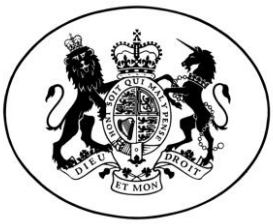
NCN: [2021] UKFTT 0286 (TC)



# TC08229

**Appeal number: TC/2012/09177**

***VALUE ADDED TAX – Soft-drinks - In relation to some deals, whether HMRC have discharged their burden in relation to establishing connection to fraud? - No - In relation to other deals, whether the Appellant knew or should have known of the connection to fraud? - Yes - Appeal allowed in part, dismissed in part***

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

**ULSTER METAL REFINERS LTD** **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE CHRISTOPHER MCNALL**
**MR MOHAMMED FAROOQ**

**Sitting using the Tribunal's Cloud Video Platform, on 12-16 October 2020, and 8 and 9 December 2020, and receiving written submissions dated 29 January 2021 (HMRC) and 19 February 2021 (the Appellant)**

**Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.**

**Mr David Bedenham, Counsel, instructed by CTM Tax Litigation Limited, for the Appellant**

**Mr James Puzey and Mr Joseph Millington, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents**

## DECISION

1. By way of its Notice of Appeal dated 4 October 2012, the appellant, Ulster Metal Refiners Ltd ('**UM**'), challenges HMRC's decision, made on 1 October 2012 by Officer Walter Watt on HMRC's Specialist Investigations unit, to deny UM the right to deduct input tax claimed on the purchase of soft drinks in the VAT periods 03/11 (£264,426.99) and 06/11 (£198,428.77): **'the Decision'.**

2. Any casual reader tempted to conclude that the Tribunal's processes are so slow that an appeal relating to 2011 VAT issued in 2012 has taken almost a decade to reach a final hearing, is referred to the Tribunal's earlier decision, released in June 2019 ([2019] UKFTT 385), which sets out the lengthy procedural history. The appeal against the Decision was originally dismissed by a different panel of this Tribunal in 2015: [2015] UKFTT 0255 (TC) ('**the 2015 Tribunal**'). There were then onward appeals to the Upper Tribunal and to the Court of Appeal of Northern Ireland. The Court of Appeal decided to remit to a differently constituted Tribunal for rehearing, and, at a subsequent interlocutory hearing, the present Chairperson decided that the tenor of the Court of Appeal's order was that the whole of the appeal - insofar as still in dispute - and not just parts of it, was to be reheard.

3. Even though the appeal has been heard and decided once already, none of the previous findings of fact (where those findings of fact related to disputed or controversial issues) stand. Therefore, in relation to issues which were in dispute or controversial before the 2015 Tribunal, we approach this appeal afresh, and on the basis only of the facts and material presented to us in this appeal.

4. However, the slate is not wiped entirely clean. The oral and written evidence given last time round (as opposed to the Tribunal's findings made on the basis of that evidence) does not disappear as if it had never been given (and we have had placed before us transcripts of five days of the hearing which took place in November 2014); nor do findings of fact where those facts were not in dispute or were uncontroversial. It is proper, where appropriate, to have regard to those findings and that evidence, subject to considerations of relevance. But it is certainly not improper, for example, for either party to have sought to deploy evidence of fact given in the Tribunal last time so as to seek to expose inconsistencies in the evidence this time round, and, in the event of inconsistency, to invite the Tribunal to make appropriate inferences.

5. There is some dispute as to the factual scope of the appeal as it now stands.

6. HMRC's Further Amended Statement of Case dated 11 May 2018 identifies that the following three sets of soft-drink deals remain in dispute:

   (1) Supplies by Irwin Enterprises to UM (**'the Irwin Deals'**).

   (2) Supplies by Paul Magee Wholesale Beverages to UM (**'the Magee Deals'**).

   (3) Supplies by PCB Logistics Ltd to UM (**'the PCB Deals'**).

7. Annexes C and D of that Statement of Case are the landscape format deal sheets for the periods 03/11 and 06/11 respectively with Irwin as supplier. These are very important documents in this appeal, because they are the deal sheets which HMRC actually states, as part of its case, for the Irwin Deals. There was extensive and detailed reference to them during the course of the appeal.

8. In our view, HMRC's case, when it comes to the Irwin Deals, is that which is set out in the deal sheets actually annexed to that Statement of Case, and not to any other deal sheets annexed to any other document. The annexes to the Statement of Case are intended to be, and stand as, part of the case being stated by HMRC. HMRC has advanced a particularised case in relation to each of the deals, and the tracing of those deals so as to demonstrate what it says is the connection to fraud. That is the case which the Appellant has to meet, and which the Tribunal has to consider.

9. During the course of the hearing, HMRC - as it was entitled to do - abandoned its reliance on some of the deal sheets (see below). However, and in relation to the remaining deal sheets (and the analysis contained in them), absent an application to amend the deal sheets (which would necessarily, for the reasons already set out, be an application to amend the Statement of Case), then the case for us to consider is that which has been stated, and no other. The industry and ingenuity of Counsel for HMRC in composing deal sheets, annexed to their Skeleton Argument, which advance different deal chain analyses (whether instead of, or as an alternative to, the earlier deal sheets) is impressive. But, if there is a problem with any of the deal sheets annexed to the Statement of Case (as, by inference, there must be; hence the need to seek to posit different deal chains) HMRC's Skeleton Argument is not the vehicle to recast the deals. It is an important document, but it is still just a skeleton argument. A Skeleton Argument is neither a species of evidence nor a pleading, and argument is not the time or place to state what is amounts to a materially different case because to do so would undermine the purpose and integrity of the Statement of Case. The overriding objective, and the interests of fairness and justice, mean that the only case to be considered is that in the deal sheets annexed to the Statement of Case.

10. Some clarification is needed in relation to the precise number of deals. The Decision related to 135 purchases - Irwin (114 deals, but with 116 invoices because the Appellant had duplicated the invoices in relation to 2 deals); PCB (10); and Paul Magee (9) - but HMRC's Further Amended Statement of Case refers to 128 and not 135.

11. There has been a shift in the detail of HMRC's position in relation to the number of deals in dispute.

12. As to Irwin, the recovery of input tax on Deals 61 and 95 are no longer denied. Deals 72, 82, 90, and 95 are no longer in issue, being duplicated deals.

13. Of the 116 Irwin invoices (including the duplicated invoices), HMRC accepts that the denial of input tax on 18 invoices (amounting to £57,238.42) cannot be maintained. This is a combination of invoices where no deal sheet has been prepared, or which have been claimed twice.

14. In relation to the 10 PCB invoices, HMRC has accepted that the denial of input tax on 2 of them (amounting to £6,173.27) cannot be maintained. Only PCB Deals 13, 14, 15, 16, 17, 18, 19, and 22 remained in dispute.

15. In relation to the 9 Magee invoices, HMRC has accepted that the denial of input tax on 2 invoices (amounting to £10,900.80) cannot be maintained. Only Magee deals 9, 12, 17 and 18 remained in dispute.

16. Therefore, as we understand it, HMRC maintain the denial in relation to 96 of the Irwin Deals; 8 of the PCB Deals; and 4 of the Magee deals. But, if we have misapprehended the number of the deals in dispute, and if that is a misapprehension

which calls for correction (which - given our conclusions, including the overarching decisions in principle as to each of the three sets of deals - it may not), then we are prepared to revisit the same administratively.

17. The overall amount in dispute therefore dropped accordingly, from £462,855.71 to £380,287.70 (Mr Bedenham's figure) or £380,887.21 (Mr Puzey's figure) (a difference of just under £600).

18. We have concluded, for the reasons set out more fully below, that the appeal in relation to the Irwin Deals is allowed; but the appeal in relation to the Magee Deals and the PCB Deals is dismissed.

**The relevant law**

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

20. Domestic legislation governing the recovery of input tax is contained in sections 24 – 26 of the VAT Act 1994 and in the VAT Regulations 1995. In general terms, if a taxable person has incurred input tax that is properly allowable, then he is entitled to set it against his output tax liability and, if the input tax credit due to him exceeds the output tax liability, then he is entitled to a repayment.

21. When considering the denial of a claim to input tax credit where a transaction is alleged to be connected with fraud, the starting point is the judgment of the CJEU in the combined appeals *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL (C-439/04 and C-440/04)*. Where the tax authorities find that the right to deduct has been exercised fraudulently, those authorities are permitted to claim repayment of the deducted sums retroactively. In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraud must be regarded as a participant in that fraud (whether or not her profited from it).

