Neutral Citation: [2023] UKFTT 60 (TC)

Case Number: TC08702

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2017/03643

VALUE ADDED TAX – input tax deductibility – right to deduct restricted under principles in Kittel *– absence of documentary and witness evidence – adverse inferences to be drawn – whether purchases of alcohol were connected with fraudulent VAT evasion – whether part of an orchestrated scheme to defraud the Revenue – whether the appellant knew or should have known its transactions connected with fraud –* ***appeal dismissed***

Heard on: 6 to 10 June 2022 and
13 June 2022
Judgment date: 20 December 2022

Before

TRIBUNAL JUDGE HEIDI POON
MEMBER SUSAN STOTT

Between

EVERYDAY WHOLESALE LIMITED

Appellant

and

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr Jatinder Singh Johal, director of the Appellant

For the Respondents: Joshua Carey, and Lewis MacDonald, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. Everyday Wholesale Limited ('the appellant' or '**EDW**') appeals against the respondents' ('HMRC') decision dated 3 April 2017, which denied the claims of input VAT for the accounting periods 04/13 to 04/16 inclusive on the grounds that the input tax so claimed was incurred in connection with the fraudulent evasion of VAT, and that the appellant either knew or should have known the same.

2. The respondents accept that the assessments raised in connection with periods 07/13, 10/13, 07/14, 10/14, and 10/15 are out of time and will be withdrawn.

3. The assessments in relation to periods 04/15, 07/15, 10/15, 01/16 and 04/16 remain in dispute with the overall quantum under appeal now stands at £236,896.43.

4. It is the respondents' case that the trade that led to the out-of-time assessments in the prior periods remains relevant to the substantive appeal as showing that the appellant knew or should have known of the connection with fraud after 01/15.

5. All of the transactions in question relate to the wholesale of alcohol.

REPRESENTATION FOR THE APPELLANT

6. The appellant was represented by Mr Tristan Thornton of TT Tax in these proceedings at all times until at least May 2022. Mr Thornton was indeed expected to be appearing for the appellant in the substantive hearing, having filed supplemental skeleton argument on 12 May 2022. Mr Johal informed the Tribunal that the appellant could not afford the fees to continue its engagement of Mr Thornton in these proceedings, and is representing the appellant himself.

7. In any event, the appellant has the benefit of Mr Thornton's written submissions, and HMRC have considered and addressed the issues raised by Mr Thornton, including the procedural challenge against some of the assessments as being out of time. The Tribunal has also taken into account Mr Thornton's written submissions for the appellant in this decision. There are in all three written submissions lodged for the appellant by Mr Thornton, namely:

(1) Appellant's position on tax losses filed on 1 September 2020 of 6 pages; and

(2) Appellant's skeleton argument filed on 18 January 2021 of 9 pages; and

(3) Appellant's skeleton argument filed on 12 May 2022 of 5 pages.

EVIDENCE

8. In terms of documentary evidence, the Tribunal is provided with 12 electronic bundles of documents totalling more than 3,500 pages, most of which are witness statements of HMRC officers enquiring into the suppliers in the fraudulent deal chains identified for the purposes of this appeal. There is no challenge as regards the authenticity or contemporaneity of the exhibits relied upon by HMRC in relation to the traders concerned in the relevant deal chains.

9. The respondents called Officers James Gardam, and Matthew Bycroft as witnesses. Their witness statements with exhibits are adopted as evidence in chief, and both officers were cross-examined by Mr Johal, and answered supplemental questions from the Tribunal. We find both officers to be credible witnesses, and accept their evidence as to matters of fact.

10. As director of the appellant company, Mr Jatinder Johal lodged a witness statement of 21 pages long and gave evidence, and was cross-examined. We do not find Mr Johal a reliable witness; his overall evidence lacks the integrity of a credible witness as set out in the relevant parts of the decision.

LEGISLATIVE FRAMEWORK

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

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

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

> **24 Input tax and output tax**
>
> (1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say–
>
> (a) VAT on the supply to him of any goods or services;
>
> (b) VAT on the acquisition by him from another member State of any goods; and
>
> (c) VAT paid or payable by him on the importation of any goods from a place outside the member States,
>
> Being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.
>
> […]
>
> (6) Regulations may provide—
>
> (a) for VAT on the supply of goods or services to a taxable person, VAT on the acquisition of goods by a taxable person from other member States and VAT paid or payable by a taxable person on the importation of goods from places outside the member States to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases; […]
>
> **25 Payment by reference to accounting periods and credit for input tax against output tax**
>
> (1) A taxable person shall–
>
> (a) in respect of supplies made by him, and
>
> (b) in respect of the acquisition by him form other member States of any goods,
>
> account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.
>
> (2) Subject to the provisions in this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him. […]

26 Input tax allowable under section 25

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

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

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

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

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

[…]

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

AUTHORITIES

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

ISSUES FOR DETERMINATION

15. In the *Kittel* judgment, the European Court of Justice (the 'ECJ') held at [56] that 'a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods'. The rationale for such an approach is stated in the following terms:

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

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

16. The ECJ's conclusion at [61] confirms 'it is for the national court to refuse that taxable person entitlement to the right to deduct' where 'it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known, that by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT.'

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

(1) Was there a VAT loss?

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

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

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

MTIC fraud

18. Missing Trader Intra-Community ('MTIC') fraud comes in two main versions: the so-called 'classic' variety and the 'contra-trading' variety. This appeal concerns the 'classic' variety, which is succinctly set out by Clarke J in *Red 12*:

> '[2] The classic way in which the fraud works is as follows. Trader A imports goods, commonly computer chips and mobile telephones, into the United Kingdom from the European Union ("EU"). Such an importation does nto require the importer to pay any VAT on the goods. A then sells the goods to B, charging VAT on the transaction. B pays the VAT to A, for which A is bound to account to HMRC. There are then a series of sales from B to C to D to E (or more). These sales are accounted for in the ordinary way. Thus C will pay B an amount which includes VAT. B will account to HMRC for the VAT it has received from C, but will claim to deduct (as an input tax) the output tax that A has charged to B. The same will happen, *mutatis mutandis*, as between C and D. The company at the end of the chain – E – will then export the goods to a purchaser in the EU. Exports are zero-rated for tax purposes, so Trader E will receive no VAT. He will have paid input tax but because the goods have been exported he is entitled to claim it back from HMRC. The chains in question may be quite long. The deals giving rising to them may be effected within a single day. Often none of the traders themselves take delivery of the goods which are held by freight forwarders.'

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

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

20. Without prejudging the issues, the same terminology of 'defaulter', 'buffer', 'broker, and 'EU trader' is adopted in our findings of fact.

THE FACTS

Enquiry into appellant's VAT affairs

21. Officer Gardam's evidence covered the information gathered by HMRC in the course of the enquiry into the VAT affairs of the appellant. He had taken over the enquiry from Officer Tony Jennison since the latter's retirement. Three witness statements dated 28 August 2018, 9 December 2019, and 7 April 2020 respectively by Officer Jennison have been adopted, and consolidated by Officer Gardam, whose witness statement dated 4 May 2021 is of 214 paragraphs, and accompanied by 166 exhibits in a bundle of 1,114 pages. From Officer Gardman's evidence, we make the following findings of fact.

Company details of the appellant

22. The company number of the appellant is 07507755, with associated details as follows.

(1) The date of incorporation was 27 January 2011, but the name of company on incorporation was 'Trade Release Ltd' with a proposed registered office address at 12A The Mall in Ealing, London, and the company director was a Mr Daljit Singh Bassi.

(2) Also on 27 January 2011, Trade Release Ltd registered for VAT, with details of its intended business activities being: 'Business consultancy' and 'General wholesale'; estimated value of turnover in the next 12 months to be £100,000, and the business address to be at 14 Thornbury Avenue in Middlesex. The named agent Woodhouse Victor of VG Woodhouse & Co has its address at 12A The Mall in Ealing.

(3) Since the VAT registration, the appellant company has changed its principal place of business ('**PPOB**') on four occasions:

(a) 75 Waterside Trading Centre, Trumpers Way, Hanwell, London W7 2QD with effect from 26 July 2012;

(b) 75A The Waterside Trading Centre, Trumpers Way, London, W7 2QD with effect from 14 April 2014;

(c) Suite 4, Sinckot House, 211 Station Road, Harrow, HA1 2TP with effect from 10 March 2017; and

(d) Back to 75A The Waterside Trading Centre, Trumpers Way, London, W7 2QD with effect from 23 August 2017.

The appellant's trading activities

23. The background to the appellant company is as follows:

(1) On 27 January 2011, the appellant was incorporated under company number 07507755 under the name 'Trade Release Ltd'.

(2) Mr Daljit Bassi Singh was its sole director and shareholder at incorporation.

(3) From 27 January 2011, the appellant registered for VAT and declared its main business activity to be 'business consultancy/general wholesale' with an estimated turnover of £100,000.

(4) On 1 July 2012, Mr Johal became the director of the appellant.

(5) On 30 August 2012, the appellant notified HMRC of its change of address, but it did not notify HMRC that it intended to change its trade activity.

(6) On 5 September 2012, Mr Bassi replied to HMRC's enquiry letter that Mr Johal had acquired the company and retained the VAT registration of Trade Release Ltd, and that Mr Johal was aware of all its outstanding liabilities of VAT and bills, and that Mr

Johal was aware of the debts at the point of purchase. (Mr Bassi's reply was contrary to what Mr Johal asserted in evidence that it was important to him that the appellant company had no debts when he purchased the company from Mr Bassi.)

(7) The first VAT period in which the appellant traded in alcohol was 04/13.

HMRC's actions regarding the appellant's new trade

24. On 3 June 2013, HMRC made an unannounced visit to the appellant's new PPOB and became aware of its change in trading activities to alcohol wholesale. There followed two series of actions in relation to the appellant's trading activities.

25. The first area of HMRC's actions concerned the seizure of alcohol from the appellant.

(a) On 20 August 2013 HMRC seized non-duty paid goods from the appellant's PPOB with an assessment value of circa £67,000.

(b) On 17 September 2015, the appellant was issued with an excise assessment for non-duty paid goods in the sum of approximately £22,000.

26. The second area of actions concerned its purchases from identified fraudulent defaulters.

(a) On 15 April 2014, HMRC visited the appellant and provided it with Notice 726 and the leaflet on '*How to Spot Missing Trader Fraud*'.

(b) On 16 April 2014, HMRC notified the appellant of various issues including the actions that had been taken by HMRC in relation to the following traders which supplied to EDW.

(i) Infinity Collections Ltd its VAT registration had been cancelled with effect from 25 June 2013;

(ii) MSJ Enterprises Ltd was issued with a veto letter;

(iii) Easy Services Ltd was issued with a veto letter.

(c) On 1 December 2014, HMRC issued the appellant with a tax loss letter in respect of its purchases from:

(i) 04/13 – VIP Hampshire for £8,171.91;

(ii) 07/13 – VIP Hampshire for £1,199.25;

(iii) 07/13 – Infinity for £5,925.80;

(iv) 07/13 – Easy Services for £7,855.24;

(v) 10/13 – RSK Inc Ltd t/a Global Cash and Carry Ltd - £48,623.49; and

(vi) 01/14 – Indera UK Ltd - £435.32.

(d) On 21 October 2016, the appellant was notified of tax losses relating to its 10/13 to 04/16 VAT periods.

(e) On 24 October 2016, the appellant was notified that on the balance of probabilities, tax losses were identified in respect of 10 of its suppliers.

(f) On 3 April 2017, the appellant was notified of HMRC's decision to deny it its input tax on *Kittel* basis.

27. The appellant only provided information in relation to one bank account number – 082, but without a sort code showing on the bank statement that was provided. Despite repeated requests, this information was never provided to HMRC.

Entities in deal chains

28. The entities which supplied to the appellant and having been identified as fraudulent defaulters in deal chains that led to *Kittel* denials being issued to the appellant are as follows. Although the *Kittel* denials for five of the ten periods originally issued are to be withdrawn for being out of time, the respondents' case is that there is a schematic pattern of transactions undertaken by the appellant that were connected with the fraudulent evasion of VAT, and those out-of-time periods of *Kittel* denials are as relevant in discerning the pattern of trading with defaulting suppliers, and form part of the evidence relied upon by HMRC.

29. The entities which have been identified by HMRC in the deal chains include:

(1) Infinity Collections Limited ('**Infinity**')
(2) Pachinger Bros Limited ('**Pachinger**')
(3) Logical Retail Limited ('**Logical**')
(4) IK Drinks Limited ('**IK Drinks**')
(5) Elassab Solutions Limited ('**ESL**')
(6) Lupt Utama Limited ('**Lupt**')
(7) Phoenix Wholesalers Limited ('**Phoenix**')
(8) Gempost Limited ('**Gempost**')
(9) AK Suppliers Ltd ('**AK Suppliers**' or '**AKS**')
(10) Booze Factory (UK) Ltd ('**Booze Factory**')

Appellant's VAT returns and *Kittel* denials

30. The turnover on the appellant's VAT returns in the relevant periods is as follows:

	VAT Period	Turnover	*Kittel* denial Assessment	Defaulting Suppliers	Annex II ref	In/out of time
1	04/13	£119,417				
2	07/13	£256,020	yes	Infinity		Out of time
3	10/13	£258,921	yes	Pachinger		Out of time
4	01/14	£290,994				
5	04/14	£316,090				
6	07/14	£473,201	yes	Logical		Out of time
7	10/14	£333,909	yes	IK Drinks		Out of time
8	01/15	£271,560	yes	ESL		Out of time
9	04/15	£346,572	£37,889.14	IK Drinks & ESL	A/II/p1	
10	07/15	£655,789	£63,383.13	ESL & Lupt	A/II/p1 -2	
11	10/15	£499,771	£31,123.34	Lupt	A/II/p2	
12	01/16	£435,324	£67,039.85	Phoenix	A/II/p3	
13	04/16	£203,579	£37,461.58	Phoenix & Gempost	A/II/p3	
		Quantum under appeal	**£236,897.05**			

31. The appellant has not paid any VAT on any returns since it started trading. It has consistently filed VAT returns late and is currently allocated to the highest level of default surcharge, that being 15%. (The appellant has also consistently filed its Corporation Tax returns late which has resulted in late filing penalties.)

The Deal Chains

32. The deal chains which are subject to *Kittel* denials in VAT periods which remain in time are set out in **Annex II** appended. HMRC provided the Tribunal with an Excel deal sheet to summarise the deal chains relevant to this appeal. We note a discrepancy of £2,385 when reconciling the VAT period totals of the in-time assessments to the overall quantum in dispute. The discrepancy is traced to an omitted deal in 04/15, which is inserted in Annex II (page 1) as deal 2 (IK Drinks →EDW on 18 February 2015.) The quantum in dispute is stated as £236,896.43, (which agrees with the tabulated total at §30, accepting the £0.62 difference).

33. The entities involved in the deal chains relevant to this appeal are summarised as follows. It is the respondents' case that the out-of-time deal chains are relevant to their submission that there had been an orchestrated scheme to defraud the Revenue over a period of time (including those periods which are out of time) and of which the appellant was a participant.

