



TC02584

Appeal number: LON/2006/0316

VAT- Input tax – Whether supplies made –no –Whether discretion under Regulation 29(2) VAT Regulations 1995 to accept other evidence exercised, or exercised unreasonably – no – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

FUTURE PHONIC LIMITED

Appellant

- and -

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

Respondents

**TRIBUNAL JUDGES: CHARLES HELLIER
SWAMI RAGHAVAN**

Sitting in public at 45, Bedford Square on 23-27 April 2012

Mr Young, counsel, instructed by Dass solicitors, for the Appellant

Mr Singh, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction / issues in dispute

- 5 1. This decision concerns two appeals against HMRC's decisions to disallow the VAT input tax credit of the appellant, Future Phonic Limited in relation to two purported purchases of Garmin satellite navigation devices in May and June of 2005.
2. HMRC say the supplies described on the invoices relied upon by the appellant to make its input tax claim had not taken place and so no entitlement to deduct input tax
10 arose. HMRC rely principally on evidence from a manager from Garmin to say it is highly unlikely that the appellant was supplied with the particular types of Garmin products in the quantities claimed.
3. The appellant argues the supplies did take place, and that HMRC exercised their discretion to accept other evidence of the supplies unreasonably.
- 15 4. The appellant also raises an argument that HMRC's treatment infringes EU principles of non-discrimination in that they have made assessments in relation to supplies of the goods as between domestic suppliers earlier in the chain of supply to the appellants but have refused a claim in relation to the appellant who was involved in intra-community trade.

20 *Evidence and witnesses*

5. We had 3 lever arch files containing the HMRC decisions, pleadings, correspondence between the parties and copies of witness statements and exhibits.
6. We heard oral evidence from the following persons who also provided witness statements:
- 25 (1) Saeed Farid, the director of the appellant.
- (2) Sean Biddlecombe, who was, at the relevant time, Director of International Marketing for Garmin (Europe) Ltd, and who gave evidence on the particular Garmin products, the mechanisms for distribution, and the details of transactions in the products in the period June 2004 to June
30 2005.
7. The statements of all the witnesses who gave oral evidence had been served in advance, and those statements stood as the witnesses' evidence in chief. In the course of examination of Mr Biddlecombe further evidence was given.
8. We also read witness statements (which also stood as the witnesses' evidence in
35 chief) but did not hear oral evidence from the following:
- (1) Hassan Masood, director of Elite Global Limited.
- (2) George Beaddie, Higher VAT Assurance Officer of HMRC.

- (3) Jasvinder Singh Bhabra, an HMRC Officer working in the team responsible for dealing with traders whose main business activities include buying and selling mobile telephones, computer chips and other electrical equipment.
- 5 (4) Carl Watson, Higher Officer of HMRC Southampton VAT Office.
- (5) Christopher Hodge, Intelligence Officer for HMRC.
- (6) Stewart Yule, Higher VAT Assurance Officer of HMRC.
- (7) Jennifer Ann Carter, VAT Assurance Officer of HMRC.
- (8) Charles Forward, Financial Controller of Garmin (Europe) Limited.
- 10 9. In addition, with the appellant's agreement, we received details of assessments HMRC had made on other parties earlier in the alleged chain of supply to the appellant through Mr Singh's oral submissions.

Costs regime

- 15 10. No application as to the costs regime applicable to the proceedings having been made, the Tribunal invited representations from both parties as to whether the costs regime under the VAT Tribunal Rules 1986 ("the old regime") or the costs regime under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("the new regime") should apply or indeed whether an order should be made splitting costs between the old and new regime depending on when they were incurred.
- 20 11. The appellant's preference was for the old regime to apply. HMRC did not have a preference as between the old regime applying or a split order applying the old regime to matters before 1 April 2009 and the new regime to matters after that date.
- 25 12. Considering the Upper Tribunal's decision in *Atlantic Electric* [2012] UKUT 45 (TCC) the Tribunal considered that where substantial costs had been incurred before 1 April 2009 the starting point ought to be to make an order for splitting costs across the old and new regime unless there were good reasons not to do so.
- 30 13. In this matter there was substantial work undertaken both before and after 1 April 2009. There was no clear expectation demonstrated by the parties as to which regime should apply and no application had been made by the parties despite the issue being raised in previous directions.
14. It was not apparent to the Tribunal why it should not, in these circumstances, make a split regime costs order and accordingly the Tribunal directed that up until 1 April 2009 the old regime would apply. From 1 April 2009 the new regime would apply.

Background facts

15. On the evidence before us we made the following findings of fact which we set out by way of background. Further findings of fact are also set out later on in the discussion section of our decision.

5 *Appeals*

16. The appeals are against two decisions of HMRC dated 3 March 2006. The first decision of that date disallows £905,800 input tax claimed by the appellant in the period 05/05. The second decision disallows £397,566.25 input tax claimed by the appellant in the period 08/05.

10 *The two transactions*

15 17. The appellant claims it bought goods from Elite Global Ltd (“Elite”) and Synergy Services Ltd (“Synergy”) in the UK and sold these goods to Daystar Telecon S.L. (“Daystar”) in Spain. We refer to purchases from Elite as “Deal 1” and the purchase from Synergy as “Deal 2”. The purported goods were of two types of satellite navigation devices the first being the Garmin Street Pilot 2610 in-car GPS system (“the 2610”) and the second being the Garmin 76CS navigation system (“the 76CS”).

18. The two purported purchases as shown on the supplier invoices are summarised as follows:

Supplier and invoice number	Date	Description of goods	Unit price (£) Total inc. VAT(£)	Input tax (£)
DEAL 1				
Elite EG310505/1	31 May 2005	4000 Garmin GPS 76CS navigations systems	370.00+VAT Total 1,739,000	259,000
Elite EG310505/2	31 May 2005	8000 Garmin Street Pilot 2610 in-car GPS systems	462.00+VAT Total 4,342,800	646,800
DEAL 2				
Synergy	29 June 2005	6500 Garmin GPS 76CS	349.50+VAT	397,566.25

INV290605FUT		systems	Total	
			2,669,306.25	

19. The Purchase orders from Daystar to the Appellant showed the following:

Date and invoice number	Goods	Unit price (£)	Total (£) (no VAT)
Deal 1			
27 May 2005	8000 GarminStreet Pilot 2610 Incar GPS	463.00	3,704,000.00
	4000 Garmin GPS76CS Tom Tom Navigation	371.00	1,484,000.00
Deal 2			
29 June 2005	6500 Garmin GPS 76CS	350.00	2,275,000.00

20. The Sales invoices from the Appellant to Daystar showed the following:

Date	Goods	Unit price (£)	Total (£) (no VAT)
Deal 1			
27 May 2005	8000 Garmin Street Pilot 2610 in –car GPS systems	463	3,704,000
No. 117	4000 Garmin GPS 76CS systems	371	1,484,000

			5,188,000
Deal 2			
29 June 2005 No. 138	6500 Garmin GPS 76 CS systems	350	2,275,000

21. The appellant, Elite and Synergy were all registered for VAT at the relevant time.

Inspection reports by freight forwarder

22. The goods purported to be supplied for both transactions were said to have been held at a freight forwarder company called Jade Logistics Ltd. (“Jade”). Jade are said to have inspected the goods and we note the following information from their stock inspection reports for the appellant:

Deal 1 –the 2610s

- (1) Date inspected: 27 May 2005.
- 10 (2) Type of stock: Garmin Street Pilot 2610 In Car GPS Head Units.
- (3) Quantity: 8000 items.
- (4) Approximate weight 420 grammes
- (5) Total weight 7600 kgs.

Deal 1 – the 76CSs

- 15 (1) Date inspected: 27 May 2005.
- (2) Type of stock: Garmin GPS 76 CS in Car GPS Head Units.
- (3) Quantity: 4000 items.
- (4) Approximate weight – [left blank]
- (5) Total weight 1600kgs.

