[2018] UKUT 0363 (TCC)

Appeal number: UT/2016/0225

VALUE ADDED TAX – "missing trader" fraud – whether HMRC made an "assessment"– whether HMRC's case adequately pleaded and put to witnesses - nature of appeal against FTT's factual findings – appeal dismissed

UPPER TRIBUNAL
(TAX AND CHANCERY CHAMBER)

ARIA TECHNOLOGY LIMITED

Appellant

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Respondents

TRIBUNAL: MR JUSTICE ROTH
JUDGE JONATHAN RICHARDS

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4A 1NL on 20-22 June 2018

Michael Firth, instructed by direct access, for the Appellant

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

referred to simply as Mona in Luxembourg. Deals 10-12, in the period 21 July to 1 August 2006, involved the purchase of, again, Intel Pentium CPUs from Ashtec Distribution Ltd ("Ashtec") and their resale to Silver Pound Trading LDA ("Silver Pound") in Portugal.

6. It appears that the eight deals with Supreme had a value of some £2.8 million (Judgment, [142]) and the three transactions with Ashtec a value of some £2.3 million (see Judgment at [141] and [171]).

The Judgment

7. The hearing before the FTT lasted 15 days and the parties submitted extensive written closings and further written submissions after the conclusion of the hearing. As well as significant documentation, the FTT heard substantial oral evidence, including from Mr Taheri, Mr Harasiwka and Mr McFadden who were all cross-examined.

8. The Judgment comprises 100 pages and 374 paragraphs. In view of some of the criticism directed at it on behalf of Aria, it is relevant to refer to its structure. After an introductory section describing the characteristics of MTIC fraud and the governing law, the FTT first deals with a preliminary issue regarding whether the decision of HMRC amounts to an assessment, to which we return below, and then sets out the substantive issue for determination. After summarising some background facts concerning Aria and describing the 11 disputed transactions and the companies involved in the transaction chains demonstrating the connection to fraudulent losses, the next section of the Judgment is headed: "Did the Appellant know, or should it have known that the transactions in this appeal were connected to fraud?" There follows a full discussion of the evidence, including some extensive quotations from the oral evidence, covering 155 paragraphs and broken down under various sub-headings. The Judgment then summarises the submissions of the two sides, and the next section is headed, "The Decision". That includes a sub-section called "Findings of fact on whether the Appellant knew or should have known, that its transactions were connected to fraud", which covers 41 paragraphs, leading to the "Conclusion" that the FTT was satisfied that knowledge or means of knowledge was made out.

9. On this appeal, Mr Firth submitted that only the sub-section entitled "Findings of fact…" was relevant in considering the basis on which the FTT reached its conclusion, and then subjected the 41 paragraphs in that sub-section to detailed criticism as an inadequate factual foundation for the findings recorded. He contended that the long, earlier section of the Judgment was simply a recitation of the evidence, divorced from any assessment by the FTT, and so served only as background.

10. We reject that contention as fundamentally misconceived. There is no one right way of structuring a judgment. Where the evidence is voluminous, the manner in which a judge may discuss the evidence and justify his or her factual findings is not to be put into a straitjacket. Here, the FTT set out, in considerable detail, those aspects of the evidence which it regarded as relevant for its approach to the question it had to decide. The relatively short, "Findings of fact" subsection is not to be read in isolation. On the

repeatedly entering and leaving the UK)[3]. That evidence was not challenged in cross-examination. Therefore, the finding that his understanding of MTIC fraud was "full" was irrational, against the weight of the evidence, had not been put to Mr Taheri and was not available to the FTT.

54. However, the relevant consideration is the extent of Aria's knowledge of MTIC fraud and not merely that of Mr Taheri. There was ample evidence before the FTT, reflected in the Judgment, to support a finding that Aria was aware that the products it was dealing in were particularly susceptible to MTIC fraud and that HMRC expected taxpayers trading in such goods to make checks of both their suppliers and customers. At [124] and [125] of the Judgment, the FTT referred to letters sent to Aria about MTIC fraud, including a letter dated 2 December 2003, which expressly referred to checks on both suppliers and customers.

55. No doubt as a purely linguistic matter, very few people will have a "full" understanding of MTIC fraud. Even those most familiar with the fraud might not know its full extent or precisely how it is perpetrated in all circumstances. Moreover, HMRC accept that Mr Taheri's previous input tax claim had not been denied but had merely been delayed while further checks were pursued. However, that does not undermine the basic point made by the FTT that, because Mr Taheri had experienced some difficulties in the past with input tax recovery and given his professional experience in an industry that was susceptible to MTIC fraud, he could be expected to have a good understanding that MTIC fraud was a live issue in his (and Aria's) chosen line of business. Aria's awareness of MTIC fraud generally was plainly relevant to the FTT's assessment of whether Aria knew or should have known that the disputed transactions were connected to fraud.

56. Mr Taheri had said in cross-examination that he did not understand the "carousel" nature of the fraud. However, the finding that the FTT made did not require it to reject that evidence. There was ample basis for the FTT to conclude that that Aria had a sufficient understanding of MTIC fraud to appreciate the importance of making checks on both suppliers and customers[4].

Due diligence checks (Points 7, 8, 9,10, 11[5], 13 and 35 of Mr Firth's skeleton argument)

57. At paragraphs [340], [341], [343] and [344] the FTT set out conclusions that it had drawn from the extent of Aria's due diligence on both customers and suppliers as follows:

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[3] Moreover, being unaware of the "carousel" nature of the fraud, Mr Firth argued that Mr Taheri could not have been aware of the importance of performing due diligence on Aria's customers, as well as its suppliers.

[4] As noted at para 54, there was ample evidence that Mr Taheri realised that HMRC attached significance to checks on customers as well as suppliers, even though he evidently thought that checks on suppliers were more important.

[5] i.e. the second point 11: see note 2 above.

that it had failed to address the core of Aria's submissions on the significance of due diligence. More specifically, in reaching its conclusion, the FTT ignored potentially benign reasons why Aria might perform limited due diligence on suppliers (for example the fact that Aria already knew and trusted its suppliers, and its policy of not undertaking "bulk deals" with a supplier with whom it had not traded for a full year). The FTT also ignored evidence that Aria's policy was real and had resulted in it turning down brokerage transactions in the past.

(5) HMRC's pleaded case at paragraph 40.5 of their Statement of Case was that Aria had "no commercial risk" in entering into its transactions since it received payments from its customers before making payment to suppliers. Therefore, in finding at [343] that Aria faced "significant" risk if its customers did not pay, the FTT was making an irrational finding and, moreover, a finding that had not been adequately pleaded or put to Aria's witnesses.

(6) On no view could an absence of meaningful due diligence on customers "only" lead to the conclusion that Aria was aware of fraud particularly since Aria's due diligence on customers in deal 3 (which was not connected with fraud) was no different from its due diligence on customers in the disputed transactions that were connected with fraud. Mr Firth argued that the FTT's use of "unsustainable hyperbole" at [343] demonstrated that the FTT had closed its mind to Aria's case and submissions.

(7) As a matter of pure logic, Mr Firth submitted that absence of due diligence could not be indicative of connection to fraud: a trader who knew that its deals were connected to fraud would have every incentive to "paper" its transactions with seemingly extensive due diligence in an attempt to mislead HMRC into thinking it was a legitimate trader. Therefore, it followed that the FTT's overall conclusion, that lack of due diligence on suppliers indicated that Aria knew its transactions were connected with fraud, was irrational, took into account irrelevant considerations and ignored relevant considerations.

(8) At [341], the FTT deduced from Mr Taheri's inability in cross-examination to recall details of a conversation about VAT from Mr Afzalnia (the managing director of Ashtec) that took place many years ago, that his evidence on the issue was vague and uninformative. In doing so, the FTT failed to take into account the highly relevant consideration that the passage of time would inevitably have dulled Mr Taheri's memory.

60. Mr Firth is correct to say that the FTT was mistaken in concluding that Aria last dealt with Supreme in 2004. In fact, Aria had bought £12,000 worth of computer monitors and other goods from Supreme in January 2006. However, in our view this error is clearly not material. The fundamental point was that the disputed transactions were out of all proportion to any previous dealings with these suppliers, and Mr Taheri accepted that Aria had never traded to such a high level with Supreme (or Ashtec) before: see at [143].

failure to perform adequate due diligence pointed towards a conclusion that it knew its transactions were connected with fraud. Other inferences might have been possible (for example that Aria's business procedures were simply slipshod, or that it was so busy trying to make money that it cut corners with due diligence), but the negative inference that the FTT drew was, in our judgement, available to it and sufficiently explained. In stating the basis of its conclusion, the FTT was not bound to set out and explain why it rejected each alternative hypothesis. Hence Mr Firth's submission that a trader who knew its transactions were connected to fraud would have an incentive to "paper" its transactions with apparently plausible due diligence is nothing more than speculation as to how people might be supposed to act; it was not evidence and the absence of discussion of such a speculative submission is not an error of law.

69. In paragraph 40.5 of their Statement of Case, in a section headed "Further Evidence of Knowledge or Means of Knowledge", HMRC referred to Aria having "no commercial risk" since it received all payments before suppliers were paid. Read in context, that was an assertion that Aria's business model in the disputed transactions was uncommercial and contrived. We do not think it can be read as suggesting that HMRC were acknowledging that Aria's failure to perform significant due diligence on customers was understandable because customers would pay in advance.

70. At [343], the FTT was identifying a "risk", namely that if Aria's customer did not pay, Aria would be exposed as it still had to pay its supplier and it would be little comfort to Aria that it was entitled to obtain the goods. The FTT was not saying that the risk had actually materialised and so caused Aria loss. Mr Taheri had testified that Aria had previously cancelled orders from suppliers because customers cancelled their order and that Aria had not suffered any significant financial loss as the supplier had simply sold to someone else. However, it was not clear whether Mr Taheri's evidence related to orders being cancelled before, or after, a binding contract of sale was in place. Moreover, even if various suppliers had been understanding in the past, there was always the risk that these two particular suppliers would not be so accommodating. Furthermore, Aria's actions in deals 10 and 12, in which the goods had been released to the customer prior to full payment, operated to increase that risk (although Aria said that these were mistakes: see para 124 below). But all this demonstrates, in our view, that the FTT was fully entitled to identify a "significant" commercial "risk" even if that risk had not actually resulted in a loss to Aria.

