AN COIMISIÚN UM ACHOMHAIRC CHÁNACH
TAX APPEALS COMMISSION

31TACD2023

Between

[redacted]

Appellant

and

REVENUE COMMISSIONERS

Respondent

Determination

Contents

INTRODUCTION

1. This is an appeal to the Tax Appeals Commission ("the Commission") by [redacted] ("the Appellant") pursuant to the Value Added Tax Consolidation Act 2010 ("VATCA 2010") against assessments raised by the Revenue Commissioners ("the Respondent") to Value-Added Tax ("VAT") in the total amount of €6,542,195 for the period from 1 January 2013 to 30 June 2018. The assessments were raised on the basis that the Appellant knew or should have known that it was participating in transactions connected with the fraudulent evasion of VAT.

2. The appeal proceeded by way of a hearing from 12 to 16 September 2022.

Background

3. On 17 April 2019, the Respondent raised a Notice of Assessment to VAT against the Appellant in the total amount of €6,542,195. The relevant assessments are as follows:

    - 1 January 2013 to 31 December 2013: €1,195,755.
    - 1 January 2014 to 31 December 2014: €1,047,736.
    - 1 January 2015 to 31 December 2015: €894,639.
    - 1 January 2016 to 31 December 2016: €1,216,730.
    - 1 January 2017 to 31 December 2017: €1,492,734.
    - 1 January 2018 to 30 June 2018: €694,601.

4. The Respondent contended that the Appellant had bought [redacted] from twelve [redacted] (also known as 'missing traders' – the two phrases are used interchangeably in this Determination), and had sold [redacted] to four further dealers in the EU, in circumstances where its counterparties had not properly accounted for VAT on the transactions, and that the Appellant knew or should have known this. Accordingly, pursuant to the principles enunciated by the Court of Justice of the European Union ("CJEU") in *Axel Kittel v État belge* Case C-439/04 ("*Kittel*") and *Mecsek-Gabona Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága* Case C-273/11 ("*Mecsek-Gabona*"), the Appellant was liable for the foregone VAT.

5. The Appellant appealed the assessments to the Commission on 15 May 2019. The appeal proceeded by way of a hearing from 12 to 16 September 2022.

6. The rest of this Determination is divided into two parts. Part 1 addresses the Appellant's contention that its right to defence under EU law was breached by the Respondent. This

contention was originally raised by the Appellant as a preliminary point to be addressed before a substantive hearing; however it subsequently decided to address the issue as part of the overall hearing. At the hearing, the Respondent argued that the issue should be determined prior to the hearing of evidence. The Commissioner was satisfied that it was appropriate to hear the parties' evidence in advance of considering the right to defence point in the Determination, as he did not consider it would prejudice the Respondent to allow it to adduce evidence prior to such consideration. Consequently, this question will be considered in Part 1. Part 2 will then, insofar as required, address the question of whether the Appellant knew or should have known that it was involved in transactions connected with the fraudulent evasion of VAT.

PART 1 – WAS THE APPELLANT'S RIGHT TO DEFENCE BREACHED?

7. The first question that falls to be considered is whether the Appellant's right to defence under EU law was breached by the Respondent, and if so, what consequences follow from such a breach.

Jurisdiction

8. However, before addressing this, it is necessary to consider whether the Commissioner has jurisdiction to examine the Appellant's complaint. In its closing submissions, the Respondent, while not explicitly stating that the Commissioner did not have jurisdiction, drew attention to the failure by the Appellant to challenge the assessment in court, and argued that the appeals process before the Commission "*proceeds on the basis of a valid assessment*."

9. The Commission was established by virtue of the Finance (Tax Appeals) Act 2015, which commenced on 21 March 2016. Section 6(2) of the 2015 Act states that Appeal Commissioners shall perform certain functions "*in relation to the Taxation Acts*", including *inter alia* "*(f) hearing an appeal where the Commissioners have decided that a hearing is the appropriate method of adjudicating on the appeal*" and "*(g) determining appeals*". Section 2 of the 2015 Act defines "*the Taxation Acts*" to include *inter alia* the VATCA 2010. Section 111(2) of the VATCA provides for a right of appeal to the Commission regarding an assessment to VAT.

10. Irish law on VAT implements, and is governed by, European Union law. Recital 4 of Council Directive 2006/112/EC ("the VAT Directive") states that

"*The attainment of the objective of establishing an internal market presupposes the application in Member States of legislation on turnover taxes that does not distort conditions of competition or hinder the free movement of goods and services. It is therefore necessary to achieve such harmonisation of legislation on turnover taxes by means of a system of value added tax (VAT), such as will eliminate, as far as possible, factors which may distort conditions of competition, whether at national or Community level*."

11. The CJEU has made clear that a duty exists on bodies dealing with disputes, such as the Commission, to apply EU law. In *Commissioner of An Garda Síochána v Workplace Relations Commission* Case C-378/17 ("the WRC case"), the court stated that

    "*38. As the Court has repeatedly held, that duty to disapply national legislation that is contrary to EU law is owed not only by national courts, but also by all organs of the State — including administrative authorities — called upon, within the exercise of their respective powers, to apply EU law…*

    39. It follows that the principle of primacy of EU law requires not only the courts but all the bodies of the Member States to give full effect to EU rules."

12. More recently, in *Banco de Santander SA* Case C-274/14, the CJEU considered whether the Spanish Tribunal Económico-Administrativo Central (TEAC) (Central Tax Tribunal) was sufficiently independent to constitute a tribunal under Article 267 of the Treaty on the Functioning of the European Union. The court found that it was not, but nevertheless stated that

    "*78. It must be added that the fact that the TEAs do not constitute 'courts or tribunals' for the purposes of Article 267 TFEU does not relieve them of the obligation to ensure that EU law is applied when adopting their decisions and to disapply, if necessary, national provisions which appear to be contrary to provisions of EU law that have direct effect, since these are obligations that fall on all competent national authorities, not only on judicial authorities…*"

13. The Commissioner considers it clear from the above that there is an obligation on all competent national authorities to ensure that EU law is applied, even if such an authority does not constitute a court or tribunal under Article 267 TFEU. In any event, however, the Commissioner is of the view that the Commission does constitute a tribunal under Article 267. He has considered the determination of the Chairperson of the Commission in 08TACD2021, wherein she addressed this question in detail and found that the Commission did constitute a tribunal. Furthermore, he notes that the predecessor to the

Commission, the Appeal Commissioners of the Office of Appeal Commissioners, referred a request for a preliminary ruling on the implementation of the VAT Directive in *National Roads Authority v Revenue Commissioners* Case C-344/15. The Respondent did not object to the making of the preliminary reference in that instance, and the reference was accepted and ruled upon by the CJEU. As such a reference may only be made by "*a court or a tribunal*" (Article 267 TFEU), this acceptance demonstrates that the CJEU considered the Commission's predecessor to constitute a tribunal.

14. The jurisdiction of the Commission to apply EU law has also been considered by the Irish courts in light of the CJEU's judgment in the WRC case. In *An Taisce v An Bord Pleanála* [2020] IESC 39, the Supreme Court, reflecting on that judgment, observed that

> "*It would therefore seem to be the case in accordance with this judgment that a body such as An Bord Pleanála would be required to disapply national measures of whatever type, if inconsistent with EU principles… If applied literally, that judgment is capable of having widespread ramifications for the jurisdiction of national non-court bodies, or administrative entities, which are called upon to apply national legislation where an EU measure is relevant. Such bodies, under whose remit EU rights may arise, include the Environmental Protection Agency, the Tax Appeals Commission, the Valuation Tribunal, the Refugee Appeals Commission, the Information Commissioner as well as the District and Circuit Courts…"*

15. The jurisdiction of the predecessor of the Commission was subsequently considered in detail by the Court of Appeal in *Lee v Revenue Commissioners* [2021] IECA 18. Murray J held that

> "*The Appeal Commissioners are a creature of statute, their functions are limited to those conferred by the TCA, and they enjoy neither an inherent power of any kind, nor a general jurisdiction to enquire into the legal validity of any particular assessment. Insofar as they are said to enjoy any identified function, it must be either rooted in the express language of the TCA or must arise by necessary implication from the terms of that legislation*."[1]

He further held that

> *"From the definition of the appeal, to the grounds of appeal enabled by the Act, to the orders the Appeal Commissioners can make at the conclusion of the proceedings, and*

[1] Paragraph 20

the powers vested in them to obtain their statutory objective, their jurisdiction is focussed on the assessment and the charge."[2]

16. Towards the end of the judgment, Murray J considered the jurisdiction of the Commission's predecessor under EU law following the WRC case. In an *obiter dictum,* he stated that

> "*The Workplace Relations Commission decision applies a principle of European law operative where a national tribunal is seized with a dispute, requiring that it give effect to the supremacy of European law in the course of determining that dispute. If a taxpayer wishes to contend that the application of a particular provision of the TCA breaches EU law, then the Appeal Commissioners must address that contention if it is relevant to the matter with which they are seised and, if it is appropriate and necessary to do so to decide that case, to disapply the provision or otherwise exercise their powers so as to ensure that EU law is not violated. <u>The same principle dictates that the Appeal Commissioners may entertain claims based upon the doctrine of abuse of rights in European law.</u> These principles derive from the mandates of European law. Neither expand the jurisdiction of the body as a matter of national law*."[3] (emphasis added)

While these remarks were *obiter* and concerned the Commission's predecessor, the Commissioner considers that it is clear authority that the Commission has jurisdiction to apply EU law as appropriate.

17. In *Glencore Agriculture Hungary Kft v Nemzeti Adó- és Vámhivatal Fellebbviteli Igazgatósága* Case C-189/18 ("*Glencore Agriculture Hungary*"), the CJEU stated that

> "*39. Among the rights guaranteed by EU law is respect for the rights of the defence, which, according to a consistent body of case-law, is a general principle of EU law which applies where the authorities are minded to adopt a measure which will adversely affect an individual. In accordance with that principle, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of EU law, even though the EU law applicable does not expressly provide for such a procedural requirement…*"

[2] Paragraph 64
[3] Page 40

18. The Appellant contends that the right set out by the CJEU in *Glencore Agriculture Hungary* was breached by the Respondent. Consequently, the Commissioner is satisfied that the Appellant's claim is "*based upon the doctrine of abuse of rights in European law"*, as stated by Murray J in *Lee v Revenue Commissioners*, and therefore is something that falls to be considered by the Commissioner. Indeed, the Commissioner considers that it would be rather illogical to find otherwise, given that it is not in dispute that the factual considerations in this case are governed by the application of EU law, as enunciated in the *Kittel* and *Mecsek-Gabona* judgments. No rationale has been put forward as to why the Commissioner should consider and apply the principles set out in those two cases, but not in *Glencore Agriculture Hungary*, and the Commissioner is satisfied that it is appropriate for him to do so.

Engagement between the parties re raising of assessment

19. In its closing submissions, the Appellant requested the Commissioner to refer to *inter alia* its letter of 6 May 2020 to the Respondent, which set out its basis for contending that its right to defence had been breached. The Commissioner does not understand the Respondent to dispute the factual substance of the Appellant's description of the engagement between the parties in and around the raising of the assessment, albeit the Respondent obviously does not accept that the right to defence has been breached.

20. According to the Appellant's letter of 6 May 2020, the Respondent attended at the Appellant's premises on 24 and 25 October 2017 for the purposes of carrying out an investigation into VAT and PREM for the years 2013 – 2016. On 26 March 2018 the investigation was extended to include 2017. Subsequently, the Respondent sought bank account information relating to the Appellant, both directly from it and via a notice pursuant to section 906A of the TCA 1997 to the Appellant's bank.

21. On 22 March 2019, the Appellant attended a meeting at the Respondent's premises in [redacted] According to the Appellant, it was at this meeting that, for the first time, the Respondent alleged that the Appellant had engaged in transactions with missing traders "*where they shouldn't have*".

22. The Commissioner has considered the Respondent's note of the meeting of 22 March 2019. The majority of the conversation was between the Respondent's [redacted] and the Appellant's [redacted] The Commissioner notes the following from the Respondent's note:

"[redacted] noted that this investigation was in relation to VAT abuse in the [redacted] business and a pattern of behaviour between Missing Traders and [the Appellant] had been identified and was a serious concern."

"[redacted] noted that he would not be giving the specific details of this behaviour collected through the review of the records to [the Appellant] today. The details would subsequently follow in a letter and [the Appellant] would have time to review."

"If [the Respondent's] conclusion is wrong that will be a matter for the appeals commission to decide. For now, [the Respondent] will put our case forward based on the current information available.

[The Appellant] can defend the claims made. [The Respondent] will issue a detailed letter of the findings and how we arrived at this conclusion. [The Respondent] will proceed to raise an assessment against [the Appellant]."

"[redacted] noted that [the Respondent] would assume that [the Appellant] would appeal the case but the investigation would go no further at this point.

[redacted] thought he was only present to provide more information at this meeting.

The letter of the findings will issue and after this point [the Appellant] will have 30 days to appeal. After this letter is issued [the Respondent] will not come back to [the Appellant] but [the Appellant] can still engage with [the Respondent] on the findings and provide evidence to the contrary of the case being made. Discussions can still be ongoing up to the appeal."

"Agent advised that they wait for the letter before addressing any further issues.

[redacted] wanted to see the evidence currently available.

[redacted] noted [the Appellant] will have the detailed findings letter within 2 weeks. [redacted] will note in the letter when he will make the assessment for. [The Respondent] cannot provide the evidence identified before the letter is issued."

"[redacted] noted that a response to the letter could go a long way to explaining it all. That a response would be reviewed and if it rebuts the claims made then [the Respondent] can change its conclusion for the appeals process. If the response does not rebut the claims made then the appears [sic] *process will go on as normal."*

23. The Respondent's letter to the Appellant was dated 5 April 2019 – although according to the Appellant it was posted on 10 April 2019 and received by the Appellant on 11 April 2019. The letter set out the grounds on which the Respondent contended that the

Appellant knew or ought to have known that its transactions with the missing traders were connected to a scheme for the fraudulent evasion of VAT. The letter also stated:

"*I propose raising assessments immediately under the provisions of Section 111 of the VAT Consolidation Act 2010 in the sum of €6,157,660 to collect the above amounts and formal notices of assessment will issue to the company in due course.*

These notices may be appealed to the Tax Appeals Commission, Fitzwilliam Court, Leeson Close, Dublin 2 within 30 days of the date of said notices."

24. A further letter from the Respondent, dated 12 April 2019, issued to the Appellant and stated *inter alia* that assessments totalling approx. €6.5m "*will issue…in the near future.*" On 17 April 2019, the Appellant's agent sent a letter to [redacted] of the Respondent, via the Respondent's secure messaging system, requesting a right of reply to the allegations before the raising of the assessments. On the same day, [redacted] responded to the agent and stated that, "*The assessments have therefore been raised by me and formal notices will issue to your client in the near future…*" The Notice of Assessment that subsequently issued to the Appellant was dated 17 April 2019.

Fundamental Rights and Caselaw

25. The Charter of Fundamental Rights of the European Union ("the Charter") provides *inter alia* the following:

"*<u>Article 41 – Right to good administration</u>*

1. *Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union.*
2. *This right includes:*
   (a) *the right of every person to be heard, before any individual measure which would affect him or her adversely is taken;*
   (b) *the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy;*
   (c) *the obligation of the administration to give reasons for its decisions…*

[…]

<u>Article 47 – Right to an effective remedy and to a fair trial</u>

Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article…

[…]

Article 51 – Field of application

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties…"

26. In *Kamino International Logistics and Datema Hellmann Worldwide Logistics v Staatssecretaris van Financiën* Joined Cases C-129/13 and C-130/13 ("*Kamino*"), the CJEU stated that

"*29. The right to be heard in all proceedings is now affirmed not only in Articles 47 and 48 of the Charter of Fundamental Rights of the European Union, which ensure respect for both the rights of the defence and the right to fair legal process in all judicial proceedings, but also in Article 41 of the Charter, which guarantees the right to good administration. Article 41(2) provides that the right to good administration includes, inter alia, the right of every person to be heard before any individual measure which would affect him adversely is taken…*

30. In accordance with that principle, which applies where the authorities are minded to adopt a measure which will adversely affect an individual…the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision…"

27. In *WebMindLicenses Kft v Nemzeti Adó- és Vámhivatal Kiemelt Adó- és Vám Főigazgatóság* Case C-419/14 ("*WebMindLicenses*"), the CJEU held that

"*In circumstances such as those of the main proceedings, by virtue of Articles 7, 47 and 52(1) of the Charter of Fundamental Rights of the European Union it is incumbent upon the national court which reviews the legality of the decision founded on such evidence adjusting value added tax to verify, first, whether the interception of telecommunications and seizure of emails were means of investigation provided for by*

law and were necessary in the context of the criminal procedure and, secondly, whether the use by the tax authorities of the evidence obtained by those means was also authorised by law and necessary. It is incumbent upon that court, furthermore, to verify whether, in accordance with the general principle of observance of the rights of the defence, the taxable person had the opportunity, in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it. If the national court finds that the taxable person did not have that opportunity or that that evidence was obtained in the context of the criminal procedure, or used in the context of the administrative procedure, in breach of Article 7 of the Charter of Fundamental Rights of the European Union, it must disregard that evidence and annul that decision if, as a result, the latter has no basis. That evidence must also be disregarded if the national court is not empowered to check that it was obtained in the context of the criminal procedure in accordance with EU law or cannot at least satisfy itself, on the basis of a review already carried out by a criminal court in an inter partes procedure, that it was obtained in accordance with EU law."

28. In *Glencore Agriculture Hungary*, the CJEU stated *inter alia* that:

"39. Among the rights guaranteed by EU law is respect for the rights of the defence, which, according to a consistent body of case-law, is a general principle of EU law which applies where the authorities are minded to adopt a measure which will adversely affect an individual. In accordance with that principle, the addressees of decisions which significantly affect their interests must be placed in a position in which they can effectively make known their views as regards the information on which the authorities intend to base their decision. The authorities of the Member States are subject to that obligation when they take decisions which come within the scope of EU law, even though the EU law applicable does not expressly provide for such a procedural requirement…

40. That general principle thus applies in circumstances such as those at issue in the main proceedings, in which a Member State, in order to comply with the obligation arising from the application of EU law to take all legislative and administrative measures appropriate for ensuring collection of all the VAT due on its territory and for preventing fraud, submits a taxpayer to a tax inspection procedure…

41. An integral part of respect for the rights of the defence is the right to be heard, which guarantees every person the opportunity to make known his view effectively during an administrative procedure and before the adoption of any decision liable to affect his interests adversely. In accordance with the Court's case-law, the purpose of

the rule that the addressee of an adverse decision must be placed in a position to submit his observations before that decision is taken is to put the competent authority in a position effectively to take all relevant information into account. In order to ensure that the person concerned is in fact protected, the purpose of that rule is, inter alia, to enable that person to correct an error or submit such information relating to his or her personal circumstances as will argue in favour of the adoption or non-adoption of the decision, or in favour of its having a specific content…

[…]

51. The requirement, referred to in paragraphs 39 and 41 of this judgment, for a person to be able to make his views known as regards the evidence on which the authorities intend to base their decision means that the addressees of that decision must be in a position to be aware of that evidence…The principle of respect for the rights of the defence thus has as a corollary the right of access to the file…

52. As the addressee of a decision having an adverse effect must be put in a position to submit his observations before that decision is taken, so that, in particular, the competent authority will be able effectively to take account of all the relevant evidence and so that, where appropriate, the addressee will be able to correct an error and effectively rely on such evidence relating to his personal situation, access to the file must be authorised during the administrative procedure. Therefore a breach of the right of access to the file during the administrative procedure is not remedied by the mere fact that access to the file was made possible during the judicial proceedings relating to an action in which annulment of the contested decision is sought…

53. It follows that, in an administrative tax procedure such as that at issue in the main proceedings, the taxable person must be able to have access to all the evidence in the file on which the tax authorities intend to base their decision. Thus, when the tax authorities intend to base their decision on evidence obtained, as in the case in the main proceedings, in the context of related criminal procedures and administrative procedures initiated against his or her suppliers, that taxable person must be able to have access to that evidence.

