although the Commissioners may validate VAT registration details, it does not serve to guarantee the status of suppliers and purchasers. Nor does it absolve traders from undertaking their own enquiries in relation to proposed transactions. It has always

remained a trader's own commercial decision whether to participate in transactions or not and transactions may still fall to be verified for VAT purposes."

130. A warning in similar terms was given in other letters, such as that of 3 July 2014.

131. A check with Wigan was part of the overall decision to trade.

132. Moreover, and as the 2012 letter makes clear, one check might not be sufficient:

> "To facilitate a complete and efficient service it is advisable that you repeat the process" (ie, the validation process) for each and every transaction. This would ensure that the most up to date information is utilised. Our aim is to operate a 24/48 hour turnaround for all verification requests".

133. Hence, repeat checks were encouraged. In the circumstances of this appeal, some traders were not checked at all, or where checked only once. There is no evidence of any trader being checked before every transaction. We are not holding the Appellant to a standard of checking with Wigan before each and every deal. A sensible approach had to be taken. In fairness to the Appellant, we also add that, where there is evidence of checks with Wigan, the stated 48 hour deadline was seldom (if at all) met by HMRC. But delay from HMRC was not a good reason not to make checks at all, or to make them only after trading had already begun, or not to wait for the result of the validation.

134. On the basis of Mr Crothers' evidence, Mr Magill makes a valiant attempt to argue that the supply of product under an HMRC issued and authorised VAT number, checked under the available system, and paid for through a licensed bank "carry much more weight as due diligence and indicators of legitimate trade than any other example identified by HMRC". But this argument cannot and does not succeed because (i) it ignores VAT Notice 726 and the reasons for the VAT Notice; (ii) it ignores or trivialises due diligence; (iii) it ignores the Appellant's actual failures to check with Wigan and/or VIES; (iv) it ignores the Appellant's actual fact of trading before checking was done and/or completed (v) it ignores that the over-arching context is VAT fraud, which, in order to work, is perpetrated by people who use VAT numbers; (vi) it ignores the fact that even fraudsters have access to bank accounts. That is to say, deployment of a valid VAT number and access to a bank account are insufficient discriminators of fraudsters from non-fraudsters.

135. Mr Crothers was initially critical of HMRC, on the basis that there should be 'a sheet' tellinhg him what to do. But, when presented with the terms of the MTIC list - which does exactly that, in plain and easy-to-understand language, and with reference to MTIC fraud generally - he resorted to criticism that the MTIC list (which he had had, before the transactions in dispute in this appeal) was just things being "thrown up" in front of the Appellant - that is to say, to get in the way of the Appellant doing the deals it wanted to do.

136. That list is topped-and-tailed with exhortations to 'be suspicious'. But Mr Crothers' evidence was that being suspicious would, in effect, stifle his deal-making, by preventing him from dealing with certain people or businesses.

137. It seems to us that this is very important in this case. Put bluntly, Mr Crothers' one and only concern was to do a deal. As long as a seller had a VAT number and a bank account, then his self-developed and self-applied test of commercial probity was whether the seller could actually come up with the goods. Beyond that, and as emerged with great clarity in this evidence, he was frankly indifferent to the risk of fraud.

138. Mr Magill accepts that, "with the benefit of hindsight, knowledge of fraud in the chains, and careful scrutiny of the documentation" there were "deficits" in the Appellant's due diligence. This is a sensible - indeed, an inevitable - concession, on the evidence, but, in our view, goes nowhere near far enough in capturing the extent of the Appellant's failures.

139. What 'due diligence' which was done was fragmentary and perfunctory, often against circumstances and/or documents which should have excited suspicion as to the commercial bona fides of the seller. We agree with HMRC that diligence was not actually being done as a tool so as to allow the Appellant to assess the risk, and as a means whereby he could identify and decline to engage with risky sellers. There is good evidence - including from Mr Crothers in cross-examination - that what checks were done were being done as a paper exercise. That is certainly corroborated by the fact that, regardless of the results of 'due diligence', or even before it had been received, Mr Crothers would just get on with trading.

140. There are other, individual, features which illustrate the pervasive effect of this attitude on his business practice, and which, in our view, have properly and reasonably led HMRC to the denials of input tax.

141. We must caution ourselves against 'guilt by association', where tax losses or defaulters are at more than one remove from the Appellant. As Mr Crothers himself says in his evidence, the only information and material generally available to the Appellant was information and documentation exchanged between WDL and its immediate supplier and its immediate customer.

142. It is also fair to say that the deal packs contain many documents which HMRC do not allege were known to WDL at the time; and we must be very careful not to allow the much bigger picture of tax fraud (captured in the many thousands of pages of documents, to which little or not reference was made, much involving entities at more than one remove from WDL, and which WDL cannot reasonably have known about at the time) to distract from the focus which we must have on WDL's knowledge at the relevant time.

143. However, this does mean that the dealings with direct suppliers are particularly important and instructive, because these were things in which Mr Crothers and WDL had a direct part. Not only is there an immediate link, but the intensity and quality of inquiry as to the suppliers' commercial integrity rested squarely on WDL, and enable us to make a proper and rounded assessment of what WDL (as opposed to HMRC) knew, or should have known, at the relevant time.

144. A significant part of the Appellant's case is that he did not have the investigative resources of HMRC and therefore cannot be held responsible for not unearthing things which HMRC, with time and application, was able to. But the argument is ill-conceived. HMRC's own investigative ability is not the yardstick against which the Appellant is being measured. The Appellant is being measured simply in terms of what it knew or ought to have known about its own counterparties and its own transactions - not what HMRC knew or ought to have known.