71. Having identified the "risk", the question for the FTT was what, if any, inference should be drawn from the fact that Aria performed little due diligence on its customers. Conceptually this was similar to the issue, described at para 68 above , that the FTT was addressing when considering why Aria performed limited due diligence on suppliers. Aria was inviting the FTT to draw no adverse inference (on the basis that it expected customers to pay in advance and no adverse consequences had arisen in the past when customers had pulled out of deals). Other more negative inferences were possible: for example, that Aria realised that it was not running the ordinary commercial risks of non-payment since the transactions were part of an orchestrated VAT fraud. HMRC put to Mr Taheri an allegation that all of his talk of due diligence was "hollow" because he knew that, irrespective of when the goods were despatched, Aria would get paid.

72. As a purely linguistic matter, the FTT did overstate matters when it said at [343] that the absence of customer due diligence pointed "only" to an awareness of fraud. In a multi-factorial assessment of competing inferences that should be drawn from a large volume of facts, it will seldom be the case that a single piece of evidence points "only" towards one conclusion. However, we do not accept Mr Firth's submission that this in itself demonstrates that the FTT had closed its mind to Aria's case or had refused to take into account relevant considerations that might indicate a conclusion that Aria was unaware of connection to fraud. The FTT had pointed to the facts that Mr Taheri had emphasised that in general due diligence on customers, and not only on suppliers, was important; and that the risks involved in these transactions in particular were significant. When the Judgment is read as a whole, it is clear that the lack of due diligence on customers in the disputed transactions was considered alongside the wholly inadequate due diligence on the suppliers in leading to a conclusion of knowledge.

73. The absence of checks as regards deal 3 does not vitiate this conclusion. As the FTT noted, at [354], once regard is had to the details of that transaction it was very different. The supplier, Digimate Ltd, was a long-standing trading partner of Aria and the goods purchased were Digimate monitors, i.e. the seller was an associated company of the manufacturer.

74. Mr Firth criticises the FTT for ignoring a relevant consideration (namely the inevitable difficulty that Mr Taheri would have had in remembering conversations that took place a long time ago). That criticism is misplaced. The FTT could not have failed to be aware that all events relevant to the appeal took place a long time ago. The FTT heard the witnesses give evidence whereas we can only read a transcript of that evidence. It was pre-eminently for the FTT to assess what was said by each individual witness based on the totality of his evidence. Thus, we note that on another point the FTT recorded that Mr Taheri (like Mr McFadden) claimed to recall important information when they gave oral evidence which was absent from their written statements and that it found their evidence on that point was untrue: see at [350]. It would be wrong for us to substitute a different inference on the implication of the passage of time from that of the FTT.

75. Accordingly, we consider that the FTT's factual conclusions from the lack of meaningful due diligence, including customer due diligence, were fully open to it. Further, we note that the FTT also relied on this for the alternative finding that Aria should have known of the connection to fraud: [368]. Even if, contrary to our view, the FTT's approach is flawed as alleged in justifying a finding of actual knowledge, it seems to us that it can manifestly support the conclusion as to means of knowledge.

Treatment of box numbers (point 12 of Mr Firth's skeleton argument)

76. The Judgment also contained findings on a different aspect of due diligence, namely the way that Aria recorded and dealt with the unique numbers that appeared on boxes of goods it purchased.

77. At [173] - [177], the FTT referred to evidence that indicated that Aria recorded, or asked its agents, to record details of box numbers. However, having recorded those

details, it did nothing with them. The FTT drew the following conclusions on the treatment of box numbers, at [345]:

> "345. We reached a similar point on the issue of box numbers which were retained by the Appellant but were put to no use. Mr McFadden's oral evidence on the matter was poor; having initially asserted that the box numbers were checked against each other he ultimately accepted that he was "just performing a function" and "checking they were all there…I don't recall doing anything else with them." Mr Taheri, who had included box numbers on his checklist of due diligence stated that nothing was done with the numbers. We found that this was indicative of the Appellant's attitude to due diligence generally; that it was a box-ticking exercise of no substance. No real assessment was made from the information collated which in our view supported knowledge on the part of the Appellant that the deals were contrived; clearly there would be not be any need for a knowing participant in the fraud to undertake any effective or thorough due diligence."

78. Mr Firth criticises the FTT's reasoning in the following respects:

> (1) The evidence demonstrated that Aria was not aware of any need to maintain a database of box numbers and check whether any of its transactions involved it purchasing goods it had purchased before. HMRC had asked Aria to keep a record of box numbers and Aria did so. Therefore, at most Aria's conduct demonstrated that it did not understand why HMRC made their request; it could not support an inference that it knew its transactions were connected with fraud.
>
> (2) HMRC had not pleaded, nor put to Aria's witnesses, that its failure to perform checks using the box numbers it had recorded indicated it knew its transactions were connected to fraud. In those circumstances it was not open to the FTT to make the finding it did.
>
> (3) HMRC had only argued that the way Aria dealt with box numbers indicated that it was "indifferent" to whether it was connected with fraud. The FTT had gone further and had argued it indicated actual knowledge of fraud.

79. Overall, we reject Mr Firth's criticisms. As a matter of pleading, at paragraph 31.6 of HMRC's Statement of Case, HMRC had set out their case that a business trading in computer chips should have kept a record of box and lot numbers. In cross-examination, Mr Puzey had put it to Mr Taheri that the purpose of recording box numbers was to enable a trader to check whether it was dealing in goods that had been "carouselled". Therefore, the significance of the reason for recording box numbers was put to Mr Taheri.

80. The evidence therefore indicated that Aria was recording information and doing nothing with that information. The relevant question for the FTT was what, if any, inference should be drawn from this apparently pointless action. One possible conclusion was that no inference should be drawn: Aria recorded box numbers simply because HMRC asked it to do so. Another possible conclusion was that, because Aria

(4) Similarly, the FTT ignored Aria's evidence that discussions about price largely took place over the telephone which explained why there was relatively little documentary evidence as to how price was agreed.

(5) Aria had explained in unchallenged evidence that it had never come across a single instance of a CPU in which it was trading being faulty and, in that evidence, had explained what would have happened if a CPU were faulty. The FTT was wrong to conclude that evidence relating to faulty goods was vague and, in doing so, took into account an irrelevant consideration.

89. Mr Firth's criticisms of the findings relating to Aria's knowledge of the goods were as follows:

(1) Mr Taheri had only accepted in cross-examination that he was not aware of one specific product (the "Gigapro 7074" computer controller) before Supreme had offered it for sale in deals 1 and 2. All other products in which Aria dealt in deals 4 to 11 were well-known Intel processors of which Aria was fully aware and the contrary was never suggested to any of Aria's witnesses in cross-examination.

(2) The FTT did not explain adequately what it meant by the descriptions of the goods in the contractual documentation and why it felt those descriptions were not indicative of ordinary commercial trading. This point was neither put to Aria's witnesses nor pleaded.

(3) It was not put to Mr Taheri in cross-examination that describing CPUs as "OEM" was imprecise. The FTT did not give adequate reasons for preferring Dr Findlay's evidence (that the term "OEM" was imprecise) to that of Mr Taheri. In particular, the FTT did not refer to the fact that, in cross-examination, a document was put to Dr Findlay which, in Mr Firth's submission, indicated that Intel agreed with Mr Taheri on the issue and, that Dr Findlay ultimately accepted that the designation "OEM" referred to "tray" processors.

(4) In any event, the question was not what Dr Findlay thought the description of the products meant, but whether it was adequate for Aria's purpose. Even if Aria had used a description of the goods that differed from that used by others within the industry, that could not sustain a conclusion that Aria "was not concerned about the documentation". Therefore, it followed that, at [357] of the Judgment, the FTT had ignored relevant evidence and had reached an irrational conclusion. Having done so, in determining that the description of goods used in contemporaneous documents pointed in favour of an inference that Aria knew its transactions were connected with fraud, the FTT had taken into account irrelevant considerations.

The FTT's findings at [347] relating to Aria's turnover

90. The FTT was clearly aware that Aria considered its brokerage business to be seasonal: see at [184]. In any event, the fallacy in Mr Firth's contention that it was not

open to the FTT on the evidence to find that there was a "sudden increase" in turnover is demonstrated by a graph produced in Mr Taheri's witness statement: this showed clearly that turnover in 07/06 increased sharply, not just in comparison with the previous VAT period but in comparison with all of Aria's VAT periods since 10/03.

91. Mr Taheri had given unchallenged evidence to the effect that much could go wrong when putting together brokerage deals: for example, suppliers or customers could pull out of the deal or customers could fail to pay. The FTT did not expressly refer to this evidence, but it was not obliged to refer to all Aria's evidence as otherwise its decision would have been unmanageably long. However, at [183] - [185], the FTT referred to Mr Taheri's evidence that the brokerage side of the business did not require extensive human resources. Only three individuals spent any time on brokerage deals and, as noted at para 121 below, none of those individuals claimed to spend a large amount of their working time on them. At [180], the FTT had referred to Mr Bailey's evidence that half of Aria's turnover in 07/06 came from brokerage deals and it was entitled to conclude that there was a relevant contrast between the brokerage business and the retail business that needed several hundred employees to generate the same amount of turnover in the period We consider that there was manifestly sufficient basis for the FTT reasonably to find that these brokerage deals involved relatively little work. This finding involves no error of law.

