



**TC07036**

**Appeal number: TC/2017/01489**

*VAT – denial of input tax – agreed loss connected to fraud – did the Appellant know or should it have known that the transactions were connected with fraud? – held the Appellant should have known*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**MICHAEL GOLD AND ANNE ELIZABETH GOLD      Appellant  
T/A GOLDHILL ASSOCIATES**

**- and -**

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

**TRIBUNAL: JUDGE SARAH ALLATT  
MRS CATHERINE FARQUHARSON**

**Sitting in public at Rolls Building on 11 – 14 December 2018**

**Mr T Brown, instructed by VAT Advice Line for the Appellant**

**Mr J Carey, instructed by the General Counsel and Solicitor to HM Revenue  
and Customs, for the Respondents**

## DECISION

### Background

1. Michael Gold and Anne Elizabeth Gold t/a Goldhill Associates ('the Appellant') appeal against a decision of the Commissioners for HM Revenue and Customs ('the Respondents') to deny its input tax reclaim on four transactions entered into in the total sum of £261,994.26 claimed in monthly VAT accounting periods 01/16, 02/16 and 03/16.
2. The input tax has been denied on the basis that the Appellant knew or should have known its transactions were connected with the fraudulent evasion of VAT.
3. Each of the four transactions upon which input tax has been denied has been traced to fraudulent tax loss. At the start of this appeal the tracing of two of the transactions to tax loss was disputed by the Appellant, however halfway through the hearing the parties reached agreement that all of the transactions have been traced to a fraudulent tax loss. We shall therefore deal only briefly with the mechanism of the loss and its connection to the Appellant.
4. In each of the four transactions the Appellant purchased from the same UK trader and sold to the same EU trader. Each of the Appellant's deals traced either directly to a fraudulent VAT loss or through a contra-trader to a fraudulent VAT loss.
5. The only question at issue is whether the Appellant knew, or should have known, that its transactions were connected with fraud.
6. The Respondents' primary contention is that the Appellant knew that its transactions were connected with the fraudulent evasion of VAT.
7. The Respondents' secondary contention is that, in the absence of actual knowledge, the Appellant should have known of the connection of its transactions with a VAT fraud.
8. The Appellant submits that it did everything it could to verify the bona fides of the transaction and the parties to the transaction, and that it did not know, and could not have known, that the transactions were connected with fraud. The Appellant submits HMRC have not proved that the Appellant should have known that the transactions were connected with fraud.
9. Burden of proof lies on the Respondents in respect of all aspects.

### Evidence

10. We heard evidence from Anne Gold, Michael Gold, Gavin Stock, Julian Cook and George Beaddie.
11. To aid with the logical presentation of this judgement we shall start with the background facts from the evidence of Mr and Mrs Gold.

12. Michael Gold and Anne Hillard (later Anne Gold) formed Goldhill Associates in November 1990 and have been trading in the sales/exports distribution of computer software, hardware and peripherals associated with the technology for 27 years. During this period of trading they have sold many different products including Spectrum +2 Computers, cassettes, floppy disks and CD software. Later they developed a business relationship with Datel Electronics (Datel) distributing their products in the UK and exporting to the rest of the world.
13. Mr and Mrs Gold work from home in the same office.
14. At the start of the business they ran the entire operation, including packing and posting, from their home, but since 1996 they decided to utilise the facilities of a fulfilment house (B&L Distribution, now Multipack) to perform the day to day warehouse duties. The majority of their goods are shipped to Multipack which is based in Lancashire and for a cost per unit will store/pack the goods and then send them to customers worldwide via established freight companies e.g. DPD, UPS, Fed Ex, DHL. Goldhill Associates usually charge freight costs on customers' invoices and hence pay all freight direct.
15. As all products have a unique barcode this allows the warehouse and Goldhill Associates to identify the stock and ensure the customer gets exactly what they order without discrepancies.
16. Goldhill Associates has had a strong business relationship with Datel since 1998. They have distributed their products in the UK and worldwide and are listed on the Datel website as their sole UK/Export distributor.
17. Datel are their main supplier. They have a wide variety of customers in the UK and abroad, some of whom are wholesalers and some of whom sell to the public.
18. Goldhill Associates currently have no formal written contract with Datel and regard the basis of the relationship as one of integrity and trust. They pay for goods on a weekly basis and for larger orders may make payment in advance.
19. They use the accountancy program 'QuickBooks' for day-to-day stock control, invoicing, credit control and VAT returns.
20. Goldhill Associates have insurance cover for goods at various storage locations and whilst they are in transit.
21. Mr Gold is responsible for the negotiation of price and supply of goods. His negotiations involve mainly telephone and Skype calls and email correspondence. He will look to the market place to research price and supply of goods required by his customers. Over the years he has built up many contacts and, by virtue of these associations, business opportunities will often present themselves.
22. Mr Gold is responsible for purchase orders, invoices and credit control. When they take on a new supplier or customers he will obtain verbal references and research the company. They also check the time in business and VAT Registration details. He

has many contacts within the industry who can supply him with verbal references and information. For any new customers they always ask for payment in advance.

23. Goldhill Associates mainly invoice in GBP, and strongly prefer that, but have had a bank account in Euros which was closed in May 2012 as they had not used it for some time.

24. Goldhill Associates aim to make a profit of 8-15% on sales. Negotiations are based on conditions such as volume, payment terms, potential new product/customer, and specific marketplace.

25. Turnover for Goldhill Associates was around £800k in 2015, and around £1.2m in 2014. This is usually made up of many small transactions, averaging according to Mr Gold around 20-30 transactions a week.

26. In 2013 Goldhill Associates were subject to a MTIC Monitoring Project in which they supplied details of their trading to HMRC for nine months.

27. Mr Gavin Stock from HMRC took us through the background of the VAT history of Goldhill Associates.

28. Prior to 2013 Goldhill Associates had had regular, infrequent, routine HMRC visits. In April 2013 Goldhill Associates was selected for an extended MTIC (Missing Trader Intra Community) monitoring project as a result of some of their supply chains being monitored. At the first visit Mr and Mrs Gold were given the leaflet 'How to spot MTIC fraud', MTIC fraud was explained to them, and they were told about VAT notice 726 (Joint and Several Liability for Unpaid VAT) and it was explained to them how they could use the HMRC VAT validation facility based in Wigan.