20 *Deal 2 76CS only*

- (1) Date of inspection:
- (2) Type of stock: 6500 Garmin GPS 76CS in car GPS Head Units.
- (3) Quantity: 6500 items
- (4) Approximate weight: [left blank]
- 25 (5) Total weight: 2600kg

23. All three of the inspection reports above stated the following:

(1) Origin of stock: Central Europe

(2) Level of inspection 100% (range 0% 10%/50%/100%)

(3) Stock count 100% (range 0% /10%/50%/100%).

5 (4) “We have inspected the goods and they (sic) have found them to be present and correct and in good condition and free from customs stamps.”

24. Jade issued an invoice to the appellant on 29 June 2005 which showed an inspection charge regarding 8000 2610s and 4000 76CSs in the total amount of £528.75.

Future Phonic Limited and its director Mr Farid

10 25. From Mr Farid’s witness statement we found the following.

26. Mr Saeed Farid has been a director of the appellant (then known as Farid Consultancy Limited) since 2000 which is when the appellant was registered for the purposes of VAT. The main business activity on the appellant’s application was stated as being the provision of IT consultancy services. Around 2000 the appellant
15 acquired a consultancy contract with T-Mobile UK Communications. In carrying out the contract Mr Farid formed contacts within and outside that organisation. At around the end of 2002 / start of 2003 he decided to use these contacts and develop a wholesale business trading in mobile telephones and other electronic/IT related equipment. An amended VAT certificate was issued by HMRC pursuant to Mr
20 Farid’s request which changed the trade classification to “64200-Telecommunications”.

27. To take account of the expansion of the appellant’s business activities, its name was changed on 31 January 2003 to Future Phonic Limited. On 2 June 2006 the appellant changed its name to Ex More Limited. Although this name change took
25 place after the disputed transactions we mention this because the banking documentation showing some of the payments made for the transactions refers to Ex More Limited. The explanation for this given by Mr Farid, which we accept, was to the effect that the systems underlying the production of bank statement print-outs reflected the current name in which the account was held even if this was in relation
30 to transactions prior to the name change.

28. It was not until April 2005 that the appellant entered into its first wholesale transaction. Before that the appellant continued with the consultancy side of the business. In August 2005 Mr Farid decided to end the consultancy side of the business on the basis that the wholesale trade side of the business was buoyant.

35 29. The appellant did not enter into any formal distribution agreement with Garmin. It was not contractually prevented from purchasing any Garmin products outside Garmin’s official distribution channels.

30. Deal 1 was Mr Farid’s first transaction in GPS devices. He could not recall whether he had received stock offers of, or requests for, GPS devices prior to Deal 1.
40 He recalled it had been a very busy time and there were “faxes every day coming in

and going out”. Looking back at that time Mr Farid reflected that it was a time of, in his words, “greed and ambition”. He told us the details of the stock became secondary and that he was “anxious to get going”.

Sean Biddlecombe’s evidence

5 31. Mr Biddlecombe’s witness statement of 14 April 2011 adopts the contents of a statement given by Mr Forward dated 6 March 2007. Mr Biddlecombe gave further evidence at the hearing which was cross-examined by the appellant and also answered further questions from the Tribunal.

10 32. Mr Biddlecombe’s evidence covered the corporate structure of Garmin, the process for forecasting, producing and delivering products in Garmin’s official channels, the specifications of the products and their pricing. We set out the facts from this evidence in relation to these matters below. Our views on the weight of Mr Biddlecombe’s evidence on the grey market for the products, worldwide production numbers, remuneration of employees, and his views on whether the products were
15 supplied in the disputed transactions are discussed further following [110] below.

33. In May and June of 2005 Mr Biddlecombe was Director of International marketing. His title has subsequently changed to General Manager. He has worked for Garmin since 1994.

20 34. We found Mr Biddlecombe to be a highly credible witness who was knowledgeable about the Garmin products in issue, and the Garmin businesses.

Garmin’s corporate structure – operation of supply chain for Garmin products – the position in 2005

35. Garmin Limited (“GL”) is the Group holding company. Products are produced in two countries, the USA and Taiwan.

25 36. There were three sales organisations, Garmin International Inc. (“GI”) which covers the Americas, Garmin (Europe) Limited (“GE”) which covers Europe, Middle East and Africa (“EMEA”), and Garmin (Asia) Corp (“GC”) which covers Asia and Oceania.

30 37. There were two segments to Garmin’s production activities. The first was in car navigation and fitness and marine products, and the other aviation. At the relevant time there were two factories in Taiwan which manufactured for the first segment. They sold to GE in Southampton and GI in Kansas. The aviation segment was strictly controlled and aviation products were only built in Kansas. GE received aviation products only from GI.

35 38. As well as selling to GI and GE the Taiwan factories also had a sales outlet to Asia (GC).

39. Each of the sales organisations had a network of distributors within its geographic region, they were the sole official suppliers of Garmin products.

40. The normal way in which products are ordered and distributed was as follows:

5 (1) GE placed an order on GL which in turn placed an order on GC. A similar process was followed for GI purchases from GC. Goods were shipped from GC to GE in Romsey where they were received in GE's bonded warehouse.

10 (2) GE's distributors placed orders on GE and GE shipped out directly to them. At the time of the transactions in issue the way GE operated was to forecast its requirements and fulfil orders from its inventory. Since then there has been a policy of building to order based on distributor forecasts.

(3) All significant volumes of Garmin product in the relevant geographical location were meant to transit through the local Garmin entity. Therefore goods destined for countries in EMEA ought to have transited through GE.

15 41. There were shipments between Garmin entities but these would tend to be small volumes.

42. For global accounts such as Kenwood (a customer in Belgium) there was a similar process except that the purchase order was received centrally in GI who then placed both GE's and GI's purchase requests with GL.

20 43. On occasions products were "drop shipped". The term "drop shipped" means for instance that Taiwan might ship directly say to Kenwood in Belgium. The invoicing for such an arrangement would follow the terms of the distribution agreements between Garmin and its distributors but the product would go direct to Kenwood.

25 44. Mr Forward was only aware of one shipment that was drop shipped. It was not clear over what period if any he was referring to. This was in November 2005 and this was on a different product (a C310). In cross-examination Mr Biddlecombe mentioned the direct delivery of satnavs to BMW (see [70-71] below). We concluded that drop shipping of Garmin products was a rare practice.

30 45. In relation to placing of orders by distributors, GE's main distributors had a weekly shipping slot. They had regular stocking orders which they supplemented with short notice requirements. GE did not ship without an e-mail or paper order.

35 46. Each entity whether GE, GI or GC produced sales forecasts to the factory setting out their expected requirements. Mr Biddlecombe was involved in that process for GE. In addition global production figures were distributed to the local entities. Mr Biddlecombe would get weekly reports every Monday for each factory which showed part numbers entries, how much had been built, planned production, and actual production. He would see the forecasts and sales history of local dealers including for dealers in Taiwan, China and the Philippines but understandably these would not be of particular interest to him.

47. He therefore was aware of forecasting and production beyond GE.

48. Mr Biddlecombe told us that the number of units Taiwan decided to produce was driven by forecasts. He said the production manager would have to secure components from China, Taiwan and US e.g. chips, screens, and batteries. The negotiation for the underlying procurement was handled centrally in US office so e.g. the contract for Intel is negotiated in the US.

49. The Taiwan factories only manufactured Garmin branded products.

50. We were shown a schedule which set out details of sales for years preceding 2005 (1993 to 2004) and for the first 7 months of 2005 for GE's major customers. Sales to non UK country distributors were set out in a separate schedule. We accept these documents as an accurate record of such sales.

51. There was a two step distribution model for products within EMEA. If GE was selling to France then it would sell and deliver the goods to the French distributor and then they would be sold on to domestic retailers. The exception to this was that in the UK, GE acted as the distributor.

52. We were asked by the Respondents to note a reference to "Synergy SpA" on the separate schedule. At the time this was the exclusive distributor in Italy. Synergy SpA was based in Milan and Mr Biddlecombe had dealt with them for the past 15 years. Garmin bought the business in 2007 and it was now called Garmin Italia. We accept that there was no connection between the "Synergy SpA" in Garmin's schedule and the appellant's purported supplier in Deal 2.