92. Although HMRC did not, in their Statement of Case make reference to Aria's increased turnover, or what they saw as Aria's "sudden success" in its brokerage business, as we noted above this was apparent from Mr Taheri's own witness statement. Further, the sudden and very significant increase in Aria's turnover resulting from the 11 disputed transactions was specifically put to Mr Taheri in cross-examination, where he confirmed that these transactions contributed some £3.4 million to Aria's turnover of £9.9 million in period 07/06. Mr Taheri was also cross-examined about how his company was suddenly purchasing these large quantities of goods from Supreme (from whom Aria had only made much smaller purchases) and from Ashtec (from whom Aria had never previously purchased) and selling them to three customers (Mona, Mitz and Silver Pound) with whom it had had no prior contact. Moreover, it was specifically put to Mr Taheri that in all the circumstances deals 1 and 2 were "too good to be true" although he did not accept that (saying only that he "might have been pleasantly surprised" and that it was an "unusual occurrence").

93. As to profit margin, the analogy that Mr Firth seeks to draw with the profits of grey market brokers is a false one. Dr Findlay's evidence, which the FTT clearly accepted, was that Aria was not pursuing any of the "legitimate" grey market opportunities identified at [250] of the Judgment. There was, therefore, no reason to expect it would obtain the margins that operators in the legitimate grey market could obtain. Accordingly, the fact that operators in the "grey market" achieved higher margins cannot call into question the FTT's conclusion, in essence, that the disputed transactions involved Aria obtaining relatively large sums of money for relatively little effort.

94. The fact that Aria had never suggested that its ability to export goods was the reason it could carry out its brokerage business does not demonstrate that the FTT ignored Aria's evidence. The FTT was not obliged to set out the profits to which it was referring

or resolve the difference of opinion between Mr Taheri and Mr Bailey referred to at [210] of the Judgment as to whether Aria's profit margins were "consistent" or not. The FTT had found that turnover increased significantly in 07/06, that Aria received large sums of money in connection with just 11 transactions that took place with customers it did not really know and with suppliers who were trading in very much larger volumes than they had previously. In our view, that can fairly be described as involving both the receipt of profit over a short period and "sudden success".

95. Altogether we think the submissions under this head are yet another example of failing to see the wood for the trees and to read the Judgment as a whole. The FTT was fully entitled to find on the evidence that the disputed transactions, objectively viewed, were "too good to be true" and that a reasonable businessman would have sought to understand how that could be achieved. Looking at all the deals together and the explanation being offered, the FTT was entitled to reach the conclusions it expressed at [347].

The FTT's findings at [349] relating to negotiations

96. We do not consider that HMRC failed adequately to put their case such that the FTT was not entitled to rely on the lack of negotiations prior to these contracts. At paragraphs 40.5, 40.9 and 40.10 of their Statement of Case, HMRC made it clear that they regarded the fact that Aria was able to buy and sell large quantities of goods on a "back-to-back" basis without formal written contracts as indicators that Aria was involved in a contrived trade. Aria could have been in no doubt that HMRC were arguing that it knew or should have known it was party to contrived transactions, rather than genuine commercial trading. Indeed, it is significant that Aria sought as a means of rebutting this contention to put in evidence, in the form of Mr Taheri's notes, that there were substantive negotiations before these transactions were concluded. HMRC put to Mr Taheri an assertion that these notes could not be relied be relied on as they did not accurately record what had happened. Thus, we think it is clear that the question of how the deals were concluded was fairly in play, and Aria was well aware of the issue.

97. The FTT devoted 18 paragraphs of the Judgment to discussion of the notes (see [358]-[366]), in which it expressly held that Mr Taheri's explanation for failing to mention the notes earlier was untruthful, and that the evidence as to the circumstances in which the notes came to light was "vague and varying." In consequence, there was no reliable evidence of any pre-contract negotiations. It might perhaps have been preferable if the Judgment had referred in [349] to the fact that Mr Taheri had produced notes which sought to describe negotiations but that they could not be relied on, with a cross-reference to the later discussion of that evidence. But reading the Judgment as a whole, the view the FTT reached about pre-contract negotiations and its reasons for doing so are sufficiently clear.

98. In paragraph [349], the FTT is not simply commenting on the detail of the procedure by which Aria's sales quotes became purchase invoices, or its procedure for dealing with faulty CPUs. The FTT's core finding, which is clear from reading paragraph [349] as a whole, is that the way in which Aria carried out the 11 disputed transactions was uncommercial and that this pointed in favour of an inference that Aria knew those

evidence pointed against the conclusion that Aria's brokerage business formed part of the legitimate "grey market" in CPUs.

The FTT's findings at [350] and [351] relating to Aria's knowledge of the goods and the description of goods in contractual documents

103.We do not accept that there was any obscurity about what the FTT meant in referring to the description of the goods in the documents. As [357] makes clear, this was based on Dr Findlay's evidence, and the FTT summarised, and indeed quoted from, Dr Findlay's evidence in this regard earlier in the Judgment: see at [259]-[260]. Anyone reading the Judgment as a whole would be in no doubt as to the criticisms of the description to which the FTT was here referring. It is of course correct that Aria challenged Dr Findlay's evidence as to the ambiguity in the description "OEM" in the contractual documents, and that Mr Firth put to him a document from Intel which suggested that Intel thought "OEM" and "tray" CPUs were the same thing. However, having read the transcript of Dr Findlay's cross-examination on this point, we do not see that Dr Findlay ultimately came to accept this proposition. On the contrary, as we understand his evidence, Dr Findlay said that the Intel document divided CPUs into two categories: "boxed" CPUs (which were sold with fans to retail purchasers) and "tray" CPUs (which were sold wholesale to system manufacturers). Dr Findlay then explained that there was a third category of CPUs which were sold wholesale to "mid-market assemblers" in boxes that did not contain fans. That third category of CPU was not a "tray" CPU but, since it was sold wholesale by OEMs could still be described as "OEM". As we understand it, this was why, notwithstanding the Intel document, Dr Findlay maintained that "tray" CPUs and "OEM" CPUs were not simply synonyms for each other. It was of course for the FTT to assess that evidence and decide what weight to place upon it (and we note that Aria's expert, Dr Billing, did not address this point), and we reject the suggestion that the FTT misunderstood the evidence.

104.As for the assertion that this was not put to Aria's witnesses or pleaded, the question is whether there was any unfairness to Aria. In our view, there clearly was not. It is manifest from HMRC's pleaded case that they contended that the disputed transactions were not part of a legitimate "grey market". Dr Findlay's written report expanded on this and set out in detail (at para 5.10) the features which he considered were the "minimum requirements" in order to identify a CPU, including whether it was in box or tray. That report is dated 12 October 2011, some three years before the hearing in the FTT. Aria would therefore have been well aware of this point, and indeed obviously obtained the Intel document so as to challenge Dr Findlay. Nonetheless, Aria did not address the point in its own written evidence in chief (Mr Taheri's consolidated statement is dated April 2014). Moreover, when Mr Taheri gave oral evidence, he was expressly given an opportunity to comment on the point raised by Dr Findlay about "OEM" and boxed CPUs.

105.Having decided that Dr Findlay was correct and that the term "OEM" was imprecise, the FTT needed to decide what inference to draw. Mr Firth's complaint, referred to at para 89(4) above, is effectively that the FTT should have drawn a neutral inference (that the description was good enough for Aria's purposes, even if it was imprecise) over the negative inference (that Aria's use of an imprecise term suggested

that it knew it did not matter how it described the goods in contractual documentation). It was a matter for the FTT to evaluate what inference to draw and there is no basis for us to interfere with its conclusion.

106. Turning to Aria's knowledge of the products it was selling, we agree that Mr Taheri had not accepted that he had little knowledge about the CPUs that Aria sold in deals 4 to 11[9]. To that extent, the statement in [351] that Aria "knew little or nothing about the goods it was selling" is erroneous. It should have been qualified as referring only to the "Gigapro 7074", the subject of deals 1-2. Although that amounts to an error , we do not regard it as material. Moreover, as regards the Gigapro 7074, the FTT rejected the evidence Mr McFadden gave as untrue. That was a serious finding. Despite the numerous other challenges to factual findings which Aria advanced in this appeal, this was not challenged.

Inspection reports (Point 25 of Mr Firth's skeleton argument)

107. Inspection reports were an issue in the appeal in two distinct, but similar, respects:

> (1) Aria produced written reports of inspections undertaken by Imex Logistics addressed to it in relation to deals 4 to 11. On deals 1 and 2, Aria could not produce a copy of an inspection report addressed to it. However, it did have copies of reports prepared by Alpha International Freight Forwarders Ltd ("Alpha") that were addressed to 4A Developments Ltd. At [240] and [241], the FTT recorded the explanation Aria's witnesses gave: Mr Taheri speculated that Aria must have relied on a verbal inspection report. Mr McFadden said that he had either received a written report or had relied on a verbal report.
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> (2) At [226], the FTT referred to evidence that for some of the disputed transactions goods were released before receipt of the written inspection report. Mr McFadden's evidence was that Aria must, in deciding to release goods, have relied on a verbal inspection report.

108. At [351], the FTT rejected Mr Taheri's evidence as mere speculation and Mr McFadden's evidence as unconvincing:

> "351. As regards the inspection reports we found that the content provided scant detail as to the goods. This was striking given that the Appellant on Mr Taheri's admission knew little or nothing about the goods in which it was trading, it never took physical possession of the goods and the inspections were purportedly carried out by freight forwarders upon which the Appellant conducted no due diligence. We found the evidence of Mr McFadden that verbal reports would have been obtained prior to a written report unconvincing and we found the

[9] At paragraph 168 of his witness statement, Mr Taheri referred to other products as "popular products at the time" and was apparently not cross-examined on that point. However, in paragraph 169 of his witness statement, Mr Taheri acknowledged that he had not heard of the Gigapro 7074 until it was offered for sale to Aria by Supreme.

113. We also think that Mr Firth has overstated the significance of the FTT's finding that Aria performed no due diligence on freight forwarders. The FTT was not saying that this failure on its own indicated knowledge of connection to fraud. Rather, the FTT's conclusion was that it was surprising that Aria was prepared to trust freight forwarders, whom it did not know, to tell it whether valuable goods that it had purchased were in order or not. Therefore, the point here related to the commerciality or otherwise of these transactions.