### **Reliability of witnesses**

29. We found Mrs Gold to be a truthful and straightforward witness. We found Mr Beattie and Mr Cook to be truthful and straightforward witnesses. We found Mr Stock to be an honest witness, however we found him to be lacking in commercial knowledge and so ignore his opinions about how he would expect a normal business to run. We also note that at least twice in HMRC witness statements the witness statement itself did not match the underlying documentation. This happened once in Mr Stock's statement where he said, in relation to MTIC fraud 'Mr Gold advised that he had not known how easy it was' (bundle R/AWS/44) when the underlying visit report said 'MG advised that he knows how easy it is' (bundle R1/2, 415) and once in Mr Cook's statement, where a sentence implied that Goldhill Associates had made a statement explaining how they were introduced to CD Europe 'Goldhill Associates originally told CD (Europe) that it had identified customers abroad who required goods', where the underlying documentation showed that the statement had been made by CD Europe. Mr Secombe had said 'I've known Goldhill Associates for approximately 20 years and knew they knew my customer who wanted the goods'.

30. We found Mr Gold to be an honest witness but prone to exaggeration, and to not always answering the question asked, and that his memory was not reliable. We will discuss instances of this further below.

### **Evidence surrounding the transactions in question**

31. The four transactions in question were purchases of branded high end, noise cancelling or wireless headphones. In each instance the headphones were purchased from CD (Europe) Ltd ('CD Europe') (a UK supplier) and sold to SkyCity Universal Trading Aps ('SkyCity') based in Denmark.

32. The first transaction was for 1500 Bose QC20 headphones. The invoice date from Goldhill Associates was dated 31 January 2016.

33. The second transaction was for 1500 Bose QC20 headphones. The invoice date was 17 February 2016.

34. The third transaction was for 1850 Beats Solo 2 headphones. The invoice date was 21 February 2016.

35. The fourth transaction was for 2300 Bose QC25 headphones. The invoice date was 3 March 2016.

### **Background to all four transactions**

36. Mr Gold explained that in January 2016 he was contacted by Simon Insull who used to work for Centresoft, a software/peripheral supplier, from whom he had purchased stock numerous times in the past. Mr Insull asked him if he was interested in some new business and introduced him to CD Europe. Mr Gold spoke to Paul Sercombe of CD Europe to discuss new business following his conversation with Mr Insull. Mr Gold had prior knowledge of Mr Sercombe as he had also previously worked for Centresoft. Mr Sercombe explained a customer, who he identified as SkyCity in Demark, had a requirement for large quantities of Bose headsets and he (Mr Sercombe) had already found a supplier who could fulfil quantities required. Mr Sercombe explained that due the large VAT outlay when purchasing the goods from the UK, he did not have sufficient cash flow to finance the VAT element for three months. Mr Sercombe asked if Goldhill Associates would be interested in the deal and future business together.

37. Mr Gold explained he understood that his involvement would require further negotiations with the customer (SkyCity) and possible future business. SkyCity and Goldhill Associates had business dealings in 2010.

38. Mr Gold stated as soon as he was introduced to the deal he did due diligence checks on CD Europe and Paul Sercombe and also checked information on SkyCity, who he remembered being an existing customer. He also spoke on the phone to Claus Jessen of SkyCity.

39. Mr Sercombe gave him the details of the headphones to be supplied including prices. Mr Gold questioned the price of the headphones as it seemed quite high and did his own research into pricing as this was a new product for him. Mr Gold said he was unable to match the quantities required from any other suppliers.

40. Mr Gold stated that he then negotiated with CD Europe to purchase the required quantity of headphones from them and sell on to SkyCity. He then negotiated with SkyCity advance payment for the headphones.

41. A 3% profit margin was agreed on the total order in order to remunerate him for the time spent on negotiating with the customer, organising paperwork and, in part, financing the deal as there would be a UK VAT element which would need to be funded by Goldhill Associates.

42. As the deal was of large monetary value Mr Gold decided to ring CD Europe's supplier who Mr Sercombe had reluctantly informed him was 3 A Distribution Ltd (3 ADL) in Wembley, in order to confirm that the stock existed and would be available for shipment prior to him accepting advance payment from SkyCity and transferring money to CD Europe. Mr Gold enquired about their business activities and supply of different products. From his telephone conversation he stated he was satisfied that 3ADL were able to source or had stock available to supply CD Europe

43. Mr Gold spoke Mr. Jessen of SkyCity in January 2016 regarding the purchase of Bose Headphones from CD Europe. He had known Mr Jessen for many years from meetings at trade exhibitions. Mr. Jessen explained that he had been discussing purchasing headphones from CD Europe in the UK. Mr. Jessen and Mr Gold talked about his requirements relating to the purchase of Bose headphones, including: pricing, logistics, and payment terms (i.e. back to back against his purchase order). During several discussions and emails, Mr Gold stated they concluded that the supply of headphones via CD Europe was the best option considering the quantity required.

44. Mr Gold agreed to facilitate the deal if all his checks were satisfactory. After the initial contact was made with Sky City and CD Europe Mr Gold stated he did his own due diligence checks which included checking VAT registrations and length of time in business. In addition for CD Europe he sought verbal references from his contacts and also arranged to meet Mr. Sercombe in person at the office of Goldhill Associates, and received copies of his driving licence and passport.

45. Mr Gold was told that his CD Europe and SkyCity would prefer the transactions to be in Euros. Goldhill Associates opened a Euro bank account for this purpose. They had previously had a Euro bank account but had closed it as it was not frequently used, as they preferred payment in sterling.

46. Mr Gold stated in view of the smaller profit margin that it made more commercial sense to have the headphones shipped directly to Sky City from On Logistics warehouse rather than having them delivered to Multipack as this would incur an extra delivery charge, delays and warehouse costs. He also negotiated with

Mr Sercombe that he would pay the freight charges as the Goldhill Associates' margin was small.

47. Mr Gold stated his input in all negotiations and finance of the deals was crucial to transactions going ahead.

## **The transactions in detail**

### **Transaction 1**

48. Mr Sercombe and Mr Gold spoke after the introduction made by Mr Insull, and this was followed by an email on 21 January 2016 in which Mr Sercombe states his European customer will be in contact with Mr Gold shortly.

49. Mr Jessen does indeed get in touch and speaks to and emails Mr Gold on 22 January, enquiring about 1000 Bose QC 20 black headphones, barcode 0017817607230.

50. Mr Sercombe emails Mr Gold on 22 January quoting a price of €244.80 each.

51. On 22 January Mr Gold replies asking Mr Sercombe to send Mr Jessen an email quoting a price of €252.14, thus including the 3% profit for Goldhill Associates.

52. Mr Sercombe did this on 25 January.

53. Mr Jessen replies immediately agreeing the price and saying his customer is looking for 3000 pieces, but he would be happy to do that in two transactions of 1500 each,

54. Mr Sercombe replies, asking Mr Jessen to send Mr Gold a purchase order.

55. Mr Jessen then requests the details of Goldhill Associates, and then sends a purchase order, confirming the price, quantity and barcode.

56. Mr Gold, who was going away on 28 January, then emails Mr Sercombe checking the availability of the stock and when exactly they would be ready to ship.