53. We were shown another schedule which set out Garmin Europe's Middle East sales in 2003, 2004 and the first 6 months of 2005. We accept this as accurate.

25 *The products*

54. Both products were GPS devices. The 2610 was introduced in August 2003 and the 76CS was introduced in April 2004.

The 2610

55. We were shown a copy of the catalogue for this product. It was one of the first generation satnav devices. It gave turn by turn instructions and audio guidance.

56. We accept the evidence given by Mr Forward that the weight of the boxed unit was 2.2kg.

57. According to the catalogue the weight of the unit was .93 pounds (which converts to 0.42 kg) and the unit was powered using adaptor cables.

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The 76CS

58. We were shown a copy of the catalogue for the product. The 76CS is a hand held GPS device, the size of an old-fashioned mobile phone. It is used for hiking, walking, camping or when in a boat to give a position to a waypoint. It was primarily of interest to persons carrying outdoor pursuits or sailors of small dinghies. Maps could be loaded on to it e.g. a map of buoys for marine use or street maps. The “C” in 76CS signified a colour screen and “S” signified the sensors which were compass, pressure, altitude change and pressure change.

59. We accept the evidence given by Mr Forward that the weight of the boxed unit was 0.61kg. The boxed unit included a manual.

60. From the catalogue information we find that the weight of unit itself is 7.6 ounces (which converts to 0.215kg) with batteries. The unit used two AA alkaline batteries.

Pricing of product

61. Mr Biddlecombe explained that pricing of the products varied. He said £700 was not an unreasonable price for the 2610 and £600 was not unreasonable for the 76CS but was on the high side.

62. Mr Biddlecombe was shown a print out from a Garmin website referring to the retail price of \$589.27 for the 76CS (described as being “for domestic US market only”). He said that was not an unreasonable price and thought that that was a cheaper price than in Europe but thought this might be explained by the fact that in the US there was a one step distribution process, rather than a two step one in Europe.

Base-maps for the products

63. Both products had built in base maps which related to a particular geographical region and which could not be erased

64. A European product would come with a European base map, a US one with a US base map.

65. The base map would show major routes, up to the equivalent of A roads, coastline and state borders. More detailed maps could then be overlaid – e.g. a European map for driving, or coastal maps, or Ordnance Survey maps for the UK.

66. With the European 2610 there would be a CD in the box which contained the detailed European street map.

67. For the 76CS there was no cartography in the box. A CD could be bought separately or downloaded separately. The idea was that if, say a hiker, wanted data for France then he or she would buy that there. The retailer would not necessarily know for which area the customer wanted a map which is why it was not included.

68. It was possible for a non European device to function in Europe but it would simply show the basic co-ordinates of a position with no map.

Product updates

5 69. While it was possible that there may have been updates to the maps there were no updates to the devices themselves.

*Quantities and values of transactions in Garmin products and in these particular products
2610s*

10 70. We were shown a schedule of distributor purchases from GE between 1 July 2004 and 30 June 2005 which had been produced by Mr Forward of GE and which we accept as accurate. The data was sorted by the number of units purchased. The largest unit order was for an amount of 5930 and was made up of 28 invoices. This was for BMW motor bikes. The invoices went to Germany; the products were drop shipped to Australia.

15 71. The machines ordered by BMW were specially configured to come up with the BMW logo on front page and to show the BMW dealer database.

72. The total number of units bought in the year to 30 June 2005 was 24,864.

76CSs

20 73. We were shown a schedule of distributor purchases from GE between 1 July 2004 and 30 June 2005 which had been produced by Mr Forward of GE and which we accept as accurate. From July 2004 through to June 2005 the total of 76CS sold by GE was 6950.

25 74. We were shown a schedule which set out sales quantities per order for the 76CSs which had been produced from information provided by Mr Forward of GE and which we accept as accurate. On the schedule the number 10 for example showed that a particular customer had bought 10 products.

75. We noted the vast majority of the orders were for single or double digit quantities. There were a small number of triple digit orders with amount ranging between 100 and 200.

30 76. Some of the orders listed the quantity as zero. We accept Mr Biddlecombe's evidence that that these denoted replacements which had been made under warranty.

HMRC's VAT treatment of other traders in supply chain

77. With the agreement of the appellant we received the following details orally from Mr Singh.

Deal 1

78. There was documentary evidence (a chain of invoices for the units the subject of the appeal) of a chain of supply which started with Shakedown Productions, which invoiced Ellerwood, which invoiced Elite, which in turn invoiced the appellant.
5 Shakedown was de-registered on 19 July 2005. It was assessed in 3 January 2006 for April to June 2005 in the amount of £4,205,273.00. No returns were submitted by it, and no input tax was claimed. Shakedown was assessed for underdeclared output tax.

79. Ellerwood was deregistered on 5 November 2005. It denied onward supply to Elite and no assessment was raised by HMRC in respect of such a supply. No
10 assessment was raised against Elite. No input tax reclaim was made by Ellerwood. Elite put in its return. It is not known how the supply or the failure of the supply from Ellerwood was dealt with.

Deal 2

80. There was documentary evidence of a chain of supply which started with Able
15 Trading Ltd which invoiced Pearl Craft UK, which invoiced Synergy, which in turn invoiced the appellant. Able Trading Ltd was deregistered as a missing trader on 23 August 2005. On 12 September 2007 it was assessed for a number of periods including June 2005. The amount was £8,685,329.08. No return was submitted. No input tax was claimed. An assessment was made for under-declared output tax.

20 81. Pearl Craft UK was deregistered as a missing trader on 11 November 2005. An assessment for period June to August 2005 on 23 January 2006 was made for £7,029,593.00. No returns had been submitted therefore no input tax had been claimed. An assessment was made for under-declared output tax.

25 82. On 20 August 2007 Synergy was notified of an assessment for the 06/05 period. There was a nil return. An assessment was made for output tax in that period. Input tax was claimed. In making the assessment HMRC disregarded the input tax on the Pearl Craft invoice on the basis that supplies in the quantities shown were unfeasible and the invoice was invalid under Regulations 13/14 of VAT Regulations 1995. The assessment was for £402,915 and was not challenged by Synergy. The Pearl Craft
30 invoice included output tax but input tax on that was disregarded.

Law

83. At the time the purported supplies were made to the Appellant, Council Directive 77/388/EEC (“the Sixth Directive”) was in force. Insofar as is material, Article 17 of the Sixth Directive stated as follows:

35 “Origin and scope of the right to deduct

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

2. 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
40 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...”

84. These provisions are reflected in section 24 of the Value Added Tax Act 1994(“VATA”). Section 24(1) of VATA states as follows, insofar as is material:

“Subject to the following provisions of this section, “input tax”, in relation to a taxable person, means the following tax, that is to say—

(a) VAT on the supply to him of any goods or services...

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”

85. Section 26 of VATA concerns the exercise of the right to deduct. Section 26(1) states as follows:

“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”.

86. Article 18 of the Sixth Directive also concerns the exercise of the right to deduct. It states as follows, insofar as is material:

“Rules governing the exercise of the right to deduct

(1) To exercise his right of deduction, a taxable person must:

(a) in respect of deductions pursuant to Article 17(2)(a), hold an invoice drawn up in accordance with Article 22(3)...

(2) The taxable person shall effect the deduction by subtracting from the total amount of value added tax due for a given period the total amount of the tax in respect of which, during the same period, the right to deduct has arisen and can be exercised under the provisions of paragraph 1...

(3) Member States shall determine the conditions and procedures whereby a taxable person may be authorised to make a deduction which he has not made in accordance with paragraphs 1 and 2”.

87. Article 22(3)(a) of the Sixth Directive, which again concerns the exercise of the right to deduct, states as follows, insofar as is relevant:

“Every taxable person shall ensure that an invoice is issued, either by himself or by his customer, or in his name and on his behalf, by a third party, in respect of goods or services which he has supplied or rendered to another taxable person or to a non-taxable legal person...”.