54. Furthermore, as the Advocate General observed in points 59 and 60 of his Opinion, the taxable person must also be allowed access to documents which do not directly serve as a basis for the decision of the tax authorities, but may be helpful in the exercise of the rights of the defence, in particular to exculpatory evidence that may have been collected by those authorities…

55. However, in so far as, as was observed in paragraph 43 of this judgment, the principle of respect for the rights of the defence is not an absolute prerogative but may be subject to restrictions, it should be observed that, in a tax verification procedure, such restrictions, enshrined in national law, may, in particular, be designed to protect requirements of confidentiality or business secrecy…and also, as the Hungarian Government has claimed, the private life of third parties, the personal data relating to them or the effectiveness of the criminal action, which access to certain information and certain documents is liable to harm.

56. The principle of respect for the rights of the defence, in an administrative procedure such as that at issue in the main proceedings, therefore does not impose on the tax authorities a general obligation to provide unrestricted access to the file which it holds, but requires that the taxable person is to have the opportunity to have communicated to him or her, at his or her request, the information and documents in the administrative file and taken into consideration by those authorities when they adopted their decision, unless objectives of public interest warrant restricting access to that information and those documents…

57. It follows that, when the tax authorities intend to base their decision on evidence obtained, as in the case in the main proceedings, in the context of criminal procedures and related administrative procedures initiated against the taxable person's suppliers, the principle of respect for the rights of the defence requires that the taxable person be able to have access, during the procedure of which he is the subject, to all of that evidence and to the evidence that may be useful for his or her defence, unless public-interest objectives justify restricting that access.

58. That requirement is not satisfied in the case of a practice of the tax authorities consisting in not giving the taxable person concerned any access to that material and, in particular, to the documents on which the findings made are based, to the reports drawn up and to the decisions adopted at the close of the related administrative procedures, and in communicating to him or her indirectly, in the form of a summary, only a part of that material which they have selected according to criteria which are specific to him or her and over which he or she can exercise no control."

Submissions

Appellant

29. Counsel for the Appellant contended that the assessment had been issued in breach of its right of defence, as provided for under the European Charter of Fundamental Rights,

because the Respondent failed and/or refused to provide the Appellant with access to the information and documentation upon which its conclusions were based prior to the issuance of the assessment. As a result, the Commissioner was precluded as a matter of EU law from having regard to the information, explanations and documentation provided by the Respondent in support of the assessment. Consequently, the appeal must be allowed.

30. Counsel stated that the Appellant had previously called upon the Respondent to produce evidence that it had not deliberately raised the assessment in order to ensure that the Appellant would not have an opportunity to make representations regarding same. Not only did the Respondent not provide such evidence, it decided not to call [redacted], the officer who had issued the assessment, despite having previously stated that he would be called. Counsel submitted that "*only one inference can be drawn from this course of action.*"

31. In the alternative, and without prejudice to the foregoing, counsel for the Appellant argued that the Respondent should be limited to reliance only upon the issues, facts and evidence which were provided in the letter of 5 April 2019. It was argued that the Appellant was not provided an opportunity to respond to the letter of 5 April 2019 prior to the issuance of the assessment on 17 April 2019.

Respondent

32. Regarding the Appellant's submission on the right to defence, the Respondent stated that [redacted] evidence was that he had seen the email from the Respondent on 17 April 2019 which stated that the Appellant was entitled to reply to the findings set out in the letter of 5 April 2019. Almost everything that the Appellant needed to consider was in its own records. No application had been made to the courts to declare the assessment a nullity; instead the Appellant, which had the benefit of legal advice at all relevant times, was content to use the mechanisms of the Commission, which are premised on the existence of a valid assessment. Consequently, its reliance on *Glencore Agriculture Hungary* was out of place. The Respondent had made clear to the Appellant that the making of an assessment was not itself a final decision, adversely affecting the rights of the Appellant, but was something that the Appellant was invited to engage with.

Material Facts

33. Having read the documentation submitted, and having considered the submissions of the parties, the Commissioner makes the following findings of material fact in respect of the Appellant's right to defence:

33.1 The Appellant was first notified by the Respondent that the Respondent considered it had engaged in transactions with missing traders that it knew or ought to have known were connected with the fraudulent evasion of VAT at the meeting on 22 March 2019.

33.2 At the meeting on 22 March 2019, the Respondent told the Appellant that an assessment would be raised against it, and that the Appellant would be entitled to appeal against the assessment to the Commission. Therefore, the Respondent had decided by 22 March 2019 to raise an assessment against the Appellant.

33.3 The notice of assessment was raised against the Appellant on 17 April 2019. The Appellant was not afforded an opportunity to respond to the allegations against it prior to the issuance of the notice of assessment.

33.4 The Appellant was not provided with the file of evidence on which the Respondent relied to raise the notice of assessment prior to its issuance on 17 April 2019.

Analysis

34. It does not appear to the Commissioner that there is any significant disagreement between the parties regarding their engagement prior to the raising of the notice of assessment on 17 April 2019. Indeed, it appears that the most important meeting was the one that took place on 22 March 2019, and in its account of what transpired the Appellant has largely relied upon, and not disputed the contents of, the Respondent's own note of the meeting.

35. Consequently, the Commissioner is satisfied that [redacted], on behalf of the Respondent, told the Appellant *inter alia* that

> "*If [the Respondent's] conclusion is wrong that will be a matter for the appeals commission to decide."*
>
> *"[The Appellant] can defend the claims made. [The Respondent] will issue a detailed letter of the findings and how we arrived at this conclusion. [The Respondent] will proceed to raise an assessment against [the Appellant]."*
>
> *"[redacted] noted that [the Respondent] would assume that [the Appellant] would appeal the case but the investigation would go no further at this point."*
>
> *"The letter of the findings will issue and after this point [the Appellant] will have 30 days to appeal. After this letter is issued [the Respondent] will not come back to [the Appellant] but [the Appellant] can still engage with [the Respondent] on the findings and provide evidence to the contrary of the case being made. Discussions can still be ongoing up to the appeal."*

"[redacted] noted [the Appellant] will have the detailed findings letter within 2 weeks. [redacted] will note in the letter when he will make the assessment for. [The Respondent] cannot provide the evidence identified before the letter is issued."

"[redacted] noted that a response to the letter could go a long way to explaining it all. That a response would be reviewed and if it rebuts the claims made then [the Respondent] can change its conclusion for the appeals process. If the response does not rebut the claims made then the appears [sic] *process will go on as normal."*

36. The Commissioner is satisfied that the clear import of the above quotations is that the Respondent had decided by 22 March 2019 to raise an assessment against the Appellant, and was not willing to provide the Appellant with an opportunity to address the allegations against it before the assessment was raised. It is clear from the above that the Respondent envisaged that any response from the Appellant could be dealt with in the context of an appeal to the Commission, but not before.

37. The Respondent issued a four-page letter to the Appellant dated 5 April 2019 setting out its allegations at a high level (it is noted that the Appellant alleges that the letter was posted on 10 April and received by it on 11 April, but the Commissioner considers that nothing material turns on this). The letter also stated that the Respondent proposed raising the relevant notices of assessment "*immediately*" and that these could be appealed to the Commission within 30 days. The notice of assessment subsequently issued on 17 April 2019.

38. The Commissioner considers that the CJEU's jurisprudence on the right to defence in VAT cases such as this one is clear. In *WebMindLicenses*, the court held that

"*It is incumbent upon that court [*i.e*. the national court which reviews the legality of the decision founded on such evidence adjusting value added tax], furthermore, to verify whether, in accordance with the general principle of observance of the rights of the defence, the taxable person had the opportunity, in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it*." (emphasis added)

39. The CJEU expanded on what is required to vindicate a taxpayer's right to defence in *Glencore Agriculture Hungary*. The relevant paragraphs of that judgment have been set out at length above. In particular, the Commissioner notes the following remarks:

"*41. An integral part of respect for the rights of the defence is the right to be heard, which guarantees every person the opportunity to make known his view effectively during an administrative procedure and before the adoption of any decision liable to*

affect his interests adversely. In accordance with the Court's case-law, the purpose of the rule that the addressee of an adverse decision must be placed in a position to submit his observations before that decision is taken is to put the competent authority in a position effectively to take all relevant information into account…

[…]

52. As the addressee of a decision having an adverse effect must be put in a position to submit his observations before that decision is taken, so that, in particular, the competent authority will be able effectively to take account of all the relevant evidence and so that, where appropriate, the addressee will be able to correct an error and effectively rely on such evidence relating to his personal situation, access to the file must be authorised during the administrative procedure. Therefore a breach of the right of access to the file during the administrative procedure is not remedied by the mere fact that access to the file was made possible during the judicial proceedings relating to an action in which annulment of the contested decision is sought…"

40. As stated by the CJEU in *Kamino,* the right to defence is derived from the Charter. The Commissioner considers Article 41 of the Charter to be of particular relevance in considering the obligations upon the Respondent in this instance, and in particular "*the right of every person to be heard, before any individual measure which would affect him or her adversely is taken*" and "*the right of every person to have access to his or her file, while respecting the legitimate interests of confidentiality and of professional and business secrecy*." Pursuant to Article 51, the Respondent is obliged to respect the rights protected by the Charter when implementing EU law (such as in this instance). Furthermore, national courts and tribunals are obliged to interpret national measures in conformity with the Charter whenever they come within the scope of EU law.

41. The Commissioner rejects the submission of the Respondent that the Appellant cannot rely on the judgment of *Glencore Agriculture Hungary*. Firstly, as set out above, he is satisfied that he is entitled to consider whether the right to defence has been breached. Secondly, while it is correct that the facts in *Glencore Agriculture Hungary* were concerned with whether evidence gathered in parallel criminal proceedings should be provided to the taxpayer, the Commissioner is satisfied that the CJEU's comments quoted herein clearly were intended to apply more broadly, including in the instant case.

42. Consequently, the Commissioner is satisfied that the Respondent breached the Appellant's right to defence. The Respondent explicitly refused to allow the Appellant to respond to the allegations before the assessment was raised against it, and instead said that any such response could be provided in the context of an appeal to the Commission.

However, the Appellant was entitled to submit its observations on the allegations, and the Respondent was obliged to consider these observations before deciding whether or not to raise an assessment.

43. In this regard, the Commissioner considers surprising the Respondent's submission that "*the making of an assessment was not itself a final decision, adversely affecting the rights of the Appellant, but was something that the Appellant was invited to engage with.*" The raising of the assessment against the Appellant was not a neutral step in a process of engagement between the parties, but was the culmination of the Respondent's investigation into the Appellant (as confirmed by the Respondent's own notes of the meeting of 22 March 2019). If the notice of assessment had not been appealed by the Appellant, it would have been final and conclusive and the amount of tax assessed, €6,542,195, would have been payable within fourteen days (section 111 VATCA 2010). In the circumstances, it is difficult to understand the basis on which the Respondent contends that the making of the assessment did not adversely affect the rights of the Appellant.

44. In its submissions, the Respondent draws attention to [redacted] email of 17 April 2019 to the Appellant's agent, wherein he stated that "*the raising of an assessment does not preclude your client from exercising a right to reply to the findings outlined in my letter of 5h April and I can confirm that should a reply lead me to mitigate those findings, I am powered under the TCA 1997 to discharge the assessments without the necessity of a hearing before the Appeal Commissioner*." The Respondent also notes that [redacted] had accepted he had seen this email. However, the Commissioner does not consider that this email addresses the requirement that the Appellant should have been allowed an opportunity to comment on the allegations before the assessment was raised.

45. Furthermore, it is apparent that the Respondent failed to provide the Appellant with the "*file*" of evidence upon which it based its decision to raise the notice of assessment. In its notes of the meeting of 22 March 2019, it was stated that, "[redacted] *noted [the Appellant] will have the detailed findings letter within 2 weeks.* [redacted] *will note in the letter when he will make the assessment for. [The Respondent] cannot provide the evidence identified before the letter is issued.*" The Commissioner considers that the CJEU's judgment in *Glencore Agriculture Hungary* is clear that the taxpayer should be provided with the file of evidence prior to the authority's decision: "*53. It follows that, in an administrative tax procedure such as that at issue in the main proceedings, the taxable person must be able to have access to all the evidence in the file on which the tax authorities intend to base their decision…*" (emphasis added). However, as discussed above, by the time of the meeting of 22 March 2019 it was clear that the Respondent had decided to raise the assessment against the

Appellant. While the CJEU did allow that a tax authority could restrict access to information and documents if "*objectives of public interest*" warranted it, no such objectives have been invoked by the Respondent in this instance.

46. In its submissions, the Respondent stated that "*almost everything that the Appellant needed to consider were in the Appellant's own records*", including due diligence records on the missing traders. The Commissioner agrees that the vast majority of the documentary evidence before him in this matter originated from the Appellant. However, he does not agrees that this fact should operate to disapply the Respondent's obligation to provide the file of evidence upon which it sought to rely, to the Appellant prior to the decision to raise the assessment, and he does not consider that there is anything in the judgment in *Glencore Agriculture Hungary* to support such a conclusion. It seems to the Commissioner that the implication of the Respondent's argument would be that the Appellant should have, in effect, to guess what the Respondent intended to rely upon, from the entirety of its documents relating to the [redacted], and respond accordingly. The Commissioner considers that such an approach could not possibly be in compliance with the *dictum* of the CJEU that "*The requirement, referred to in paragraphs 39 and 41 of this judgment, for a person to be able to make his views known as regards the evidence on which the authorities intend to base their decision means that the addressees of that decision must be in a position to be aware of that evidence*[4]*.*"

47. At this juncture, the Commissioner notes that the Appellant has invited him to draw the inference that the Respondent deliberately raised the assessment in order to ensure that the Appellant would not have the opportunity to make representations regarding same. The Commissioner is not willing to make any such finding. He agrees with the Respondent that to do so would be to stray outside his jurisdiction. In any event, it does not appear to him that the question of motive is relevant in assessing whether there has been a breach of the right to defence, and consequently, even if such a finding was permitted, he does not believe that it would be necessary to determine the question.

48. Therefore, it follows that the Commissioner is satisfied that, in failing to provide the Appellant with its file of evidence and in failing to allow it to comment on the Respondent's concerns prior to the raising of the notice of assessment, the Respondent breached the Appellant's right to defence under EU law as derived from the Charter, and in particular Article 41(2) thereof. There is no doubt but that the Appellant has been provided with the evidence upon which the Respondent relies, and has been afforded numerous opportunities to respond and put forward its own case, in the context of these proceedings.

[4] Paragraph 51

However, the judgment in *Glencore Agriculture Hungary* is clear that "*a breach of the right of access to the file during the administrative procedure is not remedied by the mere fact that access to the file was made possible during the judicial proceedings relating to an action in which annulment of the contested decision is sought*.[5]" Consequently, the Commissioner is satisfied that Respondent's breach of the Appellant's right to defence was not rectified by the subsequent provision of evidence or the ability to make submissions.

49. In considering the result of this breach, the Commissioner notes that the CJEU held in *WebMindLicences* that "*It is incumbent upon that court, furthermore, to verify whether, in accordance with the general principle of observance of the rights of the defence, the taxable person had the opportunity, in the context of the administrative procedure, of gaining access to that evidence and of being heard concerning it. If the national court finds that the taxable person did not have that opportunity … it must disregard that evidence and annul that decision if, as a result, the latter has no basis*." As the Commissioner has found that the Appellant was not given access to any evidence, or given an opportunity to be heard, prior to the Respondent deciding to raise an assessment against it, it follows that he is obliged to disregard all of the evidence proffered by the Respondent in this case.

50. Furthermore, the Respondent bears the burden of proving that the Appellant knew or should have known that the transactions with the missing traders and the EU customers were connected with VAT fraud. In *Maks Pen EOOD v Direktor na Direktsia 'Obzhalvane i danachno-osiguritelna praktika' Sofia* Case C-18/13 ("*Maks Pen EOOD*"), the CJEU held that

> "*28. Accordingly, a taxable person cannot be refused the right of deduction unless it is established on the basis of objective evidence that that taxable person – to whom the supply of goods or services, on the basis of which the right of deduction is claimed, was made – knew or should have known that, through the acquisition of those goods or services, he was participating in a transaction connected with the evasion of VAT committed by the supplier or by another trader acting upstream or downstream in the chain of supply of those goods or services…*
>
> *29. Since the refusal of the right of deduction is an exception to the application of the fundamental principle constituted by that right, it is incumbent upon the competent tax authorities to establish, to the requisite legal standard, that the objective evidence to which the preceding paragraph of this judgment refers is present. It is for the national*

[5] Paragraph 52

courts subsequently to determine whether the tax authorities concerned have established the existence of such objective evidence…" (emphasis added).

51. Consequently, as the Respondent bears the burden of proof, and as the Commissioner is obliged to disregard all of the evidence proffered by the Respondent, it therefore necessarily follows that there is no valid evidence before the Commissioner, and the notice of assessment against the Appellant must be reduced to zero. In coming to this determination, the Commissioner is exercising his power, and fulfilling his obligation, to ensure that EU law is not violated, as recognised by the Court of Appeal in *Lee v Revenue Commissioners* [2021] IECA 18.

52. In conclusion, the appeal is allowed in full.

PART 2 – DID THE APPELLANT KNOW, OR SHOULD IT HAVE KNOWN, THAT IT WAS INVOLVED IN TRANSACTIONS CONNECTED TO VAT FRAUD?

53. The Commissioner has determined this matter on the basis that the Respondent breached the Appellant's right to defence, and that as a result there is no valid evidence before him. However, he is conscious that four full days of evidence on the substantive question of whether or not the Appellant knew or ought to have known that it was involved in transactions connected to VAT fraud have been heard. If the Commissioner's determination that the Appellant's right to defence was breached is incorrect, he believes it would be unfortunate for the parties, and in particular for the two witnesses who gave lengthy oral evidence at the hearing, to have to rehear the matter. Therefore, he considers it appropriate to set out herein what his determination would have been, had he found that the Appellant's right to defence had not been breached. Consequently, the remainder of Part 2 considers the entirety of the evidence put before the Commissioner in order to conclude whether or not the Appellant knew, or should have known, it was involved in transactions connected to VAT fraud.

54. The Appellant is a distributor of [redacted]. It has been in business since [redacted] and supplies [redacted] as well as [redacted] services to [redacted] customers, other [redacted] wholesalers in Ireland and abroad, and retail customers. It holds stocks of [redacted] at [redacted].

55. This appeal concerns, firstly, the purchase of [redacted] by the Appellant from twelve missing traders / [redacted] between 2013 and 2018. The Respondent alleged that the Appellant's transactions with these missing traders were connected with the fraudulent

evasion of VAT, and that the Appellant knew or should have known this. Consequently the Respondent disallowed input credits claimed by the Appellant in respect of the twelve missing traders in the total amount of €4,684,501.

56. Secondly, the Appellant provided intra-community supplies of [redacted] to four EU customers on a zero-rated basis. The Respondent contended that the Appellant knew or should have known that those supplies would subsequently be connected with the fraudulent evasion of VAT, and consequently the Respondent assessed the Appellant for total VAT in the amount of €1,857,693 in respect of those supplies.

57. The jurisdiction to impose a VAT liability on a taxpayer, where it is not alleged that he directly engaged in fraud himself but rather engaged in transactions that are connected with fraud, arises under EU law and from the case law of the CJEU. In particular, *Kittel* governs the right to deny input credits on purchases and *Mecsek-Gabona* governs the right to refuse a taxpayer exemption from VAT for intra-community supplies. The implementation of the principles enunciated by the CJEU has been given further consideration by the courts of England and Wales.

Case Law

58. In *Kittel*, the CJEU stated *inter alia* that:

> "*51… it is apparent that traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing their right to deduct the input VAT…*
>
> *56. In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.*
>
> *57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice…*
>
> *59. Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'.*

60. It follows from the foregoing that the answer to the questions must be that where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void – by reason of a civil law provision which renders that contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller – causes that taxable person to lose the right to deduct the VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT or to other fraud.