57. Mr Gold emails Mr Sercombe a pro forma sales order (Goldhill Associates to SkyCity) on 25 January, asking Mr Sercombe to agree everything including the freight cost.

58. On 26 January Mr Sercombe replies to Mr Gold saying he would have the stock within 3 working days of ordering it. He emails again agreeing the sales order.

59. On 27 January Mr Gold asks for, and receives, the Euro bank account details of CD Europe.

60. On 27 January Mr Gold emails Mr Jessen the sales order and copies in Mr Sercombe.

61. Mr Gold then emails Mr Sercombe with a purchase order and requested a pro-forma invoice.
62. This was received later that same day (27 January 2016). It had a date of 27 January 2015.
63. On 27 January Mr Gold sends Mr Jessen details of Goldhill Associates' new Euro bank account.
64. Meanwhile, also on 27 January Mr Gold emails a contact of his in Germany to enquire about wholesale prices for the Bose headphones.
65. This contact replies back on 28 January that the QC20, black, Android version cost €191 for a supply of 1500 pieces.
66. On 1 February Mr Gold emails Paul Sercombe to say he expected Mr Jessen would transfer the money on Tuesday or Wednesday that week.
67. On 2 February Mr Gold received an email from his contact in Germany, stating that the barcode 0017817607230 had been discontinued. Furthermore that barcode only came in a dark grey version. He gave the new version, that did come in black, as 0017817658539.
68. On 2 February Mr Gold emails Mr Sercombe. He said 'The barcode 0017817607230 that you gave me has been discontinued. The QC20 has been updated as detailed below with new barcode 0017817658539 The QC 20 as I now understand is available for the Android, Samsung and Apple in Black or White.....DOES CLAUS NOT HAVE THIS INFORMATION AND MORE IMPORTANTLY YOUR SUPPLIER STATES HE HAS CHECK WITH BOSE AVAILABILITY IF THE BARCODE IS DISCONTINUED HOW DID HE STOCK WHEN IT IS DISCONTINUED AND AVAILABLE SINCE IT IS REPLACED.'
69. On 2 February Mr Sercombe replies saying he will get to the bottom of it.
70. Mr Gold replies and said 'Looking at the Bose UK website it does appear that there are 2 separate models either Android or Apple, both in Black or White. This would mean Apple Black or White and Android Black or White. So please investigate yourself and speak with Bose customer services on the phone to confirm that my information is correct and more importantly that that the barcode that I have stated is accurate. (Good ideas to get barcodes for all 4 versions) .....Please inform Claus and establish which model he wants be the Android or Apple version and Black or White. For clarity speak with your supplier and establish the actual facts and real stock position based on updated barcode.'
71. Mr Sercombe replies on 3 February and said 'I can ask the Bose customer service but I can't mention the order as it is a breach of contract for any authorised dealer to sell this amount to an unauthorised dealer.'



72. Later on 3 February Mr Sercombe confirms the barcode as 0017817658515. He also copies Mr Jessen into the email and says he has spoken to him and Mr Jessen has confirmed this is fine.

73. Mr Jessen then sends a revised purchase order dated 25 January with the new barcode.

74. On 4 February Mr Jessen sends an email to Mr Gold stating he had received payment from his customer, that he had already told Mr Sercombe this, and that Mr Jessen would pay Mr Gold as soon as he had the money.

75. A copy of the payment is sent by Mr Jessen on 5 February to Mr Gold.

76. Mr Sercombe then requests payment from Mr Gold based on the pro-forma invoice (still dated 27 January 2015).

77. Late on 5 February Mr Gold emails Mr Sercombe requesting a phone call before he transfers money. He mentions he has offers to buy QC20 headphones from around €205 trade, and questions why Mr Sercombe is paying considerably more.

78. Mr Sercombe replies on 6 February that if Mr Gold could find that price ‘ we will see what we can do on the next orders, but we have to be careful not to let Bose find out the quantities as they will try and put a stop to it’.

79. Mr Gold transferred the money to Mr Sercombe on 6 February and emailed to confirm this.

80. Mr Sercombe replied on 8 February (a Monday) confirming the payment had been received, and said that he should have the stock by Wednesday.

81. On 9 February Mr Gold emails Mr Sercombe ‘please send me Jan 31 invoice as discussed’.

82. This invoice (now dated 31 January 2015) was sent on 9 February.

83. On 11 February Mr Sercombe emails Mr Gold and Mr Jessen together, saying the goods were booked to leave that morning.

84. Mr Jessen replies saying once he had confirmed delivery he would like to proceed with the next order.

85. Mr Jessen emails Mr Gold on 16 February saying ‘I can see that the goods are due in to me today’.

### **The second transaction**

86. On 11 February Mr Gold emailed Mr Sercombe ‘...when do we get started with the next 1500 units..Does your supplier have the stock...’

87. Mr Sercombe replies that stock was available for the next order as soon as he (Mr Sercombe) sent over a purchase order and payment.

88. On 12 February Mr Gold emails Mr Jessen (copied to Mr Sercombe) checking that he was happy with how the transaction had gone while he had been away, and saying he was back in the office next week and had already sent a second pro-forma invoice.

89. On 16 February Mr Jessen emails that payment from his customer for the second order was expected the next day.

90. On 17 February Mr Sercombe emails Mr Gold with a pro-forma invoice for the second transaction dated 17 February 2016.

91. Also on 17 February SkyCity paid Goldhill Associates, Mr Gold sent a purchase order to Mr Sercombe, Goldhill Associates paid CD Europe and Mr Sercombe confirmed receipt and said he expected the stock would be shipped on Friday (2 days later).

92. Late on 17 February Mr Gold emails Mr Sercombe 'Paul, Just getting very slightly confused. I know we discussed this while I was in US, but my brain is turning to Mush... I am 99.99% certain that Claus wanted and ordered the Android version . I assume this was version shipped on order last week. Bose updated the barcode 0017817658539 which I believe the is Android Black version, Providing I am correct and this is the version that Claus requires, please change barcode on my latest order to 0017817658539. Paul, please confirm I am correct....'

93. Mr Sercombe replies on 18 February 'the barcode is 0017817658515.... You will see on Friday as Ann will receive her pair.'

94. This deal ended up overlapping with deal 3, and on 22 February Mr Jessen emails Mr Gold and Mr Sercombe to say that he has agreed that both orders can be shipped together.

95. Mr Gold emails Mr Sercombe on 26 February to ask whether both orders have shipped.

96. Mr Sercombe replies on 26 February to confirm both sets have shipped.

### **The third transaction**

97. On 18 February Mr Jessen emailed Mr Sercombe requesting 1850 Beats Solo 2 wireless headphones, black. Mr Jessen asked for a price, and the barcode details.