88. Article 22(3)(b) of the Sixth Directive concerns the exercise of the right to deduct and sets out what is required to be shown on an invoice for VAT purposes. It states, insofar as is relevant, that:

“Without prejudice to the specific arrangements laid down by this Directive, only the following details are required for VAT purposes on invoices issued under the first, second and third subparagraphs of point (a)...- the quantity and nature of the goods supplied ...”.

5 89. The provisions in the Sixth Directive concerning the exercise of the right to deduct are reflected in VATA and in the Value Added Tax Regulations 1995 (“the VAT Regulations”). Section 24(6) of VATA insofar as is relevant states that:

“Regulations may provide-

10 (a) for VAT on the supply of goods or services to a taxable person...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 or other information as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases...”

15 90. Regulation 13(1) of the VAT Regulations states that save as otherwise provided in the Regulations, where a registered person:

“(a) makes a taxable supply in the United Kingdom to a taxable person”, he shall provide that person with a VAT invoice.

20 91. Regulation 13(2) states that the particulars of the VAT chargeable on a supply of goods shall be provided on a document containing the particulars prescribed in Regulation 14(1), and that

“such a document issued to the buyer shall be treated for the purposes of paragraph (1)(a) above as a VAT invoice...”.

92. Regulation 14(1) of the VAT Regulations states as follows, insofar as is relevant:

25 Contents of VAT invoice

14(1) Subject to paragraph (2) below and regulation 16 and save as the Commissioners may otherwise allow, a registered person providing a VAT invoice in accordance with regulation 13 shall state thereon the following particulars—

30 ...(g) a description sufficient to identify the goods or services supplied,
...(h) for each description, the quantity of the goods...”

93. Regulation 29(2) of the VAT Regulations states that:

35 “At the time of claiming deduction of input tax... a person shall, if the claim is in respect of-

40 (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 or provide such other...evidence of the charge to VAT as the Commissioners may direct”.

Decisions referred to

94. We were referred to the following decisions in the course of the parties' submissions

- (1) *Plazadome Ltd v HMRC* [2009] UKFTT 229 (TC)
- 5 (2) *Powa (Jersey) Limited v HMRC* [2009] UKFTT 360 (TC)
- (3) *Powa (Jersey) Limited v HMRC* [2012] UKUT 50 (TCC)
- (4) *S&I Electronics PLC v HMRC* [2012] UKUT 87 (TCC)

Appellant's arguments

95. *Unequal treatment*: While the Respondents have disallowed the input tax claimed by the appellant they have not similarly disallowed the input tax claimed by Elite and Synergy on their alleged purchases of the equipment or repaid to Elite and Synergy the output tax which they charged to and collected from the appellant. By favouring one taxable person over another the Respondents are breaching Article 22(8) of the Sixth Directive in that they are allowing those companies engaged in domestic transactions (Synergy and Elite) to have their input tax credited whereas they have disallowed the input tax credits of the appellant, the one company that was involved in intra community trade.

96. *Fiscal neutrality*: It is clear that some goods were supplied and that the principle of fiscal neutrality precludes the generalised differentiation between lawful and unlawful transactions except in limited situations.

97. *The evidence shows the goods described on the invoices were supplied*. The appellant relies on the transaction documentation, the stock check by Jade and the treatment by the Respondents of others in the supply chain. There was nothing evidentially to suggest the pricing of the products was inappropriate. The evidence from Garmin deals with supplies through official channels and while Mr Biddlecombe's evidence deals with supplies through official channels in the UK there is no evidence on the amount of worldwide production of the products so as to be able to calculate the size of the grey market for them.

98. *HMRC's discretion to accept other evidence for the supplies* – It was clear that some goods were supplied. If, because the goods were not as described on the invoice, the invoice would not comply with the regulations then prima facie input tax was not creditable, but Regulation 29 of the VAT Regulations 1995 gave HMRC discretion to accept other evidence of a supply. The Respondents failed to exercise that discretion. This amounted to *Wednesbury* unreasonable exercise of discretion. It was not good enough for the Respondents to say as they did that the goods were not as described. It was manifestly irrational to fail to consider issues such as the assessment of other suppliers in the chain, and not to take account of the bona fides of the appellant. References in the Sixth Directive to prevention of abuse can be distinguished as there was no avoidance or abuse here.

Respondents' arguments

99. *Failure to prove goods described in the invoices issued to it were supplied to appellant:* The onus is on the appellant to prove on the balance of probabilities that the goods described in the invoices issued to it by Elite and Synergy were supplied to it. Absent proof of supply it has no right to deduct input tax. The evidence showed that the goods described on the invoice were not supplied.

100. On the basis of information provided by Garmin not only has the appellant failed to prove that it was supplied with Garmin 2610 and 76CS units described on the invoices issued to it by Elite and Synergy but it is inconceivable that the appellant was supplied with those units in the quantities claimed.

101. The evidence from Garmin demonstrates that Garmin operates a tight distribution chain and that it is highly unlikely that the appellant sourced Garmin 2610 and 76CS products from any alleged grey market.

102. If sourced from the grey market the products would have weighed the same as any other unit. The discrepancies in weight further demonstrate the appellant was not supplied with genuine Garmin 2610 or Garmin 76CS products.

103. *HMRC's discretion to accept other evidence:* The Respondents did not accept there was a supply of goods. The appellant did not say the goods were counterfeit and has not offered evidence of what else the goods were. There can be no scope for a right to exercise discretion where there was no charge to tax. The Respondents cannot be criticised for not exercising their discretion as no request was made and no alternative evidence was provided.

104. *Other assessments:* The Respondents' treatment of others has no bearing on question of fact of whether goods claimed to be supplied were supplied. The earlier sale and the later sale are irrelevant to the question of whether supplies were made. If the Respondents treated others incorrectly this should not mean the appellant should be treated incorrectly as well.

105. *Equal treatment / non-discrimination:* The arguments raised by the appellant had been rejected in the Upper Tribunal cases of *Powa (Jersey) Limited* and *S&I Electronics PLC*.

Discussion

106. The primary issue before us is the factual one of whether the supplies purported to have been made were in fact made. We consider in turn the relevance and weight of the evidence, making further findings of fact where appropriate in order to reach a conclusion on this issue in relation to the two Deals.

107. This part of the discussion is structured as follows:

- (1) Could the quantities of 2610s and 76CSs described on the invoices have been supplied through Garmin's normal distribution chain?

- (2) Could the quantities of 2610s and 76CSs described on the invoices have been supplied from the grey market?
- (a) Mr Biddlecombe's evidence on the grey market.
 - (b) Mr Farid's evidence on the grey market.
 - 5 (c) Leakage of products into the grey market from the Taiwan factories
 - Probability of significant recorded over-production by Taiwan factories
 - 10 - Probability of significant un-recorded over-production by Taiwan factories.
 - (d) Leakage of products into grey market from the regional entities (GE, GI, GC) Could the quantities of goods described on the invoices have been amassed from goods delivered to the various Garmin regional entities?
 - 15 (e) Leakage of products into grey market at level in the distribution chain below the regional distributor.
 - (f) Deal 1 – Probability that 2610s sourced from EMEA grey market.
 - (g) Deal 1 – Probability that 2610s sourced from worldwide grey market.
 - 20 (h) Deal 1 – Probability that 76CSs sourced from EMEA grey market.
 - (i) Deal 1 – Probability that 76CSs sourced from worldwide grey market.
 - 25 (j) Deal 2 – Probability that 76CSs sourced from EMEA grey market.
 - (k) Deal 2 – Probability that 76CSs sourced from worldwide grey market.
 - 30 (3) Transaction documentation and evidence from Mr Farid that the appellant bought the goods and evidence from Mr Masood that Elite sold the goods to the appellant.
 - (4) Payment of invoices.
 - (5) Weight of products compared with weight stated in inspection reports.
 - (6) Relevance of pricing.
 - 35 (7) Relevance of HMRC's treatment of other suppliers.
 - (8) Weighing the evidence.
 - (9) Conclusion on Deal 1.
 - (10) Conclusion on Deal 2.

(1) Could the quantities of 2610s and 76CSs described on the invoices have been supplied through Garmin's normal distribution chain?