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

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

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

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

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

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

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

25. We are also bound by the remarks of the Court of Appeal of Northern Ireland made in this very appeal, [2017] NICA 26 (itself being bound by remarks of the House of Lords) which said:

> [36] It is well established that in ordinary civil litigation involving allegations of fraud, the obligations in respect of pleadings are heightened. The fraud must be "distinctly alleged" and it must be sufficiently particularised. As Lord Millet said in Three Rivers District Council v Governor & Co of the Bank of England (No 3) [2003] 2 AC 1 at Para [186]
>
> > "This is only partly a matter of pleading. It is also a matter of substance. As I have said, the defendant is entitled to know the case he has to meet. But since dishonesty is usually a matter of inference from primary facts, this involves knowing not only that he is alleged to have acted dishonestly, but also the primary facts which will be relied upon at trial to justify the inference. At trial the court will not normally allow proof of primary facts which have not been pleaded, and will not do so on a case of fraud. It is not open to the court to infer dishonesty from facts which have not been pleaded, or from facts which have been pleaded but are consistent with honesty. There must be some fact which tilts the balance and justifies an inference of dishonesty, and this fact must be both pleaded and proved".

26. Those remarks have particular relevance when it comes to our assessment of the Irwin Deals and the approach to be adopted.

**The background facts**

27. The 2015 Tribunal set out non-controversial background facts at Paragraphs 6-27 of its decision as follows:

> "(1) Background Facts
>
> 6. The background facts are not controversial and we find as follows.
>
> 7. Mr Donaldson has a background in trading non-ferrous scrap metals in Northern Ireland. He incorporated the appellant company in 1982 and in the same year it became registered for VAT. Mr Donaldson and his wife Joan Donaldson were both directors of the appellant, although Mrs Donaldson resigned in August 2011 after the transactions with which this appeal is concerned. There is no suggestion that she played any part in the transactions we are concerned with.
>
> 8. In or about 2000 Mr Donaldson started wholesale trading in soft drinks. This was an offshoot of a children's party company which Mr Donaldson operated where part of the business involved vending machines stocked with confectionery and soft drinks. The soft drinks wholesale market in Northern Ireland and the Republic of Ireland ("RoI") is a relatively small marketplace. Traders know one another and many traders have the same contacts.
>
> 9. Mr Donaldson was also a director of a soft drinks business called Elite Wholesale Ltd ("Elite"). He had little if anything to do with the day to day running of Elite. The appellant purchased the assets of Elite when it went into liquidation in or about 2006. The reason Elite went into liquidation was an assessment to

VAT of several hundred thousand pounds arising because it did not have evidence of removal of goods from Northern Ireland for a consignment of soft drinks it supplied and which it had zero rated.

10. From about 2006 Mr Donaldson carried out wholesale soft drink transactions through the appellant company. He was also a shareholder and director of M1 Confectioners Ltd which was a wholesaler of sweets, confectionery and soft drinks.

11. The appellant's turnover disclosed by its financial statements was as follows:

| Period ending | £m |
|---|---|
| | |
| 30 September 2006 | 2.8 |
| 30 September 2007 | 3.1 |
| 31 December 2008 | 4.9 |
| 31 December 2009 | 3.5 |
| 31 December 2010 | 6.5 |

12. In 2009 sales of scrap metal accounted for turnover of £1.2m and sales of confectionery including soft drinks, was £2.3m. In 2010 scrap metal turnover was £2.2m and confectionery was £4.3m.

13. In the 6 month period from 1 January to 30 June 2011 covering VAT periods 03/11 and 06/11 the appellant's turnover was £4.6m.

14. We are concerned in this appeal with 115 transactions ("the Relevant Transactions") in which the appellant purchased soft drinks from UK suppliers in Northern Ireland and sold to customers outside the UK in the RoI. It was common ground that Mr Donaldson was responsible for causing the appellant to enter into each of the Relevant Transactions. The Relevant Transactions were identified in a schedule produced by the Appellants and referred to as the Master Supply Chain Comparison. References to Deal Numbers in this decision are to those identified in the Master Supply Chain Comparison.

15. Mr Watt in his evidence identified 135 of the appellant's purchase invoices where input tax had been denied. It is not clear how these purchases reconcile to the Relevant Transactions. However the parties in their closing submissions focussed on the Relevant Transactions and we shall do likewise.

16. The appellant's suppliers in the Relevant Transactions were as follows:

| Appellant's Suppliers | Number of Deals |
|---|---|
| | |
| Irwin Enterprises Ltd ("Irwin") | 103 |
| PCB Logistics Ltd ("PCB") | 8 |
| Paul Magee ("Magee") | 4 |

17. The appellant's customers in the Relevant Transactions were as follows:

| Appellant's Customers |
|---|
| |
| Swift Valley Trading Ltd ("Swift") |
| Paradox Distribution Ltd ("Paradox") |
| Leonsbeg Sales Ltd ("Leonsbeg") |
| Texpor Enterprises Ltd ("Texpor") |

18. HMRC produced summaries which were not disputed by the appellant and which show that 74% of supplies from Irwin were sold to Paradox, 22% to Swift, 3% to Leonsbeg and 1% to Texpor about which we heard very little. In relation to supplies from PCB, 75% were sold to Paradox and 25% to Leonsbeg. All supplies from Magee were sold to Paradox. All the appellant's customers in the Relevant Transactions were based in the RoI and the appellant has zero rated the supplies. There is no issue in relation to the zero rating of those supplies.

19. There is a key issue between the parties as to identity of traders in the deal chains leading to Irwin. We deal with that issue in our detailed findings of fact below. We can record at this stage that the suppliers to Irwin as alleged by HMRC on the one hand and by the appellant on the other hand were as follows:

| Suppliers to Irwin (as alleged by HMRC) | Suppliers to Irwin (as alleged by Appellant) |
|---|---|
| | |
| Landmark Wholesale Limited ("Landmark") | William Kirk t/a Oriel Soft Drinks ("Oriel") |
| Linkup Solutions Limited ("Linkup") | Swan Fruit Limited t/a Swan Wholesale ("Swan") |
| Eurolink Trading Limited ("Eurolink") | |

20. It is common ground and we find as a fact that all the suppliers alleged by HMRC to have supplied goods to Irwin, which it then allegedly sold to the appellant, used VAT registration numbers which they had hijacked from the traders identified in the table above. No VAT was accounted for to HMRC in relation to the alleged supplies to Irwin.

21. Landmark is a legitimate UK VAT registered business. However both parties agreed and we are satisfied that Landmark's VAT number was hijacked by fraudsters who did not account for the VAT showing on invoices from Landmark to Irwin. The legitimate Landmark business did not deal with Irwin.

22. Linkup failed to account for VAT on invoices showing sales of soft drinks to Irwin. We are satisfied and both parties agreed that this failure was fraudulent. The director of Linkup denied any knowledge of sales of soft drinks. We do not need to decide the precise nature of the fraud. HMRC concluded that Linkup's VAT registration had been hijacked and the appellant accepted as much.

23. Eurolink is a legitimate UK VAT registered business. However both parties agreed and we are satisfied that Eurolink's VAT number was hijacked by

fraudsters who did not account for the VAT showing on invoices from Eurolink to Irwin. The legitimate Eurolink business did not deal with Irwin.

24. The appellant contends that the suppliers to Irwin were Oriel and Swan which it says were both legitimate businesses based in the RoI. We deal below with the evidence in relation to Oriel and Swan.

25. There is no dispute as to the deal chains in relation to supplies purchased by the appellant from PCB and Magee. Both parties agreed and we are satisfied that the supplier to PCB and Magee was in all cases Mark Cartel trading as M J Cartel.

26. Mark Cartel applied to be registered for VAT with effect from 1 September 2010. His main business activity was described as wholesale of soft drinks and confectionery. Invoices obtained from Magee and PCB show sales of soft drinks for the period October 2010 to June 2011 totalling £459,545. However Mr Cartel made no VAT returns and failed to account for VAT on those sales. HMRC have been unable to contact Mr Cartel. Both parties agreed and we are satisfied that Mr Cartel or someone who had adopted that name fraudulently failed to account for VAT on the sales to Magee and PCB.