61. By contrast, 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, it is for the national court to refuse that taxable person entitlement to the right to deduct."

59. In *Mecsek-Gabona,* the CJEU held *inter alia* that:

"53. In that regard, it should be borne in mind that, in proceedings brought under Article 267 TFEU, the Court has no jurisdiction to check or to assess the factual circumstances of the case before the referring court. It is therefore for the national court to carry out an overall assessment of all the facts and circumstances of the case in order to establish whether Mecsek-Gabona had acted in good faith and taken every step which could reasonably be asked of it to satisfy itself that the transaction which it had carried out had not resulted in its participation in tax fraud.

54. If the referring court were to reach the conclusion that the taxable person concerned knew or should have known that the transaction which it had carried out was part of a tax fraud committed by the purchaser and that the taxable person had not taken every step which could reasonably be asked of it to prevent that fraud from being committed, there would be no entitlement to exemption from VAT.

55. In the light of all the foregoing considerations, the answer to Questions 1 and 2 is that Article 138(1) of Directive 2006/112 is to be interpreted as not precluding, in circumstances such as those of the case before the referring court, refusal to grant a vendor the right to the VAT exemption for an intra-Community supply, provided that it has been established, in the light of objective evidence, that the vendor has failed to fulfil its obligations as regards evidence, or that it knew or should have known that the transaction which it carried out was part of a tax fraud committed by the purchaser, and that it had not taken every reasonable step within its power to prevent its own participation in that fraud."

60. In *Maks Pen EOOD*, the CJEU held *inter alia* that:

> "*23. It should be borne in mind that, according to settled case-law, the right of taxable persons to deduct VAT due or already paid on goods purchased and services received as inputs from the VAT which they are liable to pay is a fundamental principle of the common system of VAT established by the relevant European Union legislation…*
>
> *26. That said, it must be borne in mind that the prevention of tax evasion, tax avoidance and abuse is an objective recognised and encouraged by Directive 2006/112. In that connection, the Court has held that European Union law cannot be relied on for abusive or fraudulent ends. It is therefore for the national courts and authorities to refuse the right of deduction, if it is shown, in the light of objective evidence, that that right is being relied on for fraudulent or abusive ends…*
>
> *27. While that is the position where tax evasion is committed by the taxable person himself, the same is also true where a taxable person knew, or should have known, that, by his acquisition, he was taking part in a transaction connected with the evasion of VAT. He must therefore, for the purposes of Directive 2006/112, be regarded as a participant in that evasion, whether or not he profits from the resale of the goods or the use of the services in the context of the taxable transactions subsequently carried out by him…*
>
> *28. Accordingly, a taxable person cannot be refused the right of deduction unless it is established on the basis of objective evidence that that taxable person – to whom the supply of goods or services, on the basis of which the right of deduction is claimed, was made – knew or should have known that, through the acquisition of those goods or services, he was participating in a transaction connected with the evasion of VAT committed by the supplier or by another trader acting upstream or downstream in the chain of supply of those goods or services…*
>
> *29. Since the refusal of the right of deduction is an exception to the application of the fundamental principle constituted by that right, it is incumbent upon the competent tax authorities to establish, to the requisite legal standard, that the objective evidence to which the preceding paragraph of this judgment refers is present. It is for the national courts subsequently to determine whether the tax authorities concerned have established the existence of such objective evidence…"*

61. In *Mobilx Limited (in administration) v Revenue and Customs Commissioners* [2010] STC 1476 ("*Mobilx Limited*"), the English Court of Appeal stated *inter alia* that:

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

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*.*

60. The true principle to be derived from 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…*

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

Evidence and Submissions

62. At the hearing, the Commissioner heard evidence from a witness for the Appellant and a witness for the Respondent. Opening submissions were heard from counsel for the Appellant. The hearing was listed for five days; however it became apparent at a relatively early stage that it would not be possible to complete hearing the evidence and closing

submissions within the scheduled five days. Consequently, the Commissioner decided to sit for longer days in order to complete hearing the witness evidence, and at the conclusion of the evidence he directed that the parties could provide written closing submissions *in lieu* of oral submissions.

63. The parties disagreed as to which side should give evidence first. The Appellant argued that the CJEU's jurisprudence was clear that the burden of proof in demonstrating that the Appellant knew or should have known that it was participating in transactions connected with the fraudulent evasion of VAT rested on the Respondent, and that the typical practice in the UK was that HMRC went first in *Kittel* cases. The Respondent argued that, as with all appeals to the Commission, the burden of proof to show that the assessments were not correct lay on the Appellant, and that consequently it should give evidence first.

64. The Commissioner was conscious of the *dictum* of the High Court in *Menolly Homes Ltd v Appeal Commissioners* [2010] IEHC 49 that "*The burden of proof in this appeal process is, as in all taxation appeals, on the taxpayer. This is not a plenary civil hearing. It is an enquiry by the Appeal Commissioners as to whether the taxpayer has shown that the relevant tax is not payable*." Therefore, the Commissioner was satisfied that the overall burden of proof remained on the Appellant. However, the Commissioner was also satisfied that the fundamental question at issue in the appeal was whether the Appellant knew or should have known that it was participating in transactions connected with the fraudulent evasion of VAT. Having regard to the CJEU's judgment in *Maks Pen EOOD,* the Commissioner was satisfied that it would be more efficient to hear the Respondent's evidence first, before hearing from the Appellant. In coming to this view, the Commissioner was also mindful of section 949H of the Taxes Consolidation Act 1997 as amended ("TCA 1997"), which allows for "*a flexible approach being adopted by the Commissioners in respect of procedural matters*".

Respondent's Evidence

[redacted]

65. [redacted] is an officer of the Respondent, and was a Higher Executive Officer from [redacted] before being promoted to Assistant Principal. She stated that she was assigned to the Appellant's case as an auditor in or around October 2017. She met representatives of the Appellant at that stage and also again in March 2019. She also considered various records and documentation of the Appellant, including *inter alia* sales and purchase invoices, stock records, financial statements, sales/purchase ledgers and 1,298 emails between the Appellant and certain suppliers for the period 2013 – 2018. She

also had access to mutual assistance records ("MAR") and section 906A records, i.e. bank statements for the Appellant and missing traders.

66. In her witness statement, she explained her understanding of missing traders as follows:

> "*These Missing Traders are short-term suppliers of goods who commence to trade after registering for VAT in Ireland. They quickly begin to acquire large volumes of supplies from other EU member states, which is* [sic] *liable to the zero rate of VAT. They then sell these goods to customers in Ireland, normally at a cost reduction but with VAT included.*
>
> *The purchaser of those* [redacted] *(e.g. Appellant) takes a deduction of VAT for the* [redacted] *acquired.*
>
> *However, the supplier fails to make appropriate VAT returns and eventually disappear without returning the VAT collected on the sales of* [redacted] *The Missing Trader ceases business activity and is replaced by a new trader that will repeat the same process creating a fraudulent chain of traders.*
>
> *By undertaking the required due diligence processes, the purchaser of those* [redacted] *plays a pivotal role in detecting and addressing any supplier's unusual business conduct by refusing further engagement with these traders.*
>
> *However, if the purchaser opts to ignore these risk flags and continues to engage with these suppliers, their role is essential in the perpetuation of the VAT fraud.*"[6]

67. She stated that [redacted] supplied by missing traders accounted for approximately 25% of overall [redacted] purchases by the Appellant during the period she was concerned with, constituting €20 million worth of purchases. She stated that she had identified twelve missing traders who had supplied the Appellant with [redacted] and in her witness statement provided the following table:

Order in the fraudulent chain	Period	Name	Trading As	VAT on purchases by [redacted]
1	Jan-Mar 2013	[redacted]	[redacted]	85,200
2	Mar-Sep 2013	[redacted]	[redacted]	647,325
3	Sep 2013-Jan 2014	[redacted]	[redacted]	199,354
4	Feb-Jul 2014	[redacted]	[redacted]	408,917

[6] Pages 3 and 4

5	Aug-Dec 2014	[redacted]	[redacted]	318,728
6	Jan-Jun 2015	[redacted]	[redacted]	321,364
7	Jun-Nov 2015	[redacted]	[redacted]	291,727
8	Mar-Jun 2016	[redacted]	[redacted]	297,908
9	Jun-Aug 2016	[redacted]	[redacted]	129,172
10	Oct-Nov 2016	[redacted]	[redacted]	68,826
11	Oct 2016-Dec 2017	[redacted]	[redacted]	1,221,380
12	Jan-Dec 2018	[redacted]	[redacted]	694,600
		TOTAL VAT CLAIMED from Missing Traders		4,684,501

68. Additionally, she had identified four EU customers to whom the Appellant had sold [redacted] and where there was a VAT liability arising:

		0% SALES	VAT IMPLICATIONS	PERIOD
1	[redacted]	4,693,141.00	1,079,422.43	2013-2017
2	[redacted]	972,565.00	223,689.95	Jun-Sep 2013
3	[redacted]	739,336.00	170,047.28	Jun-Nov 2016
4	[redacted]	1,671,886.00	384,533.78	Oct 2016-Dec 2017
		8,076,928.00	**1,857,693.44**	

69. She had not carried out an investigation into the twelve missing traders themselves but was in a position to state that the following had not paid the requisite VAT: Missing Traders 1, 2, 3 and 12. She did not disagree with the witness statements submitted by other employees of the Respondent. She stated that the total amount defrauded was in excess of €9.6 million.

70. She stated that the director of Missing Trader 3 was [redacted], i.e. the same individual as at the prior step in the chain. Additionally, [redacted] (who traded as Missing Trader 12) was the accountant for Missing Trader 11, who preceded him in the chain. The Appellant was aware of this as there was an email from Missing Trader 11 informing [redacted] that he was in a joint venture with Missing Trader 12.

71. Regarding the explanation provided by the Appellant for its decision to commence trading with [redacted] in and around 2013, she stated that, having carried out "*interventions*" on other taxpayers:

> "*I found the business model existed. There was the* [redacted]*. However, the difference in relation in relation to what the books and records of the Appellant was showing me and what the books and records of the other taxpayers were showing to me, was that the continuity of the supplies were not there. The timeline was different. Like, in the case of the Appellant, it's 2013 to 2018 continuously, with no interruption of the supply and no effect into the business from the changing from one trader to the other continuously for that period of time, whereas, in the other interventions that I carried out, it was occasionally only two/three of the dealers, of the* [redacted]*, and for a very short period of time, maybe 2016, and only for an amount that was not – that it was by no way in relation to that. The VAT at risk in that particular case was less than €80,000*."[7]

72. In her witness statement, [redacted] grouped the 'red flags' regarding the Appellant's trading relation with the missing traders into five categories:

    i. Payments in advance of invoice

    ii. Awareness by Appellant of dealing with the same person(s)

    iii. Lack of due diligence

    iv. Unusual credit terms

    v. EU customers and circular movement of [redacted]

73. She stated that it was possible that a particular piece of evidence could move from one category to another. For example, she found evidence that had suggested a prepayment by the Appellant to Missing Trader 6 for [redacted] to be partially delivered by Missing Trader 7. Following receipt of the Appellant's witness statement, she was happy that no prepayment had occurred; however, she considered that an alternative explanation was that there had been a back-order of [redacted] so that '[redacted] *that were ordered from one particular supplier and were delivered by the next one.*" As a result, that piece of evidence could be reclassified from category 1 (payments in advance of invoice) to category 2 (awareness by Appellant of dealing with the same person(s)).

[7] D2/P36/L29

74. Consequently, she stated that "*it doesn't mean that, by answering one of the concerns, the issue is completely resolved, because it cannot be looked into isolation. That may be resolved, but when the other issues that feed into it, the issue itself is not resolved… each item is going to paint a picture. For the picture to dilute, everything has to be resolved*."[8]

75. In respect of category 1 of the specific allegations against the Appellant, she stated that she found evidence of a prepayment to Missing Trader 1 in April 2013. There was an invoice for €169,833.40 dated 19 April 2013, but the Appellant's bank statement stated that this had been paid on 9 April 2013.

76. She also found evidence of a payment to Missing Trader 6 for an order of [redacted] that was partially delivered by Missing Trader 7. On 21 May 2015 the Appellant placed an order for 200 [redacted] with Missing Trader 6. On 5 June 2015, the Appellant's stock records confirmed receipt of 100 [redacted] from Missing Trader 6. On 8 June 2015, Missing Trader 6 issued an invoice for €66,420, which was paid on 11 June 2015. The Appellant's last transaction with Missing Trader 6 was on 25 June 2015, and as of this date there was still a pending order of 100 [redacted] that had not been received by the Appellant.

77. On 30 June 2015, the Appellant's ledger recorded a first transaction with Missing Trader 7 for an amount of €66,420 (the same amount as the invoice referred to above from Missing Trader 6); however the invoice for this new trader was not received until 20 July 2015. In her witness statement, [redacted] stated that, "*Stock records refer to a supply of 200 units from [Missing Trader 7]. This early recording on both the Supplier's ledger and the Stock records indicate that: Appellant is aware of the continuity between both missing traders at a very early stage of the transition, even before any invoice or correspondence is received from the new trader. Appellant has a deep knowledge of the intrinsic functioning and the main characters of the fraudulent chain of traders*."[9]

78. On 20 July 2017, there was the first email correspondence on record with Missing Trader 7, wherein the latter stated "*Good talking to you earlier and I hope we can establish good business for our companies*." [redacted] noted the gap between the commencement of business with Missing Trader 7 and the receipt of this email and stated "*It would seem reasonable to believe that it is not possible to enter a business transaction with a supplier with whom you have not yet established contact. As a result, I concluded that Appellant was aware of the transition between missing traders*."[10]

[8] D2/P40/L27
[9] Page 7
[10] Witness statement, page 7

79. On 21 July 2015, Missing Trader 7 issued an invoice for a supply of 200 [redacted] for €66,420, which was paid by the Appellant on the same date. [redacted] stated that "*The effect of making this payment is that Appellant pays the same amount twice, i.e. €66,420 to [Missing Trader 6] on 11 June and €66,420 to [Missing Trader 7] on 21 July*."[11]

80. However, on 23 July 2015, the Appellant's bank statement showed a payment in for €66,420. [redacted] in her statement wrote that "*The duplicated payment was spotted by either the Appellant or the Missing Trader and it was reversed, with only one payment made for the 200 units of* [redacted] *received by the Appellant. I could not identify which of the suppliers returned the payment*."[12] However, on foot of receipt of the Appellant's statement, she was satisfied that this was due to a bounce back from the supplier's account. But she added that:

> *"I can see there's no prepayment, that no prepayment was made to [Missing Trader 6] in relation of* [redacted] *provided by [Missing Trader 7], so I'm happy with that, Commissioner. However the problem that is still unresolved is when tracing the* [redacted] *through the correspondence through the ledgers, this pending order of 100* [redacted] *of that particular model that is hanging there that I cannot see as being delivered or challenged or no questions about a pending order that would have an impact on the business of* [redacted] *And I do see an amount of* [redacted] *from the next trader, and the invoice for those* [redacted] *that were ordered with [Missing Trader 6]. So there's a back order of* [redacted] *The payment is made to the second trader. So there's no prepayment, and I am happy with that, but the item about the back order of* [redacted] *being delivered basically you place an order with one trader but it's the second trader that is going to make the delivery of those orders."*[13]

81. Regarding category 2, [redacted] stated that on the last day of the Appellant's trading relationship with Missing Trader 2, it recorded four invoices and immediately made the corresponding payments. In her opinion, this was an unusual pattern of business as "*businesses tend to make a single bulk payment to the supplier that they can later on reconcile with specific invoices if required."*[14] She contrasted this practice with payments to suppliers such as [redacted] and [redacted] "*where Appellant's payments are regularly pooled together and paid in one single transfer for a number of purchase invoices.*"[15]

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[11] Witness statement, page 7
[12] Page 7
[13] D2/P56/L4
[14] Witness statement, page 8
[15] Witness statement, page 8

82. On the day prior to its last transaction with Missing Trader 2, the Appellant commenced a new business relationship with Missing Trader 3: "*So there's that awareness that, like one company, one trader is ceasing, the next one starts immediately*."[16] In her statement [redacted] stated that she believed that "*Appellant knew that business would continue as usual but now under a different name [Missing Trader 3]…I understand, however, that it is sometimes normal that a self-employed individual incorporates his business and that this could have been indeed the case. In a legitimate business transaction, this would have raised no concerns to [the Respondent]. However, when analysing the overall chain of fraudulent transactions, I find this example is evidence of the awareness of the Appellant that they are always dealing with the same person(s), and that this awareness is present since the early stages of the chain."*[17]

83. She also noted certain email correspondence, including one from 2 October 2014 from Missing Trader 5 to the Appellant referencing "*the prices agreed with our mutual friend*"; she stated that word-of-mouth references could be normal in business, "*But what is not common is, for example, the agreement of prices that carries over from one mutual friend to another…"*[18] She also referenced an email of 16 January 2018 from Missing Trader 11 that stated he was in a joint venture with Missing Trader 12 and that "*any invoices that are outstanding will be credited in full by myself and will be re-invoiced through [Missing Trader 12]*." Reference was also made to an email from the Appellant to Missing Trader 11 on 24 November 2017 which stated that "*As we are currently getting ready for our stocktake, we will NOT be taking any more deliveries after this load if you can supply*." [redacted] stated that she was happy that stock-taking had happened as indicated, but added:

> *"However, if I go to the facts, which are do they actually cease the relationship, the stock records show that that's it, there is no more – there are no more transactions, effectively, but sorting out whatever was pending in relation to invoices. So, effectively, the transaction – the relationship ends even though it is not literally stated there.*
>
> *The other thing that I have noticed in relation to the stock taking, and I take that they do carry out stock taking, and I am happy with that, the VAT registration of [Missing Trader 11] was cancelled, and I think it's on the – just one second because I don't know – yes, on the 23rd, exactly. So the VAT registration is cancelled on the 23rd. There is an e mail from the 24th November from the Appellant instructing his supplier that they are not taking any more stock, they are providing the reason, that it's for stock*

[16] D2/P64/L18
[17] Page 9
[18] D2/P67/L6

taking… So I take that they don't need more [redacted] *that's what I take from the reading of their e mails, they don't need more* [redacted] *they need to get rid of stock. However I do see stock coming from different people. So* [redacted] *is providing* [redacted] *"*[19]

84. Regarding Missing Trader 9, the witness stated that the Appellant's ledger showed four entries on 31 August 2016 for a total amount of €302,881. These were the last invoices issued by that trader to the Appellant; however the invoices were dated 13 and 14 September 2016, which she considered unusual. The invoices were subsequently credited off on 1 October and 1 November 2016; however the last payment to Missing Trader 9 was made on 14 September 2016 for goods invoiced on 31 August 2016: "*I concluded that the Appellant credited off the invoices in this ledger as they were aware that a new trader was being introduced in the fraudulent chain.*"[20]

85. The Appellant then received three invoices from Missing Trader 10, which [redacted] stated replaced the four invoices from Missing Trader 9. The Appellant discharged these invoices in December 2016 and February 2017. She also drew attention to invoices from these two missing traders, and submitted that the content across the two missing traders matched each other (save for a correction she believed was necessary in relation to the calculation of certain [redacted] She submitted that:

> "*Across all the different sectors, including* [redacted] *it wouldn't be normal behaviour that you have goods from one supplier and that you pay a different supplier for goods that were delivered to you by the other supplier, which is effectively what has happened. Not only that, it's the fact that there's an acceptance – like when a trader issues an invoice, the invoice is issued because there's a supply. So, for the customer of that supplier to accept that invoice, they are accepting a supply that in this case never took place because it took place with the previous person on the chain*."[21]

She acknowledged the Appellant's explanation for what had transpired – that it had been asked by Missing Trader 9 to pay Missing Trader 10.

86. She also referenced an email from Missing Trader 9 on 1 July 2016, which stated "*A good friend of mine gave me your contact details to get in touch with you. He told me you are buying* [redacted] *in bulk and you are a very good payer.*" However, the Appellant's ledger

[19] D2/P68/L14
[20] Witness statement, page 11
[21] D2/P81/L28

indicated that stock had been received from Missing Trader 9 on 29 and 30 June, which she believed gave rise to concern.