108. On the basis of the Garmin evidence and schedules we find that it is unlikely that any products obtained in the quantities that are shown on the relevant invoices were obtained through the normal Garmin product distribution chain. We are satisfied that such quantities obtained through the product distribution chain would have shown up in the reporting schedules that were put before us and further that they would have been noticed by Mr Biddlecombe. The amounts would have shown up as abnormal both in terms of the percentage they represent of total units distributed, but also in terms of the transaction amount. We received evidence on what happens when there is over supply and how this is managed. None of that evidence suggests that those mechanisms were deployed so as to result in relevant amounts of the relevant products becoming available. Certainly if they had we think Mr Biddlecombe would have known about it.

109. The appellant suggests that Mr Biddlecombe's evidence is limited because it does not address production figures on a worldwide basis. We disagree. We received evidence from Mr Biddlecombe as to his knowledge of worldwide production and forecast figures and his estimates of the relative ratios of the consumption of production as between EMEA the US and Asia (these were 1:1:0 for 2610s and 1:2.5:0.25 for the 76CS). We are satisfied that Mr Biddlecombe had such knowledge of the worldwide production and forecast figures as to be in a position to give a reasonable estimate of such ratios and that by applying them to the EMEA figures this provides us with an approximate set of worldwide production figures. Based on those we find it more likely than not that the quantities in the disputed transactions were not supplied through Garmin's normal distribution chain.

(2) Could the quantities of 2610s and 76CSs described on the invoices have been supplied from the grey market?

110. The appellants do not rely on supplies being made through the official channels. They say there is a "grey market" in these goods the extent of which is not reflected by Garmin's figures, because it consists of sales made otherwise than by Garmin distributors.

111. We must look at and assess Mr Biddlecombe's evidence on the grey market in relevant products, and the evidence of Mr Farid too.

(2)(a)) Mr Biddlecombe's evidence on the grey market

112. In cross examination Mr Biddlecombe was shown a print out from the website of what appeared to be an Australian importer of electronic products which stated that that firm

"...now provides some products from internationally based distributors other than the manufacturer's locally licensed importer. These are referred to as "direct import" products or "grey market" products and will be shipped directly to you from overseas."

113. It was not in dispute between the parties that a grey market in the relevant Garmin products (as described in the extract above and more broadly in the sense of genuine products which are sold outside of the official distribution channels) could have existed and Mr Biddlecombe acknowledged this in his answers given in both
5 examination and cross-examination.

114. In particular Mr Biddlecombe told us of two sorts of grey market of which he was aware. One arose in the US from the fact that US dealers sold units more cheaply than European dealers; and one arose “intra-Europe” though the different margins across the different distribution channels there.

10 115. US grey market sales would for instance arise through someone in Europe buying the product advertised on a US website such as Amazon marketplace. Sales made in this way would result in the purchaser obtaining a product which was not fit for use in Europe because the products would be equipped with US base maps.

15 116. The intra-Europe grey market was mainly an issue in Eastern Europe and in particular Latvia and Lithuania.

117. Mr Biddlecombe was not aware of the size of either of these grey markets. While he acknowledged there could be a similar grey market in Asia he had no specific knowledge about this.

20 118. He accepted that in a situation where Garmin had surplus old stock and wanted to get rid of it Garmin could reduce the price and dump the products on the market through for example Amazon. Mr Biddlecombe could not give a figure for products that might be dumped because of updating. Whatever the figure he thought it would be lower for the 76CSs given there were higher margins on those and less product. He thought that for the 76CS this would be under 1000 units and that the dumping would
25 take place over a number of weeks. If Garmin needed to get rid of excess stock it would do this through the authorised distribution channels. Mr Biddlecombe said he knew five companies which would take such stock quickly.

30 119. Taking into account the description of the process by which products were manufactured according to forecasts by distributors and evidence that Mr Biddlecombe gave in cross-examination, that rather than it being the case that it was possible that Taiwan produced more than was needed, there was a problem of back orders, we were left with the impression that the scenario whereby Garmin was left with excess stock in the relevant products was certainly not a commonplace one.

35 120. Mr Biddlecombe was not aware of a practice of Taiwan overproducing and thereby building up “buffer stock”. As discussed earlier he had sight of the production figures so we think that if there was a practice of building up buffer stock, and this was recorded in the production figures this is something Mr Biddlecombe would have been aware of. The fact he was not so aware suggests to us that Taiwan was not building up “buffer stock” and recording this in the production figures.

40 121. Mr Biddlecombe accepted that once in the grey market Garmin lost control of the product distribution. However we are satisfied from the evidence that he gave that

if significant quantities of the products, and certainly products in the volumes purported to have been supplied to the appellant were traded in the grey market this would be something that would have come to Mr Biddlecombe's attention. We accept Mr Biddlecombe's evidence that the official distributor would be concerned about being undercut by significant grey market supplies and that they would complain to him. He would therefore get to hear about any significant grey market activity in the region he covered. Mr Biddlecombe told us by way of example of an occasion when a Spanish distributor had sold into Norway. These sales became visible to the Norwegian distributor who then complained about prices in its market. It turned out the sales were made in error but we think this shows that if there was significant grey market activity in a distributor's market, the official distributor would get to hear about it, and would be likely to complain to Garmin with the result Mr Biddlecombe would have heard about it too.

122. We should mention that in response to questions put to him Mr Biddlecombe said that in his view it was highly unlikely that the quantities of the product of various non-European specification, and European specification were being traded in Europe. He put the percentage chances of the goods in the appellant's transactions coming from the grey market at 1-2%, stated he would be "staggered" if volumes of such products had come through US channels. We approach these statements with caution conscious that they amount to opinions and given that Mr Biddlecombe was a witness of fact. We do not therefore place weight on such views but must instead look at the evidence of fact provided in order to reach our own opinion on the likelihood or otherwise of the products described in the appellants' invoices coming from the grey market. But we accept that product designed for the US market would be less attractive to a non US customer.

(2)(b) Mr Farid's evidence on grey market

123. Mr Farid's statement exhibits a document he says he obtained from the internet. This is entitled "Garmin Reports Record First Quarter, Affirms 2005 Guidance". The document refers to a record first quarter ended March 26, 2005 and refers to "Over 584,000 units" being shipped in this quarter.

124. As pointed out by the Respondents this figure refers to shipments of all of Garmin's products not the shipments of the Garmin 2610 and 76CS models.

125. Mr Farid's statement also exhibits a transcript dated October 26, 2005 of Garmin's third quarter earnings call. This refers to more than 700,000 Garmin products being shipped in the 3rd quarter of 2005. Again we note this figure refers to all Garmin products and not just the shipments of Garmin 2610 and 76CS models.

126. We were satisfied that Garmin were supplying products other than 2610s and 76CSs. The transcript of the earnings call referred to above refers to 49 new products being introduced in the year to date and refers to a number of different products such as "C-series, i-series, StreetPilot 2720 and M3". Further, the fact that the records of monetary values of products sold to major European customers in 2005 which we accepted as accurate, far exceeds the value that would be generated if only 2610s and

76CSs were sold indicates Garmin were selling other products in addition to 2610s and 76CSs. The evidence of Mr Forward, in explaining “drop shipments” mentions the shipment of another product, a C310.

5 127. Mr Farid’s statement exhibits a report from KPMG undated but copyrighted 2003 entitled “The Grey Market”. The statement refers to various excerpts from the report including:

10 “branded products have been diverted from the authorised distribution channel within a country or are imported into a country for sale without the consent or knowledge of the manufacturer...computers and related products are among the industry sectors most effected by grey market activity and information technology products valued at as much as 40 billion US dollars in sales are passing through the grey market annually...authorised distributors may purchase more units for end customers than they ultimately require and may sell them to brokers instead of returning the excess units to the OEM.”

15 128. We consider the report of very limited relevance to the issue before us. As the Respondents point out the report refers to the grey market for information technology products in general and says nothing about the size of any grey market for Garmin products, or even the Garmin products which are the subject of the appeals before us. Further it is not clear that the report speaks to the size of such a grey market during the period in issue.