VAT periods out of time

34. The time limit issue was a central contention in the course of these proceedings and Mr Thornton's supplemental skeleton argument lodged on 12 May 2022 stated as follows:

> '[9]. … The Appellant can demonstrate that the assessments for 07/13 to 01/15 inclusive were out of time. Under s73(6) VATA 1994, HMRC have the longer of two years from the end of the accounting period, or one year after sufficient evidence of facts to have raised the assessment. The decision was issued on 3 April 2017, longer than two years after the end of each of these periods.
>
> [10] HMRC assert that the last piece of material evidence was received by HMRC on 5 August 2016, …[being] Sage reports and original copies of invoices relating to period 01/16. [The appellant contends that] none of this information related to (and therefore was not material to) periods 07/13 to 01/15. … that HMRC held all relevant evidence of facts they have relied upon in this case for more than one year prior to 3 April 2017. HMRC chose nto to assess those periods, waiting until they could make assessments for later period. In doing so, they exceeded the time limits imposed on them for the earlier periods. Combining those assessments with assessments for later periods cannot reasonably extent [sic] the statutory time limits …'

35. Although Mr Thornton was not engaged to appear for the appellant at the hearing, the time limit issued that was raised in his skeleton argument is fully conceded by HMRC at the opening. While the time limit issue is no longer a live issue in this appeal, the appellant's transactions pertaining to the out-of-time periods remain relevant to HMRC's case that the transactions were connected with an orchestrated scheme to defraud the Revenue.

36. The VAT amounts and the deal chains relating to the out-of-time periods are as follows.

(1) 07/13: Infinity → EDW for £8,171.91.

(2) 10/13: Pachinger → Booze Factory → EDW for £14,980.29.

(3) 07/14: Logical → Gujarr → Golden Harvest → Gempost → EDW for £13,157.86.

(4) 10/14: IK Drinks → Gempost → EDW for £12,067.63.

(5) 01/15: ESL → Maynard Sales → IK Drinks → EDW for £32,911.73.

(6) The total of the out-of-time assessments is £81,289.42.

VAT periods in time

37. As regards the in-time periods, the deal chains and the appellant's position are as follows.

(1) Period 04/15: supplies from IK Drinks and ESL

(a) Deals 1-4 IK Drinks → EDW, there appears to be no contention.

(b) Deals 5-9, ESL → AK Suppliers → EDW: the appellant accepts the accuracy of these deals; but asserts that there was no tax loss because no assessments were issued given ESL was deregistered.

(2) Period 07/15: deals 1-9, ESL → AK Suppliers → EDW; and deals 10-13, Lupt → AK Suppliers → EDW

(a) The appellant accepts the accuracy of these deals,

(b) that there was a fraudulent tax loss, and

(c) that these transactions appear to be part of an orchestrated scheme to defraud the Revenue.

(3) Period 10/15: deals 1-8, Lupt → AK Suppliers → EDW

(a) The appellant does not accept the accuracy of these deals, and

(b) disagree with Officer Bycroft's statement (para 26) where he has reconciled these deals, as the only supplier to AK Suppliers during 10/15 was Lupt Utama.

(4) Period 01/16: deals 1-21, Unknown trader → Phoenix → EDW

(a) The appellant accepts the purchases from Phoenix,

(b) It does not accept that there is a link to a VAT loss, or

(c) If there is a VAT loss that it is fraudulent.

(5) Period 04/16: deals 1-5, Unknown trader → Phoenix → EDW, and deals 6-11, Gempost → EDW

(a) The appellant accepts the purchases from Phoenix; it does not accept that there is a connection to a VAT loss, or if there is a VAT loss that it is fraudulent.

(b) The appellant accepts the purchases from Gempost; it does not accept that there is a link to a VAT loss, or if there is a VAT loss that it is fraudulent.

Fraudulent Defaulters in Deal Chains

(1) Infinity Collections Ltd (Period 07/13)

38. The facts relevant to Infinity as a trader in deal chains related to EDW are as follows:

(1) In 07/13, EDW purchased directly from the Infinity in 5 deals with a total value of £35,554.80, with invoices dated 4, 8, 12, 16 and 22 July 2013.

(2) Infinity was incorporated on 31 January 2012; its directors at all material times were Byarny Rijo Victor Leito, and Miah Salim.

(3) Leito was appointed on 31 January 2012 and resigned on 9 March 2014 whilst Salim was appointed on 20 June 2013 and remains a director.

(4) It was registered for VAT with effect from 1 July 2012 (VRN 135 889 764) as a provider of 'fancy clothes and goods' with an estimated turnover of £110,000.

(5) The registered address for is PPOB was Hillreach in London.

(6) Its first VAT return was not received, and a central assessment was raised. On 25 March 2013, a member of the public telephoned HMRC and said the business was not at its registered address at Hillreach.

(7) Its PPOB was changed to Belvedere, Kent on 10 April 2013

(8) HMRC visited the Belvedere address in Kent, which was a home address and not a business premises. An alternative address in Woolwich was provided, to which HMRC issued a central assessment. Upon receipt of the assessment an unrelated business contacted HMRC and said that Infinity was not known to it.

(9) Infinity rendered late VAT returns for 07/12, 10/12, 01/13, 04/13, and 07/13. Thereafter it did not submit VAT returns. In fact, the returns did not declare over £2.5M of sales from invoices provided by other customers.

(10) On 12 February 2013, a best judgment assessment in the sum of £403,775 was raised for the transactions underdeclared, of which some £10M would appear to have been achieved in the first year of trading.

(11) On 11 June 2013, its PPOB then changed back to Hillreach, London.

(12) On 2 July 2013, its PPOB changed to Croydon in Surrey.

(13) On 25 June 2013, Infinity was deregistered for VAT as a suspected stolen identify/missing trader; that is a hijacked VRN by a fraudulent defaulter.

(14) Infinity was known to HMRC in relation to two criminal operations.

(15) The deals with Infinity undertaken by EDW were conducted after the VAT deregistration of Infinity.

(16) On 19 February 2014, HMRC issued a demand for £2,624,151 of VAT that had been included on invoices that Infinity was not entitled to charge.

(17) On 9 March 2014, Byarny Leito was terminated as director and company secretary of Infinity, but this was not notified to Companies House until 27 June 2014.

(18) In 2014, the registered address changed to 136 Wren path, then to 119 Binsey Walk and then back to 136 Wren Path.

(19) On 30 March 2015, Infinity was wound up on the petition of HMRC.

(2) Pachinger Bros Ltd (Period 10/13)

39. The facts relevant to Pachinger as a trader in deal chains related to EDW are as follows:

(1) On 19 August 2013, EDW purchased from Booze Factory in a deal worth £48,414.60. Booze Factory sourced its goods the same day from Pachinger.

(2) Pachinger was incorporated on 6 December 2012; its director at all material times was Jan Pachinger.

(3) It was registered for VAT with effect from 20 December 2012 as a provider of 'wholesale of hairdressing products and equipment, barber chairs, scissors, machines', etc. with an estimated turnover of £200,000; its PPOB at all material times was in Derby.

(4) Despite rendering sales invoices to Drinks Stop Cash and Carry, it did not submit returns for VAT periods 03/13, 06/13, or a final return, and was assessed for £77,296, £19,771, and £10,975 respectively.

(5) On 8 August 2013, HMRC visited the PPOB of Pachinger, which was a residential address and no one answered. A seven-day de-registration letter was left.

(6) On 16 August 2013, Pachinger was deregistered. It was assessed for the unpaid VAT it had invoiced in a total sum of £108,042, which was not appealed.

(7) Pachinger's debt to HRMC upon liquidation was £252,565.41.

(3) Logical Retail Ltd (Period 07/14)

40. The facts relevant to Logical as a trader in deal chains related to EDW are as follows:

(1) On 18 June 2014, EDW purchased from Gempost. That deal traces from Gempost to Golden Harvest, to Gujarr Ltd, to Logical. Apart from the sale from Logical to Gujarr Ltd, which took place on 11 June 2014, all deals took place on the same day.

(2) Logical was incorporated on 11 April 2012, and its previous name was 'Basement Claim Solutions Ltd'. Both its address and its director's address were registered under 'Abacus Accountants Forward Building' in Slough.

(3) From 11 April 2012, it was registered for VAT with its main trade activity being 'claim solutions', but does not appear to have ever traded in that capacity.

(4) On 15 May 2013, the company changed its name to Logical, which was notified to Companies House on 4 October 2013.

(5) Logical submitted nil returns for 07/12,10/12, 01/13, 04/13, and 07/13. All were submitted late.

(6) On 24 July 2013, HMRC notified Logical of the cancellation of surcharges previously recorded for 10/12, 01/13, and 04/13. The letter was returned marked 'Gone Away'.

(7) On 1 November 2013, Logical replaced its director and changed its PPOB to an address in Sheffield, and notified to Companies house on 13 March 2014, and to HMRC on 8 April 2014.

(8) On 2 July 2014 HMRC invited the director of Logical to an interview in relation its undeclared supplies, but received no response.

(9) On 24 July 2014, HMRC attempted to visit Logical at 3 different addresses in Sheffield associated with the company. No sign of the business operating was found at any of the addresses, and those present denied any knowledge of it.

(10) Between 10 February 2014 and 31 July 2014, Logical issued invoices totalling £24M, none of which were declared to HMRC.

(11) Logical was deregistered on 6 August 2014.

(12) Logical was assessed for sales to Gujarr Ltd between February and July 2014 totalling £28,854,322.03, and an assessment was raised on 1 May 2015 for VAT periods 08/13 to 08/14 in the sum of £4,803,957; the assessment was never paid.

(4) IK Drinks Ltd (10/14 & 04/15)

41. The facts relevant to IK Drinks as a trader and a direct supplier to EDW are as follows:

(1) On 9 October 2014, EDW mad purchases of £33,486.25 from Gempost, which purchased the goods from IK Drinks on the same day.

(2) IK Drinks was incorporated on 8 February 2006; its directors at all material times was Hasan Baig (appointed 1 October 2007 and resigned 1 February 2014), and Aftab Saeed Khan (appointed 1 January 2015).

(3) It was registered for VAT with effect from 1 March 2006 as a provider of 'fast food outlet' with an estimated turnover of £80,000.

(4) Its PPOB at all material times was Unit 3A Bridge Road Industrial Estate, Bridge Road, Southall, Middlesex, and also at Unit 1 Charlton House, Springfield Road, Hayes, Middlesex with two different postcodes (UB4 0JT and UB4 0LG).

(5) Between periods 02/13 and 11/14, IK Drinks claimed input tax of £5,485,279 on the purchase of alcoholic drinks (suggesting a turnover of just under £37.5M in two years). This was denied on *Kittel* basis for the reasons:

(i) All of the deals were undertaken back-to-back within 24 hours.

(ii) IK traded with 15 different suppliers, which all went missing.

(iii) All deals were cash purchases.

(iv) Deals were made on credit with the supplier not being paid until the business had received payment from the customer. This was done without any formal written contracts.

(v) In 2012 and 2013 the business achieved a turnover of circa £8 million without employing a single member of staff, but it purported to make less than £40,000 profit.

(vi) The goods were not insured despite their considerable value.

(vii) IK Drinks achieved its turnover without advertising at all.

(6) Every VAT return was late, and it was on the highest rate of default surcharge. Its final return suggests turnover of £24 million, but a profit of just 0.6%.

(7) On 16 February 2015, it was de-registered on the basis that it had used its VAT registration solely for the purposes of participating in VAT fraud. The deregistration decision gave the additional reasons:

(i) The director had previously been a director of a Missing Trader by the name CINO UK Ltd.

(ii) The director had purchased the business as a fast food retailer but rather than apply for a new VAT Registration, had retained the VRN of the purchased business to bypass HMRC's controls.

(iii) The director had not complied with their other tax obligations and had several outstanding debts.

(5) Elassab Solutions Ltd (04/15 & 07/15 for deals 1-9)

42. The facts relevant to ESL as a trader in deal chains related to EDW are as follows:

(1) On 31 October 2014 and 5 December 2014, EDW purchased from IK Drinks in two deals worth £89,237.51. These deals traced through Maynard Sales Ltd to the defaulter ESL.

(2) Between 1 April 2015 and 10 June 2015, EDW purchased from AK Suppliers in nine deals, which also traced to ESL.

(3) It was incorporated on 8 July 2014; its directors at all material times were Mr Thomas Myers (appointed 27 September 2014) and Mr Isaac Medrano (appointed 6 November 2014), and Dragica El Assab (appointed 15 April 2015) and Mr Pedro Arroyo (appointed 1 May 2015).

(4) Its PPOB at all material times was a flat (No. 91) in Cowley Road, London (and was in the same block as the PPOB of Lupt).

(5) It was registered for VAT with effect from 1 August 2014 as a provider of 'interior designer and decorations of commercial spaces' with an estimated turnover of £80,000.

(6) On 18 January 2016, HMRC issued the following assessments to ELS, not having received the relevant returns:

(i) £467,191 for 08/14

(ii) £1,401,574 for 11/14

(iii) £1,401,574 for 02/15

(iv) £1,968,766 for 00/00 (from 1 March 2015)

(7) On 20 January 2016, one of the purported directors of the company, Mrs Elassab, telephoned HMRC to say that she had been the victim of identify fraud. She had reported it to the police about 18 months ago and had heard nothing back (and she provided a crime reference number). She had not registered the company at Companies House or for VAT. The PPOB was a flat owned by her and let to tenants. Her sister and neighbour collected her post for her and so she had learned of the assessments.

(8) ESL was deregistered as a hijacked trader, and it did not submit any VAT returns at any stage.

(6) Lupt Utama Ltd (07/15 for deals 10-13 & 10/15)

43. The facts relevant to Lupt as a trader in deal chains related to EDW are as follows:

(1) Between 26 June 2015 and 21 July 2015, EDW made four purchases from AK Suppliers. AK Suppliers purchased the goods from Lupt.

(2) In 10/15,, EDW made eight purchases from AK Supplies which were again sourced in turn from Lupt.

(3) Lupt was incorporated on 3 December 2009; its sole director was Mr Lupt Utama.

(4) It was registered for VAT with effect from 1 October 2012 as a provider of 'costume design for film, radio and TV production'.

(5) Between 15 October 2014 and 18 December 2014, three new directors were appointed in addition to Mr Utama. All new directors had resigned by 14 April 2015, when Jamail Singh was also added as a director and resigned again on the same day.

(6) Between 15 May 2015 and 30 October 2015, Lupt supplied AK Suppliers with at least £4.5 million worth of alcohol.

(7) On 9 October 2015, HMRC visited Lupt's PPOB, which was in the same block of flats as ESL's PPOB. HMRC officers observed that the PPOB was a residential address and no evidence that stock was held.

(8) Lupt was left a 7-day deregistration letter, and was deregistered for VAT due to a lack of intention to make taxable supplies.

(9) On 10 October 2015, HMRC deregistered the hijacked VRN of Lupt, and arranged a visit to the alleged customer of Lupt, which was AK Suppliers.

(10) The due diligence documentation held by AK Suppliers did not match the information provided by Mr Utama, such as the place of birth of the supposed Mr Utama being in Romania, which did not match that of the true Mr Utama.

(11) The director of AK Suppliers was introduced to the 'Director' of Lupt by a person at ESL (another missing trader). However ESL shared an address as Lupt.

(12) HMRC assert that the inference to be drawn is that Lupt's mail was stolen by ESL and the company information was hijacked.