Particulars of dealings with traders

Dynamic Sourcing Ltd

145. This is a defaulter. It was involved in one denied deal only - Deal 85 (a deal worth about £60,000) - on 11 February 2016 (period 04/16). As such, it is, in terms of value and volume, a relatively insignificant part of the overall picture. But it is amongst the earliest in time, and, even though one deals, throws a revealing and unflattering light on Mr Crothers'

approach, even at that early stage, to ensuring the integrity of his supply chain. His approach can fairly be described as slapdash and inadequate:

(1) Dynamic approached the Appellant, which had not dealt with it previously. The initial approach was by phone, followed up with a letter dated 21 December 2015;

(2) The Appellant did not check the VAT number with Wigan;

(3) On the available evidence (including the late disclosure) the Appellant did not conduct a VIES check on Dynamic Sourcing;

(4) In his oral evidence, Mr Crothers could not remember who he had dealt with at Dynamic Sourcing;

(5) In his oral evidence, Mr Crothers went on to describe in his oral evidence meeting a director, a Mr Parminder Singh, in a McDonald's car park in Lisburn one afternoon, for about 15 minutes, although he could not remember exactly when;

(6) Mr Singh told him that he 'wanted to start doing a bit of business' with WDL, that Mr Singh could source confectionery and soft drinks and had a couple of good supply chains out of England;

(7) Mr Crothers did not explore with Mr Singh as to his experience in the food and drink industry, but formed the view, without more, that someone who said that he had experience in 'international trade', 'was not a total lunatic or a total idiot', 'knew the game', and 'knew how to trade internationally';

(8) None of this was contained in Mr Crothers' witness statement;

(9) From the documents he was shown (he could not remember whether he had seen these before or after meeting Mr Singh) Mr Crothers knew that Dynamic was a recently incorporated company (less than a year previously, 30 March 2015) and without any available Companies House filings. Therefore, he knew next to nothing about its finances;

(10) The company's VAT certificate had an even more recent EDR, being 1 September 2015, and so it was, in VAT terms, a recently established company;

(11) The VAT certificate said that its business was 'management consultancy', but Mr Crothers was not concerned as to this apparent mismatch with the sort of trade which was being proposed, and did not ask Mr Singh why the director of what was ostensibly a recently-formed limited company describing itself as a management consultancy, based in the English Midlands, should be meeting him in a car park in the north of Ireland with an eye to selling confectionery and soft drinks in the north of Ireland, or whether Dynamic (as per its letter of 21 December 2015) was genuinely in a position to 'facilitate national/international trade in branded soft drinks';

(12) The address given on the VAT certificate was in Birmingham, but the address on the letter of introduction was Cheltenham. Mr Crothers did not ask about the discrepancy;

(13) Mr Crothers did not try to check its online presence;

(14) The bank statement showed 3 transactions in the course of one month between 23 November and 21 December 2015, two of which appeared to relate to the same invoice, with a balance of £203.14. Mr Crothers was not concerned with this evidence, put before him, as to the absence of trading activity and liquidity, and entered into a deal

worth £62,247 - ie, a sum completely out of kilter with the (limited) evidence of Dynamic's own finances.

146. Much of this did not appear in Mr Crothers' witness statement, and he was unable to provided any explanation as to why not ("No idea"). Much of the above information was extracted in cross-examination. Mr Crothers appeared resistant to imparting much information about his dealings with Dynamic and Mr Singh, but was, in contrast, quick to volunteer explanations (for example) as to how its bank statement did not cause him concern (to paraphrase, it doesn't have to be a very active bank account; "Maybe it was his first bank account"; "You don't necessarily have to have hundreds of thousands of pounds in your account to do business"). The explanations were improvisatory; and their substance unsatisfactory. This set the tone for much of the subsequent cross-examination.

147. As the above details show, there were several 'red flags', and they were obvious.

148. In response to a question from the Tribunal, Mr Crothers said that the bank statement "wouldn't really have worried me too much. At the end of the day, if you can, you know, produce - if he lands me with a product and he's registered, and the product comes in and I pay the [money] into that bank account, well, then that's what he's give me". This exemplifies the extremely lax - almost insouciant - overall attitude to diligence and ensuring integrity in the supply chain which we have already identified.

149. WLD was sent a deregistration/veto letter for Dynamic on 25 October 2016.

Monarch Trading Solutions Ltd

150. This is a defaulter. It was involved in 30 deals between 18 October 2016 and 18 January 2017:

(1) It approached the Appellant;

(2) No check was done with Wigan;

(3) On the available evidence (including the late disclosure) the Appellant did not conduct a VIES check;

(4) He had been shown only the photograph page of a passport (ie, not its details page);

(5) Mr Crothers said that he had visited Monarch at premises in Canary Wharf, London; but he did not produce, despite this being canvassed with him by the Tribunal, any evidence as to a visit to London (for example, plane and train tickets). He was unsure about the name of the person he met, thinking it was one Sandy Khan;

(6) During the period of trading, WDL was visited by HMRC. During that visit, he told Officer Wilkinson that WDL had been contacted by Monarch; and that Mr Crothers was unable to remember the contact name at Monarch. Mr Crothers told HMRC that he had visited its premises, which were a serviced office in Canary Wharf;

(7) Monarch had been registered for VAT with effect from 24 July 2015 - ie, in VAT terms, was a fairly recently established company;

(8) Its Effective Date of Registration for VAT purposes did not correspond with Monarch's assertion in its letter of introduction that it had had "20 years" of experience, but Mr Crothers did not seek to explore this obvious discrepancy;

(9) During his meeting with Monarch, Mr Crothers' evidence was that he was told that Monarch 'had done lots of batteries and could do Redbull and soft drinks', but did not ask about Monarch's trading history;

(10) Mr Crothers did not receive a bank statement, did not ask for one, and was unconcerned with the absence of one, even though a bank statement was something he would have expected to see;

(11) He did not check its phone number;

(12) He was unconcerned that the diligence paperwork sent to him by Monarch included a document from one 'Top Deal Services', which was located on a farm in Suffolk; he did not ask how Monarch had come to acquire that document; or whether it said anything as to Monarch's approach to accurate paperwork.

151. On balance, and notwithstanding the absence of supporting evidence, we consider that Mr Crothers did visit premises at Canary Wharf: we consider it is too intricate a lie for Mr Crothers to have improvised at the witness table. But, given that there was a visit, it serves simply to heighten the impression of a lack of diligence by Mr Crothers. The director was a Sandy Khan, not Kaur; and he did not see fit to explore why Monarch, ostensibly occupying glittering premises in the commercial heart of London, should not have been able to show and tell him much more about itself and its commercial antecedents.

152. The 'red flags' were obvious. His lax approach was exemplified by his answers in relation to this trader:

> "You take everybody at their word at how much experience they have in dealing in product because it's very easy when they either can produce the product or they can't ..." (underlined emphasis added by us).

153. Again, the sole and exclusive focus seems to be on whether product is actually provided. There is no apparent recognition that fraudsters were operating in relation to VAT, to the FMCG market generally, including some of WDL's own commercial counterparties.