87. Regarding Missing Trader 11, she stated that "*the first invoices that [Missing Trader 11] send to the Appellant again they match exactly the amounts of those invoices that we've previously discussed and the [Missing Trader 9] and the [Missing Trader 10]* [redacted]"[22] These were provided with an email from Missing Trader 11 to the Appellant that stated "*as request* [sic] *copy of the invoice from early October*"; however [redacted] stated that the Appellant's ledger suggested that the transactions in early October were with the previous trader in the chain.

88. On 3 November 2016, Missing Trader 11 emailed the Appellant to state "*please ignore these invoices and pod's. I send* [sic] *them out by mistake*." [redacted] stated that she "*could not find evidence of these invoices that were issued in error or the credit notes that were cancelling those invoices recorded on the [Appellant's] ledger*."[23] In her statement, she wrote that "*I concluded that the Appellant noticed that this was a mistake by the new missing trader on the chain and that as these transactions had already been dealt with under different suppliers they did not need to be recorded again*."[24]

89. [redacted] stated that she carried out an exercise to check the prices of the Appellant's most sold [redacted] for 2013 (total sale value of €628,569.16), to ascertain whether the Appellant's argument that it needed to source [redacted] from [redacted] was reasonable. In her statement, she referenced a unit price of €367 as supplied by [redacted] in January 2013, compared to €300 as supplied by Missing Trader 1. In September 2014, a 'regular' supplier supplied 4 [redacted] at €320 each, versus €286 by Missing Trader 5. In October 2015, another 'regular' supplier supplied one [redacted] at €345 compared to Missing Trader 7 who supplied at €275 per [redacted] In 2016, a further 'regular' supplier provided a total of 174 [redacted] at €275 each, compared to €280/€275 from Missing Trader 8.

90. She stated that "*from 2013 to 2016, consistently, you can see the use of exclusively the missing traders…you can see there that they do indeed stop dealing with* [redacted] *in 2013, because at least the last – there is one instance of that supplying in 2013, and I do take on board that they did mention that occasionally they might go to* [redacted] *if they are stuck. But consistently, from 2013 till 2016, according to these, is nearly an exclusivity from missing traders*." [25] She stated that she understood from the Appellant that

[22] D2/P83/L20
[23] D2/P86/L9
[24] Page 12
[25] D2/P101/L22

[redacted] business model changed in 2011 and that consequently "*the margins were tight, there was an excess of* [redacted] *due to their* [i.e. [redacted] *discounting policies and that they* [i.e. the Appellant] *were not going to be able to avail of those discounts* [from [redacted] *any longer and they need to resort to finding cheaper suppliers*."[26]

91. The third category of 'red flags' was lack of due diligence. [redacted] referred to Missing Trader 8, and stated that she considered the provision of a residential address as the trader's place of business to be unusual. She accepted certain explanations regarding other matters provided by the Appellant; however she noted an inconsistency between the CRO registration for Missing Trader 8 [redacted] and the name on the invoices provided to the Appellant [redacted]

92. She also raised concerns about Missing Trader 6. She stated that the contact details for this trader on the invoices gave the address as "[redacted]", which a Google Maps search suggested were the premises of "*a well-known bread baking company in Ireland."*[27] In her statement, she referred to a delivery street which stated that the Appellant had collected goods from these premises, which she stated should have given rise to concerns. This matter was further addressed in cross-examination.

93. She further noted that Missing Trader 4 quoted a residential address, and that this was "*an individual with no commercial history on* [sic] *the* [redacted] *business*."[28] She also noted that Missing Traders 2 and 5 had provided invoices that were invalid for VAT purposes, and that the Appellant had failed to flag this. Additionally, in her witness statement she made certain comments and allegations about a haulier used by several of the missing traders. However, on receipt of the Appellant's witness statement, those comments were withdrawn.

94. She stated that she believed the Appellant was aware of VAT fraud in the [redacted] industry. She referred to the meeting in October 2017, at which [redacted] *expressed concerns saying, look, that these people, they are out there selling* [redacted] *cheaply, massive discounts, is not normal…"*[29] The Respondent's notes of the meeting stated that [redacted] had expressed concerns that the Appellant's competitors could be doing something "*illicit*"; however she acknowledged that [redacted] had denied using that word.

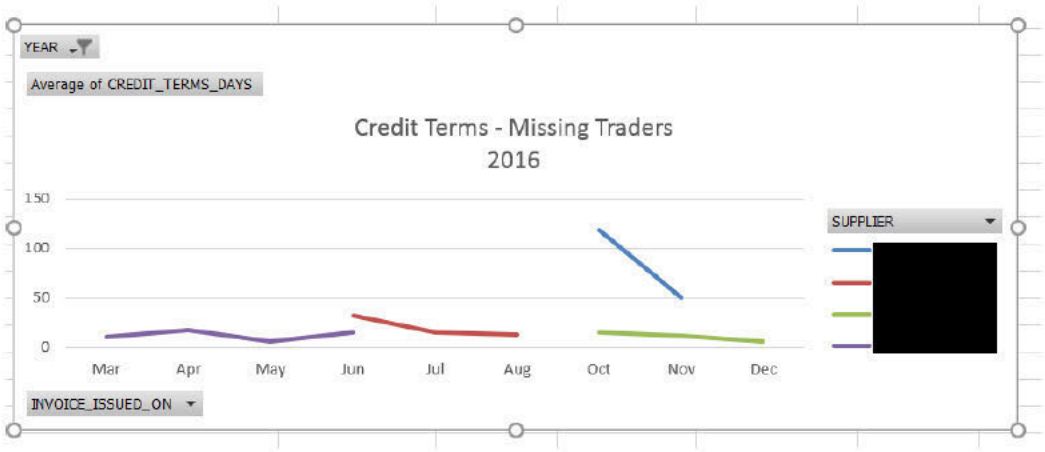
95. Regarding category 4, she stated that she identified unusual patterns with credit terms provided by the missing traders to the Appellant. Normally, she said, you would expect

[26] D2/P103/L19
[27] Witness statement, page 16
[28] Witness statement, page 17
[29] D2/P125/L17

that at the start of a business relationship credit terms would be tighter, and as the relationship progresses the credit terms lengthen. However, she identified in respect of some of the missing traders that the credit terms were longer at the start of the relationship and became much shorter towards the end. She stated that "*at no point I have found any evidence that this has affected the business or that that has been queried or that the Appellant has contacted with e mails saying, 'Look, why are you changing this now? We started and you were giving me 60 days and now I have to pay you after five days.' So that was another of the questions that came to me, that led me to conclude that it is an irregular way of conducting business.*"[30]

96. She provided the following charts as an appendix to her witness statement:

[30] D2/P130/L16



97. She stated that these charts showed that there was generally no interruption in supply between the various missing traders.

98. Regarding category 5, which counsel for the Respondent termed the 'zero-rating point', the witness stated that she identified a circular flow of [redacted] in early 2013 from the Appellant to EU Customer 1: "*By using information from mutual assistance that it carried out that actually – that were carried out by my colleagues working on those missing traders,*

we were able to identify that within a short period of time, within a month, month and a half, there was a flow from [EU Customer 1] from [redacted] *to Northern Ireland, from Northern Ireland to [Missing Trader 2] in Ireland, and from the missing trader back to the Appellant*."[31] 70 [redacted] were supplied to EU Customer 1 at a unit price of €405, and 100 [redacted] were ultimately provided to the Appellant at €371 per [redacted] The Respondent was not contending that it was necessarily the exact same [redacted] that the Appellant provided to EU Customer 1 that ultimately came back to it.

99. The witness also stated that the Appellant had prepaid Missing Trader 2 for this transaction, as they were delivered on 17 April 2013, but a note on the delivery docket stated they were paid for on 9 April 2013. She noted that the Appellant's statement had admitted an element of prepayment due to split delivery, but had stated that such prepayment was unusual. However, she had further inspected the Appellant's ledger and had noted in respect of Missing Trader 2 that on 1 September 2013 five invoices issued to match payments made on 20, 22 and 30 August 2013. Therefore, her conclusion "*was that it was not a unique and isolated instance of a prepayment of goods*."[32]

100. She stated that she had presented specific invoices as evidence, but asked the Commissioner "*to remember the materiality that is involved in this particular case which has also been part of the assessments that we have raised, and they've been a critical part of our decision that it was not an isolated case. We're talking about sales from the Appellant to [EU Customer 1] in excess of 6 million in a period from 2013 to 2018. We have seen sales from [EU Customer 1], the* [redacted] *customer of the Appellant, to the Irish missing traders for a value in excess of 4 million in the same period uninterruptedly all across the period, and we have seen transactions linking EU customers, which are the ones that we have brought into our assessments that are supplying* [redacted] *that have links with [EU Customer 1] and that go back to the missing traders and eventually to our Appellant*."[33]

101. She compared the amount of purchases made by the Appellant from missing traders, which she stated resulted in a vat loss of €9.6 million over the relevant period, with other interventions she had worked on: "*The maximum amount of suppliers that have been involved in other interventions have been two of these missing traders. And the value of the VAT at large in those particular interventions was €85,000, in the region of €85,000*

[31] D2/P139/L17
[32] D3/P11/L9
[33] D3/P11/L20

worth of VAT… So the difference, when we compare what's going on in – with other businesses, is a huge indicator that this behaviour is not normal elsewhere."[34]

102. Also in regard to category 5, the witness stated that there were further examples where the Appellant paid zero-rated customers in advance of receiving invoices, including with EU Customers 2 and 3. She also noticed unusual credit terms in respect of some of the zero-rated customers. She referred to a MAR received from HMRC that linked the director of EU Customer 3, [redacted], to Missing Trader 2.

103. In respect of another zero-rated customer, EU Customer 4, in her witness statement she had stated that "*a simple online search would be sufficient to verify that [EU Customer 4] did not seem to be in the* [redacted] *business but in the management of real estate*."[35] In its statement, the Appellant suggested that [redacted] had mistaken that company for one located in Northern Ireland, whose UK CRO reference stated that it was "*involved in the sale of a variety of goods.*" The witness, in her oral evidence, accepted the point made by the Appellant but stated that she believed it was logical to presume that the two companies were connected. She stated that she had information that the UK company was connected to Missing Trader 12.

104. [redacted] also referred to certain invoices from Missing Trader 5 and noted that some of them appeared to be out of sequence, in terms of their numbering. She stated that "*I have seen it before, it can happen, it can happen, and sometimes it's just a normal error and we flag it to the taxpayer, they may give an explanation for that, and we look at the things in context. So if everything is okay and it's just a matter of one instance of something happening, surely – it will be sorted, but it's not a major issue*."[36]

105. She also referred to email correspondence between the Appellant and Missing Trader 9, regarding missing [redacted] There was an email from the missing trader on 28 July 2016 referring back to a delivery on 21 June 2016. However, the witness stated that the Appellant's ledger suggested that its first delivery from Missing Trader 9 was after 21 June 2016: "*now I have a document that confirms that there was an order, a back order of* [redacted] *from a period when there was no business relationship… And, Commissioner, again this example is very much linked with the example of [Missing Trader 6]…this is the example where there was an alternative reading of the events and where there was either the prepayment or the back order. The Appellant provided sufficient evidence to satisfy Revenue that there was no prepayment. So the other explanation left to us that the back*

[34] D3/P14/L24
[35] Page 24
[36] D3/P29/L22

order of [redacted] *with the previous supplier. And this documentation here is now showing a similar issue between different traders, between [Missing Trader 9] and the previous trader in the chain, which is [Missing Trader 8].* "[37]

106. On cross-examination, she accepted that when the Respondent sought information from the Appellant, same was provided. When asked what test she had applied when recommending that the assessments be raised against the Appellant, she stated *inter alia* that, "*It was the level of involvement, how frequent he – the facts presented to me, the recurrence on those transactions, and basically did he* [sic] *know that there was something amiss? Did he know that he should have stopped dealing with certain suppliers?*"[38]

107. Regarding her reference to red flags, and her evidence that "*it doesn't mean that, by answering one of the concerns, the issue is completely resolved, because it cannot be looked into isolation. That may be resolved, but when the other issues that feed into it, the issue itself is not resolved*", she stated that "*You see, there is only one red flag, which is the business behaviour. The rest – the items that are categorised in different sections just to help understand how they fitted within the globality of it.*"[39]

108. She confirmed that "*We do not have evidence that [the Appellant] knew that there was fraud*."[40] Regarding why she did not consider the [redacted] with whom the Appellant traded "regular", she stated that "*it is not of a regular nature to make an arrangement with one particular supplier and then carrying over those arrangements with the next supplier in the line. So, that is not of a regular nature. So, of a regular nature would be that if you have supplier 1, you have your own terms and agreements with that particular supplier. And then with trader 2, you establish a new relationship which is different with different prices are being agreed and a different relationship all together*."[41]

109. The witness stated that she had tried to be as impartial as possible, including giving credit to the Appellant where it had done things "*correctly*". She did not disagree with the suggestion that she had taken issue with approximately 20 out of 1,200 emails. Regarding whether the Appellant was entitled to claim VAT reductions, the following exchange occurred:

[37] D3/P33/L7
[38] D3/P38/L27
[39] D3/P44/L4
[40] D3/P48/L1
[41] D3/P50/L1

"*Q. Were you satisfied that – leaving this issue or knew or should have known entirely to one side – the Appellant was entitled to deduct the VAT that it had claimed?*

A. I had not encountered any evidence otherwise.

Q. Okay. And in terms of the zero rating of the supplies, are you satisfied that, leaving the knew or ought to have known issue to one side, it was entitled to zero rate the supplies?

A. I am satisfied."[42]

110. She accepted that additional due diligence documentation had been provided by the Appellant since she had prepared her witness statement. She accepted that there was due diligence on record for Missing Trader 8, but did not consider it satisfactory. She did not agree that her statement said it was satisfactory.

111. It was put to her that the Respondent had referred to a relatively small number of alleged prepayments in respect of the total number of transactions involved (approximately 200):

"

Q. …let's say you have five allegations of fraud – of a prepayment, in the 195 occasions where there is no prepayment, does that not indicate to the Appellant that its transactions are not connected with fraud, because a prepayment is a necessary ingredient of the fraud?

A. I never said, and Revenue never established that the prepayment is the necessary ingredient of the fraud. All Revenue has to answer for is present the facts that there were prepayments, which is a very unusual and irregular way of operating business, and that that particular prepayment happened at a particular time and with a particular set of suppliers or supplier, which in this case happened to be fraudsters."[43]

112. Regarding the alleged back-order of [redacted] between Missing Traders 6 and 7, it was put to the witness that the Appellant had ordered the 100 additional [redacted] from Missing Trader 7, and she was asked why she had concluded that the only reasonable explanation was that the Appellant had ordered the [redacted] from Missing Trader 6 but that they were delivered by Missing Trader 7: "*there is no effect on the chain of supply, there is no question from*

[42] D3/P64/L25
[43] D3/P81/L7

the Appellant about where are my [redacted] *there is no question about why are you ceasing trading, nice having done business with you, anything along those lines. We see immediately the next trader is sticking in there with – straight into the ledger, reflecting a receipt of goods or a transaction for which there is no documentary evidence that there was ever an order of those particular* [redacted]"[44]

113. She stated that she considered it unusual to make four separate payments for four invoices on the same day: "*it is an irregular way of conducting your business and that that irregular way of conducting your business is persistently present in your books and records*."[45] It was put to her that identifying a difference between business dealing with [redacted] compared to 'regular' or 'legitimate' traders did not show why the Appellant should have known they [redacted] were engaged in VAT fraud: "*That evidence in itself is just a fact that I have encountered. That fact cannot be examined in isolation, cannot be linked to VAT fraud in isolation. In this particular case, that is a finding that it is irregular and that I have to list it in my findings as an irregular business practice*."[46]

114. She was asked about the relationship between Missing Traders 2 and 3 (i.e. Missing Trader 2 was a sole trader, who then incorporated and became Missing Trader 3):

> "*Q. Why, then, when you get to the credit terms on page 31, do you highlight the fact that there's an increase in the credit terms when [Missing Trader 3] incorporates in circumstances where your evidence yesterday was that it was entirely normal that when you build trust in a relationship, you get more credit? Why is that an indicator of fraud?*
>
> *A. Okay, that in itself, right, it wouldn't be an indicator of fraud if you're dealing with a sole trader that incorporates. But if I direct you to my page 31, where you have the chart, you will be able to see that the credit terms with [Missing Trader 2], the line there is flat. Basically there's no credit terms with them. They are payment on delivery. And now we have a person that, from a commercial point of view is the same person, it's just incorporating, and suddenly there's this abrupt change which, regardless of which explanation we want to give, it is irregular. Even though they were linked and they are the same person, it is still irregular, based on the existing relationship*."[47]

[44] D3/P91/L6
[45] D3/P96/L20
[46] D3/P99/L17
[47] D3/P108/L14

115. Regarding the email that referred to a "*mutual friend*", she said it appeared to her that this was someone "*that had the power or the ability to agree prices in relation to* [redacted] *that were supplied by that missing trader*."[48] She was asked what it was about Missing Traders 11 and 12 merging that should have alerted the Appellant to fraudulent behaviour: *"[Missing Trader 12] is an accountant… which happens to be the accountant of [Missing Trader 11], which happens to be connected with that EU customers for which - [EU Customer 4], in particular. So those are the basis and the evidence that I presented to you that would indicate that there is a fraud, and, from your client's perspective, if the commencement of a relationship starts on the basis of a transaction and an event that is irregular, I cannot say that they knew that [Missing Trader 12] was into fraud, because it is an accountant, but I knew that [Missing Trader 11] was irregular, and that may bring into the next trader in this particular transaction.*"[49]

116. She was asked about the Appellant's contention regarding the change of business model provided by [redacted] that it said led to it engaging with [redacted]:

> "*Q. So the first thing I want to ask you is: Do you accept that* [redacted] *removed the rebates and discounts that the Appellant was receiving before 2011?*
>
> *A. I do accept that there was a change in the discounting policy.*
>
> *Q. Okay. And do you accept that the effect of that is that the price that we would have to pay* [redacted] *increased?*
>
> *A. Yes, I do accept that.*
>
> *Q. And do you accept that* [redacted] *increased the rebates and discounts it was giving to Irish* [redacted] *and* [redacted] *it targeted them directly?*
>
> *A. My inquiry into that business model, one of the explanations that were given to us was that there is, and there was an acceptance that there was some* [redacted] *that were buying in excess of their needs to avail of a higher discount, therefore they were causing a particular excess of* [redacted] *in there, and that was one explanation, and there was an alternative explanation*
>
> *Q. Sorry, just to be clear. You are satisfied that what you just said happened?*
>
> *A. Yes.*

[48] D3/P127/L21
[49] D3/P131/L4

[…]

Q. But from your investigations, do you understand that they [redacted] were ordering excess, they were ordering more than they needed?

A. Yes.

[…]

Q. I see. So, they are somehow getting sold from when the [redacted] and the [redacted] acquire them, they are somehow getting sold, you accept that?

A. Well I imagine they are in the market… The effect was that they were – a lot of [redacted] at a cheaper price."[50]

117. It was put to her that she had no evidence to justify the conclusion in her witness statement that the Appellant should have known that Missing Trader 11's VAT registration had been cancelled: "*All I know is the VAT registration happened on the 23rd November. Then the email* [from the Appellant regarding stock taking] *is triggered on the 24th. So I am merely listing the facts*."[51] She did not have evidence that the Respondent had notified the Appellant of the cancellation pursuant to section 108D of the TCA 1997.

118. Regarding the payment to Missing Trader 10 for [redacted] delivered by Missing Trader 9, and the evidence of the Appellant that this was done on the insistence of Missing Trader 9 against the wishes of the Appellant, she stated that "*the explanation mattered to the extent that there is an awareness that there is an irregularity in the request of the supplier*."[52] She was asked if the Respondent had carried out an investigation into [redacted], from whom the Appellant had also supplied [redacted] She stated she was not aware of any such investigation and had no knowledge that they could be classified as missing traders.