98. Mr Sercombe replies later that day giving a price of €222.73, saying barcode was to be confirmed but the colour and model were available. He asked Mr Jessen to liaise with Mr Gold and copy him (Mr Sercombe) in to emails.

99. Mr Jessen then emails Mr Gold with a purchase order, also on 18 February.

100. Mr Gold issues a purchase order to CD Europe, also on 18 February.
101. Mr Sercombe issued a pro-forma invoice to Goldhill Associates, purportedly for the Beats but in actual fact saying 'Bose QC 20 noise cancelling' but with the number of units (1850) correct for the Beats order, dated 18 February.
102. Mr Jessen paid Goldhill Associates on 22 February.
103. Mr Gold advises Mr Jessen on 22 February that he had received the payment and had paid CD Europe.
104. Also on 22 February Mr Gold emails Mr Sercombe (who was in China) with payment details for the Beats headsets, adding in the same email 'Please update me regarding 2<sup>nd</sup> shipment of the 1500 Bose Headsets as to when they are shipping.. It might be a good for you to ask your warehouse to contact me with shipment details since they are sending my shipment in my name I should be in direct contact with them.'
105. This was followed by a second email on the same day 'Paul, regarding 2<sup>nd</sup> shipment of Bose QC20 Headsets, please update... In your absence I spot with Lindee at On Logistics who confirmed that only 1 order had been shipped to Skycity so far (original order). She was unaware of a 2<sup>nd</sup> shipment... Paul, so that I can keep Claus updated during your absence, is 2<sup>nd</sup> shipment being sent direct from supplier or On Logistics and where are they supposed to arrive and be shipped from where ever. I just want to Update Skycity..'
106. Mr Secombe replies later that day 'Don't worry it's all in hand, On Logisties won't know about the shipping until the goods arrive. I have received your funds, many thanks and passed on to my supplier who has informed me that the Beats will be with me on Wednesday. I have informed Claus of this and he has said to wait until Wednesday to ship all the goods together, I have ccd Claus in on this if you need to confirm..... please let Ann know that her Bose will be also with me on Wednesday and I will get them sent out, please let me know best address.'
107. Mr Jessen then confirms he is happy to receive the 2<sup>nd</sup> Bose shipment at the same time as the Beats.
108. On 24 February Mr Gold emails Mr Sercombe 'Please ask your warehouse to confirm barcodes for both items when stock arrives with them..'
109. On 25 February Mr Gold emailed Mr Sercombe 'I have now been offered the following Beats Solo 2 Black Wireless Headsets (same as we are selling to Skycity) at 185 Euro. You stated that you were paying approx. €212 so 185,00 would seem to be a nice cost. I have not built in any profits for you or myself, however I wonder if Claus might be interested in additional stock. I have invoiced last lot to him at 222.73 so with extra cost saving allowing 20 Euro split for both of us we could sell at 202.00....'

110. As mentioned above under deal 2, Mr Gold chases shipping details on 26 February, and this is confirmed by Mr Sercombe.

111. The shipment is confirmed as having arrived on 4 March.

### **The fourth transaction**

112. On 2 March Mr Jessen emails Goldhill Associates and CD Europe, presumably after phone calls, confirming a deal for 2500 Bose QC25 black headphones. No barcode is mentioned. He confirms the price.

113. Mr Gold replies and asked for a purchase order, and emails Mr Sercombe to ask for a pro-forma invoice.

114. Mr Jessen emails a purchase order for 2500 units on 3 March. Mr Sercombe then emails Mr Gold to say he only has 2300 units available, and he has told Mr Jessen this.

115. Mr Sercombe issues a pro-forma invoice on 3 March 2016 for 2300 units.

116. Mr Jessen emails Mr Gold on 7 March to confirm he had made the payment. Mr Gold paid Mr Sercombe the same day and received confirmation that the funds had been received and the stock ordered.

117. The stock was received by Mr Jessen on 15 March 2016.

118. On 8 March Goldhill Associates was contacted by HMRC to ask for further details on transactions 1,2 and 3. No further transactions were made between Goldhill Associates, CD Europe and SkyCity.

### **Subsequent matters**

119. Goldhill Associates were notified in 2016 that the deals were connected to fraud. We heard in evidence from Gavin Stock that particularly Mrs Gold was upset that this was the case, and that he believed this to be genuine.

### **Contentious areas in the evidence**

#### **Normal course of business**

120. Both Mr and Mrs Gold stated in written and oral evidence that they saw these four transactions as an extension of their normal business. Their evidence was they dealt in many kinds of headphones, often in quantities in the thousands. The primary difference they saw in this transaction was the overall value of the transaction. Because the headphones were from large brands, the cost per unit was much higher than headphones they normally supplied.

121. Mr and Mrs Gold stated that the fact that they were not buying from a manufacturer or an authorised distributor in these deals, nor selling to a customer who was selling directly to the public, was not out of the ordinary for their business.

122. Both Mr and Mrs Gold stated that the fact that they opened a Euro account to do these deals was not something that made this transaction unusual.

123. Mr Gold stated that it was not unusual to receive an order for a customer and then place an order with a supplier for that exact amount of stock.

124. In contrast to these statements we also heard that the vast majority of goods sold by Goldhill Associates were supplied by Datel (a manufacturer). We heard from Mr Gold that a number of his customers do sell directly to the public.

125. We also heard that although customers in Europe had previously asked to make payments in euros, Mr Gold said 'it is something we have tried not to adopt. We say, 'Look, if you want the goods please transfer the money in sterling'.'

126. We heard that the headphones in question were designed for phones, not for gaming, which is the 'normal' business undertaken by Goldhill Associates. Mr Gold understood that they were to be used on airlines (and appears to have been told so by Mr Jessen) but we have no evidence to show this. In particular the Beats headphones are described as 'wireless' whereas in oral evidence we heard that the Bose headphones came with a jack to be plugged in, and there was no indication in evidence that the Beats were different.

127. When asked about how frequently a customer would place an order and Mr Gold would in turn place an order directly with his supplier for the same amount, and then receive advance payment from his customer and immediately make the advance payment to his supplier, Mr Gold said 'We stock Datel. We keep it in our warehouse or it is shipped directly from Datel themselves....so it is not frequent that we would actually buy something specifically for a customer...'

## **Negotiation**

128. Mr Gold stated in oral evidence that he was crucial to the deal going ahead. One of the main aspects to this was that he was providing the funding for the VAT for the purchase (because CD Europe needed to pay VAT to its supplier, and did not have the cash balance to do this and then wait for repayment from HMRC).

129. Throughout his witness statement Mr Gold refers to areas where he negotiated (for example, advance payment from SkyCity, and CD Europe paying the freight costs). Mr Gold said, and we accept, that there were numerous telephone/Skype calls in addition to the email evidence that was placed before the Tribunal.