154. WLD was sent a deregistration/veto letter for Monarch on 26 January 2017.

Ave Brands Ltd

155. This is a defaulter. It was involved in 71 deals between 9 February 2017 and 14 June 2017:

(1) It approached the Appellant;

(2) Mr Crothers was given a passport for a Mr Akgoz, who he believed (but did not know) to be a director, who he did not meet, and he did not check to see what Mr Akgoz's role was. Hence, the provision of the passport served no useful purpose;

(3) He could not remember the full name of his contact;

(4) Its VAT certificate (with an EDR of 1 October 2014) gave its business activity as "Wholesale of hardware, plumbing and heating equipment and supplies";

(5) Mr Crothers did not inquire into how this company had come to be in a position of selling fast moving consumer goods;

(6) He began trading with Ave on 9 February 2017;

(7) Between 9 February 2017 and 13 February 2017, he did 6 deals;

(8) Contrary to Mr Crothers' oral evidence, those were all before a VIES check was done, which was on 14 February 2017;

(9) He did not contact Wigan to check Ave's VAT number until 23 February 2017;

(10) On 7 dates between 9 February 2017 and 21 February 2017, he did 19 deals with Ave. On some days he did three or even four deals;

(11) He did not hear back from Wigan until 6 March 2017. Between 23 February 2017 and 3 March 2017, he did 11 further deals on two dates: 6 deals on 27 February 2017; and 5 deals on 3 March 2017;

(12) He therefore did a total of 6 deals before conducting a VIES check, and 30 (including the 6) deals before checking with Wigan.

156. The 'red flags' were obvious.

157. Mr Crothers' evidence about Ave Brands was not reliable. His oral evidence was that he was 'nearly sure' (note - not 'sure') that a VIES check would have been done before trading. His evidence that "We wouldn't have started trading with somebody before checking their VAT number somewhere" was wrong. Neither a VIES check nor a Wigan check were done before trading.

158. WLD was sent a deregistration/veto letter for Ave on 5 October 2017.

AK Prime Trading Ltd

159. This is a defaulter. It was involved in 44 deals over a 4 day period between 18 November 2017 and 22 November 2016. Thus, from a standing start, there is a short and intense period of trading:

(1) It contacted the Appellant, probably by email;

(2) It had only been incorporated on 26 February 2016, and so was a relatively recent company. But Mr Crothers was not concerned with this, so long as it could produce the right goods at the right price: *'the proof is in the pudding, like if they can produce the ... loads at the right price..."*

(3) Its EDR for the purposes of VAT was even later, 18 April 2016;

(4) No Wigan check was done;

(5) The Appellant did a VIES check, but not until 22 November 2016, and hence not until the last day of trading with AK;

(6) The (undated) letter of introduction did not state what the company actually did or how long it had been doing it, or where is had acquired the knowledge, especially in relation to the sorts of trades the Appellant was doing with it. The letter was very vague and bumptious ("AK Prime Trading is working closely with all of the renowned brand owners and with a huge number of specialist products in all categories, we have a range to satisfy anyone:")

(7) Mr Crothers' knowledge was limited to that it 'traded', but his impression was that it could get its hands on anything;

(8) He had never met its director;

(9) He had not looked at its website;

(10) He had not visited its offices, nor looked them up online. Had he done so, he would have discovered that its offices were a residential address, and, if he had followed the guidance in the 'How to spot' leaflet, he could have made inquiries.

160. Mr Crothers' evidence about his dealings with this trader, and his knowledge of it, were really very vague and unsatisfactory. He was defensive and sought to give explanations as to why, if he had realised that the address was a residential address, it would still have been acceptable for him to have traded with it ("You can trade from anywhere. There's no law to say you have to have a fancy yard and 16 lorries sitting round...". As far as it goes, and bearing in mind that Mr Crothers did not do any check, this is, in strict terms, correct - but it does not answer that point that, had Mr Crothers realised this was the case, as he should have done, he could have explored this with AK Prime).

161. Again, the touchstone was the arrival of goods: "No, they weren't fraudulent. All the goods arrived. Goods arrived on time, or near enough, and everything was paid for".

162. The 'red flags' were obvious.

163. WLD was sent deregistration/veto letters for AK Prime on 30 November 2016 and 5 December 2016. Its VAT number had been cancelled with effect from 24 November 2016.

Buywize Drinks Ltd

164. This is a defaulter. It was involved in 170 deals between 20 September 2016 and 27 January 2017:

(1) It had only been incorporated on 15 March 2016, and so was a relatively recent company, without statutory filings;

(2) It approached the Appellant, probably by email;

(3) The letter of introduction bore the same date as incorporation, but Mr Crothers was not concerned by this;

(4) The letter (which was obviously not on a pre-printed stock letterhead) did not say, and Mr Crothers did not ask, where this (admittedly) "newly formed" company had acquired its stated specialisation of purchasing and supplying fast moving consumer goods;

(5) The address on the letter of introduction (20 Claremont Road) was not the same address as the VAT certificate (Flat 20 Claremont Quays);

(6) The letter did not have a mobile number, or landline, or fax number, or VAT number (none being allocated until 16 March 2016);

(7) No references were given, or taken up;

(8) Nothing was said as to its financial standing, or its banking arrangements;

(9) Mr Crothers did not meet its director;

(10) He did not visit or check its address (which address was obviously a residential flat, in a place called Seaford);

(11) He was not concerned that its email address was 'seafordjacko@gmail.com' - ie, an address which bore no explicit connection, whether in the addressee or the domain, to an entity known as 'Buywize Drinks Ltd'. 'Seaford' probably refers to the address, and 'Jacko' - which Mr Crothers accepted in his evidence had put him slightly on guard

- is probably a nickname for Mr Mark Jackson, its director. Mr Crothers was not concerned that his supplier was using an obviously personal email address for business;

(12) No bank statement was supplied, or asked for;

(13) Between 20 September 2016 and 10 November 2016, he did 63 deals with it - that is to say, a short and intense period of high-volume trading with a new supplier;

(14) On 20 September 2016 alone, on the first day of trading, he did 23 deals;

(15) On 3 November 2016, he was visited by HMRC, as a compliance visit, but was unable to supply HMRC with any details relating to Buywize. We find that the likeliest explanation for this is that Mr Crothers had not, at that point, received any due diligence materials;

(16) All of the above 63 deals took place before the Appellant contacted Wigan to check its VAT number;

(17) After contacting Wigan, the Appellant did a further 12 deals before hearing back from Wigan;

(18) Hence, the appellant did 75 deals before being notified by Wigan as to Buywize's VAT status, and the authenticity of its VAT number;

(19) On the available evidence, no VIES check was done.