119. In respect of the analysis carried out by [redacted] into the prices of [redacted] available from 'regular' suppliers compared to the missing traders, it was put to her that the only legitimate comparator was [redacted] at €275 per [redacted]

"*Q. And so you're saying we could have bought this [redacted] from [redacted] for €275 and we could have paid [Missing Trader 5] €286, [Missing Trader 7] €275 and [Missing Trader 7] €280/€275 and that is the only evidence you have put*

[50] D3/P133/L1
[51] D3/P139/L6
[52] D3/P142/L19

forward of a comparison of our prices versus the comparison of prices paid to other non fraudulent traders; isn't that correct?

A. Yeah."[53]

120. Regarding the due diligence into Missing Trader 8, counsel for the Appellant referred to a VAT registration certificate, and asked how someone could get a VAT registration certificate for a residential address: "*Because you could be trading from your home*."[54]

121. In respect of the contention in her witness statement that Missing Trader 6 was operating from an address that a Google search showed to be the yard of "*a well-known bread baking company*", it was put to her that "[redacted]" showed premises for [redacted], but that "[redacted]" showed a yard with [redacted] "*I am shown a street with a door on one side and a sign on top of it, and then on the picture – but I don't see the* [redacted] *there. So I assume that on the other picture it is a different street but it is the location nearby where you can store the* [redacted] *So, for me, regardless of whether it's* [redacted] *or the name of the other street, I am satisfied that, in the building where there is a plaque for the accountant and the* [redacted]*, that around the corner there is a place where they could store a small amount of* [redacted]"[55]

122. Regarding her concerns about the due diligence documentation for Missing Trader 4, she stated that "*We're talking about the trading history of a new person that comes to deal with you that does not have a background on* [redacted] *The fact that it's an RCT registration in a very particular sector that is not* [redacted] *related would have caused issues of concern, especially they are dealing – these, Commissioner, and just for your information, and I'm aware that these may not be known by the Appellant, but [Missing Trader 4] confirmed that he provided his VAT number for a misuse of the VAT number and he confirmed that he had participated in the fraud*."[56]

123. In her witness statement, [redacted] stated that *"Appellant ought to have known that when they were offered* [redacted] *deals at a considerable discount, something is not right.*"[57] Addressing this statement in her oral evidence, she stated that:

"A. This is in relation to your client's statement during the interview. So, the statement he makes that they had been approached with that list of

[53] D3/P159/L9
[54] D3/P162/L13
[55] D3/P172/L20
[56] D3/P175/L21
[57] Page 18

people that he gave to us, and he had been offered those incredible [redacted] *and those prices. So, that's when I'm say saying.*

Q. Oh, which he chose not to deal with?

A. Exactly."[58]

124. Regarding the alleged circular trade of [redacted] to EU Customer 1 in [redacted] she was asked how the Appellant should have known that the transaction was connected with a fraud when it sold the [redacted] "*I cannot say that. All I can say is the evidence as I encountered on the books and records and my analysis which is in the statement and which I explained yesterday*."[59] She confirmed that the Appellant had continued to supply EU Customer 1 after the relevant period, and that she had approved VAT repayments for those sales.

125. In its witness statement, the Appellant had sought to address the Respondent's concern about alleged pre-payments by referring to its practice of issuing pro-forma invoices. The witness stated that she was "*satisfied that a pro forma invoice is a legitimate business practice. The concerns I had is with the prepayment that takes place… If you're asking for a prepayment you must have a reason for asking for a prepayment, and on the basis of the evidence that I have submitted, it would be up to the Commissioner to decide whether they should have known that something was amiss.*"[60]

126. It was suggested to the witness that a more logical explanation for the sequential relationship between the Appellant and the twelve missing traders was that the Appellant was targeted by them. The witness responded:

"*And that was given consideration as part of my analysis, Commissioner, were they a victim? And that's part of the initial risk and in order to determine the level of involvement of the Appellant, that's when I go to the facts of the case and to the evidence, and that's when we examine all the amount of the documentation. And the issues that are identified, the different scenarios are given consideration to for each of those issues, and for the globality of the issues and it's when we look at the globality of the issues that we reach the conclusion that there is a high level of involvement that cannot be explained by we were targeting. They are serious events that happened at that particular time, there are material consequences. They are not facts in isolation. Therefore, the Appellant should have known that something was not correct in that*

[58] D3/P181/L2
[59] D3/P183/L18
[60] D3/P188/L6

behaviour. That if he continued to engage with those traders he was exposing his business to fraud."[61]

127. The Respondent also submitted a number of additional witness statements where the relevant witnesses did not provide oral evidence at the hearing:

[redacted]

128. [redacted] stated that he is currently Principal Officer, and was the Assistant Principal in charge of the team that carried out the investigation into the Appellant. He was present at the meeting in March 2019 wherein the Respondent presented its findings to the Appellant:

"*I advised* [redacted] *I was satisfied that [the Respondent's] investigation had uncovered a basket of evidence sufficient in content and regularity of abnormal or unusual business practices to justify a conclusion that the company knew or ought to have known that its transactions with 'Missing' traders were clearly linked to the fraudulent evasion of VAT.*

[…]

I indicated that I would be raising a letter to this effect immediately after the meeting and would proceed with the raising of relevant VAT assessments on the company immediately…

My letter issued on 5th April 2019 and the relevant VAT assessments were input by the end of the month."

[redacted]

129. [redacted] stated that he is an Assistant Principal in the Respondent. Regarding Missing Trader 2, he stated *inter alia* that:

"*In the calendar year 2013 Intra Community Supplies to the value of €6,705,986 were zero rated to [Missing Trader 2's] VAT number. Only one VAT3 return was filed, covering the period Jan/April 2013, which returned a T1 figure of €86,008 and a T2 figure of €84,915. The balance of €1,093 returned as being payable to Revenue was not paid.*

[…]

Based on the available evidence it appeared that lodgements of €3,461,790 related to the purported sale of [redacted] *by [Missing Trader 2] to [the Appellant]. I subsequently*

[61] D3/P196/L20

raised VAT s111 assessments, covering the period January to December 2013, in the sum of €1,322,860…

These assessments were not appealed nor was any payment received by [the Respondent] in respect of same.

It is my opinion that [Missing Trader 2] allowed his VAT number and bank accounts to be used in connection with transactions which formed part of a VAT fraud."

130. [redacted] submitted an additional statement regarding Missing Trader 6. He stated *inter alia* that:

"…[D]uring the period January to June 2015 zero rated Intra Community Acquisitions in the sum of €1,560,043 were acquired using [Missing Trader 6's] VAT number. VAT3 returns were not filed in respect of the relevant VAT periods and no payments were received by Revenue.

[…]

Based on the available evidence it appeared that lodgements of €1,717,852 related to the purported sale of [redacted] by [Missing Trader 6] to [the Appellant]. On 16 February 2016, I raised VAT s111 assessments in the sum of €389,357…

These assessments were not appealed nor was any payment received by [the Respondent] in respect of same.

It is my opinion that [Missing Trader 6] is a 'missing trader' and that the payments lodged to the bank account held in his name were in connection with a VAT fraud."

[redacted]

131. [redacted] stated that he is a Higher Executive Officer in the Respondent. Regarding Missing Trader 5, he stated *inter alia* that:

"*I formed a view that the trader had demonstrated serious irregularities in their VAT, involving [the Appellant], amongst other traders. An assessment under s. 111 of the VATCA 2010 was raised in the amount of €1,112,528 on [Missing Trader 5]. The assessment has not been appealed.*"

[redacted]

132. [redacted] stated that she is an Assistant Principal Officer in the Respondent. Regarding Missing Trader 11, she stated *inter alia* that:

"*On 2 February 2021 I instructed a Revenue Officer to input VAT Inspectors Assessment in respect of the VAT not reported to [the Respondent] and this included the VAT noted on the invoices to [the Appellant]. [Missing Trader 11] did not respond to the correspondence I issued during the intervention. [Missing Trader 11] could not be contacted and was considered to be a missing trader at that time.*

On 3 February 2021 the VAT Notice of Assessment issued to the taxpayer and his agent on record. [Missing Trader 11] did not appeal the assessments. [Missing Trader 11] has not paid the liability."

133. [redacted] also submitted a statement in respect of Missing Trader 7. She stated *inter alia* that:

"*On 28 September 2021 I instructed a Revenue Officer to input VAT Inspectors Assessment in respect of the VAT not reported to [the Respondent] and this included the VAT noted on the invoices to [the Appellant].*

The VAT Notice of Assessment did not issue to the taxpayer as the taxpayer did not reside at the address on record and was considered a missing trader at that time. The liability has not been paid to date."

134. [redacted] also submitted a statement in respect of Missing Trader 8. She stated *inter alia* that:

"*On 27 October 2021 I instructed a Revenue Officer to input VAT Inspectors Assessment in respect of the VAT not reported to [the Respondent] and this included the VAT noted on the invoices to [the Appellant].*

On 27 October 2021 the VAT Notice of Assessment issued to the taxpayer and his agent on record. [Missing Trader 8] did not respond to the correspondence I issued. [Missing Trader 8] could not be contacted and was considered to be a missing trader at that time.

[Missing Trader 8] did not appeal the assessments. [Missing Trader 8] has not paid the liability to date."

135. [redacted] also submitted a statement in respect of [Missing Trader 10]. She stated *inter alia* that:

"*On 27 November 2020 2021 I instructed a Revenue Officer to input VAT Inspectors Assessment in respect of the VAT not reported to [the Respondent] in respect of the VAT noted in the invoices to [the Appellant].*

On 2 December 2020 the VAT Notice of Assessment issued to the taxpayer and the agent on record. [Missing Trader 10] did not respond to correspondence issued during the intervention. [Missing Trader 10] could not be contacted and was considered to be a missing trader at that time.

[Missing Trader 10] did not appeal the assessments. [Missing Trader 10] has not paid the liability to date."

[redacted]

136. [redacted] stated that she was a Principal Officer in the Respondent. In respect of Missing Trader 4, she stated *inter alia* that:

"*The auditor interviewed [Missing Trader 4] on 16/12/2014 and during the course of this interview [Missing Trader 4] stated that he allowed his VAT number to be used by a named individual, and as such perpetrated a fraud.*

[…]

…I formed the view that the trader had allowed his VAT number to be used in connection with a VAT fraud. I then instructed the auditor to raise assessments for the amount of €866,858 which includes lodgements from the Appellant…

No appeal was received, and assessments were final and conclusive.

No payment was made on foot of these assessments and the full liability remains outstanding. The taxpayer claimed inability to pay and was unable to make any payment to discharge the debt."

137. Two additional witness statements were submitted by the Respondent concerning its investigation into the Appellant. The Commissioner has considered the contents of these statements and is satisfied that they do not add anything of probative value to the material already set out herein.

Respondent's Submissions

138. There was insufficient time during the hearing for oral closing submissions, and instead the parties provided their closing submissions in writing. In its closing submissions, counsel for the Respondent stated that the Appellant's contention that oral evidence does not constitute "objective evidence" was incorrect. The Respondent accepted that it could not rely solely on assumptions or belief; however there was uncontroverted evidence, both from witness statements and the oral evidence of [redacted], that significant

fraud had taken place in this case. If the Appellant did not accept this evidence, it could have challenged it on cross-examination, but it had not done so.

139. It was very clear from the evidence from the authorities, including *Kittel*, that what was required was a cumulative consideration of the totality of the relevant facts. In this case, there was objective evidence of what occurred over time – traders newly registered for VAT accumulating huge sales, on atypical credit terms, failing to pay VAT, and disappearing, following significant disruption to the market. This provided more than enough warning to a person prepared to look at the evidence, but the Appellant's [redacted] was determined not to do so.

140. The Respondent was not alleging actual knowledge on the part of the Appellant, but was alleging that the Appellant "*ought to have known (and may even have known)*", as stated in *Belmont Finance Corporation Ltd v Williams Furniture Ltd* [1979] Ch 250. As stated by the UK Court of Appeal (Arden LJ) in *Fonecomp Ltd v Revenue and Customs Commissioners* [2015] STC 2254, "*[The trader] has simply to know, or have the means of knowing, that fraud has occurred, or will occur, at some point in some transaction to which his transaction is connected.*"

141. Counsel submitted that [redacted] had accepted under cross examination that the twelve fraudsters were approximately 25% of the Appellant's business. It was submitted that if 422 transactions accounted for nearly €20 million, each transaction was approximately €47,000, whereas the remaining 60% (22,192 transactions) averaged less than €3,000 per transaction, and that this should have made the approach of the fraudsters obvious to the Appellant. This large percentage was self-sustaining despite the fact that it was characterised, for the most part, by persons who only registered for VAT a short time before the trade commenced and then ended after a short period with no explanation (for the most part) or no commercially justifiable cesser. [redacted] confirmed that the [redacted]" had, for the most part, none of the things that would characterise a trader such as [redacted] yet none of this operated as a red flag. Additionally, the ability of many of the missing traders to grant generous credit terms had never been explained.

142. Regarding due diligence, it was submitted that [redacted] was unable to show documents to substantiate that a number of the missing traders were experienced in [redacted] dealing before the Appellant commenced business with them. It was submitted that the evidence failed to convince that [redacted] was an individual concerned to ensure that he did not participate in fraud. The Appellant had sought to rely on [redacted] as a comparator, but this did not stand up to scrutiny, as it was an apparently well-established

entity with considerable infrastructure, and therefore wholly different to dealers who came and went without any infrastructure or reputation to speak of.

143. In conclusion, the Respondent submitted that the Appellant had a means at its disposal of knowing that by its purchases it was participating in transactions connected with the fraudulent evasion of VAT. Put another way, a reasonable person in [redacted] position ought to have concluded that the transactions were connected to VAT fraud. The Appellant had all the information necessary to know that it was engaging in transactions connected to VAT fraud. It collected, collated and stored the documents, but refused to consider their import – even though it was perfectly clear. Consequently, the appeal ought to be rejected.

Appellant's Evidence

[redacted]

144. [redacted] was a director of the Appellant and was also General Manager of the Appellant during the relevant period (2013 – 2018). As well as his oral evidence at the hearing, [redacted] submitted two very detailed witness statements (82 pages and 46 pages), which the Commissioner accepted into evidence.

145. In his first witness statement, [redacted] made the following "*key points*":

"*i.* *The Appellant took physical delivery of every single* [redacted] *that it purchased from every one of its suppliers including the suppliers with respect to whom the Assessment was raised;*

ii. *The Appellant paid for every consignment of* [redacted] *by electronic funds transfer; the Appellant never paid cash nor made cheques out to cash for* [redacted] *purchases;*

iii. *The price which the Appellant paid for the* [redacted] *it purchased were in line with market value prices for those* [redacted] *and, importantly, the [Respondent has] never once suggested otherwise;*

iv. *The Appellant used, during the relevant period, administrative software which tracks all purchases and sales made by the Appellant and gives a day by day, contemporaneous, rolling record of the Appellant's inventory of* [redacted]

v. *The Appellant has retained detailed records of its purchases, delivery dockets and sales.*

vi. *All of the [redacted] purchased by the Appellant from the Twelve Subject Suppliers* [i.e. the missing traders /[redacted]] *(and its other suppliers) were physically sold by the Appellant to third party customers.*

vii. *There is no specific allegation of fraud made against any of the Appellant's customers in the Outline of Argument on behalf of the Respondent. Four customers of the Appellant established outside the State (to whom zero-rated intra- Community supplies were made) are included in the Assessment under appeal and are identified and referred to in some of the correspondence between the parties; in particular the letter from the Respondent dated the 5th April, 2019 – no 'Red Flags' applicable to these entities are outlined by the Respondent nor are the names of any of the four firms mentioned in the Outline of Argument. I will further refer to our dealings with these four customers under the heading 'The Appellant's Sale of [redacted] below.*

viii. *The Appellant was purchasing [redacted] to respond to legitimate market demand, there does not appear to be a suggestion that the Appellant was buying and selling inflated or artificial quantities of [redacted]*

ix. *Over the period 2007 to 2018 the Appellant dealt with 200 substantial suppliers of [redacted] The Respondents allege that they have evidence of VAT fraud being committed by just five of these* [NB. The Respondent subsequently alleged that all twelve missing traders had engaged in VAT fraud]*. The Appellant believes this undermines the assertion that fraud was 'rife' in the industry nor can it be said with any credibility that the Appellant was dealing only with alleged fraudsters.*

x. *During the entire period throughout which the Appellant was dealing with the companies which are said to have justified the Assessment, the Appellant was simultaneously purchasing [redacted] from other suppliers including directly from [redacted] manufacturers themselves.*

xi. *The Appellant continues to deal with customers on the "parallel market" to this day and no suggestion has been made that those transactions are connected with fraud. "[redacted]" were not common in the Irish market prior to the events of 2011 though such dealers were operating in/from the UK and European markets pre-2011 and continue to do so. "Parallel market" and [redacted]" are terms I will explain in further detail in the course of this statement.*

xii. The Appellant performed the same due diligence on the subject suppliers as it did with respect to all of its other suppliers.

xiii. In all material respects the Appellant's dealings with the traders with respect to whom the Assessment was raised were in line with its dealings with its other suppliers with respect to whom no allegation of fraud is made.

xiv. The converse is also true in that, so far as the Appellant was concerned, there was nothing in the manner in which the alleged fraudsters conducted their business which was any different from the manner in which the Appellant's other suppliers conducted their business."[62]

146. [redacted] stated that his day to day tasks involved dealing with the sale and purchase of [redacted] The Appellant is engaged in the business of buying and [redacted] and specialises in [redacted] designed primarily for [redacted]. For the years 2013 to 2018, 1.87% of the Appellant's 'purchase documents' related to the twelve [redacted].

147. [redacted] stated that the [redacted] of [redacted], [redacted] etc. are known in the trade as [redacted]". In order to encourage an [redacted] to use a particular brand of [redacted] manufacturers have traditionally offered subsidies to get their [redacted]. However, in [redacted] view, the level of subsidies/rebates/discounts provided by [redacted] manufacturers to [redacted] prior to 2011 was "*reasonable*".

148. [redacted] estimated that at any given time the Appellant would have up to 20,000 [redacted] in stock at its premises. "*Accordingly, the Appellant needs a wide variety of suppliers from whom it can acquire* [redacted] *as sometimes it is looking for a very specific* [redacted] *and speed of delivery, rather than price, is of the essence and other times it is looking to acquire a stock of particular* [redacted] *at the best available price*."[63]

149. He stated that the commercial [redacted] market in the EU is in excess of 20 million [redacted] annually, and that [redacted] are a commodity. The Appellant would always need to examine a purchased [redacted] in order to ensure *"(a) it is not counterfeit (b) it is not pre-used and (c) has* [redacted][64] For various reasons there can be price and availability fluctuations in the [redacted] market, and these allow "*wholesalers and independent brokers/traders sometimes known in the trade*

[62] Page 2
[63] First witness statement, page 14
[64] First witness statement, page 15

as [redacted] *to make a profit in the parallel market by taking advantage of the price differentials and fluctuating availability which may exist for a certain type of* [redacted] *at a point in time*."[65]

150. Prior to 2011, the Appellant tended to purchase [redacted] directly from the [redacted] themselves, while also supplementing its supply through dealing with [redacted] in the UK and mainland Europe. There was little room in the Irish market for [redacted] prior to 2011. Prior to 2011, [redacted] (the company) was the Appellant's largest single supplier of [redacted]

151. According to the Appellant, its increased reliance on [redacted] for [redacted] supplies post-2011 was as a direct result of what it termed "The [redacted] Events":

> "*In 2011 a most destabilising event occurred in the domestic* [redacted] *market when* [redacted] *changed the way it dealt with two categories of the industry's customer groupings* [redacted] *(being a major grouping in the 'replacement market') and the* [redacted] *increased the incentives/subsidies to a dramatic degree in an effort to beat its* [redacted] *manufacturing competitors in selling* [redacted] *direct to the* [redacted] *by offering discounts and subsidies well in excess of what was established and normal. In or around the same time…* [redacted] *had also decided to start selling* [redacted] *at scale directly to the 'replacement market' in opposition to and in competition with the Appellant. This was a new departure and something that the Appellant had not previously encountered in the Irish* [redacted] *market… The discounts offered were so significant that this prompted some of these* [redacted] *and* [redacted] *to buy far in excess of what was operationally required by them and then sell the excess on at a profit. This in turn created a whole new* [redacted] *supply/sale paradigm since everyone except the* [redacted] *and select* [redacted] *could now buy* [redacted] *from those* [redacted] *and select* [redacted] *(usually with* [redacted] *acting as brokers) cheaper than they could buy them from* [redacted] *thereby, creating a 'parallel market'*."[66]

152. At the same time, [redacted] removed the previous rebates and discounts offered to the Appellant, leading to an increase in unit price. As a result, the market price for a [redacted], as available on the 'parallel' market, was "*significantly below*" the price that the Appellant could buy the same [redacted] directly from [redacted] Consequently, the Appellant greatly reduced its purchases directly from [redacted] For example, in 2010,

[65] First witness statement, page 17
[66] First witness statement, page 21

28.36% of the Appellant's total purchases were from [redacted] whereas by 2017 it was 0%. Instead it purchased [redacted] from third parties in the parallel market.