27. It is accepted and we find as a fact that apart from the Relevant Transactions, the appellant dealt in soft drinks in periods 03/11 and 06/11 where there was no connection with fraud. In 62 such deals the appellant was supplied by legitimate wholesalers such as L Connaughton & Sons Ltd, Henderson Foodservice Ltd and Camseng International. Onward sales were made by the appellant to Swift, Paradox, Leonsbeg and Oriel."

28. We have considered those background facts against the information and material before us. There is no challenge to any of it, and we therefore adopt those findings of background fact as our own. An appropriate amendment to the number of deals now in dispute (different to that in dispute in 2015) can be read down into the 2015 findings.

**The evidence**

29. We heard oral evidence from the following witnesses:

(1) Officer Heather Arnold

(2) Officer Walter Watt

(3) Mr Henry Donaldson

(4) Mr Liban Ahmed

30. The Appellant did not challenge the evidence in relation to the hijacked/defaulting traders, and did not require the following HMRC witnesses to be called:

(1) Margaret Claire Brown (Landmark Wholesale) (21 May 2013);

(2) Monica Coker (Linkup Solutions) (22 May 2013);

(3) Mark Barry Hughes (Eurolink Trading) (31 May 2013);

(4) Harold Geoffrey Kenneway (MJ Cartel) (24 May 2013)

31. We make the following brief observations about the evidence.

32. An unavoidable but difficult part of the background and context of this case is that many of the primary events in dispute happened the best part of a decade ago. The passage of time may lead to some degradation of recollection: in other words, memories can fade. Another feature is that, as time goes on, people can come to persuade themselves with increasing certainty as to things which happened or did not happen events when that recollection is simply not consistent with the contemporary documents.

33. Officer Arnold made witness statements dated 20 April 2018 (this was a composite of what was said to have been 'the majority of the material' in three previous witness statements, with new material underlined in the witness statement), 28 November 2018, 26 February 2019, 10 October 2019, and 27 August 2020. The latter was made after her retirement from HMRC.

34. In her written evidence, she said:

(1) She and Officer Lisa Wilkinson (from whom he did not hear or receive any evidence) had done the Irwin tracing;

(2) She and Officer Kenneway visited Irwin in September 2010 to uplift records and to discuss its trading. Invoices were matched by one Maura Cox, who was said to have been Irwin's book-keeper;

(3) During that visit, Mr Ferghal Keenan (who was not a director of Irwin - its sole director was a Mr Dynes - but who said he was the manager who took care of the day to day running of Irwin) told HMRC that all the goods he bought from Irish suppliers were sold back to Irish customers and all the goods that had been bought from UK suppliers were sold to suppliers in the UK;

(4) She and Officer Wilkinson visited Irwin in January 2011 to uplift records, and to discuss its trading;

(5) Officer Wilkinson traced the deals of 03/11, and she traced for 06/11;

(6) After the first Tribunal hearing, UM provided HMRC with a list of the denied deals, and what UM considered to be the more likely deal chain. She re-traced the Irwin deals, finding what she considered to be 'better matches' for some of them;

(7) She also attempted to trace Irwin's deals from January to June 2011;

(8) After examining Irwin's records and looking at the transactions with a view that Irwin was printing his own UK supplier invoices, there were too many deals where the only possible sales were UK-UK or IE-IE for this to be possible;

(9) She had also examined the possibility of Irwin acting as a contra-trader but did not consider that appeared to be what happened. She commented "I would be naive to say that something from Oriel or Swan was never sold to a UK trader or vice versa but I have no evidence to suggest that was normally the case;"

(10) She felt that the evidence pointed to the fraud being MTIC fraud and not Irwin printing his own invoices.

35. In her oral evidence, she said:

(1) Mr Keenan had told her that all goods bought by Irwin in the UK were sold in the UK, and all good bought in ROI went to ROI, although she did not know why Irwin would earmark its stock in that way;

(2) Maura Cox had told Officer Kennaway that all goods from IE went to IE, but Maura Cox was probably relying on what she had been told by Fergal Keenan, because Maura Cox was not the one doing the deals;

(3) The case theory that all (UK) goods supplied by Irwin went to UM (and could not have been (ROI) goods earmarked by Irwin from Oriel and Swan for Euromark and Ballymachen) was what she was told, but was all based on Mr Keenan's say-so, but she could not now say for definite what happened. The case theory hinged on what Mr Keenan had told HMRC, So, for example, in her tracing exercise, she was looking at invoices in the context that goods were passing from ROI to ROI. She had made assumptions on the basis of what she was told by Mr Keenan;

(4) She did not believe some of the things which Mr Keenan told her at the time; for example, she did not believe that he paid his lorry drivers in cash (which would have been tens of thousands of pounds), or indeed that he paid them at all. She believed he was paying someone, and he knew exactly who that was, but he was not going to tell HMRC who he was paying;

(5) She now believed that Mr Keenan was "totally involved" in MTIC fraud, but - in her opinion - she really did not think that Fergal Keenan was working on his own;

(6) When it came to Mr Keenan, she remarked that "everything he told us was lies", but looking at the documents there "has to be some sort of truth";

(7) Irwin had been put on VAT monitoring, but was not subject to extended verification because it then deregistered;

(8) In relation to Irwin's deals, she only knew what Mr Keenan had told her and the documents provided by Irwin;

(9) When asked if had recommended that Mr Keenan be prosecuted, she said that she had sent a case for criminal investigation, but that related to Irwin Enterprises and not to Mr Keenan or to Mr Dynes. She did not know what had happened to them;

(10) She could not say, and did not know, why Irwin would, on the basis of its paperwork, have bought 2 loads on the same date from identical sources;

(11) HMRC was saying that real goods had been sold by Oriel and Swan to Irwin, but which were not sold to UM but were instead sold to Euromark and Ballymachen, but the only documents in support of that case were supplied by Irwin. She did not know whether Euromark or Ballymachen had received any actual goods;

(12) She accepted that documents supplied to HMRC by Irwin without headers might have been reprinted from its own system;

(13) HMRC did not do an audit of Irwin's records;

(14) Individual documents (such as Irwin's collection/delivery notes) were not acceptable evidence of dispatch (for the purposes of zero rating);

(15) She could not explain why other documents supplied by Irwin (eg see 6/10713 and 10714, both ostensibly relating to Deal 49) had two delivery dates.

She did not know whether this was suggestive that the documents had just been put together by someone after the event;

(16) The reliance of documents ostensibly corroborative of HMRC's position - such as intra-EU figures from VIES, attempting to reconcile the amounts shown on Oriel and Swan's VAT returns with Irwin's (which, according to Officer Arnold, were only a few pound - and not millions of pounds - out) was nonetheless itself reliant on Mr Keenan telling the truth in his declarations;

(17) Asked whether it was credible that hijackers were able to source and supply very specific loads, she was prepared to accept the argument that goods were carouselling, and if so 'it is an MTIC involving many people, and probably some goods going round and round';

(18) She did not accept criticisms of HMRC's conduct of the investigation, saying "I feel as though I was meant to do everything about this case, but it was not the only work I had, and I can't take responsibility for every inquiry in Northern Ireland". She told us that, for some time at least, there were only three inquiry officers in Northern Ireland, including her.

36. We commend her for the candour of her oral evidence. At the time of her work on this appeal, she was already an experienced officer of very long standing. She was giving her evidence to us having retired from HMRC and in relation to deals and witness statements made years before. Her evidence was given truthfully, and in good faith, and Mr Bedenham was clear to us that he was not alleging any misconduct on her part (and, to avoid any doubt, we would have rejected any such allegation if made). It was hardly surprising, especially when she was asked in detail about individual deals, that she could not remember certain things, and in relation to other things she had to concede that she did not know the answer. When that happened, she did so clearly, readily, and without obfuscation.

37. Officer Watt had made witness statements dated 28 May 2013, 29 October 2013, 8 August 2014, and 12 April 2018.

38. In his written evidence, he described the Appellant's general awareness of MTIC fraud.

39. In his oral evidence, he said:

(1) He had not undertaken any tracing;

(2) There was no evidence that any of the 3 hijackers had supplied any other customers than Irwin.

40. His oral evidence was given honestly, but (as with Officer Arnold) was inevitably affected by the passage of time - he was being asked to speak to witness statements made years before. The thrust of Mr Bedenham's challenge and exploration to Officer Watt's evidence was on the footing of the Appellant's contrary positive case as to the Irwin Deals, and so, given our conclusions, does not require extensive recitation.