(2)(c) Leakage of products into the grey market from the Taiwan factories

Probability of significant recorded overproduction in Taiwan

25 129. By “recorded overproduction” we mean production by the Taiwan factories that was recorded in the production figures circulated to the Garmin regional entities that was at a given in point in time significantly in excess of the products required by the official distributors.

30 130. It was put to Mr Biddlecombe that if Taiwan built up stock and then there was a change in product then Taiwan would sell this off. He said such a sell off would be visible to him. Forecasts were done monthly at product number level. If inventory at the 3 locations was sufficient, production would not be triggered. Mr Biddlecombe derived his knowledge of Taiwan’s production from a weekly production report that Taiwan produced.

35 131. On the basis of this evidence we find that it was more likely than not that stock would not have been allowed to build up, and further that if it did and was sold off Mr Biddlecombe would have been aware of this. Mr Biddlecombe was not so aware. We find that there was not significant recorded overproduction in Taiwan.

Probability of significant unrecorded over production from Taiwan

40 132. By definition this kind of overproduction would be outside the company’s official internal controls and official reporting procedures. We accept Mr

Biddlecombe's evidence that if someone were to be found engaging in such practices, this would be very risky behaviour on their part and they would be likely to be fired. While it cannot be ruled out we think such overproduction and sale is highly improbable.

5 133. In terms of whether there is any evidence which supports a finding that there was significant unrecorded overproduction at best there are only inferences that might be drawn from the quantities stated in the transaction documentation the appellant relies upon. On that basis alone we are unable to make any finding that there was significant unrecorded overproduction by the Taiwan factories.

10 134. Even if there was unrecorded overproduction it would, when disposed of, end up in circulation in one or more of the regional markets covered by Garmin's official distribution network. We heard evidence from Mr Biddlecombe that if products in any significant quantity appeared on local markets in EMEA this would be brought to his attention. We accept that that would be the case. We find no such significant
15 quantities were brought to Mr Biddlecombe's attention.

135. Given our findings above we proceed on the basis that the goods purportedly supplied must have derived from goods which fell within the recorded production figures albeit outside of the official distributor channels.

20 136. However before doing that we discuss the evidence on two matters which we considered but did not think could assist us on determining whether the Taiwan factories had overproduced but not recorded such overproduction.

25 137. We heard from Mr Biddlecombe that the production manager in Taiwan was a long serving employee who "knew the ropes". We have no reason to think that is not the case but we should make it clear that we do not rely on this for our finding that there was not significant unrecorded overproduction by the Taiwan factories.

138. Similarly Mr Biddlecombe told us about the factory reporting direct to the CEO Dr Ming Kau and that there was an "element of trust" so that he would be very surprised if stock was built up by the factory but not disclosed. In particular Mr Biddlecombe told us he was not aware of Taiwan not disclosing buffer stock.

30 139. While we have no reason to disagree that Mr Biddlecombe would be so surprised or that he was not so aware we find ourselves unable to attach any weight to this evidence in terms of finding whether there was significant unrecorded overproduction or not. While we are satisfied the official production figures were visible to Mr Biddlecombe we do not know one way or the other whether Mr
35 Biddlecombe would have been in a position to know that Taiwan had buffer stock but that it had not disclosed such stock.

40 140. In cross examination it was put to Mr Biddlecombe that the Taiwan factory could produce more than was needed. He denied this was the case and said there was on the contrary a big problem of back orders. While a problem of back orders tends to indicate it was more likely than not that Taiwan did not have spare capacity, it would in our view be predicated on an assumption that the Taiwan factories were over

producing goods according to official forecasts and on such goods being distributed through official channels and disclosed in the production figures. It does not establish one way or the other whether there was unofficial overproduction.

5 (2)(d) *Leakage into grey market from the regional entities (GE, GI, GC) Could the quantities of goods described on the invoices have been amassed from goods delivered to the various Garmin regional entities?*

141. We have considered the possibility of whether the Garmin regional entities procured additional units to those required by the forecasts of distributors below them and sold those into the grey market.

10 142. For the following reasons we are satisfied that on the balance of probabilities it is more likely than not that no such significant amounts of additional goods were sold directly by GE, GI or GC into the grey market.

15 143. We heard evidence from Mr Biddlecombe, which we accept, that Garmin's employees whether in Europe or the US were not incentivised through sales commissions at individual entity level. What incentives there were beyond salary e.g. bonuses for vice-presidents in the US or share options were linked to operating income at the global level.

20 144. We accepted Mr Biddlecombe's evidence that ignoring the official distribution channels would be looked at unfavourably from a corporate point of view and employees engaging in such a practice would risk sanctions.

25 145. While the most plausible scenario for goods being put into the grey market would be through a surplus building up and having to be got rid of, we have already come to the view above that the practice of having to dump goods was not commonplace, and accepted evidence that even if this were to occur it would happen, certainly in the case of EMEA, through official distribution channels. We heard that this situation might arise where there was surplus stock due to a product update. But we accept that there were no product updates to the 2610s and 76CSs which would necessitate this type of action.

30 146. The absence of product updates, the risk of sanctions and lack of obvious incentives for employees to make grey market disposals, and the likelihood that a shortfall between production figures and orders made by official distributors, all suggest to us that no significant amounts of 2610s and 76CSs were disposed of by the regional Garmin entities into the grey market.

35 (2)(e) *Leakage into grey market at level of the distribution chain below the regional distributor*

147. On this basis for units to be sourced from a grey market they would at some point have to have passed through the hands of official country distributors or their customers further down the chain from the Garmin regional distributors. We consider

the possibility of that below in relation to any possible intra EU grey market and any possible worldwide grey market.

5 148. We are conscious the documentary data only refers to the Garmin European entities. We have though estimated ratios given by Mr Biddlecombe in his evidence and evidence that he had regular sight of the global production figures. As discussed above at [109] we think those ratios may be relied on to derive rough estimates of global production amounts.

Deal 1

10 149. Deal 1 concerns the purported purchase of 8000 Garmin 2610 units and 4000 Garmin 76CS units on 31 May 2005 from Elite.

(2)(f) Deal 1- Probability 2610s sourced from intra EMEA grey market

150. Garmin's data which we accept as accurate shows that a total of 26,864 units were sold to its distributors in EMEA between 1 July 2004 and 30 June 2005.

15 151. We accept the data for 2610s shows that no single distributor purchased more than 5930 units, and only 16 distributors purchased more than 200 units each in the entire year. We accept from Mr Forward's evidence that the largest single purchase of Garmin 2610 units in this period was for 900 units, and that the number of transactions of more than 500 units was 4.

20 152. The Respondents invite us to note the following from the Garmin schedule. A company as large as BMW spent far less than appellant – it spent \$2.2million in the whole of the first 7 months of 2005 on all Garmin products. Retailers such as Dixons, Maplin, Argos, and Comet spent less on all Garmin products in the first 7 months of 2005 than the appellant spent in 1 day.

153. 8000 units out of 24,864 represent 32% of annual sales in EMEA for the 2610.

25 154. Taking account of both the size of the market share for the year, and the profile of the frequency of purchases and size of their orders we think it is highly unlikely that 8000 Garmin 2610 units were amassed from any intra EMEA grey market. To amass a quantity of that size, given the distribution of products, would entail a large number of the purchasers holding surplus stock, and a concerted campaign by a purchaser to identify these purchasers and the need in turn to secure purchases from them.

30 155. We find on the balance of probabilities that the 8000 units were not sourced from any intra EMEA grey market in 76CSs.

(2)(g) Deal 1- Probability 2610s sourced from worldwide grey market

156. Applying the 1:1:0 (EMEA to US to Asia) ratio of Mr Biddlecombe to 24864, gives a rough quantity of 50,000 units worldwide for the year. 8000 units represent 16% of the worldwide total of units supplied for the year.

5 157. This represents a significant slice of the global market share and while we do not have evidence before us of the profile and frequency of purchases made outside of Europe, we do not have any reason to think such profile and frequency would be radically different. Taking account both the size of market share and purchase profile we think it is highly unlikely that 8000 units could be amassed from the worldwide
10 grey market.