(13) On 16 November 2015, Mr Utama, the true director, contacted HMRC and advised that the company was for his services as an assistant costume designer; that he had never traded in alcohol or spirits, and provided evidence of his identity. Mr Utama said that he had been abroad, and when he was charged business rates by the local authority, he became alerted to the fraud.

(14) On 23 February 2016, a dummy VRN was established and a pre-assessment letter issued on 19 September 2016 was in the sum of £3,686,544.12 of VAT which had not been declared. This was based on invoices received from AK Suppliers and other companies covering May to October 2015.

(15) On 8 November 2016, a further assessment for £72,276 from undeclared sales from November to December 2015 was raised.

(16) None of the assessments have been paid.

(7) Gempost Ltd (07/14, 10/14 & 04/16 for deals 6-11)

44. The facts relevant to Gempost as a trader in deal chains related to EDW, and also as a direct supplier to EDW in 04/16 are as follows:

(1) The appellant traded directly with Gempost in 07/14 and 10/14, when Gempost's sales traced back to Logical and IK Drinks respectively.

(2) In 04/16, the appellant made a further six purchases from Gempost worth £107,214.31, which were not declared by Gempost at all.

(3) Gempost was incorporated on 6 May 1988; its directors at all material times was Jagjit Singh Jabble (appointed 28 February 2005, resigned 1 March 2016), and Jaspal and Kulvinder.

(4) It was registered for VAT with effect from 5 June 2000 as a provider of 'wholesale of alcohol' with an estimated turnover of £1 million.

(5) Its PPOB was its accountants at all material times, which was First Floor at 4-10 College Road, Harrow, Middlesex (the same as Phoenix, see §47(3)).

(6) Gempost had no means of storing alcohol as such; goods were shipped from Gempost's supplier directly to its customers. The vast majority of Gempost's trading traced back to defaulting traders.

(7) Gempost was written to in relation to tax losses for trades in 07/11, 10/11, 07/12, 10/12,01/13, 07/13, 10/13, 01/14, 07/14, 10/14, 01/15, 04/15, with a loss to the Revenue of over £710,275.

(8) On 24 August 2016, Gempost was deregistered from VAT.

(9) It did not declare its sales to the appellant during 04/16, or submit VAT returns for 07/16 or 00/00 (its final return).

(10) On 26 September 2016, Gempost was refused its Alcohol Wholesalers Registration Scheme ('**AWRS**') licence to trade wholesale alcohol on the basis that it was not fit and proper to hold such an approval.

(11) In 2017, Gempost was was issued with the following VAT assessments:

(a) in the sum of £3,108,637 on 12 January 2007;

(b) in the sum of £84,306 on 22 February 2007;

(c) in the sum of £32,699 on 5 June 2017.

(12) Gempost was wound up on the petition of HMRC on 15 May 2017, with a debt to HMRC of £182,635.

(13) Gempost failed to provide relevant invoices to HMRC which showed its sales to the appellant. Accordingly, HMRC assert that the output tax charged for 04/16 was not declared by Gempost.

The Appellant's Suppliers

(1) Booze Factory (UK) Ltd (10/13)

45. The facts relevant to Booze Factory as a direct supplier to EDW are as follows:

(1) On 19 August 2013, EDW purchased from Booze Factory in a deal worth £48,414. Booze Factory sourced the goods the same day from Pachinger.

(2) Booze Factory was incorporated on 15 September 2005; its director at all material times was Jaswinder Singh Doal (appointed 4 May 2011 and remains the director).

(3) Its previous company name was Dura Corporation Direct Ltd and changed to Booze Factory on 9 May 2011.

(4) It was registered for VAT with effect from 1 January 2012 as a provider of 'wholesale of wine and beer' with an estimated turnover of £100,000.

(5) Its PPOB at all material times was Unit 3 Rolfe Street, Smethwick, West Midlands B66 2AR.

(6) On 20 August 2013, 65 pallets of beer and cider originating from Booze Factory was seized from the appellant, because no excise duty had been paid on the goods. There were discrepancies between the explanations provided by the delivery driver, the warehouse manager, and Mr Singh Doal (the director of Booze Factory).

(7) Notwithstanding the seizure event in August 2013, EDW continued to trade with Booze Factory, which led to the *Kittel* denial of input VAT claims in period 10/13 as respects the appellant's purchases from Booze Factory.

(8) On 24 November 2015 Booze Factory was assessed for VAT of £123,325 in relation to input tax claims for periods 11/13, 02/14, and 05/14 on *Kittel* basis.

(9) It appealed against the *Kittel* denial out of time, and was refused leave to appeal by the Tribunal by decision dated 18 August 2017.

(10) Booze Factory's agent was Vincent Curley, whose son Mark Curley completed all of the appellant's due diligence provided on other counterparties.

(2) AK Suppliers Ltd (04/15, 7/15, & 10/15)

46. The facts relevant to AK Suppliers in EDW's transactions are as follows:

(1) AK Suppliers supplied goods to the appellant in 26 deals across P04/15, 07/15, and 10/15, with an attempted reclaim of £132,395.84 input tax.

(2) AK Suppliers purchased first from ESL, (which replaced IK Drinks in the transaction chain, and had the same director as AK Suppliers). It then purchased from Lupt (after ESL was deregistered).

(3) It was incorporated on 13 April 2012 by the Register of Companies for Scotland; its previous name was Aircondirect9 Limited.

(4) It was registered for VAT with effect from 15 August 2012, and its business activity was 'selling of consumer electronics to retail & wholesale trade & import and export of consumer products' with an estimated turnover of £100,000.

(5) Its registered PPOB was at Luke Place, Broughty Ferry, Dundee from 28/08/2012 to 17/09/2012.

(6) Its director at the time of incorporation was Mr Zuber Karim, who resigned on 20 June 2014.

(7) Mr Aftab Saeed Khan was appointed sole director on 24 September 2014, and changed its name to AK Suppliers. (Mr Aftab Khan was also director of IK Drinks from 1 January 2015, and 'AK' would seem to be a reference to the initials of Aftab Khan.)

(8) The name change to AK Suppliers was reported on 21 May 2015. A change of business activity to 'Wholesale of wine, beer, spirits & other alcoholic beverages' was notified to HMRC on 7 September 2015.

(9) Its PPOB changed to Unit 16, Raleigh Court, Priestley Way, Crawley.

(10) Before its trade with ESL and Lupt, AK Suppliers traded with Serendipitous Supplies Ltd, (which was identified by HMRC as a fraudulent trader). Serendipitous was deregistered before the trade took place.

(11) All of AK Suppliers' trade was therefore with fraudulent defaulters.

(12) AK Suppliers was considered to have acted as a blocker to prevent transaction chains being traced beyond it.

(13) It was deregistered from VAT on the basis that it was using its VRN for abusive purposes, and denied £1,444,973 on *Kittel* basis.

(14) On 22 September 2015, it was deregistered for VAT.

(15) AK Suppliers was assessed for a total of £1.9 million VAT on 22 March 2016, and 4 November 2016.

(16) On 22 August 2016, a Notice of Winding up was issued by HMRC and on the same date the relevant court ordered that AK Suppliers be wound up.

(3) Phoenix Wholesalers Ltd (01/16 & 04/16 deals 1-5)

47. The facts relevant to Phoenix as a supplier to EDW are as follows:

(1) The appellant purchased from Phoenix in 21 deals in 01/16, reclaiming £67,039 of input tax, and 5 deals in 04/16, reclaiming £16,018 of input tax.

(2) Phoenix was incorporated on 4 March 2010 under the name Eitmas Clothing Limited'; its directors at all material times were Mohammed Ali Zaheer (appointed 29 June 2010), and Sukhdeep Singh Mason (appointed 1 October 2015).

(a) It was registered for VAT with effect from 1 July 2010 with a stated business as an 'importer of clothing' with an estimated turnover of £50,000.

(b) It changed its name to Phoenix Wholesalers Ltd on 6 July 2010.

(c) On 14 December 2011, it changed its trade class to wholesale of alcohol beverages.

(3) Its PPOB at all material times was at 10 College Road, Harrow, Middlesex (the same as Gempost §44(5)).

(a) Its PPOB was at the same address as Just Beer Ltd and Gempost.

(b) Phoenix shared the same PPOB with IK Drinks.

(4) On 19 January 2012, HMRC visited Phoenix, which had sublet its office space to IK Drinks.

(a) Detained goods had been removed from the warehouse despite detention notices having been issued on 22 December 2011.

(b) The director of Phoenix said that the goods belonged to Gempost; that the warehouse was not used for storage as goods went directly to the customer.

(c) As it was not possible to establish duty status, the detained goods were seized.

(d) On 6 November 2013, Phoenix was issued with a penalty in the sum of £59,249.

(e) On 30 November 2013, Phoenix was issued with a notice of potential excise assessment in the sum of £296,247 in respect of the unpaid duty on the detained goods.

(5) At another visit in December 2012, it was established that Phoenix had one customer and one supplier, and dealt only in cash.

(a) On 30 April 2014, it was confirmed that Phoenix still only had one supplier and one customer. The goods were delivered straight from its supplier, to its customer's customer. In other words, the goods went through four companies in exactly the same way for each transaction.

(b) Between 4 October 2012 and 2 June 2015, Phoenix was issued with Veto and Tax Loss letters in relation to 6 different suppliers.

(c) Between 4 June 2015 and 29 July 2015, Phoenix had one supplier: AK Suppliers.

(d) At a visit on 10 September 2015, it was established that Phoenix had identical transaction chains to IK Drinks.

(e) On 29 September 2015, it was confirmed that AK Suppliers were still Phoenix's only supplier.

(6) Phoenix's VAT returns show trading running to many millions by 2013.

(a) The turnover then receded to hundreds of thousands from 2014-15.

(b) In the period 01/16, when Phoenix started trading with the appellant its trade increased to almost £5 million in turnover.

(7) On 12 February 2016 Phoenix was deregistered for VAT on the basis that it was using its VRN solely or principally for a fraudulent purpose.

(a) It was issued with input tax denials on the *Kittel* basis for 07/15, and 10/15 totalling £351,352.

(b) It did not respond to HMRC's request for its VAT records for 10/15, 01/16 and the final return of 23 August 2016;

(c) On 24 November 2016, it was assessed for £1,295,133 as the remaining balance of input tax for 10/15 and 01/16, including supplies made to the appellant.

These assessments were subsequently withdrawn as Phoenix had been dissolved by the time the assessments were raised.

History of Mr Johal's directorships

Previous convictions

48. Mr Johal has the following convictions, both in 1997: (a) perverting the course of justice and (b) obtaining property by deception.

Previous directorships

49. Mr Johal was or is a director of the following companies:

(1) Baba Cash & Carry Ltd ('**Baba C&C**')

(2) Baba Wholesale Ltd ('**Baba Wholesale**')

(3) Baba Holdings Ltd ('**Baba Holdings**')

(4) Baba Energy Trading Ltd ('**Baba Energy**')

(5) Baba Retail Ltd ('**Baba Retail**')

(6) Waterloo Food and Wines Ltd ('**Waterloo F&W**')

(7) Trade Release Ltd (i.e. the appellant, company purchased from a Mr Bassi)

(8) AOC Distributors Ltd ('**AOC**')

Baba C&C's alcohol seizure & Kittel denial

50. Baba C&C traded in alcohol and mobile phone. There were previous occasions when HMRC intervened with alcohol seizure and *Kittel* denial of input VAT claims, and HMRC decisions in both instances were appealed to the Tribunal.

(1) In July 2003, it had non-duty paid alcohol seized from its premises, and was assessed for excise duty in the sum of £154,000. HMRC's decision to assess the unpaid excise duty was upheld on appeal to the Tribunal, wherein Mr Johal gave evidence.

(2) Baba C&C received correspondence from HMRC relating to the impact of MTIC fraud, and was notified as follows:

(a) 11 April 2003 – a budget notice regarding joint and several liability and the requirement for evidence for input tax.

(b) 28 July 2003 – a letter from HMRC regarding MTIC fraud.

(c) 11 November 2006 – a letter on the VAT validation checking procedure.

(d) On 1 December 2006 – a warning letter about MTIC fraud.

(e) 29 May 2007 – notice regarding joint and several liability and reverse charge.

(f) 25 July 2007 – Notices 726 and 700/52 issued during a visit by HMRC.

(g) 31 March 2008 – a *Kittel* denial decision in the sum of £106,400 in respect of mobile phones.

(3) Mr Johal was present at a visit by HMRC to Baba C&C on 25 July 2007, which resulted in a *Kittel* denial in respect of mobile phones. Baba C&C was assessed and denied input tax on the basis that it knew or should have known its transactions were connected with the fraudulent evasion of VAT.

(4) Its appeal of the *Kittel* denial decision was struck out by the Tribunal. Baba C&C was subsequently liquidated following the *Kittel* denial and is now dissolved.

Baba Wholesale

51. Baba Wholesale, Baba C&C and indeed the appellant (EDW) were closely associated.

(1) Mr Rajdeep Singh Johal, who is Mr Johal's brother, was its director. Mr Rajdeep Johal was also a director of Baba C&C.

(2) Mr Johal was a director of Baba Wholesale, along with his brother.

(3) It applied for a VAT number with effect from 1 January 2007.

(4) It had the same correspondence address as that given for EDW (in Cranford), and also purported to trade in alcohol.

(5) It was assessed in the sum of approximately £878,000 for under-declaration of VAT, and a penalty in the sum of £703,000 under s 60 VATA for '*VAT evasion: conduct involving dishonesty*' (since superseded by Sch 24 FA 2008 penalty regime).

(6) On 21 June 2012, Baba Wholesale's VAT registration was cancelled.

AOC Distributors

52. The facts as concerns AOC relevant to our consideration are:

(1) AOC was incorporated on 5 August 2014, with its PPOB stated to be at a Number at Byron Avenue in Hounslow.

(2) On 19 November 2014, AOC applied for VAT registration. The named applicant on the VAT application was Harkeerit Singh Mandair [B12/227].

(3) Mr Johal is the majority shareholder in AOC and the only person with significant control (over 75% of the shares).

(4) AOC traded as 'Everyday Cash & Carry' and traded almost exclusively with EDW.

(5) On 13 March 2017, AOC was denied its input tax for periods 04/16, 07/16 and 10/16 on *Kittel* basis.

Waterloo Food and Wine Ltd

53. Mr Johal's wife, Mrs Jagdeep Kaur Johal, who did not have any experience in the alcohol trade, was its director, along with Mr Johal. The company's first VAT return was for the period 10/15. Shortly after HMRC identified and visited Waterloo F&W on 8 February 2016 for the purpose of post-registration MTIC Assurance, it ceased to be VAT registered.

Due Diligence on suppliers

Notice 726 guidance

54. Mr Johal has been issued with MTIC Awareness Letters and Notice 726 on previous occasions before the deal chains in question. Notice 726 gives traders clear guidance on the types of due diligence checks which are likely to be appropriate, such as:

(1) Obtaining certificates of incorporation and VAT registration certificates;

(2) Verifying VAT registration details with HMRC;

(3) Obtaining letters of introduction on headed paper;

(4) Obtaining some form of trade reference;

(5) Obtaining credit checks or background checks from an independent third party;

(6) Insisting on personal contact with a senior officer of the counterparty;

(7) Visiting premises wherever possible;

(8) Obtaining the prospective supplier's bank details and checking they were consistent with the supplier;

(9) Checking details provided against other sources;

(10) Obtaining documentation: contract, delivery note, insurance.