Significance of "back to back trading" (Point 6 of Mr Firth's skeleton argument)

114. At [339], the FTT drew the following inference from the "back to back" nature of Aria's brokerage business:

> "The transactions took place on a back to back basis and there was no documentary evidence to show that the Appellant was ever left with unsold stock. We did not conclude from this feature of trading alone that the Appellant knew or should have known that the transactions were contrived. However it was a factor that added to the larger picture of the Appellant's trading as a whole, bearing in mind the questions posed by Moses LJ in *Mobilx* at [72]:
>
> > "(1) Why was…a relatively small company with comparatively little history of dealing in mobile phones, approached with offers to buy and sell very substantial quantities of such phones?
> >
> > (2) How likely in ordinary commercial circumstances would it be for a company in [the Appellant's] position to be requested to supply large quantities of particular types of mobile phone and to be able to find without difficulty a supplier able to provide exactly that type and quantity of phone?
> >
> > (3) Was [the supplier] already making supplies direct to other EC countries? If so, he could have asked why [the supplier] was not making supplies direct, rather than selling to UK traders who in turn would sell to such other countries.
> >
> > (4) Why are various people encouraging [the Appellant] to become involved in these transactions? What benefit might they be deriving by persuading [the Appellant] to do so? Why should they be inviting [the Appellant] to join in when they could do so instead and take the profit for themselves?"

115. Mr Firth criticised this aspect of the FTT's reasoning on the following grounds:

> (1) There was no dispute that Aria engaged in "back to back trading": it purchased goods from a vendor and sold those exact goods, in identical quantities, to a purchaser. Aria was not saying that there was documentary evidence demonstrating that it could have been left with unsold stock and, by suggesting otherwise in the quoted passage, the FTT demonstrated that it had misunderstood Aria's case.

(2) Dr Findlay's expert evidence demonstrated that traders in the legitimate grey market engaged in "back to back" trading and this business model was not, therefore, in any way suspicious.

(3) The four questions that the FTT quotes from the Court of Appeal's decision in *Mobilx* were not relevant to the evaluation of the significance of "back to back trading".

(4) In short, therefore, the fact that Aria had no unsold stock was an entirely neutral factor that was nothing more than a consequence of its chosen business model. The FTT had taken into account an irrelevant consideration in determining that the absence of unsold stock was an indication that Aria knew its transactions were connected with fraudulent evasion of VAT.

(5) HMRC did not put to Aria's witnesses in cross-examination the proposition that back to back trading was relevant to Aria's knowledge or means of knowledge of fraud.

116.Mr Firth's arguments involve a significant misreading of [339] of the Judgment. It is of course correct that the absence of unsold stock is a necessary consequence of carrying on a business that involves back to back trading. However, the FTT is not suggesting that a business that trades on a "back to back" basis should be expected to have unsold stock, or that Aria was arguing that there was any possibility of unsold stock. Rather, reading the paragraph as a whole, with the reference to the four *Mobilx* questions, the FTT is making a point about Aria's ability to execute these very substantial transactions on a "back to back" basis in the first place and the circumstances in which these transactions took place. The FTT's point, therefore, relates to the commerciality of the disputed transactions and the similar concerns articulated at [349]. Once that is appreciated, the references to the four questions posed by Moses LJ in *Mobilx* become clearer. At [339], the FTT is noting that Aria was able, in each of the disputed transactions, to sell the precise quantity of goods that it bought in short order to a single purchaser. At [137], the FTT had noted that Aria's suppliers in the disputed transactions were trading in greater volume than before and that it did not know its customers. Moreover, Aria entered into the disputed transactions as part of lengthy deal chains of the kind Dr Findlay had said in his evidence (see [251] of the Judgment) he would not expect to see if Aria was dealing in the legitimate "grey market"[10]. Those were the sort of issues to which the Court of Appeal was referring in at least the first three of its questions. As for the submission that Aria had, in effect, not been given a fair opportunity to respond to this point, that ignores the fact that HMRC had pleaded in their Statement of Case, at paras 34-35, that Aria's ability to enter into trades on a "back to back" basis in the context of long deal chains indicated it was engaged in "contrived" trading.

.

[10] Therefore, Mr Firth's argument that "back to back" trading could feature in legitimate grey market transactions was beside the point given that the FTT had evidently accepted Dr Findlay's evidence that the disputed transactions were not typical legitimate grey market transactions.

117.The FTT could, perhaps, have explained in more detail how the four questions set out in *Mobilx* related to the specifics of Aria's disputed transactions. For example, it could usefully have noted that Aria had a track record of dealing in CPUs and was not the kind of "start-up" operation that Moses LJ was referring to in the first of his questions but that the size of the disputed transactions over a very short period was different from its recent trading history. Similarly, it could usefully have explained in more detail how, if at all, it thought the fourth of Moses LJ's questions arises. However, that minor criticism cannot invalidate the FTT's reasoning at [339]. Earlier in the Judgment, the FTT made it clear that it realised that Aria was an established business and not a "start-up" operation that generated significant turnover in just a few months after starting trading: see e.g. at [59]-[60], [184]-[185]

118.Overall, therefore, we consider that the FTT was entitled to have regard to the way in which Aria's "back to back" trading took place in assessing the commerciality or otherwise of the disputed transactions. As the FTT there stated, it was "a factor" to be considered in evaluating "the larger picture".

The FTT's findings that there were "contradictions" in Aria's case (points 1, 2 and 3 of Mr Firth's skeleton argument)

119. At [336], the FTT referred to what it regarded as "contradictions" in Aria's case:

> "336. We also found the Appellant's case was contradictory in parts. By way of example, it was suggested that the deals did not happen "overnight" and that groundwork had been put in to effect the deals. Aside from the fact that we saw no evidence to support this assertion and the oral evidence on the topic was vague, we noted that the witnesses all claimed that the broker deals formed little part of their daily roles. The evidence that Mr Taheri oversaw all of the deals was at odds with his own evidence from which we formed the conclusion that he had little or no involvement in the practical side of carrying out the deals. When we viewed this against the evidence of Mr Harasiwka and Mr McFadden who also gave the impression of knowing little about the detail of deals whilst simultaneously claiming responsibility for them we formed the view that the transactions were carried out with minimal effort and little work involved."

120. Mr Firth criticised the FTT's findings in the following respects:

> (1) At [367] of the Judgment, the FTT had found that Mr Taheri had the "final say" on transactions and "authorised the deals" but at [336], the FTT was saying something different. Therefore, there was a contradiction in the FTT's analysis, not in the Appellant's case. Similarly, while at [336], the FTT had suggested that Mr McFadden and Mr Taheri had little knowledge of the deals, at [367], the FTT concluded that they had a sufficient knowledge and awareness of the transactions to know that they were connected with fraud.
>
> (2) In addition, the FTT's reasoning set out a flawed decision-making process. When the FTT said that there were "contradictions" in Aria's case,

> it was engaging in a wholesale rejection of all of Aria's evidence. It should have given better reasons rather than relying on allegations of "contradiction".

121.The paragraph could, perhaps, have been expressed more clearly, but read in the context of the Judgment as a whole, it is reasonably clear what the FTT is saying. Paragraph [336] is not primarily concerned with the extent of Mr Taheri's involvement in the day to day running of the business. Rather the contradiction that the FTT identified was that, on one hand, Aria was asserting that brokerage deals took time and effort to put together but, on the other hand, none of Aria's witnesses claimed to spend much time on the brokerage business. It is entirely misleading to describe this paragraph as a "wholesale rejection" of Aria's witness evidence. It says that Aria's evidence was "contradictory *in parts*" and this observation is expressly made in addition to the finding at [335] that Aria's oral evidence was unconvincing because it was vague and speculative. It was for the FTT to weigh the significance of the point made in [336] and its finding involves no error of law.

Release of goods without payment (point 26 of Mr Firth's skeleton argument)

122.At [226] to [228], the FTT referred to evidence that, in two deals, Aria had released goods that it was selling without receiving payment. It was common ground on this appeal that the transactions effected were deals 10 and 12, not deals 5 and 12 as the FTT stated, and that insofar as the FTT was suggesting that no payment had been made that was incorrect as, prior to the release of the goods, Aria's customer had paid half the purchase price that was due. At [352] the FTT drew the following conclusions from this episode:

> "352. We considered the evidence regarding the deals in which goods were released prior to full payment being received by the Appellant; we found the oral evidence of Mr Taheri, Mr McFadden and Mr Harasiwka was unsatisfactory. Mr Taheri claimed not to have been aware of the fact whilst Mr McFadden stated he relied on Mr Harasiwka and his team to be told when payment was made yet Mr Harasiwka could provide no explanation. In deals of such high value where the Appellant's main comfort was said to come from the lack of risk by receiving payment prior to releasing the goods we concluded that the only explanation for these events was that the inadequacy of the inspection documents, time of payment and release of the goods were irrelevant as the Appellant was fully aware that the deals were contrived."

123.Mr Firth criticised the FTT's findings on the following broad grounds:

> (1) Aria's witnesses had, in cross-examination, put forward an innocent explanation of why goods had inadvertently been released before full payment had been made. The FTT was wrong to reject that explanation.
>
> (2) It could not be correct that the "only explanation" for early release of the goods was that Aria knew that its transactions were connected with fraud. By engaging in such hyperbole, the FTT demonstrated that it had

closed its mind to the innocent explanation for the oversight that Aria had put forward.

124.Both Mr McFadden and Mr Harasiwka were cross-examined on this incident. Mr McFadden said that he had not been aware of the oversight at the time. In summary, his evidence was that he did not have access to Aria's banking information and so relied on Mr Harasiwka and his team to tell him whether payment had been received. Therefore, he must have received such a confirmation before the goods were released. Mr Harasiwka accepted in that he had no ready explanation for the early release of the goods but noted that it "may have been an error". He thought that it was possible that someone in his team had misread the account and thought full payment had been made when it had not.