41. Mr Ahmed made a witness statement dated 12 October 2020. HMRC did not oppose its late introduction. He is a tax adviser and a representative of CTM Tax Litigation Limited which has conducted this appeal on behalf of the Appellant for several years.

42. In his evidence, he said:

(1) He had decided to give a witness statement late in the day because he had not previously thought it was appropriate to be both the advocate and a witness;

(2) He had been associated with the case as long ago as the preparation of Mr Donaldson's first witness statement, in July 2013, which was the first time that UM told HMRC that UM's case was that purchases from Irwin traced to Oriel and Swan;

(3) He could not remember why he had not told HMRC sooner that UM's position was that there were no tax losses;

(4) He accepted that there was no mention in either of Mr Donaldson's 2014 witness statements, or his own statement, of meeting Gary Chambers in Belfast;

(5) At the time of the visit, he had probably known that Gary Chambers had worked for Irwin;

(6) He had interviewed Gary Chambers in the presence of Mr Donaldson despite knowing, as a trained investigator, that caution needed to be taken to avoid mixing up, or cross-contaminating, the evidence of different witnesses;

(7) Mr Donaldson, Gary Chambers and Mr Ahmed had then all gone to visit Mr Kirk;

(8) Gary Chambers did not want to give a witness statement;

(9) William Kirk did not want to be a witness, and was never going to give a witness statement, but Mr Ahmed did not consider this reluctance to be a witness suspicious, and he had not considered whether Mr Kirk might have been involved in VAT fraud;

(10) Some records - a sample to show purchases from Coca-Cola - had been obtained from Mr Kirk, but Mr Ahmed could not remember what records had been taken. He did not obtain any sales invoices to Irwin, and was not entirely sure why he had not done that. Mr Ahmed did not remember the detail of the conversation between Mr Chambers and Mr Kirk;

(11) He thought that he had looked at Kirk's ledger, and that his recollection was that all goods from Coca Cola "did look as if they had gone to Irwin", but he could not explain how he knew that;

(12) Although Mr Donaldson had said that Mr Ahmed had spoken to Mr Keenan in 2013 'at the time we both met with William Kirk or Oriel .. I called Mr Keenan to ask if he would assist and handed my mobile phone to Mr Ahmed who had a lengthy discussion with him', Mr Ahmed accepted that this was not mentioned in his own witness statement. He agreed that such a conversation had taken place, although he thought it was brief, but said that he 'had forgotten', and could not remember whether he had made a record or other note of what he accepted was an important discussion;

(13) He had decided, even before the first Tribunal, that Mr Keenan would not be 'an ideal witness', and had decided, even then, that he was not going to call him.

43. Even taking account of the fact that Mr Ahmed had only decided to make a witness statement very late in the day, and had done so in a short period of time, there was still inconsistency with the statement (which he had drafted on behalf of Mr Donaldson in support of the application to strike-out) and the evidence given before us.

44. The oral evidence that Mr Ahmed and UM had never intended calling Mr Kirk or Mr Keenan to support the appeal was troubling and less than entirely satisfactory because, in a witness statement dated 22 March 2018, prepared or drafted by Mr Ahmed but subscribed to by Mr Donaldson, Mr Donaldson sought to argue (before Judge McNall) that HMRC's appeal should be struck out because he had wanted to produce evidence from Mr Kirk and Mr Keenan, but could no longer do so (i) because Mr Kirk had retired and said that he did not hold records from 2011 and would not provide further assistance; and (ii) Mr Keenan had not been seen or heard of for 2-3 years. It is clear that the gist of that written evidence in March 2018 was not true (and for present purposes it makes no difference - but is telling - that Mr Bedenham did not ask Mr Donaldson to confirm the truth of that statement). Moreover, in March 2018, Mr Donaldson would have known it not to be true because, as became clear in Mr Ahmed's evidence, neither Mr Kirk nor Mr Keenan were ever going to be called to give evidence (regardless of the precise nature of the case actually articulated by HMRC).

45. Overall, we give no weight to the evidence of Mr Ahmed insofar as it is advanced in support of the appeal. Cross-examination, conducted vigorously but fairly by Mr Puzey, exposed unexplained holes in Mr Ahmed's evidence, especially when it came to the precise nature and extent of his dealings with Gary Chambers and William Kirk. This was obscured and not clarified by the absence of any contemporary notes (none being exhibited to the witness statement, or otherwise made available to us). That is an especially important feature where, otherwise, a witness is having to rely on their memory of something seven years earlier. Ultimately, we remained unsure what had actually been said during the meeting with Messrs Chambers and Kirk.

46. We heard finally from Mr Donaldson. He had made witness statements dated 12 July 2013, 8 September 2014, 22 March 2018 (which, as already noted, he did not confirm before us as true), 12 June 2018, 15 January 2019 (the latter three being in support of the Appellant's application to strike out HMRC's case), 29 June 2020, 30 September 2020 and 12 November 2021.

47. In passing, we note that the proliferation of witness statements - supporting the decision, and supporting the appeal - responsive and counter-responsive - is not only invidious and contrary to the overriding objective (and is accordingly unusual) but itself gives a flavour of the increasing degree of minute analysis and counter-analysis devoted to the suite of documents upon which the Decision reposes. That is a theme to which we shall return below.

48. In his evidence, he said:

(1) All his witness statements were drafted by Mr Ahmed;

(2) He had spoken to Mr Keenan 4 or 5 times after he had received the first tax loss letter from HMRC;

(3) Despite knowing that HMRC were alleging that UM's goods came from hijackers, he had not asked for Mr Keenan's business records, only his Intrastat records (in an attempt to show that Irwin was buying goods in the RoI, and those were "the best records [he] could think of"). He did not know why he had not asked for more records;

(4) He had decided not to call Mr Keenan to give evidence 'because he was a liar'

49. In some respects, his evidence was the precise counterpart of Mrs Arnold's - for instance, Mr Donaldson had told her that what she was trying to do, in terms of deal tracing, was 'practically impossible'. That marries up well with the tracing exercise as Officer Arnold described it to us.

50. But overall, when it came to Mr Donaldson's factual evidence in response to HMRC's case, his evidence was not satisfactory and, in some regards, we do not consider that Mr Donaldson was telling us the truth. We shall deal with this in more detail below.

51. Mr Puzey's cross-examination also repeatedly exposed inherent implausibilities or vagueness in Mr Donaldson's account.

52. One example of the former was his choosing not to reveal to HMRC, for several years, that he had obtained Irwin's Intrastat records (said to have been sent to him by email from Irwin's accountants, but which he had then deleted) and had been able to use those as the basis for a reconciliation exercise with the Swan invoices (which led him to conclude that none of the Swan invoices were in fact missing). The latter happened to be contrary to his allegation, in his third witness statement, made in June 2018 (drafted by Mr Ahmed, but supported with a Statement of Truth from Mr Donaldson) that it was his (i.e, Mr Donaldson's) 'belief that Irwin, or HMRC, have not provided all the Swan invoices...'. That allegation was made by Mr Donaldson although he knew that the Swan invoices which he had were all the Swan invoices to be had. Against that background, it is a troubling allegation for Mr Donaldson to have made. That fact that he was prepared to allow Mr Ahmed to draft it in those terms, and was prepared to sign it as true, does not reflect well on Mr Donaldson.

53. In cross-examination, Mr Donaldson accepted that he could have told Officer Arnold of the Intrastat records and the reconciliation exercise, and could not provide any good reason why he had not. It was put to him that it was not honest to allege that HMRC's witnesses were lying. His response was that he was accusing Irwin (and, by inference, Irwin alone). But that response was unimpressive and evasive, because Mr Donaldson (in words which, even if drafted by Mr Ahmed, he had been content to adopt as his own) was clearly levelling the accusation both against Irwin and against HMRC (and, more particularly, Officer Arnold).

54. It is hard to assess whether Mr Donaldson's approach flowed from a desire to deceive, or from something else. Looked at objectively, his failure to put his cards on the table does not make much sense because it was (at least arguably) actually contrary to his own interests to suppress what he had done, and what he had worked out. We cannot go so far as to find that this stance was actuated by dishonesty on Mr Donaldson's part, but it feeds into our strong impression that Mr Donaldson was, in his dealings with HMRC, often acting tactically. In short, and rather than just putting his cards fairly and candidly on the table, he was often engaged in a misguided game of forensic 'hide and seek' with HMRC (a conclusion only fortified by close reading of the series of increasingly intricate witness statements). We deprecate that sort of gamesmanship, and it does not reflect well on Mr Donaldson. He sought to explain that he was being led by his advisers. At one point in his cross-examination, he put this as 'taking instructions from Mr Ahmed'. However, this was UM's appeal, and not Mr Ahmed's, and decisions about whether to be candid with HMRC and the Tribunal were not exquisite matters of legal nicety, but were matters of plain common sense.