Due Diligence Reports furnished

55. Mr Johal stated in his witness statement in relation to the due diligence files of some of EDW's transactions which received *Kittel* denial.

> '[13] … I learned from the previous issues with phones that I do not have the right mentality to sit down and vet these companies myself to HMRC's satisfaction. I thought by appointing experts to do that for us we would have mitigated the risks. These experts knew what our business was and I expected that they would not pass the company if there were features which should cause alarm or would mean our buying from them did not make sense. I did additional steps myself, for example I visited the offices of AK Suppliers and some others that were reasonably local myself and did not see anything to concern me.'

56. The appellant has only lodged 3 due diligence reports for three counterparties. In evidence, Mr Johal claimed that he has in his possession many more due diligence reports on other suppliers which he could furnish. The Tribunal did not give permission for further reports to be lodged, since it was well after the close of the List of Documents having been agreed by the parties. We also have regard to the fact that the appellant was fully represented by Mr Thornton at the time when the List of Documents was drawn up, and indeed Mr Thornton was still engaged for his representation all the way when the Documents Bundle (of 12 volumes) was lodged by HMRC. In any event, it is sufficient for the purpose of evaluating the quality of the due diligence exercise that had been undertaken by treating the 3 lodged reports as samples which can inform the Tribunal of the generic quality of such exercise.

57. The due diligence reports are on (a) Gempost, (b) IK Drinks, and (c) AK Suppliers. All three reports were completed by a third party 'The Due Diligence Exchange Ltd' ('**DDE**'), and signed by Mark Curley, who is the son of Vincent Curley. Vincent Curley acted as a representative for Gempost in relation to its own *Kittel* denial decision, and for Phoenix and Booze Factory. The contents of the reports read mostly as a critique of HMRC practices, and are woefully lacking in any substantive details to evidence any genuine and credible attempt to establish whether a potential counterparty is a legitimate trader.

58. In respect of Gempost, the due diligence report states:

(1) That Gempost does not advertise, and all trading is done via word of mouth; it has just two full-time members of staff, yet the estimated annual turnover is £4,000,000.

(2) That a financial assessment of Gempost cannot be made as receipt of references are awaited. These references do not appear to have ever been received, yet the appellant traded with Gempost anyway.

(3) The site visited (described as a trading address) appears to be an office, with no evidence of premises able to store alcohol.

(4) It is recorded that Gempost's customers and suppliers arranged transportation and insurance of the goods.

(5) No credit check has been carried out in the due diligence exercise.

(6) By the time the later deals with Gempost were transacted by the appellant, this Gempost report was almost two years old, and no renewed due diligence appears to have been done at any point.

(7) The Report Review form is left blank.

59. In respect of the report on IK Drinks, it is noted that:

(1) The report actually states it is unable to provide a financial assessment as references are awaited, which do not appear to have ever been received. Notwithstanding the absent references, the appellant traded with IK Drinks.

(2) The only employee is the director, and trade is all by word of mouth, yet the annual turnover is stated at £14,000,000.

(3) The warehouse photographs show pallets and a forklift truck. A trade reference is from Phoenix Wholesalers, which appears to share the same premises as IK Drinks.

(4) The appellant later traded with Phoenix, (also a defaulting trader).

(5) No credit check is included; the Report Review Form is blank.

60. The report on AK Suppliers is dated 3 February 2016, long after all the deals with AK Suppliers had taken place (i.e. between 3 March 2015 and 23 September 2015). In addition,

(1) The FITTED Due Diligence Information section states that AK Suppliers will deliver goods to customers, including the appellant, either using their own vehicles or a haulage firm, and have their own insurance.

(2) However, elsewhere in the report it is said on multiple occasions that either AK Suppliers' customers or suppliers will provide the transport, so that AK Suppliers do not need their own insurance, and specifically that the appellant would collect the goods.

(3) The Business Information Form states that AK Suppliers commenced trading in January 2015, just 3 months prior to the first deal. The director, Mr Khan, had previously worked for the council for 25 years. (Notably therefore, he had little to no experience in the alcohol wholesale sector yet managed to source the goods at a better price than the appellant, who had a much longer history of trade.)

(4) The VAT certificate dated 28 May 2015 recorded in the report shows the PPOB as Dundee and business activity as Wholesale of radio, television, and other electrical supplies. (The notable discrepancy in the commodity supposedly to be traded by AK Suppliers as per the VAT certificate from the actual trading of alcohol receives no comment in the report.)

(5) It is noted that only verbal terms and conditions are in place, (when all the deals are into thousands of pounds).

(6) The Report Review and Risk Assessment Form are not completed.

Appellant's oral evidence

61. In cross-examination, Mr Johal was asked a host of questions of his trading practices, and of the numerous entities he came to be associated with, and his experience in wholesale trading of alcohol, and previous incidents of *Kittel* denial. Some of the questions relevant to our consideration of his credibility as a witness, and his state of knowledge in relation to the fraudulent evasion of VAT in EDW's transaction chains are summarised below, the references to documents in the bundles are in the format of [Bundle number/page number within bundle].

Pattern in trading practices

62. Mr Johal has been trading through various companies since the 1990s, and the questions were put to him as regards his experience in alcohol trading and his awareness of VAT fraud.

(1) Instead of having 'decades' in alcohol trading through the different shops he has had, Mr Johal asserted that he only had 'two stores that sold alcohol, and only for a few years' (not decades); and that he traded in grocery, not just alcohol.

(2) When asked which two stores he meant, Mr Johal stated that it was Baba C&C and EDW being the two stores he has had that traded in alcohol.

(3) When cross-examined on whether Baba Wholesale was one of the stores associated with him that also traded in alcohol, Mr Johal firmly denied any involvement with Baba Wholesale, and asserted that it was his brother's company and not his. However, in his witness statement, Mr Johal stated: '*It is correct that I was a director of Baba Wholesale, but I was not responsible for any losses there*.' Mr Johal denied that he had been a director of Baba Wholesale, but no satisfactory explanation was given for the contradiction between his oral evidence and his written statement regarding his role in Baba Wholesale.

The purchase of the appellant

63. When asked about his purchase of the appellant company from Mr Bassi, Mr Johal said that Mr Bassi was 'a friend', and 'the main reason was to save time' to buy 'a ready-made company with a VAT number which is dormant'.

(1) Mr Johal was referred to: (a) an email by Mr Bassi to HMRC dated 29 March 2012 [B12/65] in which Mr Bassi gave an explanation to HMRC's query of Bassi's VAT returns for its claim of input tax on fuel, and Mr Bassi informed HMRC then that the appellant was trading in 'high end shoes', and he had to travel up and down the country as a sale agent; and (b) the bank statement with Barclays for the appellant (as Trade Release Ltd) in January 2012, which shows 4 transactions falling within the region of £65,000 to £69,000 each, being the buy and sell of sports cars (such as Porsche), and (c) that the appellant company had no retail premises and was registered from a residential address. Mr Johal replied that what Mr Bassi did with the company before he took over was 'none of [his] concern'.

(2) When asked about the due diligence he would have carried out in purchasing the appellant, Mr Johal stated that Bassi's company was 'dormant' and 'not trading' and 'no liabilities' and therefore it was not necessary to carry out due diligence. Mr Johal also said, because Mr Bassi is 'a personal friend', it is 'not the kind of thing [i.e. due diligence] you do with a personal friend'.

(3) Mr Johal said in evidence that it was important to him that the appellant company was dormant and had no debts. He was then referred to the letter to HMRC dated 5 September 2012 [B12/82] where Mr Bassi stated: '[Mr Johal] was fully aware of all previous matters and took the company with its outstanding liabilities of VAT and other bills, which I understand he has paid. However HMRC keep writing to me …' No satisfactory explanation was given in reply of the obvious contradiction to his evidence.

(4) HMRC kept writing to Mr Bassi because Trade Release had compliance issues, and when asked whether he was aware of the compliance problems, Mr Johal replied: 'If I had known that he had problems with HMRC, I would look for alternative.'

(5) It was put to Mr Johal that the key to him in purchasing Trade Release was the VAT number. Mr Johal did not dispute, and said that 'HMRC took up to 6 months to issue a VAT number'.

The trading practice of EDW

64. Mr Johal was cross-examined on the modus operandi of EDW, and his replies included:

(1) That EDW was run as 'a shop, convenience store'; 'I can't remember if I keep work diary'; 'I concentrate on what needs to be done'; 'my active role in running the business is to use my expertise'; 'deliveries are prepared by staff'.

(2) When asked who would be doing the paperwork and be on the keyboard, Mr Johal replied: 'can't remember who he was; Vivek – can't remember his surname, Finlay, Raj, A girl'—'three or four staff'.

(3) When asked who would be replying to customers' emails, the reply was: 'We never received any emails from customers'; 'suppliers – some of them.'

Baba C&C's Kittel denial over mobile phone deal

65. Baba C&C was issued with a Warning Letter dated 1 December 2006 on MTIC fraud, addressed to Mr Johal as director of Baba C&C, and provided detailed information on what checks need to be carried out and for VAT numbers to be verified by the designed VAT office in London (fax number given).

> 'When verifying the VAT status of a new or potential customer/supplier the information provided should include the following:
>
> - Name of the customer/supplier
> - Their VAT Registration Number
> - Their contact numbers including live land line, mobile numbers, fax numbers and email address.
> - Copies of supporting documents, ie VAT certificate, letter of introduction, certificate of incorporation etc.
> - The directors details and/or responsible members
> - Whether they are buying or selling goods
> - The nature of the goods
> - The quantities of the goods
> - The value of the goods
> - Their bank sort code and account number
> - Vehicle registration details
> - I would also ask that you forward on a monthly basis a purchase and sales listings with the identifying VAT Registration Numbers against suppliers/customers.'

66. Some eight months later, HMRC visited the premises of Baba C&C. In evidence, Mr Johal was taken to the 'MTIC Post-reg Activity Report' recording the visit by HMRC to Baba C&C ('**BCC**') on 25 July 2007, which lasted for two hours from 10:55 hrs to 13 hrs, and Mr Johal ('**JSJ**') was present, along with Raj Shah ('**RS**') (Accountant/Auditor) and Vivek Ballachanda (Bookkeeper). The purpose of the visit was noted as a 'Broker visit' and the VAT period examined was 04/06, in which there was a repayment claim of £102,000 related to a deal in purchasing mobile phones. The report contains the following:

(1) JSJ stated that they had recently formed a company called Baba Retail Ltd ('**BRL**'), with a view to opening a chain of off licences which BCC would supply to; JSJ is the sole director of BRL, which will source goods from other wholesalers as well. RS estimated the first VAT return for BRL will be a repayment of about £15K.

(2) HMRC Officer Barnwell asked if there had been any further trade in mobile phones since 2003, JSJ said yes one wholesale export deal in April 2006. Barnwell said you have had letters in the past about mobile phone fraud, JSJ said 'yes', being a £600,000 Deal in 04/06 giving rise to a repayment claim of £102,000 purchased from one supplier.

(3) Lloyds TSB froze the account and held the funds for 2 weeks. The deal was sourced and they received the money up front from their customer before releasing the goods and paying the supplier.

(4) HMRC officer Cheema asked what the inspection company actually did. JSJ: 'We just pay them to check the phones were there.' JSJ confirmed that no check was carried

out on the IMEI numbers of the phones, that he had no previous experience trading in mobile phones; that the deal was arranged by an employee who had left BCC.

(5) When Cheema asked about the specification of the phones, JSJ replied that they were 3-pin, while in fact the phones were manufactured in Finland as 2-pin as per the inspection report, and were purchased from a UK company as a 2-pin and sold to Germany as 2-pin; HMRC queried why the deal was sourcing 2-pin from a 3-pin country.

(6) When asked about the due diligence checks carried out using Equifax or Veracis on your customer and supplier in relation to the mobile phone deal, JSJ said no credit checks were done either end as they are too expensive, even though JSJ accepted that it was a 'very high value transaction'.

(7) HMRC officers reissued 'Statement of Practice', Notices 726 & 700/52; discussed reverse charge during the visit.

67. The input tax claim for the mobile phone deal by Baba C&C was denied on *Kittel* basis. In cross-examination, Mr Johal was asked:

(1) That he must be familiar with PN 726 on MTIC fraud following the 2007 visit. JSJ first replied: 'No, *not generally* familiar with MTIC'. When pressed about being familiar with the contents of PN 726, he confirmed: 'Yes, I am generally familiar with the notice.'

(2) As to the circumstances that a cash and carry business should be trading in mobile phones, JSJ replied that it was to 'diversify into grocery and fresh food', and 'not just alcohol cash and carry' (which was not really answering the specific question put to him).

(3) When referred to the VAT application of BCC being for the 'wholesale of beers, wines, spirits and soft drinks' and that there was no mention of trading in mobile phones, JSJ replied that it was 'a fairly new industry – a lot of shopkeepers adding the mobile phones'; that it was 'a small display' in a convenience store; and 'every shop has a small corner with the chargers, air-pops, top-up vouchers'; it was 'like a convenience thing'.

(4) When asked why he would be trading in such high value transaction without previous experience, JSJ said it was an 'up and coming' trade, and it was 'attractive to get into it'.

(5) When asked why he decided to get into it in 2005-06, JSJ replied that 'he would have started much earlier if he had known about it'

(6) When asked if he was aware that 2005-06 was a 'boom time for MTIC' in mobile phone trade, JSJ replied: 'Yes, it is common knowledge in the industry.'

(7) When asked that it made no sense to sell to UK customers (a 3-pin country) the 2-pin brand new phones in the deal, JSJ replied that 'people from abroad would buy it', or one can 'buy an adaptor'.

68. The *Kittel* denial letter of 31 March 2008 to Baba C&C is 5 pages long, and covers the evidence of Baba C&C having an awareness of MTIC fraud in some detail before entering into the mobile phone deal, such as:

> 'There is evidence to show that at the time of the deal Baba had an awareness of MTIC fraud.
>
> - In July 2003, a standard Redhill letter was issued outlining due diligence, the role of Redhill, verifying VAT numbers and the high risks of MTIC fraud.
> - In April 2003, a warning letter was issued regarding Securities, Joint and Several liability and evidence of deduction of Input Tax.

- In May 2003, a further letter was issued requesting that Baba verify the details of potential wholesale suppliers/customers to guard against MTIC fraud.
- Baba was given 2 veto letters during a visit in May 2003 informing that 1 trader has been deregistered and that the other trader had had its VAT number hijacked to facilitate MTC fraud; and
- The dangers of MTIC fraud were discussed, along with due diligence, Joint and Several liability and third party payments at visits to Bab prior to the period this deal took place.'

Baba Energy Trading

69. In evidence, Mr Johal was asked whether the commodity intended to be traded via Baba Energy was 'carbon credit', and he replied that it was for 'renewable solar panels'. When asked why he would be thinking of trading in solar panels when he had no previous experience in that sector, he modified his reply to say that it was 'to install' solar panels.

Baba Wholesale's VAT registration to replace Baba C&C

70. The contradictions in Mr Johal's evidence as regards some basic facts of his role in Baba Wholesale are as follows:

(1) When asked if he was a director of Baba Wholesale, and he replied: 'No – never'. This denial plainly contradicted what he stated in his witness statement:

> '[21] It is correct that I was a director for Baba Wholesale, but I was not responsible for any losses there. ...'