130. However, the evidence in front of the Tribunal does not show that Mr Gold did significant amounts of negotiation. For example, all costs are agreed between the three parties on 25 January, but it is not until 27 January that Mr Gold sent an email to his contact in Germany to double check the prices. When he did check the prices, it

appeared there was significant scope for getting the headphones more cheaply, but this was not followed through. When questioned about this Mr Gold explained that firstly, he understood Mr Jessen to be more concerned about speed than cost, and secondly, the volume required would not be available through normal channels as Bose would not be happy with the headphones being sold to unauthorised dealers.

## **Insurance**

131. Goldhill Associates has insurance through Lorica Insurance. The policy states 'Subject Matter Insured - Games consoles: Peripherals such as controllers, Bluetooth headsets, microphones, cheat hardware/software, memory sticks, hard drives and similar goods pertaining to the Assured's normal business activities, suitably packed for transit. The cover insures all 'sendings' and storage only at three specified locations, namely Datel, Multipack and the home address of Mr and Mrs Gold. The premises must be adequately secured.

132. Mr Gold stated that he had discussed the transactions with his insurer on the phone, and that because when the goods were in the On-Logistics warehouse and they had been invoiced by him to SkyCity, they were 'in transit' rather than in storage, and thus On-Logistics did not need to be listed as a storage location for his insurance to be adequate. He also stated that the wording 'similar goods pertaining to the Assured's normal business activities' covered the headsets in question.

133. HMRC dispute this by saying that the headsets are for phones and are therefore not gaming accessories. HMRC also point out that Mr Gold had not visited On-Logistics and could not be certain that the premises were adequately insured. Mr Gold says he had conversations with the warehouse and was satisfied that they were reputable (however see below for points about timing of this discussion).

## **Due diligence**

134. Mr Gold stated many times in oral evidence that he had checked out everything he could in relation to all parties in the deals. He stated that he had done business with SkyCity before, and that he knew Mr Jessen for many years. He had checked their VAT number.

135. In relation to CD Europe he stated 'I checked Companies House, HMRC, the VAT registration. I even had Paul Sercombe come to our office. I even had his passport and driving licence. I checked out on Google Street view to make sure the company existed in those premises. I spoke to many people on the telephone regarding SkyCity and also CD Europe. When asked what financial health CD Europe was in, and what would have helped Mr Gold to know this, Mr Gold said he did not know particularly what the financial health of the company was. Mr Gold did not run a credit check for CD Europe.

136. Later in evidence, when asked what he checked on Companies House for CD Europe, Mr Gold said that, among other things, he had checked the financial statements of the company.

137. In actual fact, the one transaction, for a value of £624, that Goldhill Associates had done with Mr Jessen in 2010, was with a different company (also with SkyCity in the name) with a different VAT number.

138. As part of the due diligence performed on CD Europe, Mr Gold enquired who their supplier was, and was told this was a company called 3 A Distribution Limited (3ADL).

139. Mr Gold stated that he looked at the 3ADL website in order to obtain their phone number, and then had a conversation (without mentioning CD Europe) during which he was satisfied that they could supply Bose headsets in the quantities required. Mr Gold was not specific about what it was in the conversation that reassured him about this. He said 'I was totally satisfied with the answers I received back'.

140. It was pointed out by HMRC that the 3 ADL website contains a significant portion in Latin, indicating that the website was under development. In addition the website only appeared to be one page

### **Barcodes, samples and dealing with On-Logistics**

141. Mr Gold explained to us in evidence that barcodes were extremely important in all aspects of his business as this is how he can make certain what a customer wants, what his supplier has delivered, and what has been shipped out of the warehouse.

142. In transaction 1, Goldhill Associates was provided with the barcode required from Mr Jessen. This was confirmed in a purchase order. Goldhill Associates then requested this barcode model from CD Europe, and was told that CD Europe had confirmed availability with their supplier.

143. Mr Gold then discovered that the barcode related to a discontinued model. Rather than checking with Mr Jessen what he wanted, he queried this with Mr Sercombe, who replied to Mr Gold giving a new barcode and stating he had confirmed this with Mr Jessen.

144. Goldhill Associates normally use Multipack for their storage and packing requirements. For these four transactions they agreed to use On Logistics, who were used by CD Europe, as CD Europe were going to pay the freight charges, so Mr Gold stated it made no sense to incur additional charges from Multipack. Goldhill Associates had not used On Logistics before. When talking about the first deal, Mr Gold stated 'I then spoke to On Logistics on the telephone on a few occasions who confirmed to me that the condition was good, there was two pallets out in the warehouse. I then asked them to go and unwrap and get me one box of the goods, which they did whilst I was on the telephone.'

145. However, when we look at the email exchanges, the goods for the first transaction were shipped on 11 February. On 22 February, Mr Gold emails Mr Sercombe '.. It might be a good for you to ask your warehouse to contact me with shipment details since they are sending my shipment in my name I should be in direct contact with them.'

146. And on 17 February Mr Gold emailed Mr Sercombe ‘Paul, Just getting very slightly confused. I know we discussed this while I was in US, but my brain is turning to Mush... I am 99.99% certain that Claus wanted and ordered the Android version . I assume this was version shipped on order last week. Bose updated the barcode 0017817658539 which I believe the is Android Black version, Providing I am correct and this is the version that Claus requires, please change barcode on my latest order to 0017817658539. Paul, please confirm I am correct....’

147. Mr Sercombe replied on 18 February ‘the barcode is 0017817658515.... You will see on Friday as Ann will receive her pair.’

148. In a written statement to HMRC, and confirmed in oral evidence, Mr Gold stated that Goldhill Associates received sample of the Bose headsets prior to the first transaction. In oral evidence he said it came in a box that had the barcode on it.

149. However, on further questioning Mr Gold was unable to confirm why, being in possession of a sample with a barcode on, firstly there was confusion about which was the correct barcode, and secondly why he was unaware which barcode had shipped. On further questioning Mr Gold agreed that there had only been one sample received, and that it was received around 22 February (therefore after the first deal).

150. This admission not only shows inconsistencies in the evidence given by Mr Gold, but also throws doubt on the checking that he says was done by him on the shipments at On Logistics, and at the very least shows that these checks could not have been as thorough as his warehouse checks are in the normal business of Goldhill Associates.

### **Pricing and profit**

151. On two occasions, firstly for the Bose QC20 and secondly for the Beats Wireless headphones Mr Gold checked the prices and was quoted prices significantly cheaper than he was paying to acquire them from CD Europe.