153. As a result of the [redacted] events, [redacted] entered the Irish market due to the opportunities arising from the "*pool of supply*" of the excessively ordered [redacted] "*From in or around late 2013 it became common for the Appellant,* [redacted]*, to be actively approached by these new dealers*."[67] The Appellant continued to purchase from other [redacted] manufacturers: "*The total percentage of purchases from all suppliers other than the Twelve Subject Suppliers was 75.9%*."[68] Approximately 68% of the [redacted] purchased from the twelve missing traders were [redacted].

154. According to [redacted], it was plain why it was being approached by [redacted] offering to sell [redacted] and in particular [redacted]: "*Accordingly, the fact that the Appellant was now purchasing* [redacted] *from* [redacted] *gave rise to no suspicion whatsoever and gave the Appellant no cause for concern. The Appellant was intimately familiar with the circumstances which had led to the explosion in* [redacted] *for which there was an entirely rational explanation*."[69]

155. [redacted] stated that the Appellant always carried out due diligence on new suppliers, including address details, photographic identification, and VAT registration number which would be checked through the VIES website. He stated that working in the [redacted] industry required specialist knowledge and an understanding of the 'jargon', and if a would-be supplier showed a lack of familiarity with the market and its requirements he would be confident that he would spot this, and he would not have dealt with someone if they lacked such knowledge.

156. The Appellant sought to rely on [redacted], an [redacted] as a comparator with the twelve missing traders/[redacted]. For 2017, the Appellant calculated that the price per [redacted] (for six types of [redacted]) was between 9% and 16% cheaper than the prices at which [redacted] itself would sell the [redacted] to the Appellant: "*Accordingly, being offered* [redacted] *at prices less than those which* [redacted] *was offering was fully to be expected and was not in any way a cause for suspicion or concern.*"[70]

157. [redacted] submitted that, regarding their dealings with the twelve [redacted], "*The combination of industry knowledge, physical* [redacted] *inspections, due diligence and the use*

[67] First witness statement, page 27
[68] First witness statement, page 29
[69] First witness statement, page 30
[70] First witness statement, page 39

of Electronic Funds Transfer for all transactions were all entirely consistent with normal and ordinary trading."[71] He claimed that:

"*i. We knew or were aware of the suppliers themselves;*

ii. We were satisfied as to their knowledge of the industry and were not aware of them having any negative reputation in the trade;

iii. We performed our standard due diligence checks which were within industry norms;

iv. We were offered prices and terms which were in line with those in the market generally;

v. We took physical delivery of each and every [redacted] *we purchased;*

[…]

vii. We were satisfied as to the provenance and date of manufacture of the [redacted]

viii. We never paid cash nor were asked to pay cash; all payments were made by EFT;

ix. We received invoices for all transactions."[72]

158. [redacted] stated that, similarly, he believed that its dealings with the four zero-rated customers gave no rise to suspicion on the part of the Appellant: "*The Appellant a.) had proof of dispatch of all* [redacted] *b.) there was no reason to doubt the bona fides of the transport companies used for the various shipments and c.) there was no evidence of any 'mutuality of shipments'/companies buying entire consignments where the same number/batch of* [redacted] *were sold/purchased in short order such as might be indicative of circular trading. These factors in short indicate that the Appellant had no reason to reasonably suspect any impropriety as regards its dealings with these customers.*"[73]

159. [redacted] stated that, prior to being informed by the Respondent in March 2019, he had "*no knowledge*" of any missing trader type fraud in the [redacted] industry: "*In preparing this statement, I have undertaken searches and there is no mention in any document I was able to find of the Revenue Commissioners or any other body warning of a particular*

[71] First witness statement, page 41
[72] First witness statement, page 42
[73] First witness statement, page 52

prevalence of VAT fraud in our industry during the relevant period. Had they done so, I believe I would have been aware of it."[74]

160. [redacted] supplemental witness statement was made in response to [redacted] witness statement. He stated that the first time the Respondent had mentioned 'missing traders' to the Appellant was in their meeting of 22 March 2019. He claimed that the Respondent had been operating under the misapprehension that the Appellant had dealt with [redacted] selling [redacted] "*off the back of a lorry*".[75]

161. He then addressed the specific allegations raised by [redacted]. Under category 1, regarding the alleged pre-payment to Missing Trader 2, [redacted] stated that the order was a 'split delivery' and there was an element of pre-payment. He stated that split deliveries were very unusual and normally a separate invoice was issued for each delivery. He denied the allegation of prepayments in respect of Missing Traders 6 and 7 and stated there was no connection between payments to those traders.

162. Under category 2, the Appellant denied there was anything suspicious in making four separate payments to Missing Trader 2. In seeking to compare this method of dealing with how the Appellant dealt with to large suppliers such as [redacted], the Respondent had failed to understand that the Appellant had a credit facility with large suppliers, so that payment for all deliveries was made at the end of the month.

163. [redacted] stated that Missing Trader 2 informed the Appellant that he would be incorporating and would continue to trade as Missing Trader 3. [redacted] stated that there was nothing unusual about this. The Appellant also considered the joint venture between Missing Traders 11 and 12 as "*normal and unsuspicious at this time*."[76]

164. Regarding the payment by the Appellant to Missing Trader 10 for a delivery made by Missing Trader 9, [redacted] stated:

> "*50.* [redacted] *[Missing Trader 9] called to our depot shortly after the delivery of these 4 Invoices and requested that [the Appellant] pay the amounts owing to his company [Missing Trader 9] to his supplier [Missing Trader 10] to whom [Missing Trader 9] in turn owed money. The Appellant refused to make this payment as we regarded this as an unusual request.* [redacted] *persisted and we felt that we were not in a position to ultimately refuse this request as the* [redacted] *had been received and accepted by us before this dispute as to the form of payment arose. We insisted,*

[74] First witness statement, page 57
[75] Second witness statement, page 4
[76] Second witness statement, page 14

however, that the only way we could pay [Missing Trader 10] was if [Missing Trader 10] issued new invoices (which they did) and we repeatedly requested that [Missing Trader 9] issue a credit note for the invoices they had issued. When they failed to do so we generated an internal credit note so as to ensure there was no double-counting and to further ensure that the VAT was correctly accounted for.

51. We accept that one company requesting payment be made to a different entity is unusual; this is why we ceased dealing with this company. However, in the case of [Missing Trader 9] and [Missing Trader 10] we ensured that the proper VAT accounting treatment of the transaction took place and we were not prepared to blindly go along with whatever was proposed. This issue arose after we had already received delivery of the [redacted] (after many of them had been sold so that returning them was not an option) and we ceased dealing with these traders thereafter."[77]

165. Regarding the Respondent's contention that Missing Trader 11 mistakenly issued invoices for goods delivered by Missing Trader 9, [redacted] stated: "*At no point did we know or could we reasonably have known of this connection between two of our many suppliers. The Respondents appear to be unaware of, or appear to take no account of the scale of our business. Between 14th September, 2016 (when the [Missing Trader 9] [redacted] were delivered) and the 28th October, 2016 (the date on which the erroneous invoices were received) the Appellant processed 204 separate [redacted] purchase invoices from 59 different suppliers. I cannot see how the Respondents could have expected me to recall the detail of the earlier delivery and correspond it to the content of this invoice, which I had been asked to ignore, in those circumstances*."[78]

166. Regarding due diligence, [redacted] stated that the Appellant retained copies of its due diligence files held in respect of the twelve missing traders / [redacted], with the exception of Missing Traders 11 and 12, the originals of which he stated had been provided to the Respondent. He stated that the use of home addresses by some of the Appellant's suppliers did not give rise to concern due to the brokerage nature of the [redacted].

167. In respect of category 4, [redacted] accepted, with the benefit of hindsight, that "*the cessation point of dealing with one of the alleged fraudsters was followed, reasonably promptly, by another supplier*."[79] He sought to explain why this was not noticed by the Appellant at the time:

[77] Second witness statement, page 15
[78] Second witness statement, page 17
[79] Second witness statement, page 31

"*92. During the 6 years, [the Appellant] purchased 49,885* [redacted] *from the 12 subject suppliers above and purchased 17,728* [redacted] *from other 3rd party suppliers/brokers. Whilst it is true that if one isolates our dealings with the twelve subject suppliers and ignores all other suppliers with whom we were dealing, it appears as though we were moving from one alleged fraudster to the next. However, over that same time period we were dealing with at least 50 other* [redacted] *suppliers from each of whom we purchased at least €25,000 worth of* [redacted] *during the relevant period and hundreds of others below that threshold."*[80]

168. In respect of category 5, [redacted] referred to the information provided to the Respondent through MARs, and stated that this was, by definition, information that the Appellant did not have. He stated that "*There is no suggestion made that [EU Customer 1] was a missing trader and the Respondent has confirmed to the Appellant that it has no issue with it continuing to trade with [EU Customer 1]*."[81] Regarding EU Customer 3, it was denied that it had made advance or late payments, and that instead pro-forma invoices had been used. The Appellant was unaware of any relationship between the director of EU Customer 3 and Missing Trader 2.

169. In his oral evidence, [redacted] stated that, in respect of the meetings with the Respondent in 2017, the Appellant understood that the Respondent was investigating the [redacted] trade in general, and it was not until the meeting in March 2019 that the allegations were put to it. He stated that the first time the Respondent accepted the Appellant's contentions regarding the [redacted] market post the "[redacted] events" of 2011 was in [redacted] evidence at the hearing.

170. He stated that the Appellant purchased and sold 50,000 – 60,000 [redacted] per year, and that it stocked hundreds of different types of [redacted] at any one time. The Appellant has over 1,000 suppliers on its database, 200 of which are "*substantial*" [redacted] suppliers. He was asked what he meant by his comment in the 2019 meeting that "[redacted] *were still being hammered on price by competitors."* He stated that the Appellant's customers, to whom it was selling [redacted] were telling it that they could purchase [redacted] from others for much less.

171. [redacted] stated that he communicated a lot by email but more so by telephone. He had calculated that he sent and received approximately 25,000 emails annually. He estimated that "*I would imagine that the ratio would probably be two to one in favour of phone calls*

[80] Second witness statement, page 32
[81] Second witness statement, page 36

in and out. A lot of those calls wouldn't last long; quick calls, you know."[82] There was also a lot of face-to-face contact.

172. Regarding the Appellant's dealings with EU Customer 1 in [redacted] he stated that the Respondent found it difficult to understand why a [redacted] dealer in Ireland would buy certain [redacted] here and sell them to a wholesaler in [redacted] "*there's certain laws in various different countries which means that manufacturers concentrate on kind of the five to six, seven or eight fast moving* [redacted] *sizes in each specific country. So the specific* [redacted] *that is fast moving in Ireland is not specifically the* [redacted] *that's fast moving in Germany or Poland or Spain or whatever it might be, so every country is different… the manufacturers have their agents, as in* [redacted] *for example, in each different country and they then build their sales process around their fast moving items in each particular country.*"[83] By selling [redacted] to dealers in other countries, the Appellant could increase its purchases from [redacted] manufacturers, which would result in greater rebates being given to it.

173. [redacted] stated that the Respondent had allowed the Appellant to zero-rate its 2018 and 2019 sales of [redacted] to EU Customer 1, but that it had sold [redacted] to EU Customer 1 in the same way from 2013 – 2017, when its entitlement to zero-rating had been denied. Regarding its dealings with EU Customer 2, the Appellant stated that it became aware that its [redacted] were being sold by EU Customer 2 to EU Customer 1: "*So basically we credited the invoices that - there was more than one, I think three containers arrived with [EU Customer 1], we credited the ones to [EU Customer 2], we reinvoiced them to [EU Customer 1] and [EU Customer 1] paid them for us, because that's where they arrived, and we ended up being in a terrible situation with [EU Customer 2] because he owed us money for a container and we struggled to get paid for six months.*"[84]

174. He stated that the Appellant has a policy that it does not pay for [redacted] in advance. The main reason for this was that it had to check delivered [redacted] to ensure that they were what it had ordered. It would quickly become known throughout the [redacted] if it supplied inferior quality [redacted] He stated that the Appellant's dealings with all suppliers, including the missing traders, was similar: "*We order* [redacted] *The* [redacted] *were delivered. The* [redacted] *were checked. Invoice matched. Quantities matched. Prices agreed matched. Asked for payment. That's it, transaction done. So, nothing was out of the ordinary between any of these transactions.*"[85] He stated that he mostly used emails to record prices that had been agreed.

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[82] D4/P45/L7
[83] D4/P53/L26
[84] D4/P60/L6
[85] D4/P66/L2

175. He said that [redacted] supply was "*very hit-and-miss*": "*Because sometimes you might order a [redacted] and it might not come for months, sometimes you'd order a [redacted] and it would come the next day*."[86] There were about five or six people in the Appellant's office entering details of deliveries and payments on the Exchequer system. When an invoice arrived from a supplier, [redacted] expected that it would show the delivery date of the [redacted] but accepted that this might not always happen.

176. He explained the development of the parallel market in [redacted] post-2011 as follows:

> "*So an [redacted] buys excess [redacted] If that [redacted] sells them to a [redacted] trader, the [redacted] trader will hang up the invoice – which happened in 2010, '11 – in front of [redacted] and say I can buy these [redacted] off this [redacted] for cheaper than you're selling them, so they get a slap on the wrist. So then what happened was all of these independent traders who were in some way involved, be it an [redacted] or [redacted] or whatever it might be, entered into the market, with prices on [redacted] that were available to certain [redacted] pre the 2011 events, but were a lot lower than the new pricing structures which [redacted] were now offering. So it was the only cause, really*." [87]

177. [redacted] stated that if a manufacturer like [redacted] found out that a [redacted] or [redacted] had been selling excess [redacted] to a [redacted] that supply would stop, which would result in the [redacted] being unable to transact in [redacted] "*It's... it's a regular occurrence for someone to step in and out of the trade. Where they have access to excess [redacted] they sell the excess [redacted] supply is cut off. Like, it's a bigger problem for us if the supply is cut off because we need the [redacted] so we have to replace it quickly. We have to find somewhere to get these [redacted] because we need them*."[88]

178. He was asked by the Appellant's counsel whether the Appellant had carried out due diligence on all of the twelve missing traders:

> *"A. All of them.*
>
> *Q. For all of them.*
>
> *A. Most of them anyway. I just can't recall off the top of my head, but definitely all the later ones anyway.*
>
> *Q. So from what point onwards?*
>
> *A. Around 2014, '15, maybe, onwards, there or thereabouts.*

[86] D4/P69/L5
[87] D4/P88/L1
[88] D4/P92/L8

Q. You did it for everyone?

A. Yes."[89]

179. He stated that he was aware that due diligence documents had been submitted to the Commissioner for all of the missing traders other than Missing Traders 11 and 12. He believed that the documents for the latter two [redacted] had been received and subsequently provided to the Respondent.

180. [redacted] stated that Missing Trader 1 had approached him on numerous occasions in 2012 offering to sell [redacted], and that the Appellant started to deal with him in 2013. He was aware of Missing Trader 2 from the [redacted] industry, who had been working as a rep for a company a number of years ago. He stated that the "*mutual friend*" who introduced him to Missing Trader 5 was [redacted]. He did not consider this suspicious as they were both in the [redacted] industry. Missing Trader 6 was referred to him by a [redacted] dealer in Fermanagh. Regarding Missing Traders 6 and 7, he stated:

"*A. [Missing Trader 7] was calling to us for a good couple of months before we actually started dealing with him and, at that time, we were dealing with … [Missing Trader 6] and he called to us and we ended up buying some* [redacted] *from him.*

Q. So he was looking to sell you [redacted] *at the same time that you were buying from [Missing Trader 6]?*

A. Yeah. And it further – yeah. Basically it came to light after that he was actually selling [Missing Trader 6] [redacted] *too. See the* [redacted] *industry is, you know, everyone's buying and selling* [redacted]

Q. And when did you come to realise that he had been selling [redacted] *to [Missing Trader 6]?*

A. After I started dealing with him, I don't know.

Q. Did that cause you any concern?

A. No.

Q. Why not?

[89] D4/P101/L20

A. Because we were both in the [redacted] industry, we were both trading in [redacted] and no, no reason for concern for me."[90]

181. Missing Trader 8 had been calling to the Appellant with offers for [redacted] Between Missing Trader 7 and 8 there was a four-month gap, and [redacted] stated that the Appellant would have been buying [redacted] for someone else at the time. Regarding Missing Trader 8, he stated "*He did run into a supply problem. We had ordered [redacted] from him. He couldn't supply the [redacted] but he arranged for another supplier to supply the [redacted] who was also trading in the parallel market, which was [Missing Trader 9]. So, [Missing Trader 9] delivered an order of [redacted] that [Missing Trader 8] brokered for us. So [Missing Trader 9] delivered the [redacted] invoiced the [redacted] we paid [Missing Trader 9] for the [redacted]*"[91]

182. He stated that he knew the missing traders were trading in the marketplace: "*I knew they were there, but when we had a supplier obviously we were happy, and if we were getting the [redacted] at the right price and everything else we were happy at market prices, so we were happy. It's only when supply ended that we had to find a replacement supplier for [redacted].*"[92]

183. On cross-examination, regarding the issue with Missing Traders 9 and 10 [where the Appellant paid Missing Trader 10 for [redacted] delivered by Missing Trader 9], [redacted] stated that, "*I can't say whether I felt it was wrong. It definitely wasn't right. But I can't say it was wrong. He was giving me a reason for it, but even no matter what the reason was, we were not comfortable enough to pay somebody else that we didn't know for [redacted] that he had supplied*."[93]

184. Regarding a table contained in his witness statement showing the number of sale and purchase documents created by the Appellant during the relevant period, [redacted] agreed that 422 documents concerned the transactions with the [redacted], which accounted for approximately 25% of the Appellant's turnover during that time:

"*Q. That rather suggests that each of those transactions was for a significant enough delivery?*

A. Yes, correct.

Q. There weren't just a few [redacted] here and a few [redacted] there?

[90] D4/P108/L13
[91] D4/P128/L11
[92] D4/P123/L2
[93] D4/P174/L18

A. The majority would be in [redacted].

Q. Right. Because otherwise there'd be far more documents than 422?

A. Correct."[94]

185. Asked about "risk factors" when purchasing [redacted] he included whether [redacted] had been stolen: "*If something was too good to be true, yes, absolutely you would be wondering why, where, what… Well for argument's sake, if the market price of something is somewhere in the region of 280, say, to €320, depending on whether you're buying four for 320, 12 for 310, or 200 for 290, if that was offered at €200 you'd be thinking there's something wrong.*" [95]

186. He accepted that if a [redacted] was engaged in VAT fraud, that would give them a bigger profit margin on their sales, but he stated that the Appellant was never aware of that. He stated that he could not understand why people would not account for VAT: "*Well like with the powers with the Revenue Commissioners, I could never understand how that could happen… Have I come across VAT fraud or VAT non payment in the [redacted] industry? No, I haven't.*"[96]

187. Regarding due diligence, he stated:

"*A. Yeah, well, obviously, it's important to know who you are dealing with. In line of an export, if it's an export, you need to get all of your DD in place, which includes your photo identification, your tax verification or VAT verification, and some - as much company information as you possibly can.*

Q. So as much information as you possibly can?

A. Yes. You would always request as much as you possibly can.

Q. I see. And what do you understand by due diligence so in other parts of your business? That's in relation to exports, you said that maybe it would be different in other areas.