(2) Despite the written statement, Mr Johal continued to assert that his brother was the only director; that his brother learned the trade from him; but that he was not a director of Baba Wholesale; that it was 'an error in the printing of the witness statement'. When pressed to explain the contradiction between his oral assertion that he was not a director and the written statement that he was a director, Mr Johal said that he thought he was 'a director in the background'.

(3) It was highlighted in evidence that Baba Wholesale applied for VAT registration on 21 February 2006, and was registered for VAT on 1 January 2007 [B12/205] with an estimated turnover of £4.5 million.

(4) The VAT registration of Baba Wholesale was exactly one month after the issue of the Warning Letter to Baba C&C, and that Rajdeep Johal (Mr Johal's brother as the named director of Baba Wholesale) had the same address as Mr Johal.

(5) It was put to Mr Johal that the timing of Baba Wholesale's VAT registration was not a coincidence, but prompted by the Warning Letter from HMRC served on Baba C&C one month prior, which meant that Baba C&C was in the attention of HMRC.

(6) It was also put to Mr Johal how a new business would be expected to generate a turnover of £4.5 million in the first year of trading, to which Mr Johal replied that even a small shop could turn over £10,000 to £15,000 a week, and in excess £1million a year.

The appellant to replace Baba Wholesale

71. Baba Wholesale was deregistered by HMRC by letter dated 21 June 2012, with a VAT debt of £380,057.55. In June 2012, Mr Johal acquired Trade Release Ltd from Mr Bassi.

(1) When asked if the timing of the purchase of Trade Release for a 'new' VRN was prompted by the deregistration of Baba Wholesale, so as to replace the lost VRN, Johal replied: 'At no point did I deny the fact that I took over the company in June 2012.'

(2) On 24 October 2012, the appellant's PPOB was visited unannounced by HMRC for 'Post-registration MTIC Assurance' reasons between 11:48 to 11:54 hours, and Mr Johal was present; HMRC concluded the short visit by indicating that a meeting would be arranged with the director. When HMRC telephoned Mr Johal at 14:50 hrs the same day to arrange a meeting, Mr Johal got 'a bit aggressive' (per note of phone call [B12/93]), and said he would call HMRC back, but that did not happen. HMRC's repeated calls to Johal were not answered either.

(3) On 2 November 2012, HMRC invited Johal to a meeting on 15 November 2012 at their Uxbridge office, and to call to re-arrange if he was unable to make the appointment. In the absence of any response, HMRC would de-register the appellant.

(4) On 6 February 2013, Johal phoned HMRC to request the appellant's VRN to be reactivated as he was looking to do a deal. The reactivation happened at some point after the call. Mr Johal's take on the reactivation was that he had received 'authorisation from HMRC to trade'.

(5) On 15 April 2014, an announced MTIC Assurance Visit took place at EDW's PPOB at 75 Waterside Trading Centre, Hanwell, (9,000 to 10,000 square feet in size). Mr Johal was present with Raj Shah (accountant). MTIC Awareness Letter was issued.

(6) It was noted during the Assurance visit that the appellant did not 'have a WGWR/REDS etc' [Wigan/Redhill VAT office verification]. The appellant purchased stock from Bonds warehouses such as Seabrooks.

(7) The question was put to Johal that Phoenix, IK Drinks, AK Suppliers, Infinity, etc. were neither Bonds nor large national suppliers, and if the appellant had bought from national wholesalers, such as Bottleneck (Broadstairs, Kent) as per purchase orders exhibited with Johal's witness statement, the issue of defaulting traders would not have arisen. Johal did not reply to the question directly, but agreed that the deals under appeal were not from 'large national suppliers'.

(8) Johal was referred to what his accountant Raj Shah stated during the VAT visit, that the appellant 'is making losses'; 'the expenses are too high on the staff side', and 'the margins have been too low'. The question was put to Johal why the appellant was trading with such low margins, instead of answering the question, Johal said that HMRC were making assumptions and putting words in his mouth, and he had to be reminded that those were the very words of his own accountant spoken in his own presence.

(9) On 16 April 2014, EDW was issued with two Veto Letters in relation to its transactions with Easy Services (UK) Ltd (VRN cancelled from 24 January 2014), and Infinity (VRN cancelled from 25 June 2013), Johal was asked whether he became concerned with the type of transaction EDW was doing as it was the same sort of Veto Letter received by Baba C&C. Johal replied: 'Not exactly; these two letters were informing EDW of other traders.'

AOC Distributors Ltd to replace EDW

72. AOC was incorporated on 5 August 2014, and lodged its VAT application on 19 November 2014. It traded as 'Everyday Cash & Carry', and almost exclusively with the appellant as 'Everyday Wholesale'. The questions put to Johal in relation to AOC included:

(1) The timing of AOC being incorporated 3 months after the MTIC visit of EDW and the issue of the Veto Letters to EDW in April 2014 was no coincidence, and that was to form a new company with a new VRN because HMRC had become aware of EDW's transactions with fraudulent traders. Johal denied that the incorporation of AOC was prompted by the Veto Letters served on EDW, and said he was setting up a company

'different from Everyday Wholesale'; that it was a 'franchise' to 'take on partners buying into the company'.

(2) On 13 March 2017, AOC was issued with a *Kittel* denial in relation to 4/16, 7/16, and 10/16 of input VAT totalling about £97,970. When asked whether this was 'lightning flashing for the third time', Johal replied: 'This thing is part and parcel of trading'; you 'need a crystal ball, super power to avoid fraud'; 'there is only so much' a trader can do.

(3) When asked that his 'fingerprint could be found on companies connected with *Kittel* denials', Johal replied: 'yes', but it was 'a small part of what I am doing is wrong', and asserted that the majority of his trading transactions were not connected with MTIC.

On dealing with suppliers

73. In cross-examination, various questions were put to Mr Johal in relation to the notable absence of any evidence in respect of (a) negotiation for prices before entering into a deal, (b) stocklists being carried by the suppliers in the deal chains in question, (c) advertising being undertaken by the suppliers, (d) written contracts for the deals in concern, or (e) overarching contracts with the suppliers in question. Mr Johal's various replies are:

(1) When asked what evidence he could show for the claim in his witness statement that he 'could negotiate better prices', he said he had no legal representation to produce the evidence.

(2) As to the existence of written contracts, he said that there was 'no need' for contracts, as it was 'a close group of customers and suppliers/shopkeepers'; that it was all by 'words of mouth'; that he made personal visits to shopkeepers (i.e. owners of corner shops a EDW's customers).

(3) When pressed for a yes/no answer regarding stocklists, he said 'in some cases, yes'.

(4) When pressed for a yes/no answer regarding written contracts for individual transactions, he first said: 'they don't exist', and then varied to: 'can offer something in the morning' [i.e. at next day's hearing].

(5) In relation to over-arching contracts with suppliers, he said: 'No, no.'

(6) When reminded of the 2008 *Kittel* decision for Baba C&C in which it was clearly stated that not having written contracts is an indication of fraud, he replied: 'it is only relevant when dealing with suppliers who are the manufacturers.

(7) When asked what insurance the appellant took out, Mr Johal replied: 'contents, vehicles, building' but no insurance on goods when dealing with the suppliers in question

(8) When asked about the series of suppliers: IK Drinks, Gempost, AK Suppliers, Phoenix, when one supplier would stop supplying one day and another supplier spring up to take its place, that it had not caused the appellant to ask questions about the status of these suppliers, Mr Johal had no cogent reply.

(9) When asked about the absence of delivery notes for the deal chain transactions, the reply was: 'it was an internal policy' [not to issue delivery notes presumably].

(10) When asked about the two sets of invoices/purchase orders, for identical items:

(a) A purchase order by EDW dated 09/07/2015 to AK Suppliers Ltd [B12/853] matched exactly the items on the purchase order from AK Suppliers to Lupt [B12/854] dated 15/07/2015.

(b) A Purchase order by AK Suppliers to Lupt (with manuscript writing of '*Everyday*' on the face of it) [B12/854] for a total of £37,001.83 dated 15/07/2015

for identical items, as the invoice from Lupt to AK Suppliers [B12/855] dated 15/07/2015 for £37,001.83;

(c) An (unheaded) invoice addressed to Lupt [B12/856], (but would appear to be intended to be addressed to EDW according to the invoice number '*EVRDY 15715*') for identical items, (presumably from AK Suppliers).

(d) When asked why the invoice for goods buying for EDW was addressed to Lupt, Mr Johal said that it was 'a serious error' but 'not on my part'.

(e) When pressed why if this being a serious error, no questions were asked by the appellant, Mr Johal had no reply.

74. Mr Johal was taken through the due diligence reports prepared by Mark Curley in cross-examination, in that a reasonable trader would have queried the lack of credit rating of the supplier, the absence of trade references, stocklists, insurance, delivery arrangements and so on. Mr Johal's stock reply to most of these questions was to say that HMRC should have done more to protect other traders (like EDW) if these defaulting traders had been allowed to trade with a valid VRN, then it could be taken as an authorisation from HMRC.

HMRC'S CASE

75. HMRC's submissions focus on the issues for determination under the headings of: (i) whether the appellant's deals were connected with a VAT loss; (ii) whether that VAT loss was fraudulent; (iii) whether the appellant knew or should have known that its transactions were connected with fraud.

76. In relation to deals where the appellant has accepted (i) and (ii), the Tribunal cannot investigate or arrive at any conclusion other than that the appellant's transactions were connected with a tax loss: see *Hi-Octane*.

77. The respondents' case is that the transactions in question were connected with fraudulent defaulting traders at the commencement of the chains. Upwards from a 'fraudulent defaulter' in a MTIC fraud transaction chain is to be found the 'buffer traders', each of whom is VAT registered to reclaim the input tax charged, and in turn charges output VAT when making an onward sale. It is submitted that the appellant acted as a buffer trader in the relevant deal chains which could be traced to a fraudulent defaulter at their commencement.

78. The respondents' primary case is that the transactions which are the subject of the appeal were part of an orchestrated scheme to defraud the Revenue of VAT, and that the appellant knew that the transactions were connected with fraudulent evasion of VAT.

(1) The transaction chains as set out in Annex II show the overall structure of the deals, which invariably involve back-to-back transactions and impossibly low margins.

(2) The appellant was transacting in a highly regulated market, which was rife with fraud. In the year 2010-11 alone, the Revenue have identified the alcohol tax gap to be in the region of £1.2 billion. The reasonable trader entering the market must be familiar with alcohol fraud, and to ensure that they guard against such fraud.

(3) In this respect, HMRC submit that Mr Johal as director for various companies including EDW had been concerned with non-duty paid alcohol seizure, received Veto Letters in relation to various suppliers on a number of occasions, and his former companies had received *Kittel* denials.

(4) Mr Johal's history of companies with transactions linked to fraud suggests a cavalier attitude to his compliance obligations. At worst, it suggests a deliberate pattern of evading the scrutiny of the respondents.

(5) It is through this lens that the appellant's attention to protect itself from becoming involved in fraud must be viewed. The appellant was experienced in the trade and was aware of missing trader fraud and fraud generally in the alcohol market. With that knowledge HMRC submit that the appellant took absolutely no meaningful steps to prevent such knowing connection.

(6) In the alternative, a reasonable business with that level of knowledge would have ensured it did very considerably more to prevent its connection with fraud particularly in light of the significant amount of guidance afforded to those wholesaling in the alcohol market.

(7) It is HMRC's case that the deal chains in question are connected with fraudulent evasion of VAT as supported by the obtainable facts.

79. HMRC's secondary case is that, in the absence of actual knowledge, the appellant should have known of the connection of its transactions with a VAT fraud. It is submitted that Mr Johal's credibility is an important issue in this case. The Tribunal is entitled to consider the way in which Mr Johal gave evidence, and the nature of his responses, such as the often times evasive way in which he responded to questions. HMRC submit that the overall presentation of Mr Johal's evidence was poor, and all of his evidence, written and oral should be treated with extreme caution.

80. Further, HMRC invite the Tribunal to draw adverse inferences from the appellant's failure to call any witness involved in the relevant transactions, or to support its case, in line with the ordinary principles for doing so as set out in *Wisniewski, British Airways, R (ex. P. Combs & Co), Murray v DPP* and *Prest v Prest*. It is not open to HMRC to call the relevant witnesses, given the basic principle that a party cannot call a witness simply to impugn his evidence.

(1) The appellant's director conceded in cross-examination that he had repeatedly received information about MTIC awareness and about the steps he needed to take in order to avoid engaging in transactions that were linked with fraud.

(2) Mr Johal had repeatedly received Notice 726, and repeated, specific, warning shots in the form of Kittel denials, seizure and excise assessments, a dishonesty penalty for his brother (for Baba Wholesale which Mr Johal admitted in his witness statement that he was a director of, and in reality it is submitted that he was clearly in control of). There were also the veto letters served on, and the de-registration of, companies Mr Johal was involved with before the appellant's transactions in question.

(3) Despite the foregoing, Mr Johal's live evidence appeared to be of someone who was totally oblivious to the obligations of a reasonable alcohol trader. He repeatedly resorted to the mantra, 'why didn't HMRC do something about trader X', ignoring the reality that traders who are involved in the transactions are in a much better position to spot a fraud immediately, rather than months down the line when the transactions have already occurred.

(4) The appellant cannot say, as it appeared to do in evidence and submission, that HMRC failed to detect the fraud, and allowed business to continue to trade. This is because: (i) the Tribunal is not considering HMRC's state of knowledge or conduct, and (ii) even if it was open to the Tribunal to consider such matters, HMRC will only ever learn about transactions after they have happened. It follows that it is all the more important in those circumstances for a trader such as the appellant who has received significant awareness information, to be vigilant in guarding against transacting in chains connected with fraud.

(5) Mr Johal's history of directorships in former companies that had been de-registered due to being involved in transactions that were connected with MTIC fraud is as relevant to determining Mr Johal's state of knowledge in relation to the deal chains under appeal here. It is submitted that the only reasonable explanation is that Mr Johal has consistently been willing to enter transaction chains connected to fraud if it financially benefits him.

THE APPELLANT'S CASE

81. The appellant' grounds of appeal are as follows:

(1) The appellant has not been provided with evidence of a link to fraudulent tax loss.

(2) The appellant is concerned that a number of assessments may be out of time, (but this is no longer in issue).

(3) The appellant does not accept that it knew or should have known that its transactions were connected to fraudulent losses of VAT.

82. The appellant's response to the *Fairford* directions is that: (i) it accepts some but not all of the accuracy of the deal chains, (ii) that it does not accept there was an orchestrated scheme to defraud, or any connection to fraudulent VAT loss.

83. Mr Thornton's written response on the appellant's position as regards tax losses relating to purchases from Phoenix, Gempost, Infinity, Booze Factory, IK Drinks, AK Suppliers, is a detailed account of by the gaps in the respondents' evidence, such as transactions with Phoenix have not been traced beyond Phoenix. The appellant's general position is that it does not accept that it was taking part in an orchestrated scheme to defraud the Revenue, although in some cases the appellant has conceded that its transactions were connected with fraudulent tax loss.

84. In relation to the state of knowledge test, Mr Thornton's skeleton argument states:

(1) For EDW to have 'known' it must have had actual knowledge that its transactions were or would have been connected to a fraudulent loss of VAT.