165. Consistently with his particular evidence set out above in relation to Dynamic Sourcing, he considered that "experience is landing the product at your door, being able to source it, being able to ship it, being able to put it in front of you". The inadequacy of this approach, when seeking to assure oneself against involvement in VAT fraud, is manifest.

166. Consistently with the evidence above, Mr Crothers said, in a striking passage of evidence:

> "The due diligence is if the company is valid, if the company is registered for VAT and if the company can produce goods. If the company has a bank account that I can pay into, and I produce a purchase order for him, he produces a legitimate invoice and I can then sell on the produce ...
>
> [...]
>
> It's not like - you can't spend - how much time do you want me to spend on due diligence? Look, what am I supposed to do here? Like, and I supposed to just keep hounding people, "That's not right, I don't like that, I don't like this, You can't do that, you've got two different emails, you can't do that". People would get sick of it. You are there to do a job .... You know, I have to trade. That's my job. I can't go on sitting about "Here boy, I don't like the look of you..." How could you get any work done?
>
> The whole purpose of this job is to sell product. So I have to sell product, right? To sell product you have to get product. If the product lands in front of me there and I can sell that there microphone and I can sell that microphone to you, I will sell it to you..."
>
> [...]

"And that's the way it is in this game. You know, you make a decision. If the product comes in, lands on your floor, if the VAT number is valid at the time it comes in, I pay for the goods and the person I am selling to has a VAT number and it's a live VAT number, well then that deal is good"

[...]

"You have a very tight time frame of how to sell a product or when to sell a product. If a man rings you or if a guy comes to you and he says: I have got something here. Can you sell it? You either can or you can't. It's what I've been doing from 2003"

"There is scams out there every day of the week and the only way that you can tell a man is not rotten is if the product lands in front of you and then you can pay"

(extracts from Mr Crothers' evidence: Day 3, pages 77-92).

167. The 'red flags' were obvious; and the overall erroneous approach which he took is captured, very fluently, in his own words. His frustration with the need to check was evident, and emerged very clearly. But he had prioritised doing deals rather than check at all, or do more checking, or walk away, and had thereby exposed WDL to the risk of being denied repayment of input tax.

168. We acknowledge that the market might well be a fast-moving one. But this does not operate to exempt traders in this market - as in any other - from exercising due caution in their trades so as to avoid becoming involved in VAT fraud. Mr Crothers wanted to expand his business - and this is and always was a completely legitimate commercial objective. But that could not safely be done by short-circuiting the requirement to take care not to become involved with traders whose integrity and antecedents were not properly known and who might end up - as here - defaulters or otherwise involved in abuse of the VAT system.

169. Buywize was deregistered as a missing trader on 17 February 2017, and WLD was sent a deregistration/veto letters for Buywize on 23 February 2017.

Energized Sales Ltd

170. This is a defaulter. 196 deals were done between 6 February 2017 and 8 June 2017:

(1) It had only been incorporated on 31 August 2016, and so was a relatively recent company;

(2) It traded from a residential address, but Mr Crothers had neither visited nor looked it up online;

(3) It contacted the Appellant;

(4) Mr Crothers was given a copy of a passport for one Mr Pitman, but he did not speak to him. Had he done so, he would have discovered from Mr Pitman that Mr Pitman was only a director in name, acting for 'pocket money' of about £100 a month, having been approached by one Kevin Chapman (latterly appointed as a director on 1 March 2017) to do so;

(5) Mr Crothers dealt entirely with Mr Chapman. Mr Chapman and Mr Crothers had previously dealt together, at a time when Mr Chapman had been a director of AS Sales Ltd, which had been deregistered for VAT with effect from 30 April 2013, with the

Appellant being notified of this by way of a letter dated 24 July 2013. Despite this knowledge, Mr Crothers decided not ask Mr Chapman about the deregistration, on the basis that 'the man had obviously got himself back on the horse and he's back trading again', and was content to carry on dealing with him, with inquiry, even though (i) Mr Chapman had been a director of a company which had been deregistered for VAT, and (ii) his actual connection with or role in Energized Sales Ltd, before his appointment as director on 1 March 2017, was murky;

(6) The Appellant approached Wigan on 2 February 2017, but started trading before hearing back (14 February 2017), doing 7 deals on 6 February 2017;

(7) On the evidence before us (including the late disclosure) no VIES check was done, and we reject Mr Crothers' oral evidence that he would not have traded with them unless a VIES had been done;

(8) Mr Crothers admitted that he had only 'glanced' at the documents provided to him by Energized.

171. The 'red flags' were obvious. In response to a question from the Tribunal, Mr Crothers said that, to safeguard against being cheated, it was 'the same principal...I do the deal and then he has to make sure that it lands and its in good condition and it's there".

172. WLD was sent a deregistration/veto letter for Energized on 19 June 2017.

Fantasia Ltd

173. This is a defaulter. 6 deals were done between 11 July 2017 and 26 July 2017:

(1) It had only been incorporated on 31 January 2017, and so was a relatively recent company;

(2) It traded from a residential address, which (a flat) was obvious on the face of it, but Mr Crothers had neither visited nor looked it up online;

(3) It contacted the Appellant, probably by email;

(4) The director - a Mr Islam - was 18 years old, and Mr Crothers knew this, or had the means of knowing it, from the Driving Licence which he had seen;

(5) The letter of introduction described Fantasia as a 'premium player' in the wholesale and distribution of beverages and confectionery goods industry. Mr Crothers saw and read this letter. That description, alongside the known age of its director, raised an obvious discrepancy, ripe for exploration and explanation. Mr Crothers did not explore this even though (and as we agree with HMRC) it should have raised a 'red flag'. Mr Crothers' attitude was instead strikingly blase (especially in the context that Mr Islam was a person with whom he was about to do thousands of pounds worth of business): he thought that the director was "*probably bunging himself up a bit ... but you can't stop the lad for trying';*

(6) A VIES check was done on 10 July 2017;

(7) A Wigan check was requested on 11 July 2017;

(8) Three deals were done on 11 July 2017 - ie, before hearing back from Wigan - coming to about £21,000;

(9) The response from Wigan did not come until 25 July 2017;

(10) Mr Crothers admitted that he had only 'glanced' at the documents provided to him by Fantasia;

(11) No copy bank statement was provided, so there was nothing to support its assertion as to its "buying power";

(12) Mr Crothers did not know, and had not sought to explore, how an 18 year old based in England had managed to source and sell to him 26 pallets of 'Irish' Coke which were at a yard in Armagh.