125.The question that the FTT had to address was not simply why goods were released prematurely. The witness evidence was clear that a mistake had been made and that Aria's normal practice would be to wait until full payment was received before releasing goods. Rather, the FTT needed to consider what, if any, inferences should be drawn from the mistake. One possible conclusion was that it was, as Mr Firth neatly submitted, like a routine mistake made while driving a car that happens simply because of oversight and is of no consequence unless a collision occurs as a result. However, another possible conclusion was that the mistake indicated that Aria knew that, since its transactions were part of contrived chains linked to fraudulent evasion of VAT, the ordinary commercial imperative to safeguard payment was not present. There was clearly evidence before the FTT to justify the adverse evidence which the FTT drew. Having seen all the evidence that Aria was putting forward, it was for the FTT to decide whether it should draw the adverse inference or not.

126.The submission about the FTT's finding that the "only explanation" was a knowledge of connection to fraud is very similar to that Mr Firth made regarding the FTT's reasoning in respect of due diligence towards customers: see para 59(6) above. We accept that the word "only" could suggest that no other explanation was possible, which is self-evidently incorrect. But we think that, in context, the FTT meant that having found the explanation offered by the three relevant witnesses from Aria to be "unsatisfactory", the only satisfactory explanation was that Aria knew the chains were contrived. Accordingly, we do not discern any error of law in the FTT's approach.

The absence of "set procedures" for brokerage transactions (point 4 of Mr Firth's skeleton argument)

127.At [335] the FTT commented on the absence of set procedures in Aria's brokerage business:

> "335. The oral evidence on behalf of the Appellant was not convincing. The evidence of each of the witnesses was vague and littered with what they "would have done" or "would have been told" yet the clear impression we formed from each of the witnesses, and on Mr Taheri's own admission, was that there were no set procedures in place for the brokerage deals:

> "…if we were doing [the deals] often, day in day out, I suppose there would have been procedures in place…"
>
> (transcript 15 August 2014 page 35).
>
> In those circumstances we found the witnesses' references to what would have been done was not supported by any evidence of usual practice and was wholly unconvincing."

128. Mr Firth criticised this paragraph in the following respects:

> (1) Mr Taheri made no "admission" that there were no set procedures in place for brokerage deals. He had accepted, in cross-examination, that there were no procedures for doing due diligence on freight forwarders, but the FTT was wrong to extrapolate from this and draw a conclusion that there were no procedures at all. Moreover, all witnesses had referred in their evidence to procedures that Aria followed (for example, dealing only with trusted suppliers, not releasing goods without payment and seeking validation of VAT registration details with HMRC's Redhill office).
>
> (2) By overplaying the significance of the evidence, the FTT had failed to perform a balanced assessment of it and had therefore made an error of law of the kind referred to in *HMRC v Glyn* [2015] UKUT 551.

129. Mr Firth is correct in saying that Mr Taheri did not admit that there were no procedures at all in place in Aria's brokerage business. Indeed, we find it difficult to conceive how any business could function without having at least some procedures. However, the FTT's finding was that Aria had no *set* procedures in place. This is not a mere verbal quibble. The clear conclusion that the FTT reached is that, despite claiming that it had fixed procedures, Aria frequently departed from those procedures. There was ample evidence available to support that conclusion. For example:

> (1) As noted at [226] to [228] of the Judgment, Aria's stated procedure was not to release goods until its customer had paid for them. Mr Taheri had described it as a "deal-breaker" if its customer was not prepared to pay cash in advance: see at [198]. Nevertheless, in two out of the 11 disputed transactions, Aria released goods without having received full payment.
>
> (2) Aria said that it required inspection reports before it would pay its suppliers. However, the FTT referred to an instance where goods were released before an inspection report was received: see at [226]. Moreover, the FTT found that, in two out of the 11 transactions, the FTT had no inspection report addressed to it: see at [232].
>
> (3) Aria had put in evidence a pro-forma checklist that sought to capture details of suppliers and customers. However, there were no completed checklists relating to any of the disputed transactions: see at [139].

130. Therefore, the FTT did not, as Mr Firth submitted, "overplay" the evidence and reach a flawed conclusion that Mr Taheri accepted there were no procedures at all. It was a matter for the FTT to decide what inferences it would draw from the apparent fluidity in Aria's procedures. There is no basis, in an appeal on a point of law, to substitute a different inference from that made on the evidence by the FTT.

The lack of rigour in Aria's approach to contractual documentation (points 28 and 34 of Mr Firth's skeleton argument)

131. At [183] and [186] and [244] to [247] of the Judgment, the FTT referred to evidence which suggested that Aria had not paid attention to what the terms of its contracts might be on the important issues of potential liability and transfer of title.

132. Before the FTT, at least part of Aria's case was that no particular inference could be drawn from any such lack of thought as many businesses fail to formulate their terms and conditions with the precision that a lawyer might hope for. The FTT expressed its conclusion at [355]:

> "355. We considered the submissions of Mr Firth as regards legal title and the intention between traders. However, the issue for us to determine is what was known to the Appellant at the time, not the various legal possibilities. It was quite clear from the evidence that the holding and passing of title was not a matter to which the Appellant had given any thought. Building on the other evidence before us which indicated the lack of concern on the part of Aria as to the commercial risks in its business, we found that this lack of thought on the part of Aria as to the position of legal title was another issue which bore on the inference of knowledge that the deals were not genuine business transactions but were part of a fraudulent scheme."

At [368], the FTT referred to the "casual way the business was conducted without contractual terms" as part of its conclusion that, Aria "should have known" that its transactions were connected with fraud.

133. Mr Firth criticised the FTT's reasoning on the following grounds:

> (1) The FTT had misunderstood his submissions. He was not asking the FTT to consider various "legal possibilities" as to when title passed; he was making the simple point that lots of businesses show a lack of care in their standard form contractual documentation with the result that no particular adverse inference could be drawn even if Aria had also shown a lack of care.
>
> (2) In any event, there was evidence before the FTT that legal title would not pass until payment was made (which the FTT failed to address).
>
> (3) The FTT had not seen any evidence as to when title might pass in "legitimate" grey-market transactions. Therefore, it was not open to the FTT to infer that Aria's approach was unusual.
>
> (4) It was irrational for the FTT to conclude that Aria had "no contractual terms". In any event, the way that Aria chose how to enter into contracts cannot support any inference of knowledge or means of knowledge.
>
> (5) It followed, therefore, that the FTT's conclusion that Aria's approach to the passing of legal title supported an inference that it knew its transactions were connected to fraud was inadequately reasoned and unsupported by evidence.

134.Mr Firth is of course correct to say that Aria had *some* contractual terms, even if those were not reduced to writing. However, this criticism ignores the core of the FTT's finding which was that Aria's contractual terms were uncertain (as they were not set out comprehensively in writing) and did not deal adequately with the passing of legal title. We reject Mr Firth's assertion that such issues were irrelevant to Aria's knowledge or means of knowledge. Conceptually, Aria could have adopted lax or uncertain contractual terms for the disputed transactions because it realised many transactions it entered into in its brokerage business would be connected with tax fraud so that Aria did not need the kind of certainty on contractual issues that would normally be important. That was by no means the only possible inference. Indeed, since Aria had carried on a brokerage business for some time and followed a similar approach to its terms and conditions in its business generally, the inference might not be strong. However, the FTT was entitled to consider whether it should make such an inference

135.We do not consider that the FTT failed to understand or consider Aria's submissions. It was also reasonable for the FTT to take into account the fact that the standard-form documentation of Aria and its suppliers posed something of a legal conundrum. If Aria could not get legal title to goods it was purchasing until it paid its supplier, but was proposing to use money received from its customer on the "back to back" deal to pay its supplier, it might not have legal title to the goods at the point at which it was subject to an unconditional contract to sell them.

136.Our own view is that there may have been force in Mr Firth's submission that the conundrum referred to at para 135 might be of interest to lawyers but would be of little interest to businessmen. However, the FTT was not being asked to make a determination as to how business persons generally might view the legal question of when title passes. It had to decide what, if any, inference should be drawn from the way in which Aria chose to enter into these high value contracts for purchase of CPUs. Aria traded on a "back to back" basis, which made the question of when legal title passed more relevant than it would be to many businesses. Aria did not know its customers in the disputed transactions but was entering into high value contracts with them. In the light of all the evidence, it was open to the FTT to conclude that Aria realised that it did not need terms and conditions dealing with the passing of legal title because such terms and conditions would never be tested since it was engaged in contrived transactions connected with fraudulent evasion of VAT. Had that been the only basis on which the FTT concluded that Aria knew of connection to fraud, we doubt whether it would have been supportable. However, viewed in conjunction with other evidence before the FTT, and given the FTT's conclusions on that other evidence, we consider that the FTT was entitled to draw the adverse inference it drew.

The significance of Aria's possession of a letter of introduction from Mitz addressed to Sanche (Point 14 of Mr Firth's skeleton argument)

137.At [162] - [163], the FTT noted that the among documents that HMRC said that they had obtained from Aria was a letter of introduction sent by Mitz to Sanche Technologies Ltd ("Sanche"). The question that arose was how, if at all, that document came into Aria's possession. In cross-examination of Mr Bailey, it was suggested that in fact the document had never come into Aria's possession as Mr Bailey had

inadvertently caused documents received from someone else to be added to Aria's case file. Mr Bailey denied that and, at [346], the FTT made the following findings:

> "346. As regards the letter from Mitz addressed to Sanche which contained the fax number for MVS Digital we found the Appellant's evidence contradictory and wholly unconvincing. An email from Mr Harasiwka to Mr Bailey in 2007 explained that: "the bundle of papers provided to you were per those received by us and clearly Mitz transmitted a letter addressed to Sanche Technologies Limited to us in error." Mr Taheri's first witness statement also explained this as an administrative error. In evidence the Appellant sought to argue that the document may not have been in its possession and that one possible explanation was that HMRC had somehow mixed documents from another trader's file on the EF with those of the Appellant. We did not accept the Appellant's assertion and we were satisfied that the document was one in the Appellant's possession and which had been given to Mr Bailey by Mr Harasiwka. Having reached that conclusion and there being no explanation, credible or otherwise before us as to why the Appellant would have this document in its possession we concluded that there was no legitimate reason for the letter being in the Appellant's possession other than that the transactions were contrived."