158. Even if the assumption we have made around the profile of purchases is put to one side we would still be of the view that it is highly unlikely that 8000 units were sourced from the worldwide grey market given that Garmin 2610s distributed into the Americas and in Asia would not have base maps appropriate for EMEA.

15 159. We find on the balance of probabilities that the 8000 Garmin 2610 units could not have been sourced from any worldwide grey market in 2610s.

(2)(h) Deal 1- Probability 76CSs sourced from EMEA grey market

160. The purported purchase was of 4000 units on 31 May 2005. Garmin's data, which we accept shows that 6950 units were sold in EMEA between 1 July 2004 and
20 30 June 2005. 4000 units therefore represent 58% of the EMEA sales for the year.

161. Mr Forward's evidence, which we accept, states that in this period, only the top 10 customers of GE purchased more than 200 Garmin 76CS units each, and that those top 10 customers purchased 4,232 units in total between them. In a schedule produced by Garmin of their sales of 76CSs for July 2004 to June 2005 we note that
25 the order amounts are typically single or double digit figures. The largest amount ordered in a single transaction appears to us to be for 200 units. Mr Forward's evidence which we accept states that the top 10 customers of GE were the only ones with purchases over more than 200 units over the year and they accounted for 4,232 of the 6950 units sold.

30 162. Taking account of both the size of the market share for the year, and the profile of the frequency of purchases and size of their orders we think it is highly unlikely that the 4000 Garmin 76CS units were amassed from any intra EMEA grey market. To amass a quantity of that size, given the distribution of products would entail a large number of the purchasers holding surplus stock, a concerted campaign to
35 identify such purchasers and the need in turn to secure purchases from them.

163. We find on the balance of probabilities that the 4000 76CS units were not sourced from any intra EMEA grey market in 76CSs.

(2)(i) Deal 1- Probability 76CSs sourced from worldwide grey market

164. Applying the 1:2.5:0.25 (EMEA to US to Asia) ratio of Mr Biddlecombe to 6950 (and accepting his evidence that the Asian market was insignificant in the period in issue) gives a rough quantity of 26,000 units worldwide for the year. 4000 units represents 15.4% of the worldwide total of units supplied for the year.

5 165. This represents a significant slice of the global market share and while we do not have evidence before us of the profile and frequency of purchases made for markets outside of Europe, we do not have any reason to think such profile and frequency would be radically different. Taking account both the size of market share and purchase profile we think it is highly unlikely that 4000 units could be amassed
10 from the worldwide grey market.

166. Even if the assumption we have made around the profile of purchases is put to one side we would still be of the view that 4000 units were sourced from the worldwide grey market given that Garmin 76CSs distributed into the Americas and in Asia would not have base maps appropriate for EMEA.

15 167. We therefore find on the balance of probabilities that 4000 Garmin 76CS units could not have been sourced from any worldwide grey market in 76CSs.

(2)(j) Deal 2- Probability 76CSs sourced from EMEA grey market

168. The purported purchase was of 6500 Garmin 76CS units. The relevant Garmin EMEA evidence is set out above. 6500 units represent 93% of the annual sales.

20 169. Taking account of both the size of the market share for the year, and the profile of the frequency of purchases and size of their orders it would be inconceivable to accept that the 6500 Garmin 76CS units were amassed from any intra EMEA grey market. To amass a quantity of that size, given the distribution of products would entail a significant number of the purchasers (who for the most part would hold single
25 or double digit quantities) holding surplus stock, the need to identify such purchasers and the need to in turn secure purchases from them.

170. We find on the balance of probabilities that 6500 units could not have been sourced from an intra EMEA grey market.

(2)(k) Deal 2- Probability 76CSs sourced from worldwide grey market?

30 171. Applying the 1:2.5:0.25 ratio Mr Biddlecombe gave to 6950 gives a rough quantity of 26,000 units worldwide for the year. 6500 units, the amount purchased in the single transaction represents 25% of the worldwide total of units supplied for the year.

35 172. This represents a significant slice of the global market share and while we do not have evidence before us of the profile and frequency of purchases made for markets outside of Europe, we do not have any reason to think such profile and frequency would be radically different. Taking account of both the size of market

share and purchase profile we think it is highly unlikely that 6500 units could be amassed from the worldwide grey market.

173. Even if the assumption we have made around the profile of purchases is put to one side we would still be of the view that it is highly unlikely that 6500 units could
5 have been sourced from the worldwide grey market given that Garmin 76CSs distributed into the Americas and in Asia would not have base maps appropriate for EMEA.

174. We therefore find on the balance of probabilities that 6500 Garmin 76CS units could not have been sourced from the worldwide grey market.

10 175. Mr Biddlecombe did not dispute that there could be a grey market in the Garmin products. What is in dispute is the size of it and whether it was sufficiently large for the appellant to source goods in the quantities that appear on its invoices.

176. For the reasons discussed above we consider the appellant's evidence on the existence and size of the grey market does not persuade us that quantities of the 2610s
15 and 76CSs as appear on the invoices could have been sourced from such a market.

177. We have found on the basis of the Garmin evidence that there could not have been either an intra EMEA or worldwide grey market large enough to enable 2610s and 76CSs to be sourced in the quantities reflected on the appellant's invoices.

178. We are further of the view given the evidence of Mr Biddlecombe that it is
20 likely that if such quantities were in circulation in EMEA Mr Biddlecombe would have got to hear about it through the network of distributors. We are satisfied that he did not hear about such quantities being in circulation and this we think is a further indication that such quantities of 2610s and 76CSs in the amounts stated in the appellant's invoices were not being traded in the grey market in EMEA.

25 *(2)(l) Shift of evidential burden on grey market*

179. The appellant argues that on the basis the appellant states it bought the products in the grey market the evidential burden then shifts to the Respondents to show the size of the grey market. We disagree. The burden is on the appellant to show that the supplies of the products described on the invoices were made. If the appellant
30 maintains that it bought the products in the quantities described it is we think for the appellant to show that a grey market in such products existed which was able to support such supplies. We have looked at the appellant's evidence on the size of the grey market but are not persuaded that it supports the appellant's assertion that relevant quantities of the products could have been bought in the grey market. To the
35 extent there is any issue of shift in evidential burden we think any such shift is not therefore triggered. We would add that even if it was for the Respondents to show the size of the grey market the evidence that has been put forward satisfies us that any grey market in the products could not have sustained quantities of the products said to have been supplied to the appellant.

(3) Transaction document evidence, evidence from Mr Farid that the appellant bought the goods, and evidence from Mr Masood that Elite sold the goods to the appellant

180. We have considered the various documents put in evidence before us documenting the two transactions:

5 (1) The appellant's purchase orders to Elite dated 27 May 2005 and to Synergy dated 29 June 2005.

(2) Elite's two invoices to the appellant dated 31 May 2005, and Synergy's invoice to the appellant dated 29 June 2005.

10 (3) Daystar's purchase orders to the appellant dated 27 May 2005 and 29 June 2005.

(4) The appellant's invoices to Daystar dated 27 May 2005 and 29 June 2005.

15 (5) a vendor statement in relation to 6500 76CSs on 29 June 2005 by a director of Synergy, Mr Cameron Thurston in which Mr Thurston confirms amongst other things that "the stock exists".

(6) In relation to the purported supply to Daystar a "Delivery Pre-Alert", a Shipping Note, a Stock Allocation Authorisation, a Stock Release Authorisation a CMR for Deal 1 and a ferry ticket.

(7) Jade Inspection reports.

20 181. We have also considered Mr Farid's evidence that the appellant bought the goods from Elite and Synergy, and Mr Masood's evidence (which although we did not hear from him was in a statement which we read) that Elite sold the goods to the appellant.

(4) Evidence of payment

25 182. In relation to Deal 1 and payments to Elite there was evidence before us in the form of a witness statement from Mr Masood, a director of Elite which states the products were paid for by the appellant making a number of payments between 20 June 2005 and 12 July 2005 and in copies of bank statements exhibited to the witness statement of the HMRC Officer, Jennifer Carter showing a series of transfers of
30 amounts between the appellant and Elite. From that we find that the Elite received payments towards its invoice to the appellant. HMRC argued that the issue of whether payment had been made was not relevant to whether or not there had been a supply.