174. Mr Crothers was asked whether he did anything to satisfy himself that the director of Fantasia was 'a legitimate guy or just some fantasist in his bedroom at home'. He said that he had: his test was simply to buy some goods: "*If you are going to class yourself as a premiership player, you might as well see if you can play"*.

175. The 'red flags' were obvious.

176. WLD was sent a deregistration/veto letter for Fantasia on 27 October 2017.

Whitmount Ltd

177. The Appellant traded with Whitmount between a date before 17 September 2013 and 18 May 2017. Its principal place of business was Crilly's yard.

178. No Wigan check was conducted for Whitmount.

179. 12 VIES checks were conducted for Whitmount between 13 April 2014 and 25 August 2016.

180. There was otherwise no due diligence for Whitmount.

181. At the meeting in September 2013, Mr Crothers told HMRC that he had started trading with Whitmount when it had contacted him by phone; he had not obtained any trade references for Whitmount; and had not carried out any credit or background checks. This was very poor diligence, in circumstances where there were obvious 'red flags'.

182. He continued trading with Whitmount even after he had been told by HMRC, at a meeting on 28 April 2016, later followed up with a formal tax loss letter (which he described as having found 'alarming') that all those purchases traced back to a tax loss - that is to say, there was not a single purchase which did not trace back to a tax loss. These details were set out in Officer Wilkinson's witness statement.

183. At the meeting, Mr Crothers asked HMRC if he could or should continue to trade with Whitmount, but was told that HMRC could not tell him what to do, but the expectation was that he would not continue to trade with Whitmount. HMRC's note of the meeting was sent to Mr Crothers and his accountant on 13 May 2016, and any inaccuracies notified. None were. Its accuracy was not challenged in cross-examination (and could not be, because, at the time, Mr Crothers was maintaining the stance that he did not remember the meeting). We consider that note to be accurate.

184. Latterly, Mr Crothers' was able to recollect, when, in his oral evidence, he said (for the first time) that he had phoned Whitmount, and had been satisfied with their assurances that they had not been notified of any tax loss, and did not know of any fraud in their deal chains. Despite being told these things, which were directly contrary to what HMRC had told him, Mr Crothers did not revert to HMRC to ask for more details.

185. Taking Mr Crothers' evidence as true, it is startling and makes his position worse and not better. Mr Crothers, for no good reason at all was actively seeking out and preferring the word of a commercial counterparty over that of HMRC. He could not give any satisfactory explanation as to why he had done this. He continued to trade with Whitmount, unperturbed, and despite the receipt of what Mr Crothers described as an 'alarming' tax loss letter - for over a year - until 18 May 2017.

186. It is argued on the Appellant's behalf that it had not been told when where and in what circumstances the tax loss had occurred, or its nature, or even that it was fraudulent. But, with respect to the argument, this misses the point. HMRC were informing Mr Crothers that, in relation to all the deals which he had done with Whitmount and SHA Bros at that time, those deals traced back to tax loss. This is Kittel Issue 1. HMRC were warning the Appellant that those deals were putting the Appellant's ability to reclaim input tax on those deals in jeopardy.

187. In that context, and properly understood, continuing to buy from Whitmount when the Appellant had been warned that all of its purchases from them traced back to tax fraud was cavalier and unwise.

188. Whitmount was subsequently deregistered, on 3 July 2017, on grounds of abusing the VAT system.

SHA Bros Ltd

189. WDL had begun trading with SHA Bros Ltd by the time of HMRC's visit to WDL in October 2015.

190. At that time, Mr Crothers had not visited SHA, but told HMRC that he had carried out due diligence, through a firm called The Due Diligence Exchange Ltd ('DDX'), based in Northampton, and run by one Vincent Curley. That was true, although a pack from DDX, dated 27 March 2015, was disclosed only during the course of the hearing.

191. A single check with Wigan was done several months before the first trade - made on 27 March 2015. No further check was made after March 2015.

192. There were obvious flaws, calling for inquiry, with the diligence documentation provided by DDX and (through it) by SHA Bros Ltd.

193. As to the DDX report:

(1) It is principally aimed at money laundering (although it does have a section dealing with VAT);

(2) DDX's report itself is an aid to its customer's risk assessment; DDX does not itself conduct the risk assessment. The Appellant did not conduct a risk assessment, as recommended by DDX, because the Appellant did not complete the 'Report Review Form' at section 8 of the DDX pack;

(3) The cover letter to the DDX pack said that the business 'had passed [DDX's] vetting procedures' and was dated 27 March 2015, but the site visit did not take place until 1 April 2015, and the report was dated 1 April 2015;

(4) The DDX pack did not include references. It was said that they would be forwarded to the Appellant 'in due course'. Those were to come with a subsequent 'Summary Report' (see Page 2 of the cover letter, under section 'Summary'). No references were provided, and we have not seen any subsequent 'Summary Report';

(5) The references were important "because when we send references we include questions designed to obtain financial information about the business. We will forward this financial information to you as soon as all references are available";

(6) DDX themselves warn that businesses develop and circumstances change, and say (capitals and bold in the original): "IN YOUR RISK ASSESSMENT YOU WILL NEED TO CONSIDER WHEN THIS CUSTOMER SHOULD BE RE-CHECKED AND VISITED": (i) the risk assessment is to be performed by the Appellant; (ii) consideration needs to be given to when (not whether) customers need to be rechecked. There was never any such consideration here.

194. Hence, the mere fact of engagement of DDX, and the fact of DDX's own caveats, does not, in our view, suffice to demonstrate that the Appellant has taken reasonable steps to ensure the integrity of its supply chain for VAT purposes.