152. For the Bose QC20 headphones, Mr Gold was making a profit of around €8 per headset, and was paying CD Europe around €244 per headset. Mr Gold was quoted a price of €191 for the headsets, and emailed Mr Secombe to say ‘I have been quoted trade prices of around €205’. In oral evidence Mr Gold said ‘I checked out the market price for Bose headsets. We are being charged roughly a market price, maybe a couple of euros extra’. Mr Gold explained that Mr Jessen was happy with the price, and it was difficult to acquire large quantities of headphones in a short space of time. Mr Gold said that he had assumed SkyCity had tried to purchase directly from Bose and had been unable to do so. We have no evidence of this.

153. Mr Gold said ‘I did speak to several companies for days trying to secure stock from alternative places and the best I could do was to come up with 10 or 20 pieces because Bose have their recognised customers’.



154. We treat this evidence with caution because it seems unlikely that this conversation was possible without the issue about the barcodes coming up, and that seems to have arisen in email contact with Mr Gold's contact in Germany.

155. Goldhill Associates was earning a profit of around 3% on every deal. Whilst much lower than the normal mark-ups it earns, one transaction was earning Goldhill Associates around £7.5k, at a time when their regular profit was around £10k a month, for transacting, according to Mr Gold, 20-30 transactions a week.

156. Mr Gold was aware that the primary reason he was involved in the deal was to finance the VAT. When questioned about the fact that his profit was very high for a simple financing arrangement, Mr Gold referred to his other inputs into the deal, such as negotiation.

157. Mr Gold, when asked whether the deal involved commercial risk for Goldhill Associates, replied 'Goldhill had absolute commercial risk because we accepted a customer's money. And if I did not supply the goods or supplied the incorrect goods and they were not received at SkyCity, it would have been for Goldhill to have to pay all the money back. So we had huge commercial risk'.

158. However, in answer to the very next question, about whether the deals involved a consistent or pre-determined margin, he said 'We agreed 3 percent. It was as simple as that. It was a no risk deal. It was agreed at 3%.'

159. However, Mr Gold must either have been aware that financing could have been arranged by CD Europe at a much lower cost, or conversely, if he was aware that CD Europe could not get such financing, that CD Europe was not a financially strong company.

### **Invoicing**

160. The invoice issued by Goldhill Associates to SkyCity for the first deal that shipped on 11 February was dated 31 January 2016. The invoice number was 11868.

161. Invoice numbers 11866 and 11867 were issued on 10 February. Invoice number 11869 was issued on 12 February.

162. Mr Gold maintained while giving evidence that invoice number 11868 had been issued in January 2016, dated 31 January 2016, and this had been done before he and Mrs Gold went on holiday on 28 January 2016.

### **Awareness of MTIC fraud**

163. Goldhill Associates were visited by HMRC in 2013 and put on an extended monitoring project in relation to the possibility of their (non-manufacturer) suppliers being involved in MTIC fraud. Nothing untoward was found and the monitoring ceased after 9 months. In the course of the visits in 2013, Goldhill Associates were given a copy of VAT notice 726 which explains MTIC fraud, joint and several

liability, features of MTIC fraud, and the checks a business can do to verify the integrity of their supply chain.

164. Mr Gold confirmed in oral evidence that he knew that back to back transactions and euro accounts were features of MTIC fraud.

165. Mr Gold told the Tribunal he was given the impression that MTIC fraud primarily involved mobile phones.

166. However, as part of Goldhill Associates' involvement in the monitoring checks he must have been aware that goods other than mobile phones can also be used.

167. Notice 726 specifically refers to 'other electronic equipment made or adapted for use by individuals for the purposes of leisure, amusement or entertainment and any other equipment made or adapted for use in connection with any such electronic equipment'

168. Mr Gold confirmed that he had been advised to do credit checks on his suppliers and also to do a 'Wigan check', that is, to check the VAT number of his suppliers and customers with HMRC.

169. Mr Gold gave oral evidence that the HMRC officer was entirely satisfied with all the due diligence that they were doing on their customers and suppliers.

170. Mr Gold did not do Wigan checks (in 2013) because his main supplier was Datel with whom he had a long relationship, and they were the manufacture of the goods they sold.

171. Mr Gold did not do credit checks.

## **The Law**

172. The issue at stake is whether the Appellant knew, or should have known, that the transactions were connected with fraud.

173. Article 17 of the Sixth Council Directive of 17th May 1977 provides (so far as is material):

“Origin and scope of the right to deduct

The right to deduct shall arise at the time when the deductible tax becomes chargeable.

In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax, which he is liable to pay:

(a) value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;.....”

174. Articles 167 and 168 of Council Directive 2006/112/EC of 28th November 2006 on the common system of VAT provide:

“167 – A right of deduction shall arise at the time the deductible tax becomes charged.

168 – In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT, which he is liable to pay:

(a) the VAT due or paid in that member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person.”

175. Sections 24, 25 and 26 of the Value Added Tax Act 1994 (“VATA”) provide:

“24.- (1) Subject to the following provisions of this section, “input tax”, in relation to a taxable person, means the following tax, that is to say-

VAT on the supply to him of any goods or services;

VAT on the acquisition by him from another member State of any goods; and

VAT paid or payable by him on the importation of any goods from a place outside the member States,

Being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.

(2)...

(6) Regulations may provide-

(a) for VAT on the supply of goods or services to a taxable person, VAT on the acquisition of goods by a taxable person from other member States and VAT paid or payable by a taxable person on the importation of goods from places outside the member States to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases;

(1) A taxable person shall-

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member states of any goods, account for and pay VAT by reference to such periods (in this Act referred to as “prescribed accounting periods”) at such time and in such manner as may be

determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

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

176. Regulation 29 of the Value Added Tax Regulations 1995 (SI 1995/2518) provides:

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

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

(a) a supply from another taxable person, hold the document, which is required to be provided under regulation 13;... provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in sub-paragraph (a)...above, such other documentary evidence of the charge to VAT as the Commissioners may direct.”

177. Thus, if a taxable person has incurred input tax that is properly allowable, he is entitled to set it against his output tax liability and, if the input tax credit due to him exceeds the output tax liability, receive a payment.

178. However, the European Court of Justice (“the ECJ”), in its judgment dated 6 July 2006 in the joined cases of *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* C-439/04 & C-440/04 has confirmed that taxable persons who “knew or should have known” that the purchases in which input tax was incurred were connected with the fraudulent evasion of VAT will not be entitled to deduct that input tax. Specifically:

179. At [56] of *Kittel*, the ECJ stated:

“ ...a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT

must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.”

180. Conversely, the ECJ had stated at [51] that

“...traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud...must be able to rely on the legality of these transactions”.

181. The rationale for the above approach was set out by the ECJ at [57-58]:

“That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.” [57]; and

“In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.” [58]

182. At [59], the ECJ therefore concluded:

“... it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of ‘supply of goods effected by a taxable person acting as such’ and ‘economic activity.’”