(2) For EDW to be in a position whereby it 'should have known' it must have failed to take certain steps which an ordinary reasonable business in EDW's position would have done; those steps would have led EDW to have identified that its goods were or would have been connected to a fraudulent loss of VAT; and must have been in a position whereby there was 'no other reasonable explanation' for its trade other than fraud.

(3) HMRC have rightly not sought to argue that all trade ever conducted by EDW were always connected to fraud. HMRC have not produced sufficient evidence to demonstrate that there was no other reasonable explanation for its trade.

85. In his closing submissions, Mr Johal made the following points.

(1) The way he conducts his business is not as 'fanciful' as HMRC would like to make out; that HMRC have not been able to prove any misconduct or wrongdoing on Mr Johal's part that led to the tax loss, and all HMRC have done is to rely on 'suppositions'.

(2) The 'criticism thrown at [him]' has failed to 'discover' what he could have 'discovered a few months down the line' or to establish what he 'should have followed specifically' in what he 'could have done or should have done'.

(3) That not all suppliers of the appellant were linked to fraudulent transactions; it was 'only a few companies', and 'not even all the transactions with those few companies were linked to tax losses'.

(4) The due diligence taken failed to demonstrate anything that Mr Johal could have done or should have done to avoid the fraud'; that it was 'like looking at a glass' to call it 'half-full or half-empty' as it suits HMRC.

(5) The companies in question traded with annual figures of turnover between £9m to £24m, but their transactions with EDW were only about £10,000, a very small percentage in the overall scale. If EDW were involved in the 'shenanigans' as suggested, then the volume of transactions would have been a lot higher.

(6) EDW only bought from suppliers and sold onto end users, like corner shops; it was not acting as a wholesaler link in a chain of wholesalers in an MTIC fraud.

(7) There is an absence of 'clear evidence' to prove the appellant knew or should have known, and HMRC have resorted to 'character assassination of [Mr Johal]'.

DISCUSSION

86. The *Blue Sphere* test the Tribunal is to apply to determine the appeal is set out at §17, which has four elements in terms of:

(i) Was there a VAT loss?

(ii) If so, was the tax loss occasioned by fraud?

(iii) If so, were the appellant's transactions connected with the fraudulent tax loss?

(iv) And if so, did the appellant know, or should have known, of such a connection?

87. It is noted from the appellant's response to the *Fairford* directions that it accepts some, but not all, of the accuracy of the deal chains, and Mr Thornton's written response is a listing of the gaps of evidence in relation to the accuracy of the deal chains which the appellant disputes. It appears therefore that at least (ii), (iii) and (iv) of the *Blue Sphere* test are in issue for all deals, and that part (i) is in issue for some deal chains.

Burden of proof

88. The burden of proof of all four elements of the *Blue Sphere* test rests on HMRC, and to the ordinary civil standard of the balance of probabilities. Whilst the respondents bear the burden of proof, it is to be noted that:

(1) HMRC do not have to prove that the appellant knew or should have known either the details of the fraud or the identities of the fraudulent defaulters: *Megtian* [38].

(2) HMRC do not have to prove that those at the appellant who undertook or supervised the transactions were dishonest: *Citibank* at [90].

89. Although HMRC bear the burden of proof in relation to the *Blue Sphere* test, in the sense that there is a prima facie case for four elements, then if the appellant advances a positive case to the contrary, the burden is then on the appellant to adduce evidence that supports its positive case in the sense that any of the four elements does not obtain.

90. The need for the appellant to prove its positive case is made clear by the Upper Tribunal in *Fairford* where it is held that once an issue has been raised by HMRC based on some obtainable facts, an appellant taxpayer is required to defend its position, or risk an adverse finding against it.

> '[48] … An appellant who advances a positive case will be required, by virtue of other customary directions, to set it out in witness statements or, if that is not practicable, in a response or a letter, or in some similar way. Accordingly, an appellant putting a positive case must disclose his hand in advance; we see no reason why one merely putting HMRC to proof should be in a better position. If there is a real challenge to HMRC's evidence it should be identified; if there is not, the evidence should be accepted. We see no reason why an appellant who does not advance a positive case should be entitled to require HMRC to produce witnesses for cross-examination when their evidence is not seriously disputed.'

Case law on drawing adverse inferences

91. As the respondents rightly point out, it is not open to HMRC to call the relevant witnesses. This is the principle illustrated in *Kagazy*, where Picken J stated at [57]: 'it is not open to a party to call a witness to give evidence which that party will say is not only wrong but deliberately so', and went on to say:

> '… where a party wishes to assert that the evidence given in chief by a witness whom he has called is not only wrong, but is wrong on purpose. The most obvious instance is one where the witness has turned coat and has deliberately failed to come up to proof. Here the position seems clear. The party cannot cross-examine his own witness by reference to his proof of evidence or other previous statement unless and until the court has ruled that he is hostile. Nor may he call evidence to establish the general bad character of his witness.'

92. In *Wisniewski* Brooke LJ addressed the issue of adverse inferences by referring to a line of authority which shows:

> '… that if a party does not call a witness who is not known to be unavailable and /or who has no good reason for not attending, and if the other side has adduced some evidence on a relevant matter, then in the absence of that witness a judge is entitled to draw an inference adverse to that party and to find that matter proved.' (p337)

93. Brooke LJ continued by citing *McQueen v GWR* (1875) where Cockburn CJ had said:

> 'If a *prima facie* case is made out, capable of being displaced, and if the party against whom it is established might by calling particular witnesses and producing particular evidence displace that prima facie case, and he omits to adduce that evidence, then the inference fairly arises, as a matter of inference for the jury and not a matter of legal presumption, that the absence of that evidence is to be accounted for by the fact that even if it were adduced, it would not displace the prima facie case. But that always presupposes that a prima facie case has been established; and unless we can see our way clearly to the conclusion that a prima facie case has been established, the omission to call witnesses who might have been called on the part of the defendant amounts to nothing.'

94. Brooke LJ then cited *Chapman v Copeland* (1996), where an inference was drawn against a defendant driver when he failed to give evidence, followed by *Herrington v British Railways* (1972), where an inference was drawn against a defendant company for failing to call evidence. It follows that it does not matter for the purposes of an adverse inferences that the Respondents bear the burden of proof in this case.

95. Another authority referred to by Brooke LJ is Lord Lowry's judgment in *R (ex p Coombs & Co.*) at p300, where it is stated:

> 'In our legal system generally, the silence of one party in face of the other party's evidence may convert that evidence into proof in relation to matters which are, or are likely to be, within the knowledge of the silent party and about which that party could be expected to give evidence. Thus, depending on the circumstances, a prima facie case may become a strong or even an overwhelming case. …'

Scope of adverse inferences

96. The respondents seek to rely on an adverse inference to adduce proof on the matter in issue in like manner in *O'Donnell* (cited by Brook LJ at p338). *O'Donnell* is a decision by the Supreme Court of Victoria Full Court in Australia (with equivalent jurisdiction to the England and Wales Court of Appeal), and at p920 of *O'Donnell*, Gillard J stated:

> ‘Of course, patently there must be some limitation imposed upon the application of this rule. For example, any party upon whom the burden of proof on any issue is imposed must always adduce a *prima facie* case on such issue to go to the jury, and the failure of the other party to the litigation to call witnesses who may be expected to elucidate the matter cannot fill in any gaps in the proof required …’

97. As to the kind of adverse inference a fact-finding court or tribunal is to draw, Gillard J summed up the state of the authorities at p921 of *O’Donnell*:

> ‘Looking at the authorities from *Blatch v Archer* (1774) 1 Cowp. 63 right up to *Earle v Eastbourne District Community Hospital* [1974] V.R. 722, it may be accepted that the effect of a party failing to call a witness who would be expected to be available to such a party to give evidence for such a party and who in the circumstances would have a close knowledge of the facts on a particular issue, would be to increase the weight of the proofs given on such an issue by the other party and to reduce the value of the proofs on such issue given by the party failing to call the witness.’

98. Gillard J in *O’Donnell* continued by referring to *Jones v Dunkel* wherein Windeyer J cited *Wigmore on Evidence*, 3rd ed. (1940) vol. 2 s 285 at p162, which reads as follows:

> ‘The consciousness indicated by conduct may be, not an indefinite one affecting the weakness of the cause at large, but a specific one concerning the defects of a particular element in the cause. The failure to bring before the tribunal some circumstance, document, or witness, when either the party himself or his opponent claims that the facts would thereby be elucidated, serves to indicate, as the most natural inference, that the party fears to do so, and this fear is some evidence that the circumstance of document or witness, if brought, would have exposed facts unfavourable to the party. These inferences, to be sure, cannot fairly be made except upon certain conditions; and they are also open always to explanations by circumstances which make some other hypothesis a more natural one than the party’s fear of exposure. But the propriety of such an inference in general is not doubted.’

Principles on drawing adverse inferences

99. Brooke LJ set out the principles on drawing adverse inferences at p340 of *Wisniewski*:

> ‘From this line of authority I derive the following principles in the context of the present case:
>
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness’s absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, then if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.’

100. In *British Airways* Morgan J, after referring to the principles in *Wisniewski* and the House of Lords in *R (ex p. Coombs & Co*) and *Murray v DPP*, and the Supreme Court in *Prest v Prest* (at [44]), gave guidance to a fact-finding court or tribunal in relation to drawing adverse inferences as follows.

> '[143] These principles mean that before I draw an inference and made a finding of fact adverse to a witness who was not called, I need to ask myself:
>
> - Is there some evidence, however weak, to support the suggested inference or finding on the matter in issue?
> - Has the Defendant given a reason for the witness's absence from the hearing?
> - If a reason for the absence is given but it is not wholly satisfactory, is that reason "some credible explanation" so that the potentially detrimental effect of the absence of the witness is reduced or nullified?
> - Am I willing to draw an adverse inference in relation to the absent witness?
> - What inference should I draw?'

Tribunal's conclusion on adverse inferences

101. HMRC have invited the Tribunal to make adverse inferences given that the appellant has not sought to call live witness evidence from anyone involved in the transactions, its customers or suppliers, or anyone who may otherwise be familiar with the transactions, or any manufacturers, or distributors, despite the obvious relevance of the evidence that any of those other individuals or companies might give.

102. The Tribunal concurs that there is no conceptual reason why adverse inferences ought not to be drawn in this case. We consider the order of questions set out by Morgan J in turn.

(1) HMRC have not only made a prima facie case on the matter in issue, but have in fact adduced a large corpus of circumstantial evidence in relation the four elements required of the respondents to prove.

(2) The appellant has been represented by Mr Thornton through the stages of these proceedings until a month before the actual hearing of the appeal. The appellant with legal representation would be aware of the onus to adduce positive evidence to make its positive case contrary to the respondents' case.

(3) No satisfactory explanation has been given by the appellant for the absence of relevant evidence to support its positive case.

(4) The Tribunal is willing to draw adverse inferences and we do so in the course of considering each element of the *Blue Sphere* test where relevant.

Evaluation of appellant's evidence

Attribution of knowledge

103. Mr Johal, as the sole director of the appellant undertook, and was responsible for the transactions that are subject to the *Kittel* appeal. It is Mr Johal's state of knowledge which is attributable to the appellant company by the ordinary principles of attribution. Mr Johal does not dispute that he was the principal as concerns the relevant deals, and the attribution of knowledge test is by reference to Mr Johal's state of knowledge.

104. We also have regard to the Upper Tribunal's explication in *Sandham* of the key aspects of the legal context of *Kittel* which direct a taxpayer's knowledge in relation to the relevant transactions is attributable to any agent acting on his or its behalf.

Witness credibility

105. The credibility of the only witness called by the appellant is an important issue in this appeal. As related earlier, we do not find Mr Johal a reliable witness, and his overall evidence lacks the integrity of a credible witness because of its numerous inconsistencies and contradictions, some of which are highlighted as follows.

(1) Attempts to contradict the observation made by his own accountant (§71(8)) that EDW was trading at a loss in part because 'the margins have been too low' (when the appellant's low margins in those deal chains set out in Annex II stand as a matter of fact).

(2) Attempts to re-write his written statement that 'it is correct that he was a director of Baba Wholesale' in his oral evidence.

(3) Baba C&C's expansion into the mobile phone industry at a time when MTIC fraud was booming in that industry was particularly troubling. Johal's explanation that every grocery store was selling mobile phones at the time in a stall at the corner was not credible, nor the claim that the consignment being of 2-pin would be readily vendible in UK outlets is simply incredulous. The response given in the supposed commodity to be traded via Baba Energy as that of the installation of renewable solar panels is equally implausible given the established pattern of Mr Johal's trading experience and 'expertise' (as he said) has been in alcohol trading.

106. Mr Johal effectively denied all involvement with Baba *Wholesale* in evidence. We do not find this denial credible for the following reasons:

(1) It cannot be a coincidence that his brother started a company in the same trade sector, with the same name, using the same address as PPOB for Baba Wholesale and Baba C&C.

(2) The Appellant admitted in his witness statement to having been a director of Baba *Wholesale*. This is not a typographical error as Mr Johal strove to explain away; the sentence only makes sense as it appears: '*It is correct that I was a director for Baba Wholesale,* ***but*** *I was not responsible for any losses there*' (emphasis added).

(3) Baba *Wholesale* appears to have operated in exactly the same way as Baba *Cash & Carry*, and covers the gap between Baba *Cash & Carry* and the purchase of EDW.

(4) This would not be the only occasion on which Mr Johal has used a family member to 'front' a company that in fact has his fingerprints on it (his wife was a director of Waterloo Food and Wines). However, his wife did not have any experience in the trade, and shortly after the Respondents identified and visited Waterloo Food and Wines, it ceased to be registered.

(5) A similar pattern of using two outlets designated respectively as 'Wholesale' and 'Cash and Carry' can be seen in the present case, where the appellant traded as 'Everyday Wholesale', and the new company AOC traded under the name of 'Everyday Cash and Carry', while both were in the common control of Mr Johal.

107. Mr Johal's evidence on why he purchased the appellant which had no history in alcohol trade, and with existing VAT debts, was deeply unsatisfactory. The only credible explanation for buying a company which Mr Johal apparently knew nothing about (e.g. that it traded in shoes or cars, how much money it had in its bank account) is that he wished to obtain a VAT number whilst avoiding HMRC's scrutiny. That would also explain Mr Johal's reluctance to engage with HMRC when Trade Release came into their attention, and was aggressive at the attempts by HMRC in arranging a meeting.

108. The Tribunal also finds that Mr Johal had the tendency to try and answer the question he wanted to answer rather than the actual question that was put to him. In particular, we note the evasive manner with which Mr Johal dealt with the questions on the checks he had carried out on the relevant suppliers. Not only was there no credible answer of any substance given in reply to the precautionary checks taken on each of the relevant suppliers, but the mantra that HMRC should have done more to protect traders like EDW was repeatedly used to deflect the specific questions posed of the actions expected to have been taken by him as director of EDW.

109. In closing submissions, Mr Carey highlighted the rather startling position that Mr Johal adopted in respect of his written evidence. He appeared to abandon matters which he suddenly perceived as unhelpful, or resorted to saying that he did not remember, despite what was contained in his witness statement, (such as that 'it is correct' that he was a director of Everyday Wholesale). To refute his own written statement is startling, especially when the Tribunal had specifically asked him (in the absence of a representative), whether Mr Johal wanted to clarify or correct matters prior to adopting his written statement; he did not avail himself of that opportunity.