A. In dealing with new suppliers, we would also apply the same process."[97]

He did not believe that it was part of the objective of carrying out due diligence to try to make sure the Appellant was not dealing with somebody who was being fraudulent. He was adamant that he was never aware of any fraud in the [redacted] industry: "*As I said, once*

[94] D5/P125/L3
[95] D4/P202/L17
[96] D4/P233/L7
[97] D5/P9/L13

we were happy to transact with the relevant customer, the relevant supplier and the company was satisfied that they were a bona fide supplier or a customer, fraud is not something that we were ever aware of in the [redacted] *industry."*[98]

188. He stated that he passed information he gathered to the office manager, and then "*We made a joint decision as to how we would proceed with somebody as regards credit or no credit or whatever it might be*."[99] He was asked about what information he considered in due diligence documentation:

> "*Q. And if it were the case that you were looking at the ID for any supplier, similar to this, and there was an address shown on that that was out of kilter with other information that you had, would that be something that would cause you concern?*
>
> *A. No…*
>
> *If somebody gives you a copy of their passport or gives you a copy of their passport to copy, you would imagine that that is bona fide identification, as in if I'm ever asked for a copy of my identification, a passport or a driver's licence or something along that line is regarded as bona fide identification*."[100]

189. [redacted] stated that he did not consider it of interest or relevance when a supplier registered for VAT. He accepted that the Appellant received its first supply from Missing Trader 4 on 1 February 2014, and that one of the pieces of due diligence documentation received on that trader (RCT form) was dated 14 January 2014. He also accepted that the Appellant received its first supply from Missing Trader 7 on 30 June 2015 and that the due diligence documentation suggested that he had been in the business since February 2015. However he could not recall if that missing trader had sought to do business with the Appellant prior to February 2015.

190. Regarding Missing Trader 8, [redacted] accepted that he registered for VAT on 17 February 2016 and his first supply to the Appellant was 15 or 16 March 2016. He stated that:

> "*A. Again, we'd come across him in various different instances where he was dealing with various different people, selling them* [redacted]

[98] D5/P36/L19
[99] D5/P46/L13
[100] D5/P57/L12

Q. And your evidence to the Commissioner is this is before he has applied for registration for VAT, is that right?

A. I couldn't comment on that or...

Q. You couldn't comment because you don't know or you couldn't comment because you are reluctant?

A. I don't know. I don't know.

[…]

[Missing Trader 8] was around for a while, exactly how long I can't tell you. I'd say he was around for longer than a month."[101]

Later, he stated that he did not have any evidence of Missing Trader 8 operating in the business before 17 February 2016.

191. Regarding Missing Trader 9, [redacted] agreed that the VAT registration was from 1 January 2016, and the first supply to the Appellant was 29 June 2016. He stated that the Appellant had an urgent requirement for [redacted] when it became aware of that [redacted]. In respect of Missing Trader 10, [redacted] did not recall looking at the due diligence documents "*because literally this was not a relationship that was starting. This was a relationship that was ending*."[102] The payments to Missing Trader 10 corresponded to the invoices received from Missing Trader 9.

192. Regarding EU Customer 4, one of the Appellant's zero-rated customers, he agreed that an online VAT enrolment acknowledgment was dated 15 September 2016, and that the Appellant's first supply was on 19 or 20 October 2016. Regarding [redacted], which the Appellant sought to rely on as a comparator to the missing traders, he stated that the due diligence carried out was the same:

"*Q. There wouldn't be a difference between the two because one was well established and the other one was only on the scene for a few weeks?*

A. No."[103]

193. He stated that the majority of [redacted] did not have storage facilities but some might have. He did not believe that the presence or absence of infrastructure had any relevance when it came to considering due diligence. Asked about which of the twelve

[101] D5/P91/L1
[102] D5/P103/L19
[103] D5/P123/L9

missing traders the Appellant knew or had market information on the principals and contact people of the suppliers, [redacted] stated that it applied to Missing Traders 1, 2, 3, 4, 5, 6, 7, 8, 11 and 12. It did not apply to Missing Traders 9 and 10. He stated that he accepted that the graphs of credit terms granted to the twelve missing traders appended to [redacted] statement were accurate.

194. When asked why the Appellant thought it was possible that it had been targeted by the missing traders, he stated that "*Probably because we had about 60 to 65% of the* [redacted] *in Ireland*."[104]

195. Asked by the Commissioner whether he had an awareness of the possibility of fraud in the [redacted] industry, [redacted] stated: "*I guess if you talk about that probably in a more general terms, there is always the – there is always people out there that are willing to commit a fraud and – be it – like, you know, over the years we have had various customers who we have supplied* [redacted] *to and they haven't paid us, you know, and we have had various bad debts and everything else, so I would regard that as being, you know, fraud against someone or whatever. But as regards this type of fraud, the missing trader thing, absolutely not, no*."[105]

196. Asked if he thought there was a greater risk of fraud with [redacted] who had recently entered the market, compared with established businesses, he stated "*So, no, to be honest, it's been a huge part of the* [redacted] *trade for decades in Europe and the UK, but in Ireland it wasn't until* [redacted] *got so aggressive in 2011 that they basically invited the opportunity into the market place. And although* [redacted] *and brokers and agents and all that would have sold* [redacted] *in Ireland pre that time, but they would have been selling them from the UK and further afield into Ireland, if you get me*."[106]

Appellant's Submissions

197. Counsel for the Appellant stated that it was common ground that the only issue was whether the Appellant should be refused the right to deduct input tax or refused the right to zero-rate transactions on the basis that it knew or ought to have known that its purchases or sales respectively were connected to the fraudulent evasion of VAT. In the context of input tax, the test was the *Kittel* test; in the context of zero-rating, it was the test set out in *Mecsek-Gabona.*

[104] D5/P147/L21
[105] D5/P188/L11
[106] D5/P189/L26

198. Counsel submitted that there were four questions that the Commissioner had to be satisfied on:

i. Was there a tax loss?

ii. If so, did this loss result from a fraudulent evasion?

iii. If there was a fraudulent evasion, were the Appellant's transactions which were the subject of the appeal connected with that evasion?

iv. If such a connection was established, did the Appellant know or should it have known that its transactions were connected with the fraudulent evasions of VAT?

199. It was for the national legal system to determine what constitutes "objective evidence", as required by EU law, and it was submitted that oral evidence is not objective evidence. The requirement to adduce "objective evidence" requires documentary or other objectively verifiable evidence; *Crawford v Centime Ltd* [2006] 2 IR 106. There was no such objective evidence before the Commissioner to demonstrate non-payment of VAT by anyone, or the connection between that non-payment and the commission of a fraud. The Appellant had no way of establishing whether or not the suppliers accounted for VAT and no way of establishing whether their failure to do so was as a result of fraud. The Respondent was seeking the Commissioner to find as a fact that twelve specified taxpayers have unpaid tax liabilities in excess of €4.68m and additionally to find as a fact that those unpaid tax liabilities result from a fraud perpetrated by each of the twelve traders, but had not produced a shred of evidence to that effect.

200. Prior to the hearing, the Respondent submitted statements from five witnesses alleging that eight of the [redacted] had been found to have unpaid VAT liabilities linked to the fraudulent evasion of VAT. No statements were provided with respect to four of the alleged missing traders (Missing Traders 1, 3, 9 and 12); however in her oral evidence, [redacted] stated that she believed that those four missing traders had committed fraud. This evidence was not on notice to the Appellant and should be excluded; however, if it is not excluded, it was clearly insufficient to prove the necessary requirements.

201. Counsel then went on to address the evidence adduced at the hearing, without prejudice to the submissions on the admissibility etc. of the evidence. To demonstrate a tax loss, the Respondent had to show intra-community acquisition; however that had only been asserted by one witness in respect of two traders (Missing Traders 2 and 6). [redacted] evidence in respect of four missing traders was hearsay; in any event it

failed to assert the existence of an intra-community acquisition with respect to any of the companies involved.

202. In respect of whether there had been fraudulent evasion of VAT, it was clear from the CJEU that mere non-payment of VAT was sufficient to engage the *Kittel* principle; *UAB 'HA.EN.' v Valstybinė mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos* Case C-227/21. Therefore, the fraudulent evasion must be proven to the requisite legal standard on the basis of objective evidence. If the witness statements provided by the Respondent are to be treated as constituting objective evidence, only those concerning Missing Traders 2, 4, 5, 6, 7, 8,10 and 11 referred to the existence of fraud. [redacted] had not taken part in the investigation into the four missing traders she referred to in her evidence and therefore was not in a position to provide any evidence as to whether they had committed a VAT fraud.

203. Regarding whether the Appellant knew or ought to have known that the transactions were connected with fraud, the Respondent had to show that a reasonable businessman would have known, as regards each of the transactions at issue, that fraud was the only reasonable explanation for those transactions. Based on the questions put to [redacted] in cross-examination, the height of the Respondent's case was that the Appellant should have known that there was an increased, or perhaps a high, risk of fraud. But this was not the test that had to be met.

204. There was no evidence put forward by the Respondent as to the market price of [redacted] in Ireland or the EU, and therefore there was no evidence to support a finding that the prices the Appellant paid were lower than market prices. Consequently, it was not possible to find that fraud was the only reasonable explanation for the transactions.

205. Counsel submitted that, in her oral evidence, [redacted] withdrew the allegations under category 1 (Payments in advance of invoice), except for her concerns regarding the "back order" of 100 [redacted] that had been placed with Missing Trader 6 but delivered by Missing Trader 7. There was no evidence to support this alleged back order, which was pure speculation.

206. Under Category 2 (Awareness by Appellant of dealing with the same person(s)), one of the examples was the connection between Missing Traders 2 and 3; however in her evidence [redacted] accepted that it was normal to incorporate a business. Accordingly, it could not give rise to suspicion in the mind of a reasonable businessman. Regarding [redacted] email to Missing Trader 11 that the Appellant was reducing its stock for annual stock taking, the Respondent had sought to allege, without any objective evidence, that the Appellant knew of the cancellation of Missing Trader 11's VAT

registration. The Respondent had wrongly sought to draw an adverse inference from the coincidence of timing, and had not cross-examined [redacted] on it.

207. In her evidence, [redacted] sought to change the description of certain traders from “legitimate” to “regular”. However, there was a constitutional presumption of innocence. The Respondent could not be permitted to cast suspicion over the legitimacy of other suppliers with whom the Appellant dealt on identical terms to the twelve [redacted].

208. Under Category 3 (Lack of due diligence), the Respondent’s minutes of the meeting on 22 March 2019 with the Appellant recorded [redacted] stating “*If due diligence is completed and you can show that this is completed then* [redacted] *cannot be held responsible.*” Due diligence records were subsequently produced yet the assessments were not withdrawn. The Appellant was able to produce copies of all the due diligence except for those performed for Missing Traders 11 and 12.

209. There was no evidence produced by the Respondent to indicate that there was a general awareness of fraud in the [redacted] industry. [redacted] had denied any knowledge of such fraud. A review of the UK case law would demonstrate that warnings were often given by HMRC to traders in advance of any of the transactions which ultimately formed part of the assessment. In this case, the Respondent had chosen not to warn the Appellant.

210. The Respondent had sought to cross-examine [redacted] on alleged deficiencies in the due diligence documentation. None of these allegations were made prior to the hearing or by [redacted] in her evidence, and no regard should be had to any such alleged deficiency.

211. Under Category 4 (Unusual credit terms), no evidence was provided by the Respondent as to what credit terms were usual, regular or ordinary in the industry; the Respondent simply asserted that it was unusual to receive credit from new suppliers but provided no evidence to back up that assertion. [redacted] evidence was that credit terms were not at all unusual and the granting of credit was a feature of the trade. The Respondent had no basis to assert that credit would only be granted by a new supplier if the parties were known to each other. Furthermore, there was no consistency in the credit which was granted to the Appellant across the twelve [redacted].

212. Counsel submitted that the allegations under Category 5 (EU customers and circular flow of [redacted] purported to constitute the evidential foundation for the refusal of the zero-rating in respect of the Appellant’s supply of goods to customers in other EU member

states and were therefore not of relevance to the question of whether it should have known that its purchases were connected with fraud.

213. [redacted] uncontested evidence was that the [redacted] events of 2011 caused disruption which created the conditions in which [redacted] could thrive. The clear and uncontested evidence of the Appellant was that the presence of these [redacted] was as a result of the parallel market that had developed as a result. On that basis alone, counsel submitted that fraud was not the only reasonable explanation for the transactions; a perfectly plausible and rational explanation for the sudden emergence and disappearance of these traders was that they were a legitimate by-product of market disruption caused by the [redacted] events.

214. The Respondent had argued that the twelve missing traders formed a "chain". However, even if the Commissioner was satisfied that there was such a chain, it did not go any way towards establishing that the Appellant should have known of the fraud or the chain. In any event, there was no evidence that all twelve of the missing traders were in fact connected with each other. Nor was there any evidence that the Appellant was aware of this chain at the time and no evidence to conclude that a reasonable businessman would have been aware of the chain.

215. Regarding the Appellant's zero-rated supplies to four EU customers, counsel submitted that the evidence supporting the allegation that the Appellant should have known that fraud was the only reasonable explanation for the sale of €8,076,928 worth of [redacted] to those customers was virtually non-existent. The totality of the evidence was a consignment of [redacted] was sold to EU Customer 1 in [redacted] on 27 February 2013, and ultimately 280 [redacted] of the same make and model were sold to the Appellant by Missing Trader 2. The Commissioner could not be satisfied that this allegation was sufficient to find that the sale of 33,763 [redacted] to four different suppliers over a six-year period were all part of a fraudulent VAT carousel. Even if he was, there was no evidence at all to show that the Appellant should have known that fraud was the only reasonable explanation for its sales to the four companies.

216. There was no evidence of a tax loss, or of fraudulent evasion. Even the one test case provided by the Respondent did not provide a basis for refusing a right to zero-rate the supply. Even if the Commissioner was satisfied that 70 out of the 200 [redacted] sold to EU Customer 1 were connected with the fraudulent evasion of VAT, this would at most permit the denial of zero-rating in respect of those 70 [redacted] and not the remaining 130 [redacted] sold in that transaction. In any event, it would seem that the allegation was that the Appellant should have known that 70 out of the 200 [redacted] sold were connected with the fraudulent

evasion of VAT. This defied logic and common sense, and would constitute an unjustifiable extension of the principles in *Kittel* and *Mecsek-Gabona.*

217. There was no evidence whatsoever of how the Appellant should have known that the sale of its [redacted] was connected to fraud. In her evidence, [redacted] was unable to explain why the facts should have led the Appellant to know the transaction was connected with fraud. In her witness statement, she had made allegations about prepayments in the case of [redacted], EU Customer 2 and EU Customer 3. [redacted] evidence was that these apparent pre-payments were explicable by the use of pro-forma invoices. It was not disputed in cross examination of [redacted] that the use of such pro-forma invoices was a feature of the Appellant's dealings with [redacted] a long-standing supplier to the Appellant.

218. There was no evidence provided as to how the Appellant should have been aware of the allegation that EU Customer 3 was connected to Missing Trader 2, and [redacted] was not cross-examined on it. Regarding EU Customer 4, the Respondent did not even have proof of a connection between the two companies in two different jurisdictions with similar names, yet it had alleged that the Appellant ought to have known of such a connection.

Material Facts

219. Having read the documentation submitted, and having considered the submissions of the parties, the Commissioner makes the following findings of material fact:

219.1 Missing Trader 9 delivered an order of [redacted] that had been ordered by the Appellant from Missing Trader 8.

219.2 The Appellant was aware of the connection between Missing Traders 2 and 3, and between Missing Traders 11 and 12.

219.3 The Appellant was asked by Missing Trader 9 to pay one of its invoices to Missing Trader 10. The Appellant complied with this request.

219.4 Credit was provided to the Appellant at the commencement of the business relationship by some of the missing traders e.g. Missing Traders 3, 4, 6, 7 and 10.

219.5 Some of the missing traders did not provide credit to the Appellant at the start of their dealings, e.g. Missing Traders 1, 2, 5, 8, 9 and 11.

219.6 The Appellant carried out some level of due diligence for all twelve of the missing traders. Similar due diligence documentation was sourced for most of the missing traders, e.g. photographic ID, proof of address, certificates of registration and

incorporation where applicable and VIES checks. VIES checks only were provided for Missing Traders 1, 2 and 3.

219.7 The Appellant's transactions with the missing traders constituted approximately 25% of the Appellant's business for 2013 - 2018, with 422 transactions accounting for nearly €20m worth of trade.

219.8 The disruption caused by the change in [redacted] pricing and sales strategy from 2011 led to an increase in the price of [redacted] being sold directly to the Appellant by [redacted] together with a simultaneous glut of cheaper [redacted] being sold by the newly arrived [redacted] in the market.

219.9 The Appellant was not actually aware of VAT fraud in the [redacted] industry, including in its trading with [redacted]. The Respondent did not warn the Appellant about the risks in dealing with [redacted] prior to its decision to raise an assessment against it.

219.10 There was no clear evidence that the Appellant was paying below market prices for its [redacted] from the twelve missing traders, compared with what was available from other legitimate traders.

219.11 The Appellant carried out some level of due diligence for the four EU Customers. VIES checks only were provided for EU Customer 2. Similar due diligence documentation was sourced for the remaining EU Customers, e.g. photographic ID (though not for EU Customer 3), proof of address, certificates of registration and incorporation where applicable and VIES checks

219.12 There was no evidence to show that the Appellant knew or should have known, at the time it entered into the transactions, that its transactions with EU Customer 1 were connected with VAT fraud.

219.13 There was no evidence to show that the Appellant knew or should have known of a connection between EU Customer 3 and Missing Trader 2.

219.14 There was no evidence to show that the Appellant knew or should have known of a connection between EU Customer 4 and Missing Trader 11.

Analysis

220. The Commissioner agrees with the Appellant that there are four questions that would need to be satisfied to attribute liability for the missing VAT to the Appellant:

i. Was there a tax loss?

ii. If so, did this loss result from a fraudulent evasion?

iii. If there was a fraudulent evasion, were the Appellant's transactions which were the subject of the appeal connected with that evasion?

iv. If such a connection was established, did the Appellant know or should it have known that its transactions were connected with the fraudulent evasions of VAT?

221. The parties have made detailed submissions on what could constitute "objective evidence" and, on foot of that, whether there was sufficient evidence before the Commissioner to find that questions 1 and 2 had been satisfied (the Appellant having accepted that, if the first two questions were met, the third question would also be satisfied in this instance). The Commissioner considers that these give rise to complex questions of law, which he does not believe are necessary to determine for the purposes of this part of the Determination. He has already found that the assessment should be reduced in full due to the breach of the Appellant's right to defence; the purpose of this part is merely to set out what he would ultimately find, when taking the Respondent's case at its height, if the determination on the right to defence point was incorrect. As stated recently by the US Chief Justice, "*If it is not necessary to decide more to dispose of a case, then it is necessary* not *to decide more*."[107] Consequently, the Commissioner will not make a finding in respect of questions 1 – 3 above, but will simply assume that they have been met in order to focus on question 4; whether the Appellant knew or should have known that its transactions with the twelve missing traders and four EU customers were connected with the fraudulent evasion of VAT.

222. In considering this question, the Commissioner considers it necessary to differentiate between the twelve missing traders, from whom the Appellant purchased [redacted] and the four EU customers, to whom the Appellant sold [redacted] The twelve missing traders will be considered first.