183. At [61], the ECJ reiterated:

“...where it is ascertained, having regard to objective factors, that the supply is to a taxable person who knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, it is for the national court to refuse that taxable person entitlement to the right to deduct.”

184. In *Mobilx Limited (in Liquidation) v HMRC* [2010] EWCA Civ 517 (“Mobilx”), the Court of Appeal considered Kittel. At [52], Moses, LJ. stated:

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

185. At [59], Moses. LJ. went on to state in relation to the “should have known” aspect of the test:

“The test in Kittel is simple and should not be over-refined, it embraces not only those who know of the connection but those who “should have known”. Thus it includes those who should have known from the circumstances, which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraudulent evasion of VAT then he should have known of that fact...”

186. At [64] of Mobilx, Moses, LJ. then said:

“If it is established that a trader should have known that by his purchase there was no reasonable explanation for the circumstances in which the transaction was undertaken other than that it was connected with fraud then such a trader was directly and knowingly involved in fraudulent evasion of VAT.”

187. Before, at [82], warning:

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

188. Moses, LJ. also gave guidance as to the sort of circumstances that might be relevant to the “should have known” question:

189. At paragraph 72, Moses LJ cited, and in paragraph 83 commended, a number of questions posed by the Tribunal including,

“(1) Why was [the Appellant], 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 Appellant’s supplier] already making supplies direct to other EC countries? If so, he could have asked why [the Appellant’s 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?”

190. At [79], Moses, LJ. drew attention to the significance of the fact that Mobilx, aware that the CPU business in which it was engaged was “rife with fraud”, nevertheless chose to ignore HMRC’s warnings that its own transactions had, upon extended verification, been shown to trace back to fraud.

191. At [83], Moses, LJ. adopted the passage from paragraph 110 of *Red 12 Trading v HMRC* [2009] EWHC 2563 in which Christopher Clarke, J. highlighted the following:

- (a) “compelling similarities between one transaction and another.”
- (b) “pattern[s] of transactions.”
- (c) “transactions all of which have identical percentage mark ups ...”
- (d) “... made by a trader who has practically no capital ...”
- (e) “... as part of a huge and unexplained turnover ...”
- (f) “... with no left over stock.”
- (g) “A tribunal could legitimately think it unlikely that the fact that all 46 transactions in issue can be traced to tax losses by HMRC is a result of innocent coincidence.”

192. At [84] the Court of Appeal commended as significant the fact that:

“... a trader has chosen to ignore the obvious explanation as to why he was presented with the opportunity to reap a large and predictable reward over a short space of time.”

### **Submissions**

193. The Respondents submit that the Appellant knew of the fraud that was being committed.

194. Alternatively they submit that the Appellant should have known that the transactions were connected with the fraudulent evasion of VAT because that was the only reasonable explanation for them.

195. The Respondents submit that the overall scheme shows heavy orchestration and, if that is the case, then it is unlikely that a mastermind of the fraud would insert an innocent trader into the chain who might buy and sell from a trader who is not part of that scheme.

196. The Respondents submit that there was no commercial rationale for the Appellant being included in the deals.

197. The Respondents submit that the Appellant’s insurance did not cover these transactions.

198. The Respondents submit that the fact that the mark up was 3% for all deals, when they involved different products and very little work, should have been an indicator to the Appellant that this was an MTIC transaction.

199. The respondents submit that the fact that the supplier and customer seemed unaware and unconcerned about the barcodes of the products being bought and sold is very much at odds with the normal commercial business of the Appellant, and should have indicated to the Appellant that this transaction was connected with fraud.

200. The Respondents submit that the fact that (for deals 1, 2 and 3) the quantities required by the customer exactly matched those that the supplier could supply, despite Mr Gold's evidence that all other suppliers that he tried could only supply small quantities (10 – 20 pieces), should have indicated to the Appellant that the transaction was connected with fraud.

201. The Respondents submit that the due diligence undertaken by the Appellant were perfunctory and in no way could have provided the Appellant with any assurance about whether to trade with the companies or not.

202. The Respondents submit that the invoice purportedly issued on 31 January to SkyCity was in fact issued on 11 February, and they submit that this was done in order to claim the VAT refund early.

203. The respondents submit that the fact that a Euro bank account was opened by the appellant for this transaction when it was normal practice of the Appellant to request payment in sterling, indicated that a strong request must have been made to the Appellant about this, and this should have been an indicator to the Appellant that these transactions were connected with fraud.

204. The Appellant submits that there is no direct evidence provided by HMRC that the Appellants knew their transactions were connected to fraud. In contrast there is the testimony of Mr and Mrs Gold who both vehemently denied it.

205. The Appellants submit that the invoice dated 31 January did not help the Appellants claim their input VAT early, as that invoice related to the output (zero-rated) VAT on their sale. It was the invoice from CD Europe that would have been used to reclaim the input VAT.

206. The Appellants submit that Mr Gold did get involved in the 'nuts and bolts' of the transaction to earn the 3% profit. They submit he questioned barcodes and tried to obtain stock cheaper elsewhere.

207. The Appellants submit that the transactions were somewhat unusual but not completely unusual in respect of the supplier and customer talking to each other. They submit that the fact that the goods were headphones was completely usual for the Appellant's business.

208. The Appellants submit that the Tribunal should not focus unduly on the due diligence performed, and that in any case Mr Gold had known Mr Jessen and Mr Sercombe for some time.

209. They submit that the amount of information gained by Mr Gold and Mrs. Gold on CD Europe and SkyCity, together with their personal knowledge of the



individuals, was sufficient not to raise a suspicion that the only reasonable explanation was the were connected to VAT fraud.

210. The Appellants submit that the products were insured as they were 'in transit' following the issuing of their sales invoices to SkyCity. Even if as a matter of fact it is found the goods were not insured, what is important in deciding whether the Appellants ought to have known of the connection to fraud was that they genuinely believed they were insured, which it is submitted they did.

211. The Appellants submit the universal mark up of 3% for involvement and tying up capital in effect 20% of the value of the transaction, was not uncommercial, nor unusual. They submit Mr Gold undertook a lot of time consuming work in checking bar codes, looking for cheaper stock and contacting On-Logistics. He believed the 3% mark-up included an amount for the time he spent.

### **Discussion**

212. The Tribunal needs to look at the totality of the evidence and determine whether the Appellant knew that a fraud was being committed, or alternatively, whether the Appellant should have known.

213. To determine whether it should have known, the Tribunal must consider not only what the appellant knew, but also what the appellant would have known if it had done everything reasonable.

214. Taking firstly what was definitely known by Goldhill Associates:

215. It knew that MTIC fraud existed. It knew some of the basic features of this fraud included euro accounts, being approached by a customer and a supplier in a short amount of time, a transaction where the quantities wanted by the customer exactly matched those of the supplier, and a deal where profit margins were consistent.