195. That then shifts the focus to what DDX actually said about SHA Bros. There are obvious problems with the documents provided by DDX, which called for exploration, but which were not explored:

(1) SHA Bros contacted the Appellant, probably by email;

(2) The letter of introduction is undated, is not signed with a wet signature, and gives the company's address as its warehouse, and not its office;

(3) The company was established in 2003, but was not registered for VAT until March 2014 (with an EDR of 1 February 2014) - ie, on the face of it, had not passed the threshold for compulsory VAT registration for the first 11 years of its life. An explanation was given, which was that the company's VAT return 'was previously mistakenly cancelled', and that it had always been registered for VAT throughout its trading life, but there is no evidence of the previous registration, or of the cancellation, when such evidence should have been easily available;

(4) The company's bank statement - account name SHA Bros Ltd trading as B2B wholesale - was not up to date but over a year old. It showed extremely modest movement over a 1 month period (22 January to 21 February 2015), and very little by way of identifiable trading activity (as opposed to the payment of salaries, which were the two largest withdrawals). It raises obvious questions as to the company's liquidity and the genuine extent of its trading activity;

(5) The turnover and activity on the bank statement is in stark - and unexplained - contrast to what SHA told DDX its estimated current annual turnover was, which was £7m (or about £1/2 per month). Some explanation was called for as to how a company with a turnover in the low thousands in early 2015, had, little more than a year later, and with its visible premises, managed to secure a turnover in the order of millions of pounds;

(6) The business activity given on its VAT certificate was 'the retail sale of meat and meat products', which had nothing to do with the trades which the Appellant was doing;

(7) The 'business premises', shown on a photograph, being a single-fronted commercial property at 54 Plumstead High St, is a primarily a "Business Centre" for solicitors, accountants, money transfer and property management, and a travel agents (although it does have the words "SHA GLOBAL" in one of its windows);

(8) The address for the warehouse (44 Plumstead High St) was given by the Post Office to DDX as the address of another company, "The Superior Service Co Ltd": this called for explanation;

(9) There were no photographs of the interior of the warehouse as the director of SHA 'felt this may pose a security risk'; that is an odd excuse. There is just a photograph saying 'warehouse address;, showing an alleyway leading to a yard with several cars parked there;

(10) The particulars of only one trade reference were given to DDX - company whose address was given as a PO Box number, without a fax number. No reference was provided. DDX tried to obtain details of a second trade reference, but SHA's director, Mr Anis Mia, "was unwilling to provide details to obtain a second trade reference as this information is considered commercially sensitive";

(11) The director was unwilling to provide details of its landlord "as this information is considered commercially sensitive";

(12) The director was unwilling to provide a personal utility bill 'as he considers this to be confidential'. This was an odd excuse;

(13) The company's website 'is not currently active', but no explanation is given for that;

(14) The Companies House registered office was not either of the addresses on Plumstead High Street, but was elsewhere;

(15) There was no third party credit report or credit rating;

(16) There was no copy of the company's previous filings.

196. 8 VIES checks were done, between 27 March 2015 and 11 August 2016.

197. Mr Crothers told us that he had visited SHA Bros, on the same day that he had been to Canary Wharf. Likewise, we accept the evidence that he went to Plumstead. It is too detailed to have been improvised, and was consistent with what was said about coupling up with a visit to Canary Wharf. But it serves to highlight the pastiche nature of the diligence, because a short visit to a trading address, viewing its driveway alongside the shops leading to a yard behind is not really proof of anything; and Mr Crothers did not set out, in his oral evidence, why he made that visit, what information he sought to obtain, and what he was going to do or actually did with any information which he did obtain.

198. Mr Crothers was warned by Officer Wilkinson, at the meeting with HMRC on 28 April 2016, that all his purchases from SHA Bros had been traced back to a tax loss. Officer Wilkinson told Mr Crothers that she was still waiting to see the due diligence on SHA Bros. It says something about the importance (or, more precisely, the lack of it) of the DDX pack to Mr Crothers that he had not sent it to HMRC in the year since getting it; nor even had it ready to hand to show to HMRC at that meeting. It was still being requested by HMRC in May 2016.

199. Despite the clear warning, he continued to trade with SHA, unperturbed. In his oral evidence, Mr Crothers said (for the first time) that, after that meeting, he had phoned SHA Bros, and - as with Whitmount - had been satisfied with their assurances that they had not been notified of any tax loss, and did not know of any fraud in their deal chains. The same comments above hold good in relation to SHA Bros. There was no good reason to take their

word over that of HMRC. Continuing to buy from SHA Bros when Mr Crothers had been warned that all of his purchases from them traced back to tax fraud was cavalier and unwise.

200. Sha Bros was deregistered for VAT on 16 August 2016 on the basis of abuse of the VAT system. The Appellant continued to deal with SHA Bros until 22 August 2016.

201. On 24 August 2016 and 30 August 2016, WLD was sent deregistration/veto letters in relation to SHA Bros.

202. The Appellant was sent a tax loss letter on 29 September 2016.

Prime Merchants Ltd

203. As to Prime Merchants Ltd:

(1) During the course of the hearing, a pack from DDX was disclosed, with a cover letter and report each dated 22 September 2016. The same comments made above in relation to the weight, per se, to be attached to the engagement of DDX are repeated;

(2) The DDX report was not done until 22 September 2016, which was three weeks after the first deal, which was on 30 August 2016;

(3) Prime Merchants had only been incorporated on 1 February 2016, and so was a relatively recent company, without any accounts filed at Companies House (it was therefore self-evidently misleading for DDX to have stated, in its 'Fitted Due Diligence Information', to say that the company was up-top-date with filing any required statutory annual documents). Therefore (and as with any company which the Appellant was dealing with before the statutory filings were done) its true turnover, operating profit, pre-tax profit, retained profits, net worth, assets, liabilities, were all completely unknown, as was its cash flow;

(4) No check was made with Wigan until 12 September 2016, with a response on 19 September 2016;

(5) Before even asking Wigan, the Appellant did 25 deals, on 5 days, with a combined net value of about £1.097m;

(6) From a standing start, there was a brief but intense period of trading - 2 deals on 30 August; 6 on 31 August; and then 16 over the course of three days in early September 2017;

(7) It traded from an address which was a clothing shop and which had nothing to obviously link it with the sorts of trades it was doing with the Appellant;

(8) Mr Crothers had spoken with a director, but only after trading had started;

(9) 2 VIES checks were done, on 29 August 2016 and 4 September 2016;

(10) Two sheets of a bank statement (numbered 4 and 5) from 8 August 2016 to 7 September 2016 were provided. These were redacted so as to remove details of the opening balance, payments in, payments out, closing balance, and all transactions. Hence, there was no evidence of its liquidity or trading intensity. However, below one poor redaction can be seen that the opening balance on 8 August 2016 was about £1,000. Contrary to the DDX Fitted Due Diligence Information, there was no evidence that it had built up a reserve of working capital;

(11) The company had therefore used only three sheets of statements from 1 February 2016 to 7 August 2016 (just over 7 months), which is indicative of a low level of transactional activity';

(12) Its estimated current annual turnover in September 2016 was £7m (or about £1/5m a month). This was the sole-director's say-so, but is manifestly difficult to reconcile with its bank statement (even redacted), or the fact that it had only used three sheets of bank statement in just over 7 months;

(13) CreditSafe had given it a moderate risk rating of 49/100, but had said that, as at 22 September 2016, it should be given a credit limit of only £500;

(14) There had only been two credit inquiries in 7 months;

(15) The director was unwilling to provide details of a bonded warehouse or trade reference, and nothing further was taken up about this;

(16) Mr Crothers admitted that he had only 'glanced' at the documents provided to him by Prime Merchants, and the Report Review Form was not completed;

(17) On 27 October 2016, HMRC concluded that Prime Merchants was not 'a credible entity' and it was deregistered on 28 October 2016. HMRC told the Appellant that on 1 December 2016.