I. Was there a VAT loss?

110. The appellant has conceded that most of the deal chains it was involved with as set out in Annex II have been traced to a tax loss. The first element of the test therefore concerns the remaining transactions with Phoenix in 01/16 and 04/16, where it is contended that those transactions cannot be traced to a tax loss, due to Phoenix's failure to provide the relevant records. Based on obtainable facts, it is most probable that the appellant's transactions with Phoenix for 01/16 and 04/16 can be traced to tax loss for the following reasons:

(1) Phoenix traded exclusively with fraudulent defaulters who were deregistered for VAT, and that was the case despite its extensive knowledge of fraud and regular contact with HMRC.

(2) Phoenix invariably had one supplier and one customer at a time and traded on a back-to-back basis with deals taking place on the same day.

(3) All deals were paid for in cash.

(4) In 10/15 Phoenix purchased over £1million worth of alcohol from AK Suppliers, (a fraudulent defaulter) who in turn purchased from Lupt, another clear (hijacked) fraudulent defaulter.

(5) Phoenix shared a PPOB with, and replicated the transaction chains of, IK Drinks, another fraudulent trader.

(6) Phoenix claimed to use the Due Diligence Exchange to carry out due diligence checks, but never provided any evidence of due diligence.

(7) Phoenix did not respond to requests for records evidencing its input tax, did not pay the assessment due, and was deregistered for fraudulent use of its VAT registration.

111. We conclude that all the transactions in the deal chains as detailed in Annex II, whether as a matter of fact as conceded by the appellant, or on the balance of probabilities as in the case of the transactions with Phoenix, can be traced to a tax loss.

II. Was the tax loss occasioned by fraud?

112. The respondents' case is that there was an overall scheme to defraud. This has been expressly conceded by the appellant in relation to 04/15, 07/15, and 10/15, namely, the transactions traced to ESL and Lupt via AK Suppliers have been conceded by the appellant to be part of an orchestrated scheme to defraud.

113. The appellant did not concede that there was the overall scheme to defraud for the remaining transactions. However, during the course of the hearing overall scheme to defraud was not resisted with any enthusiasm by the appellant.

114. Furthermore, the Tribunal finds that there is compelling evidence of an overall scheme to defraud the Revenue for the following reasons:

(1) The overall structure of the deals as set out in the deal chains in Annex II is indicative of an overall scheme to defraud. Each of the counterparties and defaulters appear in the transaction chains for a short time, in which they do vast quantities of deals, and then disappear without a trace, as powerfully illustrated by the following example.

(a) Once AK Suppliers stopped trading with the appellant, Phoenix sold in its first week of trading £195,353.32 worth of alcohol to EDW (Deals 1-10 in 01/16).

(b) Mr Johal said in evidence that he probably rang AK Suppliers and they did not have stock available, but ultimately he did not appear to question the appearance of Phoenix doing vast quantities of trade after AK Suppliers ceased to supply it.

(2) The markups where they can be established, are at a level at 0.2–0.25%, that even the appellant agreed was '*so low as to be ridiculous*'. That markup is before factoring in any costs such as transport, storage, insurance, and staffing, and is simply not commercially viable nor sustainable if these were ordinary commercial trades, rather than preconceived ones in order to defraud the revenue.

(3) There are myriad connections between the appellants' counterparties: IK Drinks, AK Suppliers, Phoenix Wholesalers, and Gempost Ltd.

(a) IK Drinks and AK Suppliers shared a director, Aftab Khan.

(b) Phoenix and IK Drinks shared a warehouse, which was also let to Gempost, and no demarcation existed for these 3 different companies in that warehouse.

(c) Phoenix was offered by IK Drinks as a trade reference.

(d) The other trade reference IK Drinks offered was Makhan Jabble, who was the representative of Gempost in the due diligence the appellant obtained for Gempost.

(e) Mr Johal confirmed in evidence that Makhan Jabble is the brother of Gempost's director.

(4) Given all of these companies were playing exactly the same role in the transaction chain, these links are not consistent with arm's length commercial competitors.

(5) Given the concession that the trades which were traced to ESL and Lupt via AK Suppliers are conceded to be part of an orchestrated scheme to defraud, it is difficult to see how the trades with IK Drinks, Phoenix, and Gempost can be said not to be.

(6) From obtainable facts, AK Suppliers had the same director as IK Drinks.

(7) Phoenix Wholesale replaced AK Suppliers in the transaction chain, at a time when Phoenix shared a warehouse with IK Drinks. Gempost replaced Phoenix when they had shared a warehouse with both Phoenix and IK Drinks.

115. The association of this network of fraudulent defaulters was evident by: (a) their common control, such as the Aftab Khan being the director of IK Drinks and AK Suppliers, (b) through their common engagement of purported professional third-parties, such as Vincent Curley and Mark Curley (father and son), or Jagjit Jabble (director of Gempost) being brother of Makhan

Jabble, who offered a trade reference to IK Drinks, (c) through the common PPOBs shared, whether it was the registered address of their accountants (see §44(5) Gempost and Phoenix) or the warehouse premises (§47(3) Phoenix and IK Drinks), (d) the common residential block of the original owners of the VRNS for Elassab and Lupt Utema being hijacked into the network of fraudulent defaulting traders, (e) the pattern of a 'new' defaulting trader replacing a deregistered defaulting trader that can be traced to some common control, like a phoenix rising out of ashes; (f) the replication of transactions in same-day deal chains (or deals in close temporal proximity) among the network of fraudulent defaulters.

116. The respondents' central submission that there was an orchestrated scheme to defraud the Revenue has been proved to the requisite standard. We find that the evidence of contrivance is overwhelmingly consistent in establishing the fact that a network of suppliers existed to operate in the deal chains in question, and these suppliers were identifiable as fraudulent defaulters, and they had consorted with each other in a schematic pattern of trading with the overarching aim to defraud the Revenue.

III. Were the appellant's transactions connected with fraudulent tax loss?

117. The actions of the appellant's trading counterparties, which had resulted in a fraudulent tax loss are as follows.

ESL (04/15 Deals 4-8, 07/15 Deals 1-9) & Lupt (07/15 Deals 10-13, 10/15 Deals 1-8)

118. The appellant accepts all deal chains with ESL and 07/15 transactions with Lupt were connected to fraudulent tax loss, and that these transactions were part of a fraudulent scheme to defraud the revenue. That concession is rightly made, and both ESL and Lupt were clearly hijacked traders, dealing in vast quantities of alcohol from the same block of residential flats, both via AK Suppliers.

119. In relation to the transactions in 10/15, Deals 1-8 with Lupt, the appellant originally suggested that the evidence is insufficient to establish a connection because AK Suppliers have only provided HMRC with their VAT return and not the relevant invoices. This suggestion was not pursued during Officer Bycroft's evidence by way of cross-examination. In any case, we find that the relevant connection is established that these deals were linked to a fraudulent loss, and part of an orchestrated scheme to defraud the revenue because:

(1) There is no issue over the sales from AK Suppliers to the appellant, for which HMRC have produced the relevant invoices.

(2) The relevant VAT record shows that on the same day as each of the sale to the appellant, AK Suppliers made a purchase for a very slightly lower price from Lupt (e.g. Deal 1 on 2 September 2015, £20,594.40 sold to the appellant, £20,540.40 purhchased from Lupt).

(3) This is in the context that at the end of 07/15 AK Suppliers undertook four deals with back-to-back trades from Lupt Utama →AK Suppliers →the appellant, with very similar markups in the region of 0.2-0.25%.

(4) AK Suppliers did not make alcohol purchases from anyone else during that period. The remaining inputs are for much smaller amounts and for transactions such as fuel or parking tickets, which means that the alcohol could not have come from anywhere else.

(5) All of the above leads to an irresistible inference that the alcohol sold to the EDW had been purchased from Lupt Utama on the same day.

IK Drinks Ltd (04/15 Deals 1-4)

120. IK Drinks' deals with the Appellant all occurred on 18 February 2015, after IK Drinks had been deregistered. The appellant accepts the accuracy of these deals but does not accept any

VAT loss because no assessment was issued before IK Drinks Ltd were deregistered. This is simply not arguable because:

(a) The purpose of an assessment is to recover money that is owed. IK Drinks were not entitled to charge VAT, but had done so after it was deregistered.

(b) That VAT is owed to the respondents, whether or not HMRC ever issued an assessment.

121. IK Drinks was wound up with a vast unpaid debt to HMRC. It follows that there is a clear tax loss in respect of these deals. Furthermore, the tax loss was the result of fraudulent evasion because IK Drinks was a knowing participant in an overall scheme to defraud the Revenue:

(1) IK Drinks was originally a fast-food shop named 'Dallas Chicken', but was not trading before 2013. It was the purchased by a Director of a previous missing trader (with an assessed debt of £4,361,044), in order to bypass controls on VAT registration.

(2) IK Drinks proceeded to engage in the wholesale of alcohol on a massive scale with a turnover of circa £8 million in 2012 and 2013, rising to £24 million in 2014/15.It achieved this with no staff other than the director, and no advertising.

(3) For periods 02/13 to 11/14, IK Drinks were subject to a *Kittel* denial for £5.46m.

(4) All 15 of IK Drinks' suppliers went missing, which is simply implausible to be a coincidence.

(5) IK Drinks deals were undertaken on a back-to-back basis, all deals were cash purchases, and were uninsured.

Phoenix (01/16 Deals 1-21, 04/16 Deals 1-5)

122. The Appellant accepts the accuracy of these transactions but does not accept a VAT loss, or that it is fraudulent. However, the assertion that Phoenix was not a fraudulent defaulter was not pursued with any conviction during the hearing by Mr Johal. In any event, we find Phoenix a fraudulent defaulter, and a knowing participant in an overall scheme to defraud the Revenue for the following reasons:

(1) Phoenix operated out of the same premises as IK Drinks, which was replaced in the transaction chain by AK Suppliers (who had the same director as IK Drinks). Phoenix then replaced AK Suppliers, and AK Suppliers was Phoenix' only supplier.

(2) The evidence suggests that IK Drinks, AK Suppliers, and Phoenix were in reality controlled by the same people, using different companies in order to evade the respondents' intervention.

(3) Once Phoenix started trading with EDW, Phoenix immediately embarked on vast quantities of trade, with £195,353.32 of trade within the first week, and its turnover skyrocketed that quarter to almost £5 million.

(4) Between 4 October 2012 and 2 June 2015, Phoenix were issued with Veto and Tax Loss letters in relation to 6 different suppliers.

(5) Phoenix traded with one customer and one supplier. Its goods were delivered straight from its supplier to its customer, or even from its supplier to its customers customer.

(6) Phoenix was deregistered for VAT on 12 February 2016 on the basis that it was using its VAT registration solely or principally for a fraudulent purpose.

(7) It was issued with a *Kittel* denial in 07/15 and 10/15 totalling £351,352.60.

123. Phoenix suppressed its sales to the appellant by failing to declare them and did not pass on the output VAT to HMRC. It did not respond to a request for VAT records for 10/15, 01/16 and 00/00. It was assessed for £1,295,133 on 24 November 2016, reflecting the remaining balance of input tax for 10/15 and all input tax for 01/16. Its trades with EDW were in 01/16 and 04/16, when Phoenix was de-registered on 12 February 2016.

124. We accept HMRC's submission that even had Phoenix provided the relevant records, then its deals with the appellant would, on the balance of probabilities, have traced to a fraudulent defaulter as in the previous periods. In 10/15, and insofar as any record were available, Phoenix's deals traced to fraudulent defaulter Lupt Utama via AK Suppliers. Given the overall scheme to defraud, it is overwhelmingly unlikely that Phoenix's deals with the appellant did not trace back to fraudulent tax loss.

Gempost Ltd (04/16 Deals 6-11)

125. We find Gempost was a fraudulent defaulter, and a knowing participant in an overall scheme to defraud the Revenue, for the following reasons:

(1) Given the presence of the links set out above, and viewing it through the prism of the links between Gempost, Phoenix, and IK Drinks, and with the structure of the transaction chains whereby Gempost replace Phoenix, then Gempost was most probably playing the same role as Phoenix and IK Drinks as a fraudulent defaulter.

(2) Gempost's PPOB was its accountants, and it had no means of storing alcohol. Its goods were shipped from its supplier directly to its customers (which also must have meant the appellant knew who Gempost's supplier was, had it been concerned to keep delivery receipts).

(3) Gempost was written to in relation to tax losses for trades in 07/11, 10/11, 07/12, 10/12, 01/13, 07/13, 10/13, 01/14, 07/14, 10/14, 01/15, 04/15, with a loss to the revenue of over £710,275.10.

(4) All of Gempost's previous deals with the appellant (assessed out of time) traced back to fraudulently defaulting traders.

(5) Gempost did not declare its deals with the appellant in 04/16 even when asked for records from that period, and did not declare or pass on the VAT to the Respondents.

(6) Gempost was deregistered, and wound up with a substantial debt to HMRC and with massive assessments outstanding.

126. Given the foregoing, and our conclusion that there was an overall scheme to defraud the revenue in the network of suppliers as counterparties to the appellants in the relevant deal chains, the logical conclusion based thereon is that the appellant's transactions were connected with the fraudulent tax loss in relation to each of the suppliers in question. We find as a fact that the transactions as detailed in Annex II with which the appellant was concerned, were connected with the fraudulent tax loss.

Whether the appellant knew or should have known?

127. The principle to be derived from *Kittel* as concerns the state of knowledge is enunciated in the Court of Appeal decision in *Mobilx*, wherein Moses LJ stated:

> '[59] The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to

> fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*.'

128. Moses LJ continued in *Mobilx* to distinguish the nuanced state of knowledge in circumstances which the *Kittel* principle does not extend to cover.

> '[60] … *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was *more likely than not* that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion.' (Italics added)

129. The Tribunal hearing the case will be entitled to rely on inferences drawn from the primary facts established by HMRC to determine whether the Appellant had actual or constructive knowledge of its transactions being connected with VAT fraud. From the approach taken by Clark J in *Red12* at [109] to [111], which was approved by the Court of Appeal in *Mobilx* at [83], it is clear that the Tribunal should not unduly focus on whether a trader has acted with 'due diligence', but should consider the totality of the evidence, including circumstantial and 'similar fact' evidence.

> '[82] … Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected with fraudulent evasion of VAT. …'

MTIC awareness

130. As a matter of fact, and as conceded by Mr Johal in cross-examination, he had repeatedly received information about MTIC awareness, and the steps required to avoid engaging in transactions that were linked with fraud. Mr Johal had repeatedly received Notice 726, which sets out in clear terms:

(1) 'It is good commercial practice for businesses to carry out checks to establish the credibility and legitimacy of their customers, suppliers and supplies. These checks will need to be more extensive in business sectors that are commercially risky or vulnerable to fraud and other criminality.'

(2) The Notice explicitly sets out a wide range of factors to safeguard against being involved in a fraudulent transaction. All of these factors are relevant considerations in the deals in question, but were not in any measure being considered by the appellant.