216. With regard to the specific transactions, it knew that the price of the goods appeared high. It knew that there was a long chain of wholesalers, and that the link to the manufacturer or the end user was not clear.

217. It knew that the deal had already been agreed by its supplier and customer. It knew that the supplier could supply the exact amount of goods the customer wanted (for deals 1, 2 and 3).

218. It knew that euro bank accounts were apparently important to the transaction. This is despite knowing that its supplier and its supplier's supplier were both based in the UK, and its customer was based in Denmark, which does not use the euro.

219. It knew that CD Europe made a number of significant basic errors in important documents. For example, the wrong date (2015 instead of 2016) in the initial pro-forma invoice in January 2016, that was sent more than once, and the initial pro-forma invoice for the third transaction stating Bose headsets instead of Beats.

220. It knew that its customer appeared unconcerned about price (because it was happily paying around 25% higher than the trade price) and also unconcerned about which product it was receiving (because it had provided a barcode for a product that was out of date, and also did not match the description, as the barcode given only came in dark grey but the request was for black).

221. In addition, Goldhill Associates either did know, or should have known, the following:

222. It should have known that MTIC fraud is not confined to mobile phones, and that high value phone and gaming accessories are also used.

223. It should have known that the SkyCity business it had traded with before was not the SkyCity business it was trading with now. Had it enquired what had happened to the previous SkyCity business, it would have found it was dissolved after bankruptcy.

224. It should have known (from credit checks) or did know, (from Companies House checks) that CD Europe had very few assets and was in poor financial health.

225. It should have known that the profit being offered on this deal was significantly high compared to the work/value of what Goldhill Associates were providing. For example, Goldhill Associates clearly did not have a good working knowledge of the Bose/Beats products they were selling, as evidenced by the barcode queries. It would appear that, apart from the financing of the VAT, for which a high price was being charged, CD Europe and SkyCity did not appear to gain value from the involvement of Goldhill Associates, and in fact liaised between each other frequently.

226. It knew or should have known, from visiting the 3 ADL website, that the company website was not of a high standard that one would expect from an authorised dealer of Bose equipment.

227. Although initially it appears that Goldhill Associates thought that 3 ADL was an authorised Bose dealer, it quickly became apparent that it was not.

## **Decision**

228. We are not satisfied that the Respondents have proved that the Appellant knew that a fraud was being committed. We draw on several facts to come to this conclusion.

229. Firstly, Mr and Mrs Gold both vehemently deny this. It is also Mr Stock's evidence that on being told of the fraud, Mrs Gold in particular was very upset. Given Mr and Mrs Gold work in the same office and overhear each other's phone calls, it would seem very unlikely that one and not the other would be involved in a fraud. We have evidence from both of them that they discussed these deals extensively together.

230. Secondly, Mr Gold did do rudimentary due diligence, particularly on the pricing. His emails on this and the barcodes are not those of someone who knows this

is a fraud. If he knew the whole scheme was a fraud, he would not be too concerned about a discontinued product being sold, particularly as the product had been specifically asked for by his customer.

231. Thirdly, it appears that a third party (not Goldhill Associates) changed the products being supplied/requested each time Mr Gold queried the prices of the products he was buying.

232. However, we do find that the Appellants should have known that these transactions were part of a fraudulent scheme.

233. It is clear that these transactions were unusual when compared to the normal business of Goldhill Associates. The vast majority of the transactions for Goldhill Associates' normal business were to buy from a manufacturer and sell to a wholesaler or to a business that sold to the general public. The business held stock, and strongly preferred to deal in GBP. Goldhill Associates, in 2015, was making, on Mr Gold's evidence, around £10k profit a month from around 80 transactions per month. To make £7.5k profit in one transaction that required very little, if any negotiation as everything was agreed by the customer and supplier, has to be regarded as unusual.

234. We disagree that Goldhill Associates performed a significant amount of work for the 3% mark up. It is noticeable that the markup and the prices were agreed for the first deal on 25 January, 3 days after Mr Jessen first got in touch with Mr Gold on 22 January. As the price was agreed at that point, there seems to have been no expectation that Mr Gold would need to shop around elsewhere for lower prices. Nor could anyone have expected that there would be an issue with barcodes that needed investigating. So regardless of what Mr Gold did, the profit for what he expected to do seems very high. This is obvious again by the third deal, where Mr Jessen and Mr Sercombe have already agreed goods, quantity, price and shipping, and Mr Gold simply needed to issue a pro-forma invoice, an invoice, a purchase order and make a payment.

235. As the unusual transaction bore a number of characteristics of MTIC fraud, it was incumbent on Goldhill Associates to check out this transaction thoroughly.

236. We do not regard the due diligence performed as sufficient.

237. CD Europe was a company with which Goldhill Associates had never traded. Although Mr Sercombe had been known to Mr Gold for many years, this appears to be through telephone conversations only. What Mr Gold did know about CD (Europe) was that they could not afford to fund the VAT for these transactions. A credit check or a look at the accounts on Companies house would have shown a company with extremely limited assets. Mr Gold stated he obtained verbal references on Mr Sercombe, but he got no written references. Mr Gold did go so far as to talk to Mr Sercombe's supplier, but in oral evidence Mr Gold was not specific about what exactly reassured him that 3 ADL could supply Bose headsets. He said 'I felt comfortable at the end of the phone call I had with 3ADL that these were Bose. I did say where are they coming from and I was told indirectly they were coming directly

from Bose. They had supplied Bose and other branded headsets for many years'. And yet, by 6 February he has been told by Mr Sercombe that Bose must not be told about the supply, so at that point he clearly knew they were not an authorised supplier, but he still went ahead and transferred a considerable amount of money, that he was aware was significantly over trade price for the headsets, to CD Europe.

238. When performing due diligence on SkyCity it appears that both Mr and Mrs Gold overlooked the fact that this was a different company to the one with which they had previously traded, and had a different VAT number. This is not indicative of performing thorough due diligence.

239. We consider the possible backdating of the invoice is not relevant to whether Goldhill Associates knew or should have known about a fraud and make no comment on that.

240. There is not one factor that is conclusive in reaching our decision. Taking in totality the unusual nature of the transaction to Goldhill Associates, the clear similarities of the transaction to the features of MTIC fraud which Goldhill Associates knew about, the small role that Goldhill Associates needed to perform, the fact that the prices seemed very out of line with trade prices offered elsewhere, and the significant basic errors that were being made by their supplier and customer, we consider that the Respondents have proved on balance of probabilities that Goldhill Associates should have known that the only reason for the transaction was that it was connected to fraud.

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

**SARAH ALLATT  
TRIBUNAL JUDGE**

**RELEASE DATE: 13 MARCH 2019**