138. Mr Firth criticised that conclusion on the following grounds:

> (1) Aria had, in its witness evidence, put forward an explanation – namely that Mitz had simply made a mistake and sent a letter meant for Sanche to Aria. Therefore, it was incorrect for the FTT to say that no explanation "credible or otherwise" had been put forward.
>
> (2) It was irrational for the FTT to assume that Aria could put forward an explanation of how Mitz came to mis-address its letter of introduction. Aria was the passive recipient of that letter, so any explanation had to come from Mitz rather than Aria.
>
> (3) Had the FTT turned its mind to the fact that Aria had simply received a document intended for someone else, it should have realised that Aria's possession of the document did not raise any inference that it knew its transactions were connected with fraud. There is no reason to think that administrative errors are more likely in transactions where everyone knows of connection to fraud than they are in ordinary everyday life where communications sometimes go astray.

139. We agree with Mr Firth that, in this respect, the FTT has not adequately explained its reasoning. Aria had advanced an explanation, namely a simple mistake, so the FTT was wrong to say that there was "no explanation, credible or otherwise". We can infer that the FTT thought it relevant that the fax header contained details of the fax number of MVS Digital. However, the FTT has not explained why Aria's possession of a mis-addressed fax indicated that it knew the transactions (or even just deals 1-2 involving Mitz) were connected with fraudulent evasion of VAT.

The significance of Deal 3 (Point 27 of Mr Firth's skeleton argument)

140. One of Aria's transactions in the 07/06 VAT period (deal 3) was not traced back to a fraudulent evasion of VAT. We have addressed above Aria's argument that because it performed the same level of due diligence in relation to deal 3 as it performed on the disputed transactions, that demonstrated that the level of due diligence on the disputed transactions was irrelevant to the question whether it knew, or should have known, that those transactions were connected with fraud: see para 73 above. Here, we address Aria's other criticisms about the conclusions that the FTT drew from deal 3.

141. At [354], the FTT said:

> "354. We noted the Appellant's submissions regarding deal 3 which was verified and repaid. In our view the circumstances of this deal are distinguishable from the remainder in which input tax was denied; the supplier to the Appellant was a longstanding trading partner and the goods were Digimate branded monitors which were manufactured by and purchased from the associated company Digimate Hong Kong. We took the view that the circumstances of this deal did not assist us in determining the issues in this appeal."

142. In addition to the point already discussed, Mr Firth made the following criticisms:

> (1) The FTT's reasoning was contradictory. It had at [340] rejected Aria's argument that, since it had a long-standing relationship with Ashtec and Supreme, it had a well-founded trust in the integrity and provenance of goods that they were selling. Therefore, the fact that Aria had a long-standing relationship with Digimate Ltd could not logically differentiate deal 3 from the disputed transactions.
>
> (2) The FTT was wrong to regard Digimate branded monitors as being less at risk of MTIC fraud than the CPUs in which Aria was dealing. Mr Bailey had accepted in cross-examination that even branded goods being sold by a company affiliated with the manufacturer could be the subject of contra-trading.
>
> (3) Overall, therefore, the FTT had failed to take into account the relevant considerations arising out of deal 3. Had it taken into account those considerations, it would have realised that Aria's approach to deal 3, which was untainted by any connection to fraud, was no different from its approach to the disputed transactions and that, accordingly, Aria neither knew, nor should have known, that the disputed transactions were connected with fraud.

143. We regard these submissions as wholly misconceived. First, the FTT clearly considered deal 3, and the argument that Aria advanced based upon it, and concluded that it did not assist because its circumstances were materially different. Since in deal 3 Aria was buying goods from an existing and long-term supplier, which was an affiliate of the manufacturer, Aria necessarily had much greater awareness of the goods' provenance than it did when buying from suppliers who were brokers and who were selling to Aria CPUs in far greater quantities than they had previously (and in the case of Ashtec, from whom Aria had not purchased for several years). Therefore, it was

manifestly open to the FTT to conclude that the trust that Aria had in the provenance of the goods in deal 3 was greater than the trust it could reasonably have had in its suppliers in the disputed transactions.

144.Secondly, the FTT did not find that Digimate branded monitors were less at risk of MTIC fraud. That is not part of the FTT's reasoning at [354], and we note that in its decision refusing permission to appeal, the FTT made clear that it had not considered that the goods in deal 3 could not be used in an MTIC fraud: see at [55]. Nor did Mr Bailey accept in cross-examination that a purchase of branded monitors from Digimate, a company affiliated to the monitors' manufacturer, was at just as much risk of being connected to MTIC fraud as a purchase of CPUs in brokerage transactions. On the contrary, Mr Bailey simply made the point that deal 3 could not be traced directly back to a tax loss; and that in view of the very different characteristics of deal 3 he was satisfied that it was a bona fide deal and that it was unnecessary to pursue inquires to see if the transactions could involve a contra-trader:

Treatment of Dr Findlay's evidence (Point 29 of Mr Firth's skeleton argument)

145.At [317], the FTT referred to the criticisms which Aria had made of Dr Findlay's evidence (though it did not set them out). At [334], the FTT observed that it did not doubt the credibility of Dr Findlay's evidence but found it of limited assistance. At [357], the FTT rejected the assertion that Dr Findlay's evidence was misleading.

146.In his skeleton argument, Mr Firth submitted that the FTT was wrong to dismiss Aria's criticisms of Dr Findlay's evidence without giving an explanation since "the evidence clearly showed Dr Findlay's evidence was misleading". However, in his written and oral submissions to this Tribunal, Mr Firth did not seek to explain why Dr Findlay's evidence was misleading or incorrect beyond referring us to his written closing submissions to the FTT. There, he had made several criticisms of Dr Findlay's expert evidence, describing it as including "serious errors" and "some seriously misleading comments". The points raised were highly detailed.

147.In view of the way this submission was advanced at the hearing of this appeal, it is neither practicable nor appropriate for us to consider whether there was any substance in Aria's criticisms of Dr Findlay's evidence. This was not a case where the FTT was being asked to choose between the evidence of two competing experts, in which circumstances a tribunal would be expected to set out its reasons. We will only say that here, where there was a great deal of evidence and the FTT expressly said that it derived "limited assistance" from the evidence of Dr Findlay, we consider that the FTT's approach was acceptable and that it was not erroneous in law for the FTT to express an overall view of Dr Findlay's reliability and truthfulness without explaining why it rejected the various detailed points on which Aria had alleged Dr Findlay was misleading.

GENERAL CRITICISMS

148.In addition to the 36 specific criticisms directed at particular paragraphs in the Judgment, Mr Firth also advanced what he described as “general challenges” to the FTT's approach.

Lack of expert evidence

149.The FTT in a number of passages contrasted the conduct of Aria with that of "a reasonable businessman seeking to protect himself from fraud". For example, it did so as regards the lack of checks or investigation by Aria of the integrity of the impugned deals (Judgment, para [344]); and as regards Aria's failure to make any record of the details of the purchases and sales involved.

150.Mr Firth argued that the FTT would have no knowledge of how a typical or reasonable IT component trader would conduct itself, and so was not entitled to draw inferences on that basis concerning Aria's conduct, without expert evidence. In support of that submission, he relied on authorities concerning professional negligence and, in the field of VAT, on the decision of the First-tier Tribunal (Tax Chamber) in *Perenco Holdings v HMRC* [2015] UKFTT 65 (TC).

151.We reject Aria's submission as misconceived. Aria accepted that it was aware of the prevalence of MTIC fraud in the field of computer components and these 11 deals were of significant size involving sellers with whom Aria had not dealt with at anything approaching that scale and purchasers with whom Aria had not previously dealt with at all. The observations made by the FTT regarding the conduct of a reasonable dealer in such circumstances are a far cry from questions of the standard of care in the exercise of professional skill arising in a professional negligence claim. As for *Perenco*, that was a so-called 'Fleming claim' for unrecovered input tax as regards payments for professional services in connection with various share issues made by the company over 20 years previously. The question at which the FTT's observations were directed was a specialist issue involving accountancy evidence.

152.In *CCA* [2015] UKUT 513 (TT), a case on which Aria relied (albeit for a different purpose), the Upper Tribunal (Morgan J and Judge Herrington) quoted at [115] from the judgment of another Upper Tribunal (Asplin J as she then was and Judge Walters) in *S&I Electrical v HMRC* [2015] UKUT 0162 (TCC)at [65]:

> "It is true that the FTT was required to invest the reasonable man for these purposes with the characteristic of being a reasonable businessman with ordinary competence, but in our judgment a reasonable businessman with ordinary competence is not so egregious or specialist a variant of the anthropomorphic conception of justice that the FTT needed evidence of the normal characteristics of legitimate trade in the grey mobile phone market, or any other expert evidence, in order fairly and justly to apply the required impersonal standard."

153.The Upper Tribunal in *CCA* proceeded to hold, as one of several reasons for overturning the decision of the FTT, that the judge below had been wrong to decline in

the absence of expert evidence to form an assessment of what a reasonable trader would have inferred from the various circumstances (judgment at [118]).

154.It is not without significance that *Perenco* was the only authority in the VAT field on which Mr Firth was able to rely. The question of whether a trader took precautions "which could reasonably be required to ensure that their transactions are not connected with fraud" (the language used in *Kittel* at para 51), and if not, how far that is relevant in determining whether they knew or should have known that the transactions were connected with fraud, has arisen in a large number of MTIC cases. It forms part of the assessment of the trader's conduct, considered as a whole. If Aria's submission were correct, expert evidence of the practice of traders in the relevant field would be a common feature of these cases. However, the opposite is the case. Here, the particular aspects on which the FTT considered that Aria's conduct differed from that expected of a reasonable trader in the all the circumstances were matters of commercial common sense and, in our view, well within the tribunal's competence.