55. One important example of vagueness was Mr Donaldson's account of the meeting with Mr Kirk in December 2013 (a meeting at which Mr Chambers and Mr Ahmed were also present) and what happened and what was said on that occasion. It was a significant omission that Mr Donaldson had not mentioned, in his witness statements or in his evidence to the first Tribunal in 2014, that Mr Chambers had been present - either this omission was tactical, or was an attempt to conceal. In either event, a failure to mention relevant matters undermines the weight which was can safely place on Mr Donaldson's oral evidence.

56. We should also record the absence of any written or oral evidence from any of Mr Donaldson's commercial counterparties: from any of his suppliers; his former employee Mr Gary Chambers; from Fergal Keenan of Irwin Enterprises, or William Kirk. None of those persons gave evidence in 2014 either.

57. We were told that Mr Kirk and Mr Chambers were unwilling to give any evidence. Mr Donaldson must have gone along with that because he had not taken any steps to secure their attendance (even 'remotely', if they were unwilling to travel from the Republic of Ireland to the UK). Hence, Mr Donaldson's own position - both in responding to the appeal, and in advancing his own contrary positive case - were weakened by the absence of corroborative evidence from other persons who would have had useful evidence to give. Mr Keenan was said to have 'dropped from view' albeit we were not told of any determined effort to find him. Nor was there any evidence from anyone at Swan, although Mr Donaldson accepted that he could have gone to Swan, as he had gone to see William Kirk at Oriel. Mr Donaldson had not even written to Swan, which strikes us as a serious omission.

**The Irwin Deals**

58. HMRC's case is that the denial of input tax should be upheld because the Irwin Deals traced through Irwin to one of three hijacked companies: Linkup Solutions; Landmark Wholesale; and Eurolink Trading (**'the Hijacked Companies'**).

59. That is the case on connection with fraud which HMRC must prove. We agree that, where an allegation of fraud is made (which we consider does include an allegation of connection to fraud in this context), then that must be set out with sufficient particularity so that the opposing party (here, the taxpayer) knows the case that it is going to have to meet.

60. HMRC has not advanced any alternative case on connection with fraud, e.g. contra-trading or false invoicing. Indeed, it states at Paragraph 68 of its Statement of Case that the balance of evidence is not indicative of Irwin acting as a contra-trader in the transactions which are the subject matter of this appeal.

61. By its Amended Notice of Issues dated 7 January 2020, the Appellant accepts that HMRC have identified a tax loss in relation to all the hijacked/defaulting traders (i.e., meaning the Hijacked Companies) and that those tax losses were attributable to VAT fraud.

62. But, in that Amended Notice of Issues, the Appellant (i) "continues to maintain that all the supply chains involving Irwin are incorrect"; (ii) asserts that its own evidence clearly details where the goods originated from and the method of transport; and (iii) asserts that the goods supplied by Irwin all originated with the manufacturers, such as Coca Cola, immediately before each supply was made. UM says that these

goods were purchased by Irwin from a legitimate source in the RoI (Oriel), and were not purchased by Irwin from UK mainland fraudulent traders as HMRC allege. UM says that the Irwin Deals trace back to Oriel, and not to the Hijacked Companies, and were not purchased from Great Britain (ie, the UK mainland).

63. The key in relation to the Irwin Deals is whether HMRC, which bears the evidential burden, has succeeded in establishing, to the appropriate civil standard (namely, the balance of probabilities, or whether something is likelier than not) that the Irwin Deals, as it sets out, were connected to fraud: i.e., that they did actually trace through Irwin to the Hijacked Companies. Here, we remind ourselves of the guidance of the Court of Appeal of Northern Ireland (itself recapitulating the guidance given by the House of Lords in Three Rivers): see above.

64. If HMRC cannot establish that, even to the appropriate standard, then the appeal must be allowed because HMRC will have failed to establish one of the key objective conditions for the denial of input tax.

65. UM does not have to prove anything in this regard. It is not subject to any contrary burden. But, in an adversarial system, nothing stands in the way of it advancing a contrary positive case (essentially, by way of seeking to undermine the integrity of HMRC's case) to try to show that the provenance of the goods was not that alleged by HMRC. But, even though advancing a contrary positive case, UM does not thereby assume any burden. Nor does the existence of a contrary positive case impose any supplementary or new burden on HMRC to disprove the integrity of the deals which the Appellant advances. The evidence which the appellant advances in support of its position that HMRC's tracing must be wrong is prima facie admissible and relevant to the question of whether HMRC has, on the facts, discharged its burden, and therefore should be given such weight as is appropriate.

66. Over and above the fact that this is a re-hearing, this appeal is to some degree unusual because there are few reported decisions in which this has been the critical issue. That is because appellants often accept that the transactions lead to fraud, or simply put HMRC to proof (both being procedurally permissible courses of action which the *Fairford* directions contemplate) but do not themselves advance a contrary positive case. In the absence of a contrary positive case, the crux of the dispute then moves onto whether the Appellant knew or ought to have known of the connection to fraud: Issue 4. But that step is not reached in this appeal in relation to the Irwin Deals unless and until the antecedent issues are admitted by the Appellant, or are decided in HMRC's favour.

***Discussion on the Irwin Deals***

67. At the beginning of his skeleton argument, Mr Bedenham remarked:

> "Despite having had the best part of 10 years to get their house in order and despite this appeal having already been through the FtT, Upper Tribunal and Court of Appeal, HMRC's case remains confused and confusing."

68. In his oral opening, his broad submission was that the burden of tracing the deals to demonstrate connection with tax fraud lay with HMRC, and that HMRC's tracing "could not be trusted".

69. Consistently with this, Mr Bedenham mounted a determined attack on HMRC's analysis of the Irwin Deal chains.

70. Having now heard the evidence, and considered the documents, and submissions, we are bound to say that there is considerable force in Mr Bedenham's over-arching submission that HMRC has failed to discharge the burden in this regard. We accept those submissions. This is for the following reasons.

71. There are endemic and incurable problems with HMRC's case in relation to the Irwin Deals. That part of HMRC's case is affected by a collection of factors which, taken together, seriously undermine the integrity of the whole case in that regard.

72. Those do not arise from bad faith on the part of HMRC's officers, but, as became clear in Officer Arnold's oral evidence, arose simply in consequence of the ordinary human factors - principally, the pressure of work in an extremely busy investigations unit with an overburden of investigative work. Mistakes crept in, and, over the course of time, became embedded in the analysis and increasingly difficult to disentangle. Even after several days of evidence and submissions before us, and despite the assistance of experienced counsel for HMRC, they remain near impossible to disentangle.

73. That is not to ignore the review exercise which Officer Arnold conducted, which is outlined at Paragraphs 61-70 of HMRC's Further Amended Statement of Case, and Paragraphs 142 to 168 of her witness statement dated 20 April 2018.

74. Paragraph 61 of that Statement of Case is an important paragraph because it seeks to engage with the thrust of UM's challenge. Read closely, it reveals - albeit only obliquely - part of the challenge which HMRC faced and the want of precision which affects its case in relation to the Irwin Deals. Already by 2015, it was common ground between the parties that Irwin's trade in 2010 and 2011 was involved in VAT fraud. HMRC had started an inquiry into Irwin in November 2011, but that was not pursued when Irwin, very shortly thereafter, ceased trading and de-registered for VAT.

75. HMRC latterly accepted that 'it is correct that there is evidence that a high percentage of Oriel's supplies to Irwin emanated from the Coca Cola factory in the period January to April 2011, this was not the case in May or June 2011'. But there is imprecision in this, which undermines HMRC's case and which gives support to the Appellant's contrary positive case. Firstly, 'the period January to April 2011' is already the whole of period 03/11 and (noting the absence of dates) is at least part (perhaps even a whole month) of 06/11. Secondly, this is silent as to whether in 'May or June' (again, without dates) there were no sales *at all* to Oriel 'emanating from the Coca-Cola factory' in those months, or whether there were still some. The expression 'Oriel's other supplier in June 2011 was Safeway Distribution in the ROI' does not answer the point because nothing is said as to the provenance of *its* goods.