Other commercial features

204. Panels of this Tribunal are regularly cautioned not to over-weight due diligence at the expense of other factors; but to take account of the diligence against the backdrop of other factors. We bear this guidance in mind. But due diligence nonetheless still plays an important part in the overall evidential exercise.

205. Despite Mr Crothers not advertising, or having much (if indeed any) web presence, the facts show that he was being repeatedly contacted, out of the blue, by people who he did not know, had never previously encountered in the trade (with the exception of Mr Chapman, whose VAT record, as a director of A S Sales Ltd, was known to Mr Crothers, and begged obvious questions, which were not asked), without any known track-record (or who cannot, on the face of it, have had a track record), who, without explanation, had large amounts of goods at their disposal - with unknown provenance - which they were desirous of selling to him. There is no evidence that any of these suppliers were authorised distributors or dealt directly with the manufacturers. The overall impression is that the business from these defaulters simply fell into Mr Crothers' lap, and was readily seized on by him, accounting for WDL's soaring turnover.

206. Despite all these factors, Mr Crothers was prepared to part with tens of thousands of pounds a day to buy goods from these suppliers, sometimes, without any exploratory trades or trial periods, in short and intense bursts of deals - several per day.

207. The sudden launches into huge volumes of trade are striking. Even on the face of them, in terms of the likely time and effort, they sound a considerable feat for one man with a mobile phone, whilst running and serving in a shop, not writing much (if anything) down, and (on his case) going to Crilly's yard to check on consignments. The sales are true. But the explanation for how they came about does not ring true.

208. We agree with HMRC that there is a contrived air hanging over many of these transactions - a real sense of 'too good to be true' - which is suggestive of the Appellant being inserted by fraudsters upstream and downstream into a pre-arranged chain.

209. It is striking that all these deals seem to have run like clockwork. There is no evidence at all of effortful trade - for example, of the phone calls being made to try and source goods, or a buyer, or the usual 'phone-tennis' to try and get hold of a supplier or customer (and, despite flagging this during HMRC's openings, we have not been shown any mobile phone bills which could have corroborated this).

210. Nor is there evidence of failed deals; or even of attempts to procure things and failing; or of phoning around suppliers to see who had what; or (save for one example of a credit note being given for an incomplete or damaged consignment) of dispute with counterparties. All those are things which, in our view, and even with the best will in the world, would be encountered in the normal course of trade. The absence of these features here raises suspicion as to the genuine commerciality of the denied deals: over a thousand happen, during a period of over a year, and nothing ever seems to have gone wrong.

211. Those goods were often goods for which Mr Crothers was able to sell - the right kind and in the right quantities - straight away - ie, he had buyers ready able and willing to buy exactly what his sellers were selling; and sellers ready able and willing to sell exactly what his buyers wanted.

212. A suspicious pattern emerges, which is of the Appellant dealing with counterparties, who then over the course of time are deregistered, with other counterparties appearing, themselves being deregistered, and often with flurries of deals very shortly before deregistration. As time went on, and Mr Crothers was left with fewer suppliers, the information about these suppliers was becoming increasingly sketchy.

213. The gearing-up of the trade in 2016 is, for the reasons already set out, striking, and not explained. It was attributable almost entirely to the denied deals, which all trace back to tax loss; and is attributable in significant measure to supplies from defaulters.

214. There are no written contracts. The obvious difficulty with a business which works "on trust" (as Mr Crothers put it in his meeting with HMRC in September 2013) is where someone relies entirely, or too much, on trust, with people who have not demonstrated that they are trustworthy.

215. There is a complete and conspicuous absence of negotiations on price and other commercial terms.

216. Another thing notable by its absence are transport costs - such costs must have been incurred, in order to move and/or store pallets of goods. Those tasks cannot have been done for free. Such costs must have fallen on someone. Prima facie, on the ordinary application of the law of the sale of goods, when goods belonged to the Appellant - that is to say, in the period between buying them and selling them - those costs will have fallen on the Appellant, and would therefore have eaten away at its margin - perhaps significantly, given that the margins were often small - unless factored into the sale price. But there is no apparent evidence of this happening; nor even any real awareness by Mr Crothers that this was a feature. Nor was there any separate accounting-for of VAT on storage or handling costs. None of this makes any sense in a business, dealing in palletised real goods in the real world, which was, at its peak, turning over over £30m a year.

217. The absence of insurance is also relied on by HMRC. The need for insurance covering these goods when in the ownership of WDL (and hence, applying the ordinary rules of the passing of risk alongside passing of title in sales of goods) is obvious. WDL was dealing in millions of pounds worth of goods, palletised, being delivered to yards in Northern Ireland

and the North of England which it did not control, by persons it did not control, stored and handled in conditions which it did not control, and then picked up by persons it did not control. But we were not presented with any evidence that any of WDL's clients had ever complained that goods had been damaged; nor was there any evidence from Crilly or Fisher as to their terms. Mr Crothers' evidence, which we accept on this point, was that he would inspect goods at Crilly's yard, and, if there was any damage, it would be slight - that is, not to the whole pallet - and he would make it up from his stocks.

Knowledge

218. Against all this, the question then narrows down to whether Mr Crothers engaged in these transactions actually knowing that they were connected to fraud, or whether, short of actual knowledge, he ought to have known that they were. Either formulation suffices for a Kittel-denial.

219. In this, we must carefully assess the totality of the evidence, and especially Mr Crothers' written and oral evidence, in the context of documentary evidence.