The Twelve Missing Traders

223. In considering whether the Appellant knew or should have known that its transactions with the twelve missing traders were connected with VAT fraud, the Commissioner agrees with the Respondent that it is necessary to consider the evidence in the round, and notes the warning of Arden LJ in *David & Dann Limited v HMRC* [2016] EWCA Civ 142 against

[107] *Dobbs v Jackson Women's Health Organization*, US Supreme Court, 24 June 2022, Judgment of Roberts CJ, page 2

"*over compartmentalisation of the factors rather than a consideration of the totality of the evidence.*"

224. In its closing submissions, the Respondent confirmed that it was not alleging actual knowledge on the part of the Appellant, but was alleging that the Appellant "*ought to have known (and may even have known)*" of fraud, as per *Armitage v Nurse* [1998] Ch 241. The test to be applied was described by the English Court of Appeal in *Mobilx Limited* as follows:

> "*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*.*"[108]

225. The Respondent's oral evidence was provided by [redacted]. Overall, the Commissioner found her to be an impressive witness, with a clear mastery of the large volume of detailed evidence. However, he considered that at times she appeared to interpret the available evidence through the prism of what the Respondent knew, rather than what the Appellant knew or should have known. For example, she accepted it was normal for sole traders to incorporate, but also contended that the incorporation of Missing Trader 2 into Missing Trader 3 should have raised the Appellant's suspicions. Similarly, she had concerns about the joint venture between Missing Traders 11 and 12, but it was not clear to the Commissioner why this should have been of concern to the Appellant. Reliance was also placed on the cancellation of the VAT registration of Missing Trader 11 before the Appellant ceased trading with him, but it did not seem to the Commissioner that the Appellant would have been aware of the cancellation at the time, the Respondent having been made aware of it through a MAR.

226. The Respondent raised a number of "red flags" which it sorted under categories, although [redacted] stressed that it was possible for a particular concern to be moved from one "red flag" to another. The first category was "Payments in advance of invoice". The principal allegation under this category appears to have been that there was a back order of [redacted] involving Missing Traders 6 and 7. The Commissioner considers that the evidence supporting this allegation was inconclusive and he makes no finding against the Appellant under this category. While the Commissioner notes that the Appellant accepted that Missing Trader 9 delivered [redacted] that had been ordered from Missing Trader

[108] Paragraph 52

8, he accepted [redacted] explanation that this was done because Missing Trader 8 had been unable to fulfil the order. Given the nature of the [redacted] market, where it appeared uncontested that supply issues were not infrequent for any given [redacted], the Commissioner accepts that this was not something that in itself would or necessarily should have given rise to concern on the part of the Appellant.

227. Similarly, the Commissioner considered the evidence under Category 2, "Awareness by Appellant of dealing with the same person" to be unconvincing in demonstrating that the Appellant ought to have known it was involved in fraudulent transactions. There was no dispute that the Appellant knew the connection between Missing Traders 2 and 3, and between Missing Traders 11 and 12, but as stated above, the Commissioner does not consider that the evidence demonstrated why this should have given rise to a concern on the part of the Appellant that those traders were involved in VAT fraud.

228. The Appellant accepted that it was asked by Missing Trader 9 to pay one of its invoices to Missing Trader 10. The Commissioner considers that this was an irregular request but accepts the explanation of the Appellant regarding the circumstances surrounding the request and does not consider that, in itself, it should have caused the Appellant to suspect VAT fraud. However, the Commissioner does believe that it should have led the Appellant to consider whether its due diligence of the [redacted] with whom it dealt was sufficient. The question of due diligence is dealt with in more detail below.

229. More generally, it was the contention of the Respondent that the missing traders formed a chain; for example, in her witness statement, [redacted] stated "*Appellant has a deep knowledge of the intrinsic functioning and the main characters of the fraudulent chain of traders*". The Commissioner does not consider that the evidence was sufficient to prove that all of the twelve missing traders were involved in the same chain; while there was a clear pattern of one missing trader ceasing business and a new one taking its place, the Commissioner does not accept that this, by itself, demonstrates that all of the missing traders were ultimately connected. In any event, what is important is whether the Appellant knew or should have known that it was transacting with a chain of fraudulent dealers, and the Commissioner is satisfied that there was insufficient evidence to conclude that it should have known.

230. Before considering category 3, category 4, "Unusual credit terms", will be addressed. The Appellant accepted that the Respondent's charts of the credit provided to it by the missing traders were accurate. Clearly, credit was provided to the Appellant at the commencement of the business relationship by some of the missing traders e.g. Missing Traders 3, 4, 6, 7 and 10. The Commissioner agrees that this should have given rise to a

heightened concern on the Appellant, given the rather ephemeral business model of the [redacted], and he considers that [redacted] did not demonstrate the degree of concern that would have been expected in the circumstances; this will be discussed further in respect of category 3.

231. However, against this, the Commissioner considers the charts equally demonstrate that some of the missing traders did not provide credit to the Appellant at the start of their dealings, e.g. Missing Traders 1, 2, 5, 8, 9 and 11. Consequently, no consistent pattern can be ascertained from the credit terms, and the Commissioner does not find that, in themselves, they should have led the Appellant to suspect it was engaged with fraudsters. Indeed, given this lack of consistency, the Commissioner considers that the pattern of credit terms could reasonably be considered a contra-indication to the existence of a chain between the twelve missing traders.

232. Category 3 was "Lack of due diligence" and it seemed to the Commissioner, particularly during cross examination of [redacted], that the Respondent was placing its greatest emphasis on this category. Due diligence documentation was provided by the Appellant for all the missing traders except Missing Traders 11 and 12, and the Commissioner finds, on the balance of probabilities, that the Appellant did carry out similar due diligence for those missing traders, albeit he is not willing to find, as suggested by the Appellant, that the original documents had been lost by the Respondent.

233. Similar due diligence documentation was sourced for most of the missing traders, including photographic ID, proof of address, certificates of registration and incorporation where applicable and VIES checks; however only VIES checks were submitted for Missing Traders 1, 2 and 3. In its submissions, the Appellant has drawn attention to the Respondent's minutes of the meeting between the parties on 22 March 2019, wherein [redacted] is recorded as saying "*if the due diligence is completed and you can show that this is completed then [the Appellant] cannot be held responsible.*" The Appellant argues that it subsequently provided the due diligence documents for the twelve missing traders, but the Respondent continued to hold it responsible.

234. In *Mobilx Limited,* the English Court of Appeal stated the following regarding due diligence in *Kittel* cases:

> "…*tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a tribunal*

from asking the essential question posed in Kittel, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was."[109]

235. In the instant case, the Commissioner considers that it should have been obvious to the Appellant that there was a heightened risk of fraud (including VAT fraud) in dealing with [redacted] compared to transacting with established entities. This heightened risk arose from, *inter alia*, the frequently ephemeral nature of their trading (which the Appellant explained was inherent in the nature of the business) and their lack of supporting infrastructure and other staff. The Commissioner is satisfied that any reasonable businessman would understand that there was a greater risk in dealing with such counterparties compared to entities with established trading histories, physical infrastructure and staff networks, and would consequently take additional care to attempt to ensure that the risk of fraud was minimised.

236. Unfortunately the Commissioner is not satisfied that the Appellant demonstrated the expected care in its due diligence of the missing traders. While due diligence was carried out, the Commissioner considers that it was essentially proforma or 'tick-box' in nature; it seemed to him that the main consideration of the Appellant was to get the documentation in and then start trading, without any deeper analysis of the circumstances surrounding the appearance of the missing trader in the market, or awareness of the heightened risk of fraud arising. There were no credit checks or trade references obtained. While [redacted] asserted that his expert knowledge was sufficient to ascertain whether or not a [redacted] was properly versed in the [redacted] industry, it is the case that the Appellant began trading with a number of the missing traders relatively shortly after they were registered; e.g. Missing Trader 4 registered in January 2014, trade commencing in February 2014; Missing Trader 8 registered February 2016, trade commencing in March 2016; Missing Trader 10 registered August 2016, trading commenced October 2016.

237. The Commissioner would have expected that, given the lack of trading history the Appellant would have taken additional steps to ensure that the missing traders were acting *bona fide*. This expectation is only heightened by the significance of the Appellant's dealings with the missing traders during the years 2013 – 2018; their dealings constituted approximately 25% of the Appellant's business, with 422 transactions accounting for nearly €20m worth of trade. Consequently, the Commissioner considers that the Appellant

[109] Paragraph 82

must have been conscious of the significance of the missing traders to its business during those years.

238. Furthermore, the Commissioner found [redacted] oral evidence to be surprisingly defensive, and ultimately unimpressive, on the issue of the Appellant's due diligence of the missing traders. He appeared unwilling to accept, even at the level of principle, that fraud could be a problem in the [redacted] industry. While the Commissioner accepts, as a matter of fact, that [redacted] was not actually aware of fraud in the [redacted] industry, he considers that an experienced and senior businessman, working for one of the [redacted], should have been alert to, and appreciative of, the risk of fraud, including VAT fraud. However, it seemed from [redacted] evidence that he did not even consider that VAT fraud was possible: "*Well like with the powers with the Revenue Commissioners, I could never understand how that could happen*." The Commissioner does not disagree with the submission of the Respondent that his answers under cross-examination "*fail to convince that* [redacted] *was an individual concerned to ensure that he did not participate in fraud.*"

239. Therefore, it falls to be considered whether, in all the circumstances, the Appellant should have known that it was involved in transactions relating to VAT fraud. The Commissioner considers this to be a finely balanced question that is not easy to answer. On the one hand, the Commissioner is satisfied that the Appellant's due diligence of the missing traders was insufficient, having regard to the obviously increased risk of fraud inherent in dealing with such ephemeral dealers, and that [redacted] failed to demonstrate the awareness of the potential risk of VAT fraud that the Commissioner considers a reasonable businessman, in the circumstances, would have demonstrated. However, against this, the Appellant's evidence of the state of the [redacted] industry post the "[redacted] events", which was ultimately not denied by the Respondent, cannot be ignored. The Commissioner accepts that the disruption caused by the change in [redacted] pricing and sales strategy led to an increase in the price of [redacted] being sold directly to the Appellant by [redacted] together with a simultaneous glut of cheaper [redacted] being sold by the newly arrived '[redacted]' in the market.

240. The Respondent's contention, that the Appellant chose to trade with the [redacted] rather than directly with [redacted] is true, insofar as it goes. However, the Commissioner does not consider that a businessman can be criticised for choosing to purchase goods at a cheaper price from one source compared to a higher price from another source, all things being equal. Consequently, the Commissioner believes that the Appellant was entitled to purchase its stock from [redacted] rather than paying a higher

price direct from [redacted] – subject, of course, to appropriate and sufficient due diligence being carried out in advance of the commencement of trading.

241. Therefore, the Commissioner accepts that it was reasonable for the Appellant to conclude that the appearance of [redacted] in the [redacted] market was a natural consequence of the "[redacted] events". The Commissioner considers that the circumstances that gave rise to the Appellant dealing with the missing traders were very different to many of the *indicia* that have typically been seen in missing traders, or MTIC, cases in the UK. For example, in *Northside Fleet Limited v HMRC* [2022] UKUT 00256 (TCC), the Upper Tribunal remarked that

> "*In challenging the broker's entitlement to input tax credit, HMRC will frequently point to the contrived nature of the transactions, the predictable profit, achieved without negotiation and for little effort, and failures to take ordinary commercial measures such as inspecting or insuring the goods in support of an argument that the trader either knew, or should have known, that the transactions were connected with fraud*."[110]

Likewise, in *JDI Trading Limited v HMRC* [2012] UKFTT 642 (TC), the First Tier Tribunal commented that an "*archetypal MTIC case*" concerned "*an inexperienced trader with no prior knowledge or understanding of the market in which he operates who seizes what is perceived to be an opportunity to make a substantial and effortless financial gain*."[111] The Commissioner is satisfied that the circumstances involved in this case are clearly very different.

242. Furthermore, the Commissioner accepts the contention of the Appellant that it was not actually aware of VAT fraud in the [redacted] industry, including in trading with [redacted]. The Respondent had contended that the Appellant was so aware, and sought to rely on the alleged use of the word "*illicit*" by [redacted] in one of the meetings with the Appellant. [redacted] strenuously denied using that word; in any event, the Commissioner considers that there was no clear evidence before him to show that the Appellant was aware of VAT fraud. It seemed to him that, at times during [redacted] oral evidence, the Respondent conflated what it knew about fraud in the [redacted] with what the Appellant knew.

243. Additionally, the Commissioner notes that the Respondent did not warn the Appellant about the risks in dealing with [redacted] prior to its decision to raise an assessment against it. Such warnings have been given by HMRC in a number of similar cases in the

[110] Paragraph 10
[111] Paragraph 208

UK; e.g. *Davis & Dunn Limited v HMRC* (Arden LJ: "*Crucially, before they purchased the Goods, the respondents had previously been advised by HMRC of the risks of becoming involved in MTIC fraud and what to look for*."[112]); *Middlesex Wines Limited v HMRC* [2022] UKFTT 00107 (TC). While there is no requirement that such a warning be provided by the tax authorities in *Kittel* cases, the absence of one in this instance further supports the Appellant's argument that it was unaware of the risks of trading with [redacted].

244. Finally, and crucially in the Commissioner's view, there was no clear evidence from the Respondent that the Appellant was paying below market prices for its [redacted] from the missing traders. The limited evidence provided in [redacted] witness statement suggested that the Appellant was paying similar prices to what were available from "legitimate" (or "regular"; the Commissioner does not understand there to be any substantive difference between these two descriptions) traders; the Commissioner considers that the only meaningful comparator was [redacted], and it offered [redacted] at €275 each at the same time as Missing Traders 7 and 8 were offering [redacted] at €275/280 each. Obviously these prices were cheaper than what was available directly from [redacted] but the Respondent ultimately accepted the Appellant's explanation for the change in [redacted] pricing strategy that led to the increased cost of [redacted] from that source. Consequently, this was not a case where the prices being offered by the missing traders to the Appellant were "*too good to be true*"; *cf*. *e.g*. *HMRC v Beigebell Limited* [2020] UKUT 176 (TCC).

245. In weighing up whether or not the Appellant should have known that its transactions with the missing traders were connected with VAT fraud, the Commissioner has had regard to the helpful *dictum* of Arden LJ in *Davis and Dann Limited* that

> "*HMRC had to reach a high hurdle under EU law of showing that they ought to have known that the only reasonable explanation for the transactions was that they were connected to a VAT fraud… I will refer to this level of knowledge as knowledge meeting "the no other reasonable explanation standard*".[113]

246. Having considered all the evidence before him, including the oral evidence of [redacted] and [redacted], the various witness statements and the large volume of documentary evidence, the Commissioner is satisfied that the Respondent has not met the "*high hurdle*" of showing that the Appellant ought to have known that the only reasonable explanation for the transactions was that they were connected to VAT fraud. In coming to this view, the Commissioner has had particular regard to the changes in the

[112] Paragraph 9
[113] Paragraph 4

[redacted] market following the [redacted] events of 2011, which, in his view, provided a reasonable ground for the Appellant to conclude that the appearance of the [redacted] trading in excess [redacted] was *bona fide*. Furthermore, he considers the lack of evidence that the Appellant paid the missing traders below market price for [redacted] to be particularly significant, as it cannot be said that the Appellant should have known that its dealings with the missing traders were "too good to be true".

247. While he has found that the due diligence carried out by the Appellant on the missing traders was deficient, and that [redacted] displayed a lack of appreciation for the importance of carrying out appropriate due diligence in order to protect against fraud, the Commissioner considers that, in the circumstances, this deficiency demonstrates that the Appellant should have known there was, at most, a heightened risk that the transactions were connected to VAT fraud; given the countervailing factors, he does not consider it possible to conclude that the only reasonable explanation for the transactions was that they were connected to VAT fraud.

248. In conclusion, therefore, in respect of the twelve missing traders from whom the Appellant purchased [redacted] the Commissioner is not satisfied that the Respondent has proven that the Appellant knew or should have known that its transactions with them were connected with VAT fraud.

The Four EU Customers

249. The relevant test for considering whether to deny the right to zero-rate intra-community supplies is set out in *Mecsek-Gabona*. The same four questions, set out above in respect of *Kittel* for the twelve missing traders*,* apply to the four EU customers. For the same reasons as set above, the Commissioner is assuming that the first three questions have been satisfied by the Respondent for the purposes of this part, and therefore the remaining question to be considered is whether the Appellant knew or should have known that its transactions with the four EU customers were connected to VAT fraud.

250. The bulk of the foregone VAT in respect of these customers concerned EU Customer 1 - €1,079,422.43. The Commissioner does not consider that any relevant evidence was put forward by the Respondent to suggest that the Appellant should have known that its transactions with EU Customer 1 were connected to VAT fraud. Leaving aside whether the allegation, that 70 [redacted] that the Appellant sold to that customer ultimately were sold back to it, was made out by the Respondent, and also leaving aside the question of how, even if proven, the circular trade of 70 [redacted] alone could in itself justify the denial of over €1m of VAT, the Commissioner considers that no evidence was put forward by the

Respondent which could possibly lead him to consider that the Appellant should have known, at the time it entered into the transactions with the Respondent, that they were connected with VAT fraud. The Commissioner considers that this is another instance of the Respondent applying its knowledge (or, at least, its understanding) of the circumstances and using this to seek to deny, in this instance, the Appellant's right to zero-rate its sales; however, the Commissioner reiterates that what he needs to consider is whether the Appellant should have known that its transactions with EU Customer 1 were connected to VAT fraud. The Commissioner has no hesitation in finding that the assessment, insofar as it concerns that customer, should be reduced in full.

251. The Commissioner also does not consider that there is sufficient evidence regarding the remaining three EU customers to find that the Appellant should have known its transactions were connected with VAT fraud. While the Respondent had argued that there had been prepayments to these customers, the Appellant responded that it had used *pro forma* invoices in advance of receiving payment. The Commissioner considered the evidence insufficient to make a finding either way on this allegation, but notes in any event that [redacted] did accept that the use of *pro forma* invoices was a legitimate business practice.

252. The Respondent alleged a connection between EU Customer 3 and Missing Trader 2. While the Commissioner accepts the Respondent's evidence that such a connection existed, he considers that no evidence was proffered by it to show how the Appellant was, or could have been, aware of such a connection. The Respondent also alleged that the name of EU Customer 4 was very similar to that of a different company in Northern Ireland. The Commissioner considered the Respondent's evidence to be rather confused on this point, but in any event does not consider that there being two companies with similar names in neighbouring jurisdictions sufficient to show that the Appellant should have known its transactions with the company in this jurisdiction were be connected with VAT fraud. Furthermore, while the Respondent contended that EU Customer 4 was linked to Missing Trader 11, again the Commissioner considers that there was no evidence put forward to show that the Appellant was aware of this connection, or that it should have been.

253. Consequently, as the Commissioner is satisfied that the Respondent has not proven that the Appellant should have known its transactions with any of the four EU Customers were connected with VAT fraud, he finds that the assessments in respect of these customers should be reduced in full.

CONCLUSION

254. The Commissioner finds that the Respondent breached the Appellant's right to defence under EU law. As there is no valid evidence before the Commissioner, he finds that the assessment against the Appellant should be reduced to zero.

255. However, if he is incorrect about this, he would find that that the Respondent has failed to demonstrate that the Appellant knew or should have known that its transactions with the twelve missing traders and four EU customers were connected with VAT fraud, and therefore the assessment should be reduced to zero.

Determination

256. In the circumstances, and based on a review of the facts and a consideration of the submissions, material and evidence provided by both parties, the Commissioner is satisfied that the assessment to VAT for the years 2013 to 2018 should be reduced to zero.

257. The appeal is hereby determined in accordance with section 949AK of the TCA 1997. This determination contains full findings of fact and reason for the determination. Any party dissatisfied with the determination has a right of appeal on a point of law only within 42 days of receipt in accordance with the provisions set out in the TCA 1997.

Simon Noone
Appeal Commissioner
22nd December 2022

The Tax Appeals Commission has been requested to state and sign a case for the opinion of the High Court in respect of this determination, pursuant to the provisions of Chapter 6 of Part 40A of the Taxes Consolidation Act 1997