76. The biggest problem, which in our view went to the very root of HMRC's approach to the Irwin Deals, was that the mainstay of HMRC's entire case in relation to the Irwin Deals was that it was based on what Irwin had told HMRC.

77. Officer Arnold had, in essence, taken at face value what she had been told by Irwin - namely, by Fearghal Keenan (who seems to have controlled Irwin although he was not a director) and Maura Cox, who was said to have been its 'book-keeper' (and who is said to have since died) - and Officer Arnold had relied on documents received

from Irwin which she had treated as inherently reliable. She had relied on (i) what she was told - and especially the key point, identified in her witness statement, and set out above, that Irwin was selling UK to UK and IE to IE, and (ii) the suite of documents which she received, to construct the case against UM in relation to the Irwin Deals.

78. But that approach, even if (for the sake of argument) initially sufficient from an investigatory point of view, became insufficient as soon as the bona fides of Irwin came into question. When that happened, there arose an inherent, and inescapable, tension between, on the one hand, treating Irwin as an agency of truth - when it came to what it said about its deals with UM - and, on the other hand, as an agency of falsehood, when it came to its other affairs. That tension was never satisfactorily resolved by HMRC or by Officer Arnold, and it was not satisfactorily resolved at the hearing before us.

79. That was recognised, but not cured, by the review which Officer Arnold conducted, described at Paragraph 63 of the Statement of Case, 'to consider whether Irwin may have fraudulently created documents purporting to reflect purchase invoices from UK missing traders' and detailed at Paragraphs 151 to 167 of her witness statement. The problem again emerges, albeit not with great clarity, in that, having done that review, Officer Arnold still adhered to the account 'given on behalf of Irwin to HMRC officers that Irwin sold the goods from its UK suppliers to its UK customers and sole the goods from its ROI suppliers to its ROI customers'. That is a mainstay of HMRC's case.

80. There are two points here. The first point is that Officer Arnold's review was already causing HMRC to revise the deal chains to produce 'better matches' than those set out in the witness statement of Officer Watt, or placed before the Tribunal in 2015. The shifting sands of reconstructing the deal chains should have put HMRC on notice that things had already gone wrong with its iterative exercise, which had been the foundation of the case which HMRC had already presented to the Tribunal (and which had been rejected by the Tribunal).

81. The second point is that the greatest extent of movement brought about by the review was that 'it is [HMRC's] case that it is *improbable* that Irwin fraudulently created documents purporting to reflect purchase invoices from UK missing traders' (italicised emphasis added by us).

82. But, reaching that point, the inevitable question is, where did that actually leave Officer Arnold, HMRC, the taxpayer, and the Tribunal in terms of HMRC's case? The possibility of fraud by Irwin had not conclusively been excluded. There remained some probability (albeit unquantified, even in descriptive terms) that Irwin *had* fraudulently created documents - ie a species of invoice fraud. But, if it had done, or could have done, then the denial against UM in relation to Irwin deals would become much more difficult, if not just outright impossible, to maintain. This is because one enters a world of mirrors where Irwin's documents are (perhaps) sometimes true and accurate, relating to real goods, and sometimes untrue and inaccurate, relating to goods which did not exist, but with little to no ability to distinguish the two.

83. The critical, evaluative, difficulty was already apparent. It was whether it was rational for HMRC to give primacy to what it had been told by Irwin (and especially Irwin's key assertion in relation to its own deal chains) as a sufficient basis for the denial when set against the documents which Irwin had provided HMRC. If those documents

were unimpeachable, then it was inherently likelier that what Irwin said was true. And vice versa.

84. The following exchange is very telling. In re-examination, Mr Puzey asked Mrs Arnold the following question:

> "Standing back, and looking at the evidence, and your conclusion, and comparing the Appellant's tracing exercise, and the work you have done, where do you consider the truth to lie?"

85. Her answer was this:

> "I felt that given the amount of deals I couldn't match for UM, let alone everybody else, there was not enough evidence to suggest that Mr Keenan was printing his own invoices, or even acting as a contra-trader. It is impossible for HMRC to say or accept that this happened. There are lies and truth. There has to be some truth in what Fergal Keenan told us, and so I am not in the position to say what Mr Donaldson says is correct."

86. This evidence captures some of the difficulty which HMRC faced, and which it failed to surmount: the sales documentation and (for example) the delivery notes for the ostensible supplies by the hijackers to Irwin, being documents upon which HMRC rely, contain features which create genuine doubt that these documents can be correct. Even by late 2011, HMRC has recognised that Irwin was likely involved in VAT fraud, but had taken the view (rightly or wrongly) that it had been thwarted in its enquiry by Irwin's de-registration and cessation of trade. We must remind ourselves that this is not an appeal about Irwin, but it is hard to disagree with Mr Bedenham's hypothesis that Irwin was manufacturing paperwork. Once that bridge is crossed, then everything coming from Irwin - written or oral - has to be regarded with grave suspicion.

87. For example, and as Paragraph 65 of the Statement of Case identifies, Irwin's papers reveal multiple sales invoices matching each other as to quantities and goods description - one to UM, on to a UK customer ('The Soft Drinks Company') and one to an ROI customer ('Ballymacken Homes'). The Soft Drinks Company is said to have sold on to one of its customers, but it is not clear whether these were the same goods. But nothing certain is said as to the sales to UM and/or Ballymacken. HMRC say that 'it is *probable* that the supply to the Appellant was by a UK trader, not Oriel' (italicised emphasis again added by us). The same questions arise as have already been put above. Indeed, this discussion simply reflects the parties' agreement as long ago as 2015 that it was not credible that Irwin would consistently purchase identical loads of soft drinks at or about the same time for onward sale to different customers.

88. There are pervasive discrepancies and anomalies throughout the Irwin documentation. Some of these are identified by Mr Ahmed in his so-called 'Anomalies Schedule' which, in the scope of its remarks and column of 'Irwin Invoices previously denied by no longer relied on' seeks to engage in a close and detailed way with HMRC's case. That is a useful document because it exposes some of the problems with the Irwin documents and the deal chains hypothesised by HMRC - dates which make no sense; mis-matches; and postulated better matches which Mr Donaldson and his team sought to piece together.

89. The lion's share of the evidence which HMRC relies on in relation to the Irwin Deals comes from Irwin. The invoices produced by Irwin have no headers (but were

printed off by Irwin); there is no credible proof of payment for these supplies; and many of the delivery notes are self-evidently, on their face, suspect, not least because they are incompletely populated - for example, they omit a delivery address.

90. Some of the Irwin documents do not appear to be genuinely contemporary, but seem to have been produced after the event. A good example of this is the inclusion on an invoice dated 10 December 2010 of the 20% VAT rate which did not commence until almost a month later: 4 January 2011. Another is the use on some delivery notes ostensibly populated in March 2011 with an invoice reference style which did not begin until April 2011.

91. This is an adversarial jurisdiction, and it is not part of the Tribunal's task to re-investigate, or itself to act as a detective, or to suggest to HMRC what steps might have been taken to improve its evidence. It is enough to note that there were shortcomings in investigative rigour and to reflect on where that leaves this appeal.

92. Our task is simply to objectively assess the integrity of the conclusions, against the totality of the evidence which informed those conclusions, and decide whether those conclusions should stand in support of HMRC's denial of input tax. In evidential terms, it is whether the evidence supports, to the appropriate standard (namely, the balance of probabilities) HMRC's case in relation to the alleged connection to fraud.

93. In relation to the Irwin Deals, we have concluded HMRC's conclusions cannot stand. The evidence is so pervaded with inconsistency, anomalies and flaws, that it cannot safely be relied on. We do not need to go beyond that to express any concluded view as to whether the Appellant's contrary positive case (being that Irwin had created invoices relating to supplies for the purposes of off-setting its own tax liabilities relating to genuine purchases from Oriel and Swan - put by Mr Bedenham as "a tale as old as time") is right or not. It does not matter.

94. In our view, that high-level analysis suffices in relation to the appeal insofar as it goes to the Irwin Deals. HMRC advances one high-level case: the connection to fraud was because of the connection to identified hijacks. Once the evidence in support of that high-level case falls short to make the proposition good, then that case fails. We do not have the broad inquisitorial power thereafter to comb through the remnants of HMRC's case in this regard to find individual deals which, on the documents, are capable of being salvaged as connected to fraud. Nor was that an approach which we apprehended HMRC invited us to take.