Findings on matters not put to Aria

155.It was alleged that the FTT made findings of fact that were not put to witnesses, and thus contravened "a basic requirement of natural justice." It is of course well-established that a party in effect 'accused' in an MTIC case should have a proper opportunity to answer serious allegations against it: see for example the decision of the High Court in *Mobilx v Revenue & Customs Comrs* [2009] EWHC 133 (Ch), at [68], [70][11] .

156.However, where HMRC's case as regards many of the individual factors relied on is not that each individual factor demonstrated that the taxpayer knew or should have known of the connection to fraud, but that the accumulation of factors together demonstrated that the transaction was not legitimate such that the taxpayer had this knowledge, it would be a distortion of the case to require HMRC to cross-examine on each specific factor on the basis, in effect: "You must have known from this that the transaction was fraudulent?". Thus a criticism that selected elements of HMRC's case, or the FTT's findings, were not put to the taxpayer's witnesses must be examined on a realistic basis, having regard to the nature of the case which HMRC were advancing and the conclusions reached in the Judgment. Moreover, it is frequently possible to suggest with hindsight different or fuller questions that could have been put to a witness, and in our view there is no unfairness just because a point was not put in precisely the terms in which a finding is expressed in a judgment, as long as the taxpayer had a fair opportunity to respond to the essential allegation against it which the tribunal proceeds to accept. See *Edgeskill Ltd* at [147]-[148].

157.We turn to the nine specific factors relied on in this regard in Mr Firth's skeleton argument. However, several of these repeat specific criticisms levelled at particular paragraphs of the Judgment that we have addressed above:

[11] The Court of Appeal (para 17 above) did not disturb this conclusion.

(1) that Mr Taheri had a "full understanding of MTIC fraud": [338]. We have addressed the challenge to that finding at paras 54 to 56 above. As regards fairness, Mr Taheri set out in his written witness statement what he said was the extent of his knowledge and understanding of MTIC fraud, which he said he knew was taking place in his industry: see the quotation at [130]. In cross-examination, it was put to him that he knew about carousel fraud, which he denied. It was also put to him that he had been warned by HMRC of the risk of MTIC fraud (which he accepted), and that he knew from the HMRC Notice that, to guard against fraud, he should carry out checks not only on suppliers but also on customers. We do not accept that Aria lacked a fair opportunity to respond to this point.

(2) that the deals on their face carried a significant commercial risk: [343]. Again, we have addressed the challenge to this as inconsistent with the pleaded case at paras 69 to 71 above. As we there explain, the finding was that Aria was prepared to take what looked like a significant commercial risk because it knew it would get paid and so did not regard the disputed deals as carrying the commercial risk which that would normally arise from the way the transactions were structured. Mr Taheri was clearly aware of the point that such a transaction could involve a risk for Aria if the customer cancelled the order, since he addressed that specifically in his witness statement (saying that Aria's experience was that its suppliers would then let Aria cancel in turn). Mr Taheri was cross-examined about the basis of his trust in the two particular suppliers involved in the disputed transactions. But the significant point was the assertion that here Aria was not concerned about risks because it knew it was going to get paid under these deals in any event. That was put to Mr Taheri in cross-examination, albeit in the context of due diligence (and disputed by him). Looking at the matter in the round, there was no unfairness.

(3) that Aria knew it should have done something with box numbers: [345]. We think that this misrepresents the Judgment. The point about box numbers was part of the broader point concerning due diligence: i.e., that a prudent trader involved in transactions in these goods, arising in these circumstances, would have carried out various checks to ensure that the transactions were not connected to fraud. In that context, the box numbers could sensibly have been used to check that the goods were not being "carouselled". That was indeed put to Mr Taheri: see para 79 above.

(4) and (5): the significant increase in turnover and "sudden success" in brokerage deals: [347]. See para 92 above, where we note that the sudden and significant increase in Aria's business from just these 11 transactions was put to Mr Taheri. Moreover, [347] of the Judgment has to be read as a whole. The inference which the FTT drew was derived from the increase in turnover, the sudden success in brokerage deals, the relative ease with which the deals came about, and the short period over which they were done: it is that combination of circumstances which led the FTT to find that it was all "too good to be true". That inference was put directly to Mr Taheri. He

offered an alternative explanation, which the FTT evidently did not accept, but there was no unfairness.

(6) lack of individual negotiation: [349]. We have addressed the allegation that this aspect was not fairly put at para 96 above.

(7) lack of knowledge of the goods: [351]. The criticism here is that this was not suggested to Aria as regards the goods traded in deals 4-12. That is correct. The Judgment is mistaken in suggesting that Aria did not know about the goods in those deals: see para 106 above, where we conclude that this error was not material.

(8) due diligence on freight forwarders: [351]. Again, this is to extract one aspect of a comprehensive paragraph. The FTT did not find that a lack of due diligence on freight forwarders indicated knowledge of fraud. Manifestly, in isolation, it could not and so obviously that was not put to Aria. The relevant point is the way Aria was prepared to rely on inspection by freight forwarders whom it did not know, given that many of their written reports gave scant information and in some cases Aria received those reports only after paying for the goods. It is not suggested, nor could it be, that Aria's witnesses were not cross-examined about the nature of the inspection reports and the way they relied on them.

(9) the description of the goods in the documents: [357]. We have addressed the allegation that this aspect was not fairly put at para 104 above.

158.We should add that Mr Firth also advanced in general terms a broad criticism of the Judgment for failing to take into account the effect of the passage of time on the witnesses' recollection. We have addressed that at para 74 above.

Lack of reasoning

159.Mr Firth suggested that, even though the Judgment was long, it was insufficiently reasoned. He argued that the FTT spent too much time (paragraphs [65] to [121] of the Judgment) in making findings on matters that were not in dispute, in trying to summarise evidence (at [122] to [279] of the Judgment) and in providing an inadequate summary of the parties' submissions (at [280] to [317]). It followed that, in Mr Firth's submission, only paragraphs [329] to [369] of the Judgment were devoted to "making findings of fact and grappling with the issues" and the decision was inadequately reasoned as a result.

160.We consider that general criticism fails to do justice to the decision. The FTT had been confronted with a large volume of evidence, with the parties having very different perspectives both on the relevance of that evidence and the conclusions that should be drawn from it. In those circumstances, it was perfectly sensible for the FTT first to summarise the evidence that it thought was particularly relevant and, having done so, to make findings as to what conclusions should be drawn from it. Mr Firth is quite wrong to submit, as he did on several occasions, that this process necessarily involved the FTT "ignoring" evidence that was not mentioned either in the summary of evidence or in the FTT's findings of fact. The mere fact that evidence is not referred to in a

decision does not mean that it has been "ignored". Moreover, as noted at para 10 above, the structure of the Judgment is such that the factual conclusions expressed need to be read together with the FTT's recital of relevant evidence.

OVERALL CONCLUSION ON KNOWLEDGE

161.Mr Firth subjected to detailed textual analysis almost every paragraph in the section of the Judgment where the FTT summarised its "Findings of fact [on knowledge]", and in some cases almost every sentence within a paragraph. When an appeal is advanced by such a toothcomb approach, we think it is important to bear in mind that a finding of knowledge or means of knowledge of a connection to fraud is an evaluative judgment based on an accumulation of primary factors which, taken together, lead to that conclusion although looked at in isolation each factor may permit of an innocent explanation. The FTT's approach and the adequacy of its reasoning as regards any individual factor must therefore be assessed in the context of all the other factors that make up the overall picture. As Christopher Clarke J stated in *Red 12 Trading Ltd v HMRC* [2009] EWHC 2563 (Ch), in a passage significantly cited by the FTT (at [10]):

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

162. We have gone through all of Mr Firth's 36 points of criticism of the FTT's reasoning or findings of fact. We emphasise that this is an appeal on point of law, and that it is not for the Upper Tribunal to assess the evidence and decide whether we would make the same findings, but whether the findings made by the FTT were reasonably open to them and sufficiently reasoned. On that basis, we have upheld just one of the 36 criticisms (as regards the document from Mitz which we discuss at para 139 above), and on which we accept no proper reasons were given by the FTT and which should not, in the light of the evidence, have been regarded as relevant. However, having regard to all the other facts and matters taken into account, we think that it is clear that this in itself was not material to the FTT's overall conclusion: see e.g. the summary at [368]. If the test, contrary to our view, is whether the FTT would inevitably have reached the same conclusion without regard to the Mitz document, we have no doubt that it would. In our judgment, the fundamental question is then whether, on the basis of all the findings of fact properly made, the overall inference or conclusion that Aria knew, or alternatively should have known, of the connection to fraud was one that a reasonably tribunal could properly reach. Only if the answer to that question is No, is there an error of law vitiating the decision.

163.As regards such a multi-factorial assessment based on a large number of primary facts, we bear in mind Lord Hoffmann's oft quoted observation in *Biogen Inc v Medeva PLC* [1996] UKHL 18 at [54], when discussing the issue of obviousness:

> "The need for appellate caution in reversing the judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge,

> are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance (as Renan said, *la vérité est dans* la nuance), of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation. It would in my view be wrong to treat *Benmax* as authorising or requiring an appellate court to undertake a de novo evaluation of the facts in all cases in which no question of the credibility of witnesses is involved. When the application of a legal standard such as negligence or obviousness involves no question of principle but is simply a matter of degree, an appellate court should be very cautious in differing from the judge's evaluation."

164. Referring to that judgment among others, Lewison LJ stated, in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at [114]:

> "Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."

165. In the present case, when standing back and taking an overall view, we are entirely satisfied that the conclusion that Aria knew or should have known that the 11 disputed transactions were connected to fraud was a conclusion well open to the FTT on the evidence, for reasons that are sufficiently and clearly explained in the Judgment. We accordingly dismiss the main part of Aria's appeal.

WHETHER HMRC MADE AN "ASSESSMENT"

Background

166. In its VAT return for the 07/06 accounting period, Aria claimed credit for input tax of £1,513,316.35. After setting off input tax against output tax, Aria claimed a repayment of £445,156.98.