> '(1) Legitimacy of customers or suppliers. For example:
>
> - What is your customer's or supplier's history in the trade?
> - Has a buyer and seller contacted you within a short space of time with offers to buy or sell goods of same specifications and quantity?
> - Are the goods adequately insured?
> - Are they high value deals offered with no formal contractual arrangements?
> - Are they high value deals offered by a newly established supplier with minimal trading history, low credit rating?
> - Can a brand new business obtain specified goods cheaper than a long established one?

(2) Commercial viability of the transaction

– have normal commercial practices been adopted in negotiating prices?'

(3) The Notice also sets out specific example measures as follows:

'- verify VAT registration details with HMRC
- Obtain signed letters of introduction on headed paper
- Obtain some form of written and signed trade references
- Obtain credit checks or other background checks from an independent third party
- Insist on personal contract with a senior officer of the prospective supplier, making an initial visit to their premises whenever possible
- Check details provided against other sources, for example website, letterheads, BT landline records'

(4) The Notice also highlights the importance of keeping documentation such as 'delivery notes' to 'support your view of a transaction's legitimacy'.

131. Apart from MTIC awareness letters and notice, Mr Johal had received repeated and specific warnings in the history of the series of companies with which he was involved, in the form of veto letters, *Kittel* denials, and deregistration.

132. The irregularities as concerns the companies of which Mr Johal was a director were not confined to MTIC fraud, but covered non-duty paid goods that resulted in seizure, and excise and penalty assessments. A 'dishonesty' penalty for the evasion of VAT was issued to Mr Johal's brother in relation to Baba Wholesale, of which Mr Johal admitted to be a director (in his written statement), and despite his assertion to the contrary in his oral evidence, we find that Mr Johal was in control of Baba Wholesale in reality.

Repeat trade with fraudulent defaulters

133. Putting aside the former involvement with the fraudulent deal in relation to mobile phones while trading via Baba C&C, and the various denials and penalties issued to Mr Johal's previous companies, and looking strictly at the appellant's trading history, it is an inescapable conclusion that the appellant had a pattern in trading with fraudulent defaulters.

(1) For the deals that are out of time, the appellant was trading directly with the fraudulent defaulter Infinity Collections, which was a recently incorporated company in '*fancy goods and clothes*' but traded in alcohol to the tune of £9.8m in the first year.

(2) The appellant also engaged in deals that traced back to Pachinger Brothers, and Logical Retail Ltd, both were fraudulent defaulters.

(3) The deals that remain in issue are traced in turn to IK Drinks, ESL, Lupt, Phoenix, and Gempost, in some of which the appellant traded directly with IK Drinks, Phoenix and Gempost.

134. With the addition of each fraudulent defaulter, an innocent explanation or the assertion that the appellant '*did all we could*' as suggested by Mr Johal, becomes less and less credible. The accretion of incidents of the appellant trading with fraudulent defaulters with regularity and insistence is highly suggestive that there was deliberate intent, or at best, a wilful blindness to the obvious warning signs that the transactions in question were connected with fraud.

Lack of features associated with genuine commercial dealings

135. The transactions in question were not of low value, but the features customarily associated with genuine commercial dealings were singularly lacking.

(1) *Contracts* – the lack of formal or written contracts between the appellant and any of its wholesale counterparties is surprising and far from the norm for high-value transactions such as those in the deal chains. As the respondents submit, 'it beggars belief that the appellant was dealing in hundreds of thousands of pounds of goods in a market with extremely tight margins without protecting itself through terms which oculd be properly evidenced in the event of a dispute'.

(2) *Negotiations* – no documentary evidence of any negotiations was put forward. Mr Johal's oral evidence swung at random between 'all negotiations took place by word of mouth so there are no records' to 'there are records but I do not know where they are or I have not produced them'.

(3) *Insurance* – the lack of insurance was a specific risk factor highlighted in Notice 726. Mr Johal resorted to a claim that he did have his own insurance, but once again did not have any documentary evidence or adequate explanation for its absence.

136. In relation to the absence of features that are hallmarks of genuine commercial transactions, there is no good explanation given for this total lack of contemporaneous documentary evidence to support any of Mr Johal's oral evidence.

(1) The original date of service of the appellant's evidence in these proceedings was 2 August 2018, and further directions for service of evidence by 3 May 2019, and 21 January 2020, and Mr Johal was presented in these proceedings until 12 May 2022. There has been ample opportunity for Mr Johal to produce the evidence on which he relies.

(2) We draw the inference that the evidence has not been produced because it does not exist, or if it was produced, it would not be helpful to the appellant's case because it would not be satisfactory evidence to support genuine, commercial business practice.

(3) In respect of the absence of contracts, we infer that the true position was that the appellant was not concerned about disputes, because it knew that, or at the very least turned a blind eye to the fact that, its transactions were part of an orchestrated scheme to defraud. No disputes arose for the same reason; the deals were to occur, in circumstances that the participants would not complain; the quality of the goods was an irrelevancy; all that mattered was that the VAT should be charged down the transaction chain, and money paid up the transaction chain to the fraudulent defaulters.

(4) In respect of the lack of evidence of negotiations, we infer that such evidence has not been produced because it does not exist. The transaction chains were contrived and all parties, including the appellant, know what the price that goods would be bought and sold for, and there was no real need for price negotiations.

(5) In respect of the lack of insurance, we infer that the appellant did not consider insurance to be necessary because the transactions were contrived, and were going to happen regardless.

Back-to-back deals and absence of delivery notes

137. Mr Johal attempted to maintain that the back-to-back deals were not an element to be concerned about, such as those in deal chains 4-8 in 04/15 and all deals in 07/15 and 10/15, where the chain was either ESL→ AK Suppliers→EDW, or Lupt →AK Suppliers→ EDW.

(1) ESL and Lupt were both located in the same residential block of flats in Shepherd's Bush, W3, and the appellant was close by in West London W7. AK Suppliers was located in Crawley, RH10, over an hour away from both. Driving from Lupt to AK Suppliers would take one close to the appellant's premises (approximately 400m to the M4).

(2) Mr Johal was questioned whether the goods travelled to Crawley and back to West London n the same day, 'on a totally pointless round trip', or they were delivered straight to the appellant from just round the corner. Mr Johal insisted delivery notes would have existed, but have not been produced them

(3) We infer that the delivery notes probably do not exist, as such notes would have revealed the absurd state of affairs in the full transaction chains.

Due Diligence

138. From Mr Johal's evidence, it was clear that he had barely considered the Due Diligence Exchange ('DDE') reports at the time of the deals. There are parts of the reports that Mr Johal did not understand at all. As to the remainder contents of the reports, he was unable to speak to them as how they had informed him in making his trading decisions. There is no evidence to suggest that the reports were considered at the time, or followed up in any manner where elements that warranted further enquiry were clearly present.

139. Mr Johal's evidence about Gempost suggested that he had known the Jabble brothers for decades, and intended to trade with them, come what may; that the Jabble brothers are successful businessmen as evidenced by their wealth in residing in million-pound mansions. In other words, Mr Johal's evidence made no reference to the appellant's reason for trading with Gempost as connected with the contents in the due diligence report on Gempost.

140. The Tribunal finds the reports produced by DDE to be perfunctory, and the basic substantive checks (such as credit rating, trade history and references) were not performed. The reports did not make any input in the appellant's decision to trade with the suppliers in the deal chains in question. The reports were for window dressing, to give the impression that the appellant was taking due diligence seriously. In reality, the appellant was not interested in ascertaining whether its transaction chains were connected with fraud, and did not follow up on any matters noted in the reports.

141. The conclusion that these reports were produced merely for form is supported by the fact that the author of these reports, Mark Curley, was closely associated with the network of fraudulent defaulters trading with the appellant. The Tribunal is critical of the assertion that Mark Curley could be considered a bona fide independent third party to make these DDE reports of any genuine value for the purpose of establishing whether the counterparty in question is a legitimate trader. The web of association of the defaulting traders in the deal chains with Mark Curley is illustrated as follows:

(1) Mark Curley's father, Vincent Curley acted as a representative for Gempost, for Phoenix, and Booze Factory.

(2) Vincent Curley had acted for Baba C&C.

(3) Mark Curley acted for IK Drinks, and AK Suppliers.

Adverse inferences

142. In *Wetton v Ahmed*, the Court of Appeal stated that the trial judge was entitled to assess the credibility of a witness's oral evidence by reference not only to contemporaneous documents, but also by reference to the absence of those documents. Arden LJ said at [14]:

> 'In my judgement, contemporaneous written documentation is of the very greatest importance when assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can be checked against it. It can also be significant if the written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and the party adducing oral

> evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw references by its absence.'

143. The Tribunal draws adverse inferences from the absence of contemporaneous documentation. The assertion by the appellant that its transactions in the deal chains were genuine arms-length commercial deals, negotiated, confirmed, and actioned in a single day from trader to trader to trader, is without any credible factual foundation.

144. Furthermore, HMRC have proved to the requisite standard that there is a prima facie case that the appellant knew or should have known that its transactions were connected with fraud, and no proper reason has been given for the absence of key witnesses. The Tribunal is therefore entitled to draw the inference (per *Jones v Dunkel*) that if the relevant witnesses were brought to give evidence, they would have exposed facts unfavourable to the appellant.

Conclusion

145. The more heavily orchestrated and efficient a fraudulent scheme is, the more likely it is that each party knew its role therein. This is a case where we find that there was an orchestrated scheme to defraud the Revenue, and the appellant was a party in deal chains over a period of time along with a network of participants that were orchestrating the fraudulent transactions.

146. We find that, on the balance of probabilities, Mr Johal, as the person to be attributed with the knowledge in relation to the appellant, had actual knowledge that the transactions the appellant undertook as itemised in the Annex II were all connected with fraudulent evasion of VAT. In *Pacific Computers* where HMRC had likewise relied on meeting the burden of proof on the fourth element of the *Blue Sphere* test by reference to the level of orchestration, the Upper Tribunal agreed with HMRC's submissions in that respect.

> '[76] HMRC's closing submissions invited the FTT to find that the evidence showed that the level of orchestration in the deal chains was very high. It was then submitted that two questions arose: *first, how did the orchestrators of the fraud manage it so well, and secondly how likely was it that an orchestrator of such a fraud would involve an unknowing party and why?* The submission was that the only way in which the orchestrators of such a fraud could ensure a carousel pattern and speed was to tell each party from whom to purchase, to whom to sell and at what price. It was argued that the carousel, circularity and timings that occurred simply could not have happened without that level of instruction. It was further submitted that, because a fraudster would wish to retain control of the component parts of such a fraud, *it was highly improbable that an orchestrator of such a fraud would involve an unknowing party*.' (Italics added)

147. In the alternative, the transactions in question were devoid of commercial reality to the extent that a taxpayer, as the director of the appellant undertaking the transactions in question, should have known that the 'only reasonable explanation' for the transaction in which he was involved was that it was connected with fraudulent evasion of VAT. By that reckoning, Mr Johal 'should have known of that fact': *Mobilx* [59].

148. Furthermore, if a taxpayer chooses to turn a blind eye to the 'only reasonable explanation' being of fraud, or if he chooses not to make the necessary enquiries as concerns the legitimacy of a transaction as expected of a prudent trader, then the taxpayer 'should have known': *Davis & Dann*. It is the totality of the circumstances of the transactions that is to be considered, and the Tribunal concludes that the orchestration of the deal chains in question was at such a level that Mr Johal should have known that 'the only reasonable explanation' was that the transactions were connected with fraud, even if we have not been able to conclude that he knew that the transactions were connected with fraud.

DISPOSITION

149. The appeal is accordingly dismissed. The transactions in question as detailed in Annex II were connected with fraudulent evasion of VAT, and this was a fact that the Appellant, Everyday Wholesale Limited, (through the knowledge of Mr Jatinder Johal as its director) both knew and should have known.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

150. 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.

HEIDI POON
TRIBUNAL JUDGE

Release date: 20th DECEMBER 2022

ANNEX I

The authorities lodged are listed chronologically with their short case references in brackets.

(1) *Blatch v Archer* (1774) 1 Cowp 63 (‘***Blatch v Archer***’)

(2) *Ewer v Ambrose* (1825) 3 B & C 246 (‘***Ewer v Ambrose***’)

(3) *McQueen v Great Western Railway Company* (1875) LR 10 QB 569 (‘***McQueen v GWR***’)

(4) *Jones v Dunkel* (1959) 101 CLR (‘***Jones v Dunkel***’)

(5) *British Columbia Court of Appeal in Cariboo v Carson Truck Lines* (1961) 32 DLR (2d) 36 (‘***Cariboo v Carson***’)

(6) *Herrington v British Railways Board* [1972] AC 877 (‘***Herrington v British Railways***’)

(7) *O’Donnell v Reichard* [1975] VR 916 (‘***O’Donnell***’)

(8) *R v IRC ex p T C Coombs & Co* [1991] 2 AC 283 (‘***R (ex p Coombs & Co)***’)

(9) *Murray v DPP* [1994] 1 WLR 1 (‘***Murray v DPP***’)

(10) *Chapman v Copeland* (1996) 110 SJ 569 (‘***Chapman v Copeland***’)

(11) *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 (‘***Wisniewski***’)

(12) *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (Case C-439/04 & C-440/04) [2008] STC 1357 (‘***Kittel***’)

(13) *Blue Sphere Global Ltd v HMRC* [2009] EWHC 1150 (Ch) (‘***Blue Sphere***’)

(14) *Red 12 Trading Ltd v HMRC* [2009] EWHC 2563 (Ch) (‘***Red 12***’)

(15) *Mobilx Ltd (in administration), Blue Sphere Global Ltd and Calltel Telecom Ltd and Another v HMRC* [2010] EWCA Civ 517, [2010] STC 1436 (‘***Mobilx***’)

(16) *Wetton v Ahmed* [2011] EWCA Civ 610 (‘***Wetton v Ahmed***’)

(17) *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) (‘***Gestmin***’)

(18) *Prest v Prest* [2013] 2 AC 415 (‘***Prest v Prest***’)

(19) *Edgeskill Ltd v R&C Comrs* [2014] STC 1174 (‘***Edgeskill***’)

(20) *Davis & Dann Ltd & Anor v HMRC* [2016] EWCA Civ 142 (‘***Davis & Dann***’)

(21) *HMRC v Pacific Computers Limited* [2016] UKUT 350 (‘***Pacific Computers***’)

(22) *HMRC v Citibank NA, E Buyer UK Ltd* [2017] EWCA 1416 (Civ) (‘***Citibank***’)

(23) *British Airways PLC v Airways Pension Scheme Trustee Ltd* [2017] EWHC 3374 (Comm) (‘***British Airways***’)

(24) *Kazahstan Kagazy PLC & Ors v Zhunus & Ors* [2017] EWHC 3374 (Comm) (‘***Kagazy***’)

(25) *DCM Optical (Holdings) Ltd v HMRC* [2018] UKUT 409 (TCC) (‘***DCM v HMRC***’)

(26) *M&M (Cambridge) LLP v HMRC* [2020] UKFTT 107 (TC) (‘***M&M’)***

(27) *HMRC v McCord T/A Hi-Octane Imports* [2021] UKUT 0153 (TCC) (‘***Hi-Octane***’)

The additional authorities referred to in the decision are:

(28) *Megtian Ltd (in administration) v HMRC* [2010] EWHC 18 (Ch), [2010] STC 840 (‘***Megtian***’)

(29) *Sandham t/a Premier Metals Leeds v HMRC* [2020] STC 168 (‘***Sandham***’)