95. The appeal against the denial of input tax in relation to the Irwin Deals therefore succeeds at that point, meaning that, in strict terms, we do not need to go on to make any findings as to Issue 4.

96. However, and lest our conclusion on the foregoing aspect of the appeal should fall to be reconsidered - namely, had HMRC shown that the Irwin Deals were connected to the fraud as alleged by HMRC, and stated as its case - we would have found that Mr Donaldson (and, through him, the Appellant) did actually know of connection to fraud. He denied this, but we did not believe him. Some of the general features which lead to this are set out below. Other features relate particularly to Irwin.

97. The following are relevant when it comes to Mr Donaldson's knowledge and experience of VAT fraud. He had phoned HMRC on at least six occasions between September 2003 and March 2010 to check on the VAT registration numbers of potential

suppliers and customers. He received a standard MTIC letter in September 2007, and was visited in October 2010 - ie. only a matter of months before the first period in dispute - by Officers Laverty and Arnold, who advised him that he was trading in a commodity that was considered an MTIC risk. He was issued with VAT Notice 726 ('Joint and Several Liability') and the notice 'How to Spot VAT Missing Traders'. Pursuant to that visit, on 5 November 2010, HMRC sent UM an MTIC awareness letter.

98. We reject Mr Donaldson's evidence and protestations that he had understood the warnings only to be about scrap metal, and not in relation to soft drinks. But, even if he were right about that, the gist of the correspondence, notices, and visit was that VAT registered traders, as UM was, were inherently vulnerable to being involved in VAT fraud, regardless of the particular commodity.

99. In relation to Irwin, UM's due diligence and attitude to due diligence were very poor, and we have no doubt at all that Mr Donaldson and UM not only should have known better that Irwin was connected to fraud but did know better. There were very clear signposts raising suspicion that something was awry.

100. Photographs of Mr Donaldson with a smartly-suited Mr Keenan, and of Mr Keenan with some pallets of drinks are, frankly, not proof of anything other than that there was a person holding himself out as Mr Keenan, who happened to have some pallets of soft drinks in a storage unit. The absence of evidential weight is obvious, and we are sure would have been obvious to Mr Donaldson.

101. As part of the Appellant's apparent due diligence on Irwin, Mr Donaldson showed Officer Watt an unsigned and undated letter of introduction, addressed only 'to whom it may concern', from Irwin which stated that it had a turnover of £25million in 2009/2010. That stated it had been trading 'for the last five years', which takes it back to (say) 2004/2005. However, Irwin was not registered as a company until 21 February 2006, and was not registered for VAT until 1 February 2008. Those dates were plain on the face of Irwin's companies registration certificate and its VAT 4, both of which Mr Donaldson had seen.

102. Those documents - being ostensibly reliable documents produced by HMRC and Companies House (ie state agencies) - are manifestly inconsistent with what Irwin was saying about itself as to when it had begun to trade. Mr Donaldson's answer to this in cross-examination was that the letter of introduction "mattered, but it is one of those things ... if they're paying cheques and it all pans out, then its OK". In terms of commercial integrity, and the avoidance of VAT fraud, the inadequacy of this approach is obvious.

103. Given that the threshold for compulsory VAT registration on 1 February 2008 was about £60,000 then Irwin appeared to be a company which had gone from a turnover of tens of thousands of pounds to tens of millions of pounds in only (say) two years. That would also obviously invite inquiry from a prospective commercial counter-party proposing to enter into a commercial relationship: in a competitive marketplace, how had it managed to get so big so quickly?

104. A blank sheet of letter-headed notepaper from Irwin is not proof of anything, other than Irwin had a stock of stationery.

105. Irwin's own stated turnover of £25m is manifestly inconsistent with the 28 October 2010 Credit Safe report which, as at that date, was giving Irwin a credit limit

of £3,000, and a contract limit of £6,000. That report also indicated that Irwin did not have any credit rating or contract limits in the years 31/12/2008 or 31/12/2007 - again, suggestive (contrary to its own letter) that it had not been trading in those years. This is reinforced by the spreadsheet of assets etc, which would have been founded on Irwin's statutory filings, which recorded no values for 30/06/2007 or 30/06/2008.

106. In relation to the stated credit and contract limits, Mr Donaldson said that he did not think that was a risk. We do not consider that evidence to have been truthful: there was an obvious risk where the Appellant was doing dozens of deals with Irwin coming to hundreds of thousands of pounds. A company with a turnover of £25m would, self-evidently, have had credit and contract limits which were much greater.

107. There was an obvious mismatch between what Irwin was saying about itself, and what the credit agencies (both in October 2010 - ie before the disputed trades, and August 2011 - after the disputed trades) were saying. The obvious question is that, if the credit agencies were right, and Irwin was - at the end of the day, and even if liquidated by a creditor - good only for a few thousand pounds, with a correspondingly restricted credit limit, then how was Irwin managing to get its hands on this amount and value of goods. The converse is also true: if it was (as it said in the letter of introduction) good for £25milllion, then how had the credit agencies come to get it so eye-wateringly wrong.

108. A further uncommercial feature, raising inquiry, is that UM had no written terms and conditions with Irwin.

109. There is also the involvement of one Gary Chambers. As well as ostensibly being employed by UM as a driver from April 2010 to 2014 (i.e, for the entirety of the periods in dispute, and for a long time afterwards) he had earlier also been (from June 2005 to October 2007) a director and company secretary of Irwin and was an associate of Mr Keenan (Mr Chambers and Mr Keenan having been co-directors of a firm called Navan Wholesale).

110. In HMRC's 'Aide Memoire' of the visit by Officers Wilkinson and Kenneway to UM on 10 May 2011, Mr Donaldson told HMRC that Mr Chambers and City West Transport were transporting goods, "Irwin organises transport to customers and therefore Irwin would know who his customer was" and that goods would be inspected by Mr Chambers. Mr Watt said that Mr Chambers was engaged by UM and by Irwin, and that there was "a sort of grey area in-between who was working for whom." That is a fair description, and we accept it.

111. Mr Donaldson was pressed in cross-examination as to the role of Mr Chambers. In 2010, Mr Donaldson had told Officer Arnold that Irwin was delivering goods on UM's behalf at that time, but, before us, had said, for the first time, that Irwin was hiring the vehicle on UM's behalf. We considered Mr Donaldson's evidence to be improvisatory. We are not satisfied by his explanation that "I know it looks a bit strange, but that is what happened."

112. The involvement of Mr Chambers in the Irwin Deals is indeed very murky and was not clarified by the oral evidence either of Mr Donaldson or of Mr Ahmed. As already noted, there was no evidence before us from Mr Chambers, nor any satisfactory explanation as to why there was no evidence from him.

113. A further unsatisfactory feature, which further supports our sense of the unreliability of Mr Donaldson's evidence, is that we now know - from both Mr Ahmed and Mr Donaldson in their oral evidence, but not from either of them in their written evidence - that Mr Chambers had been at the important meeting with William Kirk which took place in December 2013. Even now, there remains an air of considerable mystery about that meeting, heightened by (i) the absence of evidence from any of the participants except Mr Ahmed and Mr Kirk (and the written evidence being shown in cross-examination to be incomplete, for no satisfactory reason); (ii) the absence of any contemporary note or record; (iii) the possible phone call to Mr Keenan during or after the meeting; and (iv) the otherwise patchy accounts of what is said to have been said and to have happened.

114. Mr Donaldson's evidence about the extent of his connection with Fergal Keenan was unsatisfactory. In HMRC's 'Aide Memoir', referred to above, Mr Donaldson is recorded as having said that "Due to special relationship with Fergal Keenan for past 15 years Fergal makes deliveries to Ulster Metals customers."

115. The nature of this "special relationship" remains unclear. Mr Donaldson is said to have met Mr Keenan through a firm called Elite Wholesalers, which had premises next to UM, and in which Mr Donaldson was a shareholder. Elite Wholesalers collapsed (through a VAT debt) leaving Mr Donaldson, on his own account, £300,000-£400,000 out of pocket. It makes no sense that Mr Donaldson, left high and dry by Elite's collapse, would nonetheless have thought it appropriate, or commercially prudent, to continue to do business with Mr Keenan. It is doubly strange that Mr Donaldson considered it appropriate to carry on dealing with Mr Keenan even when Mr Donaldson came to find out that Elite had collapsed because it did not have proof of dispatch of goods, and that Elite was alleged by HMRC to have been falsifying records.