Actual knowledge

220. We have concluded that Mr Crothers did not *actually* know of the connection to fraud.

221. We stop short of finding that he actually knew because this would necessarily connote, in this case, a finding that Mr Crothers was a fraudster of an especially audacious kind: it would make him a person prepared to commit fraud, over the course of many months, right under the noses of HMRC (and knowing he was under intense scrutiny by HMRC - under extended verification), at exquisite risk of the fraud being uncovered at any moment; and then that he was a person prepared and equipped to brazen it out, even before the Tribunal, throughout the course of a lengthy and searching cross-examination.

222. We simply do not think that Mr Crothers is that person. We consider him to be a clever and resourceful man, and, if he really were an actual fraudster who wished to cover his tracks, he would have done a better job.

'Blind-eye' knowledge

223. The established law in relation to blind-eye knowledge requires that there be a deliberate decision not to check, or to obtain confirmation of what might be suspected.

224. We do not consider that Mr Crothers, across the entirety of the denied deals, had "blind-eye" knowledge of the connection to fraud, in the sense that he suspected that certain facts may have existed, but he chose to refrain from taking steps to confirm their existence: see *Manifest Shipping Company v Uni-Polaris* [2001] UKHL 1 at [112] per Lord Scott.

225. We have said 'across the entirety of the denied deals' because this is a case which involves a plurality of sellers and suppliers. We have found that the Appellant's approach was comprehensively and pervasively deficient, but we do not consider it necessary to winnow out instances, in relation to particular suppliers, where an allegation of blind-eye knowledge is (even potentially) sustainable from those where it is not.

226. That is not the way in which the case has been put, or argued. Rightly or wrongly, both parties adopt a holistic and unitary approach to the entirety of the deals. We are invited to look at matters in the round, and not to draw artificial distinctions in relation to particular transactions. We consider that to be the right approach in this case, but caution ourselves that this should not be used to gloss over facts which assist the Appellant.

Negligence: "The proof is in the pudding"

227. But are left without any doubt that this is a case where Mr Crothers failed to think about the facts, which were right in front of him, and hence failed to realise their implications. As was said in *Manifest Shipping* at Para [116], this does not afford the basis for a finding of blind-eye knowledge. But his failure to check was of the kind which nonetheless can be called "seriously negligent": see *Manifest* at Para [115]. In our view, the Appellant, through Mr Crothers, was seriously negligent in its conduct of the denied deals. In the language of VAT Notice 726, he was not "sufficiently circumspect about his trading connections".

228. In response to a question about whether he was concerned that one of his counterparties (AK Prime) was relatively recently established (one of the hallmarks identified by HMRC in 'How to spot a missing trader'), Mr Crothers said:

> "The proof is in the pudding, like if they can produce the goods and if they can produce the loads at the right price. You know, if you can put the product in at the right price, you can source it and supply it and we pay for it"
>
> [...]
>
> "They weren't fraudulent. All the goods arrived ... on time, or near enough, and everything was paid for."

229. To our mind, this puts, in a nutshell, Mr Crothers' approach. He simply did not care whether his counterparties were fraudsters or not. It made absolutely no difference to him so long as they could produce the right goods at the right price. He was impervious to risk and just ploughed on regardless so long as he could make money. All he cared about was doing deals and making money. His mind was closed to any suspicion that his deals were connected to fraud.

230. We remind ourselves that having the means of knowing that the transactions were connected with the fraudulent evasion of VAT - which suffices to deny the claims for input tax - is not the same as having the means of knowing (i) that there was a risk that a transaction might have been so connected, or (ii) that it was more likely than not that the transaction was so connected: see *GSM Export (UK) Ltd v HMRC* [2014] UKUT 529 (TCC) at Para [16] *per* Proudman J.

231. We also remind ourselves that a taxpayer can only be regarded as being in a position where he should have known that the transaction was connected with fraudulent evasion of VAT where he should have known that "the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud": *Mobilx* at [59]-[60].

232. Although, in closing, Mr Magill submits that Mr Crothers was either negligent, stupid, or naive - but not culpable - this does not accurately reflect the law or the way in which it operates in cases of this kind. Whilst we do not consider Mr Crothers to have been either stupid or naive, stupidity and naivety are capable of being explanations, but are not automatically exculpatory. And whilst a state of mind which is negligent is not a dishonest state of mind, it is still a culpable state of mind, for the purposes of VAT, if that negligence takes the form of failing to see that the transactions were connected with the fraudulent evasion of VAT in circumstances where the reasonable trader (not a specialist investigator, or a lawyer, or an expert with the benefit of hindsight) would have seen that connection at the time. That is certainly the case here. Nor do we accept that the Appellant was a dupe. He had

the means of finding out, but - for whatever reason or combination of reasons - closed his eyes to the obvious.

233. The increasing preponderance of trade with defaulters and other persons abusing the VAT system shows, at the very least, that Mr Crothers might well have become known amongst fraudsters as someone who was prepared to do deals, come what may.

234. It is no answer for the Appellant to argue, as it seeks to do, that, having been subject to HMRC scrutiny for several years before the periods of the denied deals, and in having its earlier claims for input tax allowed, it was reasonable for the Appellant to take the view that its trading was being done in a manner which was unobjectionable to HMRC (that is to say, in effect, it had been given a clean bill of health amounting to a warrant to carry on).

235. Whether HMRC was right or wrong (i) firstly to withhold and then (ii) secondly to repay the input tax for the earlier periods is not a matter for us.

236. But the Appellant's argument is nonetheless wrong in certain identifiable respects:

(1) Because the trading was never entirely unobjectionable - HMRC withheld some input tax before changing its mind;

(2) HMRC never disapplied VAT Notice 726 or the 'How to spot a missing trader guidance' in relation to the Appellant;

(3) HMRC never disapplied the general law governing the ability to reclaim input tax from the Appellant.

237. Moreover, and in any event, there were materially different facts:

(1) A large proportion of the suppliers in the denied deals were not suppliers during the earlier periods;

(2) There is no evidence that the Appellant was ever advised during the earlier periods that all its deals with a particular trader had traced back to a tax loss.

CONCLUSION

238. In the circumstances, taken overall, and drawing together all the strands, we find that HMRC have easily proved, well beyond the balance of probabilities, that the Appellant (which in this case means Mr Crothers) should have known that the transactions in the denied deals were connected to the fraudulent evasion of VAT.

239. The Appellant's appeal is dismissed.

240. We wish to thank all counsel for their considerable assistance.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

Dr Christopher McNall
TRIBUNAL JUDGE

Release date: 06th JUNE 2024