167. In a letter dated 6 October 2008, Mr Bailey of HMRC wrote to Aria explaining that HMRC were denying Aria's claim for input tax of £758,770.69. That letter informed Aria of its right to appeal against HMRC's decision within 30 days and stated that:

> "A further letter showing the corrected amount of VAT now due in respect of 07/06 is enclosed."

168. The "further letter" was also written by Mr Bailey and, perhaps by oversight, was dated 7 October 2008. The letter referred back to Aria's VAT return for 07/06 and stated, so far as relevant:

> "As you have been notified, HM Revenue & Customs consider that the amounts shown should properly be amended as follows:

Box 4 Input Tax	£754,545.66

Box 5 Net tax due to HMRC	£313,613.71

> The reasons for this are detailed in my letter to you dated 6th October 2008."

This letter also notified Aria of its right to appeal against HMRC's decision within 30 days.

169. The parties were not agreed on the legal effect of the correspondence above, but its arithmetic at least is clear. Aria had claimed a repayment of £445,156.98 on the basis that all of its input tax was creditable. When HMRC decided that £758,770.69 of Aria's input tax was not creditable, the logical corollary was that Aria's repayment claim should be reduced by £758,770.69 so that Aria owed HMRC £313,613.71.

170. Aria denied that the letters of 6 and 7 October 2008 amounted to "assessments". In Aria's submission, HMRC had simply made a decision that was subject to appeal under s83(1)(b) of the Value Added Tax Act 1994 ("VATA"), that it was not entitled to input tax credit for £758,770.69. If Aria is unsuccessful in its appeal against that decision, Aria accepts that it is not entitled to the repayment of £445,156.98 that it claimed and HMRC will not be obliged to pay that sum to Aria. However, since, in Aria's submission, HMRC did not make an "assessment" for £313,613.71 it follows that, even if Aria is not successful in its appeal, it has no obligation to pay any amount to HMRC.

171. Aria also argued that, in any event, the Tribunal has no jurisdiction to decide whether an assessment has been made. Its jurisdiction, under s83(1)(p) of VATA is limited to situations where an assessment has been made. Aria accordingly argued that, if it is unsuccessful in these proceedings and HMRC take steps to seek to enforce payment of £313,613.71, the proper forum for deciding whether HMRC made an "assessment" will be those enforcement proceedings.

Scope of the Tribunal's jurisdiction

172. The Tribunal's jurisdiction in this appeal derives from s83 of VATA and that jurisdiction is subject to the qualifications and limitations set out in s84 of VATA.

173. Section 83 provides, so far as relevant:

> **83 Appeals**
>
> (1) Subject to section…84, an appeal shall lie to the tribunal with respect to any of the following matters:…
>
> (p) an assessment under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act

Section 84 provides, so far as relevant:

> **84 Further provisions relating to appeals**
>
> …

> (3) Subject to subsections (3B) and (3C), where the appeal is against a decision with respect to any of the matters in section …[83(1)(p)]…, it shall not be entertained unless the amount which HMRC have determined to be payable as VAT has been paid or deposited with them.
>
> (3B) In a case where the amount determined to be payable as VAT or the amount notified by the recovery assessment has not been paid or deposited an appeal shall be entertained if—
>
> (a) HMRC are satisfied (on the application of the appellant), or
>
> (b) the tribunal decides (HMRC not being so satisfied and on the application of the appellant),
>
> that the requirement to pay or deposit the amount determined would cause the appellant to suffer hardship.

174.Mr Firth is correct to observe that the question whether HMRC have issued an assessment is not one of the "matters" set out in the list in s83 of VATA. However, we reject his argument that this means the Tribunal has no jurisdiction in this appeal to consider whether an assessment has been made.

175.First, in Aria's Notice of Appeal submitted to the VAT Tribunal on 3 November 2008, Aria ticked a box indicating that it was appealing against an "assessment". In Part C of its Notice of Appeal, Aria ticked a box indicating that it wished to apply for a direction that the appeal be considered without payment or deposit of the tax in dispute (under the "hardship" provisions referred to above).

176.Aria, therefore, was itself indicating that it was appealing against an "assessment" and was asking the VAT Tribunal to make a direction that the appeal could proceed without payment or deposit of the disputed tax (which would only be relevant if the appeal was against an "assessment"). In those circumstances, it is plain that the Tribunal has jurisdiction to consider whether an "assessment" was made. If it could not address that question, there would be no way for it to tell whether the appeal was one that the Tribunal could entertain. Moreover, the Tribunal could not gauge the relevance of the "hardship" application without knowing whether HMRC had made an assessment or not. For example, if the Tribunal refused to accept that Aria would suffer "hardship" by paying or depositing the VAT in dispute, only if Aria was appealing against an "assessment" would this be an obstacle to the Tribunal entertaining the appeal.

Whether HMRC made an assessment

177.As Evans LJ noted in *Customs and Excise Commissioners v Bassimeh* [1997] STC 33, the making and communication of an assessment involves a three-stage process: "the decision to assess, followed by the assessment, then by the notice given". Where there is little evidence as to HMRC's internal processes, the terms of the notice (the third stage) can be relied on as evidence as to what happened at the first and second stages, but this does not alter the fact that the three stages are still separate.

178.In *Courts plc v Customs and Excise Commissioners* [2005] STC 27, the Court of Appeal endorsed HMRC's internal guidance as giving a correct summary of the law when it stated:

> "An assessment is made when you have finished calculating the amount upon which the assessment is to be based and a final decision to assess that amount has been taken. This will be when the amount has been quantified, documented, checked, signed and dated."

179.In *House (t/a P&J Autos) v Customs and Excise Commissioners* [1994] STC 211 at [223], May J (as he then was) commented on the form assessments should take as follows:

> "Although the commissioners choose to use printed forms headed 'Notice of Assessment', there is in my judgment no magic about such forms. They are not required by statute or regulation which impose no particular formality at all. All that is required is that the commissioners should make an assessment to the best of their judgment and notify it to the taxpayer. There is perhaps an understandable tendency to merge the assessment with the notification and to look only or mainly at a single document if it is called notice of assessment. But there appears to be no reason why notification should not be given by letter, nor any reason why in this case the letter dated 24 May 1990 should not be as, or part of, due notification."

180.May J was there referring to the previous statutory provisions, but they were in identical terms to those relevant to this appeal. The judgment of May J was upheld by the Court of Appeal: [1996] STC 154.

181.In the light of these and other authorities, we are satisfied that the FTT correctly summarised the law at [44] of the Judgment as follows:

> "The "making" of an assessment refers to the determination that an amount is due;
>
> There is no set formula by which an assessment must be made;
>
> The processes of assessing and notification of that assessment are separate;
>
> The assessment process involves a decision that tax is due and a calculation of that amount;
>
> Notification can take any form so long as the terms are clear to the taxpayer."

182.We also agree that applying those principles leads to the clear conclusion that HMRC had, in their letters of 6 and 7 October 2008 communicated an "assessment" to Aria. Those letters demonstrate that HMRC had concluded that, because input tax had been disallowed, far from being owed money by HMRC, Aria owed HMRC the sum of £313,613.71. The letters that HMRC sent Aria communicated that conclusion clearly and succinctly.

183.In urging us to a contrary conclusion, Mr Firth relied on the following passage from the Upper Tribunal's decision in *Benridge Care Homes Ltd v HMRC* [2012] UKUT 132(TCC) (Judge Gammie QC and Judge Hellier) at [38]:

> "as an administrative act we consider that the Commissioners, as the assessing body, must believe that they are making an assessment. We do not think that they can assess, so as to speak, "by accident"."

He submitted that, since Mr Bailey had accepted in cross-examination that he did not think he had made an "assessment", it followed that he had not done so.

184. We do not consider that the Upper Tribunal's decision in *Benridge Care Homes Ltd* establishes that the subjective views of a particular HMRC officer on the legal question whether he or she has made an assessment are determinative. In *Benridge*, the taxpayer made a claim for repayment of VAT. HMRC decided that the repayment was not due as the taxpayer had overstated input tax claims and understated output tax due and they decided to refuse the claim for repayment. Therefore, the Upper Tribunal's conclusion in the passage quoted was that the "administrative act" which HMRC thought that they were performing, and which they were performing, was a straightforward refusal to pay the taxpayer the sum claimed. That was clearly very different from an "assessment" which involved a decision that the taxpayer was liable to pay HMRC a sum of money.

185. Mr Firth also referred us to Pill LJ's statement in *Courts plc v Customs & Excise Commissioners* [2005] STC 27 at [119]:

> "What this case has highlighted is the importance of officers of the respondents being clear in their own minds what they are doing at each stage; whether they are making an assessment or a decision to assess or some other exercise."

In that passage, Pill LJ was not saying that the subjective beliefs of a particular officer can determine whether or not an assessment was made. Rather, he was saying that, because the question of whether, and when, an assessment is made will depend in large part on HMRC's internal actions, there is a public interest in HMRC officers understanding what they are doing at each stage.

186. Therefore, despite Mr Bailey's acceptance that he did not think he was making an assessment in law, we consider the FTT was correct to conclude that the letter of 7 October 2018 constituted an assessment. It follows that the FTT had no jurisdiction to consider the appeal against the assessment unless Aria had paid or deposited the tax in dispute or had been excused from this requirement under the "hardship" provisions. At the hearing, Mr Puzey confirmed to us that Aria has not paid the tax in dispute but that HMRC were not taking any point that this meant the appeal could be entertained. Neither party was able to say explicitly that "hardship" had been accepted. However, given Mr Puzey's statement, we have inferred that HMRC have, at some point in the long history of this appeal, accepted that paying the tax in dispute would cause hardship with the result that the FTT had jurisdiction to consider the appeal against the assessment, and the Upper Tribunal has jurisdiction to hear the appeal from the FTT.

DISPOSITION

187.The appeal is accordingly dismissed.

MR JUSTICE ROTH
JUDGE RICHARDS

RELEASE DATE: 2 NOVEMBER 2018