116. Other features of the Irwin Deals are suspicious. Some of these may be consequences or artefacts of its unreliable paperwork.

117. Finally, and in relation to other aspects of the UM-Irwin trade, and which would have supported a conclusion that Mr Donaldson actually knew of connection to fraud:

(1) There is an absence of evidence as to the negotiation of price. This is not only contrary to Mr Donaldson's position to HMRC in a meeting on 10 May 2011, but it is also itself an indicator of want of commerciality and an indicator of connection to VAT fraud;

(2) Goods in the alleged tax chains were not being delivered to UM's premises, but were instead - it is said - being delivered directly from Irwin's premises to the Appellant's customers' premises in the ROI;

(3) There was an absence of insurance.

**The Magee Deals and the PCB Deals**

118. In relation to the Magee Deals and the PCB Deals, the Appellant confirms in its Amended Notice of Issues that it accepts that they were all connected to a VAT fraud. That connection was one Mark John Cartel. Hence, the only issue in dispute for us to decide is whether the Appellant actually knew, or should have known, that these transactions were connected with fraudulent evasion of VAT: Issue 4.

119. In relation to the Magee Deals and the PCB Deals, if the Appellant did know, or should have known, of the connection to fraud, then it would not meet the objective conditions to be entitled to a deduction for input tax.

120. We do not accept Mr Bedenham's closing submission that HMRC's pleaded case is that it relies on the findings of the FtT which originally heard this appeal, and that the appeal should be allowed on the basis that those findings 'are no more'. That ignores the basis on which this Tribunal ordered this re-hearing to proceed, and the way in which this appeal was actually conducted.

121. Moreover, and perhaps more importantly, having heard evidence - especially that of Mr Donaldson - in relation to the Magee and PCB Deals, we do not consider there to be any proper basis upon which we should simply ignore that evidence. It would be unfair to do so, not least to the appellant, because it would effectively preclude the appellant from itself having the chance to give its side of the story, and HMRC from exploring and challenging that explanation, once given.

***Discussion on the PCB Deals and the Magee Deals***

122. In relation to the supplies said to be by Paul Magee, and PCB Logistics, we have no doubt in concluding that Mr Donaldson did actually know of the connection to fraud.

123. Mr Donaldson's position is that he is an astute business person. That necessarily connotes a person who would undertake proper due diligence in relation to his commercial counter-parties.

124. What is due diligence can depend on the nature and size of the trade. But it is not simply a paper-based exercise, or a tickbox: it also necessarily involves the application of an instinct, born of knowledge and experience, for when those commercial counter-parties are not who or what they claim to be, and, when that instinct is triggered, the exercise of a corresponding degree of caution.

125. Mr Donaldson's oral evidence was unconvincing and did not stand up to scrutiny.

126. It was put to Mr Donaldson, by Mr Puzey, right at the outset of his cross-examination that he actually knew that the deals involving Magee and PCB in 03/11 and 06/11 were connected to fraud. Mr Donaldson denied that. We did not believe him.

127. Mr Donaldson was asked how he had assured himself that neither of these individuals were involved in VAT fraud. We reject Mr Donaldson's evidence that his approach was to assume a person was not involved in fraud unless and until he could see "something concrete" to show that they were. This completely side-steps the concept of due diligence, and we do not believe that someone of Mr Donaldson's knowledge and experience can genuinely have believed that to be the correct approach.

128. We agree with Mr Puzey's submission that Mr Donaldson's attitude to due diligence was "lax". That is a most diplomatic description. Mr Magee and Mr Boyle were both persons, with no apparent track record in the trade, who were suddenly purporting to be able to source large quantities of soft drinks for a cheaper price than Mr Donaldson (who had been in the trade for years) could get elsewhere. That very circumstance would have excited suspicion in the mind of any person coming to deal with them, and should have excited suspicion in the mind of Mr Donaldson. But he

nonetheless seemed resolutely incurious as to their commercial bona fides and antecedents.

129. Viewing the evidence in the round, we are not satisfied that Mr Donaldson can ever have genuinely believed in the trading bona fides of either Magee or PCB/Mr Boyle.

130. As to Paul Magee, the sole proprietor of 'Paul Magee Wholesale Beverages', Mr Donaldson's oral evidence was that he had satisfied himself as to Mr Magee's commercial bona fides by virtue of Mr Magee bringing a 'sample' of Coca-Cola to UM's offices (namely, a case of 24 cans). This was correctly characterised by Mr Puzey as 'laughable'. No reasonable commercial person in Mr Donaldson's position (and especially not Mr Donaldson, with his long experience in the industry) would genuinely have been satisfied by this. That Mr Donaldson advanced this in support of his position either shows him to have been extraordinarily naive - which we do not consider he was - or was simply prepared to deal with Mr Magee completely regardless of Mr Magee's bona fides. It was a telling piece of oral evidence (and not something which had appeared in any of Mr Donaldson's otherwise very lengthy witness statements) which serves to cast serious doubt on the veracity of Mr Donaldson's evidence as to his knowledge of, and faith in, Mr Magee; and his alleged confidence that Mr Magee was not someone engaged in fraud

131. Other evidence which cast doubt on Mr Magee's bona fides:

(1) He had contacted Mr Donaldson by a cold call;

(2) He had no business premises (his letterhead being a domestic address also on his driving licence), no known experience in the sector (having registered for VAT only on 1 July 2010), and no viable business assets - all of which was readily discoverable;

(3) His business paperwork (and the letter of 21 October 2010) gave an incorrect business name, road, and postcode: again, all of things which were readily discoverable and which would have put a reasonable person on the alert;

(4) His VAT certificate gave his trade as 'Retail Sale of Beverages', and not as 'Wholesale Fruit/Veg Juices and Soft Drink' (which is a different trade classification, and which was the trade classification both of Irwin and PCB);

(5) There is no credit check, nor evidence of verification of the VAT number;

(6) There could not be a check of business premises because (i) no address was given, and (ii) Mr Magee said in his letter of 21 October 2010 that he was 'sourcing other premises'; i.e., he was holding himself out as a wholesaler in October 2010, but did not state, even at that time, where his stock was kept;

(7) Mr Donaldson did not know how Mr Magee could afford to let UM have the goods before payment, nor how Mr Magee was financing his business. He should have asked, but did not. Mr Donaldson explained that his approach was that he was really just concerned with whether the goods were delivered, and that, if the VAT number was genuine, that was enough;

(8) The goods arrived on a trailer, but Mr Donaldson could not remember whose.

132. As to Mr Boyle of PCB Logistics Ltd:

(1) He was said to have contacted the Appellant by a cold-call;

(2) He had no business premises, or viable business assets - all of which was readily discoverable;

(3) He had little to no experience in the sector. His invoice of 29 March 2011 was only (on the face of it) the 14th invoice he had ever issued;

(4) His occupation was listed by Companies House as an 'Enforcement Officer';

(5) His business address was the same as the address on his driving licence - ie a domestic address. So, even on the face of it, he did not have business premises in which, as a wholesaler, he could store products;

(6) PCB was registered on 29 October 2009, but even on 26 April 2011 had not filed any statutory accounts;

(7) The CreditSafe report for PCB gave it a rating of 52 (which was at the very lowest end of 'good'), and a credit limit of £1,000 (with effect from 26 January 2011). The 'Comprehensive Report Financials' in the CreditSafe report had no information at all;

(8) Mr Donaldson could not recall any details of how PCB goods arrived at his premises, other than 'on a trailer'.

133. The collection of features, set out above, self-evidently undermined Mr Magee and Mr Boyle's bona fides.

134. We reject Mr Donaldson's ostensibly resolute lack of curiosity. Taking all the above into account we have concluded that the true explanation is that he did actually know that Messrs Magee and Boyle were engaged in fraud.

135. Even if that conclusion were wrong, we would nonetheless have been entirely satisfied that Mr Donaldson ought to have been aware of the connection to fraud, for the same reasons as already set out.

136. But the outcome is identical: the appeal in relation to the Magee and PCB Deals which remain in dispute must be dismissed.

**Outcome**

137. The appeal against the Irwin Deals which remain in dispute is allowed,

138. The appeal against the Magee and the PCB Deals which remain in dispute is dismissed.

***Right to apply for permission to appeal***

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

**DR CHRISTOPHER MCNALL**
**TRIBUNAL JUDGE**

**RELEASE DATE: 12 AUGUST 2021**