183. In relation to Deal 2 with Synergy we did not have evidence before us to make a finding that the invoice was paid by the appellant.

35 184. In the absence of any explanation the fact that someone has paid an invoice for goods would tend to suggest they have received some goods although it remains open to question whether the goods they received were goods as described on the invoices.

185. The evidence that there had been some payment by the appellant is something which we take into account in favour of the appellant.

(5) Weight of units compared with weight stated in inspection reports

186. The weight of the boxed unit of 2610s is 2.2kg. The weight of the boxed unit of 76CSs is 0.61 kg.

187. Therefore 8000 boxed 2610 units would weigh 17,600 kg. According to the
5 Jade inspection report dated 27 May 2005 the total weight of the 8000 units purportedly purchased was 7,600 kg, a discrepancy of 10,000kg.

188. 4000 boxed 76CS units would weigh 2,440 kg. According to the Jade inspection report dated 27 May 2005 the total weight of the 4000 units purportedly purchased was 1,600kg, a discrepancy of 840kg.

10 189. 6500 boxed 76CS units would be 3,965 kg. According to the Jade inspection report the total weight of the 6500 units purportedly purchased was 2,600 kg, a discrepancy of 1,365kg.

190. It was not established whether the Jade weights included any pallets the boxes were on or not, but to the extent the Jade weights did include pallets we note that,
15 given that in each case the Jade amounts given are lower than the actual amounts, including pallet weight within the Jade amounts would make the discrepancy larger rather than smaller.

191. In the inspection reports the number of items is recorded next to the heading “No of BOXES”. We do not understand the appellant to contend that the weight is
20 that of the units, rather than the boxes but for the sake of completeness we record that the unit weight of 2610s was 0.42kg. The unit weight of the 76CS was 0.215kg. 8000 2610 units would weigh 3,360kg. 4000 76CS units would weigh 860kg, and 6500 units would weigh 1397.5kg. So even if the weight was of the units there would be a discrepancy.

25 192. In any event we had evidence before us that both models came with various accessories and a manual. We find it highly unlikely that if the 2610s and 76CSs were supplied such boxes as were inspected would only contain the units.

193. In his evidence Mr Farid suggested that the fact that the inspection report for the 2610s stated 7600kg instead of 17600kg could have been a typographical error. In the
30 absence of any evidence to support that we do not make any finding to that effect. In any case no explanation was put forward for the discrepancy for the other two purported supplies.

194. We agree with the Respondents’ contention that the weight discrepancies in the inspection report undermine the reliability of those reports. Thus it undermines those
35 reports as evidence that goods were supplied, or that goods were supplied of the relevant description. Having said that the discrepancy does not necessarily establish one way or the other whether the goods described were supplied or not. Having regard only to the Jade reports and weight discrepancies, it is still possible that the goods as described on the invoice were supplied but that either the inspection was not carried
40 out, or that it was not carried out properly.

195. A further point which undermines the reliability of the inspection reports, and is relevant to the purported supplies of 76CSs in Deal 1 and Deal 2, is that the 76CSs are described in the inspection reports as “in car GPS head units” whereas 76CSs are in fact hand-held portable units.

5 (6) *Relevance of pricing*

196. The appellant says there is nothing evidentially to suggest that the pricing of stock was inappropriate. The evidence was “all over the place” between £900 and £700.

10 197. From the Respondents’ closing submissions we did not understand that them to be relying on the pricing of the deals.

15 198. We would agree there is nothing to suggest the pricing points towards there not being a supply of the goods. Subject to other evidence, the fact that pricing is not inappropriate is though merely consistent with goods of the relevant description being supplied. It does not tend to establish that the goods as described were supplied and not some other goods which were of similar price.

(7) *Relevance of HMRC treatment of other suppliers*

199. The appellant argues that it appears as if assessments were raised against defaulting traders for unpaid output tax which would only have been raised if taxable supplies of the equipment had been entered into.

20 200. It is our understanding that the appellant has a number of arguments in relation to how HMRC has treated other entities in the purported chains of supply. The first which we discuss here is that HMRC assessments of other suppliers are relevant to the question of whether there were supplies of the goods in the disputed transactions.

25 201. The second is in the context of the appellant’s arguments around exercise of discretion under Regulation 29 of the VAT Regulations and where amongst other matters the appellant says it was manifestly irrational to fail to consider the assessment of other suppliers.

202. The third is that to the extent there is inequality of treatment within a supply chain such inequality is unlawful under Community law.

30 203. In relation to the first question, the appellant refers to assessments being made under s73 VATA 1994 which contains the words “...where it appears to the Commissioners...” and suggests that something must have therefore been apparent to HMRC in the way of facts. The assessments were not appealed and therefore became final.

35 204. To this the Respondents say their treatment of others has no bearing on the question of fact of whether goods claimed to be supplied were supplied. The earlier sale and the later sale are irrelevant to the question of whether supplies were made to

the appellant. Even if the Respondents were incorrect on this, the incorrect treatment of others does not mean the appellant should be treated incorrectly as well. The Respondents appear to concede that where a decision in relation to other suppliers in the chain was made after the decision in this case it should not have included the supplies of Synergy to the appellant.

205. *Assessments in the Elite supply chain* – Shakedown Productions was assessed in 3 January 2006 for under-declared output tax. The purported goods went to Ellerwood and then to Elite. Ellerwood denied onward supply and no assessment was raised. No assessment was made on Elite.

206. The question arises as to the significance of Shakedown Productions being assessed. If it is significant what is the significance of Ellerwood and Elite not being assessed?

207. *Assessments in the Synergy supply chain* - Able trading was assessed for under-declared output tax on 12 September 2007 for a number of periods including June 2005. The amount was £8,685,329.08. Pearl Craft UK Limited was assessed for underdeclared output tax of £7,029,593.00 on 23 January 2006. The assessment on Synergy for output tax in the period was for £402,915. The input tax on Pearl Craft was disregarded on basis of unfeasible supplies and because the invoice was invalid.

208. The question arises as to the significance of Able trading, Pearl Craft UK limited and Synergy being assessed.

209. In our view the assessments do not assist with the factual question of whether the relevant supplies were made to the appellant. The assessments are evidence that HMRC saw something which caused them to conclude that a supply had been made. But that might only have been an invoice. HMRC assess only on what information they have to the best of their judgment on that information. That does not require there to have been certainty that there was a supply. Unless there is evidence that HMRC saw something else which convinced them that there was a supply the assessment only shows that there was an invoice. Even if they did see something we do not know what it was. Further, HMRC may have wrongly not questioned the supplies or for reasons of policy / deployment of resources chosen not to challenge the supplies.

210. In such circumstances the Respondents' treatment of others cannot be indicative that the 2610s and 76CSs were in fact supplied to the appellant. We cannot see that it weighs at all in the scales.

211. The appellant asks us to attach significance to the fact that those assessments, not having been appealed became final. However, the appellant offered no authority for the proposition that because an assessment predicated on certain facts has become final those facts bind this Tribunal. That cannot be right in that even if judicial consideration had been given to such other assessments it would we think be open to this Tribunal to be able to make its own findings of fact on the evidence before it as to whether goods of the invoice description were supplied or not.

212. The point on relevance of assessments works both ways. For instance we do not regard the fact a decision was taken not to assess Ellerwood for input tax on the grounds it did not make a supply as conclusive that there were no supplies.

5 213. The appellant says that there is a presumption that the supplies were made because of HMRC's assessments. They say that while the legal burden is on the appellant the presumption arising from HMRC's other assessments shifts the evidential burden to the Respondents. For the reasons discussed above the assessments are not relevant to the issue of whether the goods in this appeal were
10 Respondents.

(8) Weighing the evidence

Deal 1

15 214. On the one hand we have transaction documentation in the form of a purchase order, an invoice in respect of the purported supply in respect of which payments were received, an inspection report by Jade, and transaction documentation relating to the supply of goods of the same type and quantity to Daystar. Further there is evidence from Mr Farid that the appellant bought the products, and from Mr Masood in the form of his witness statement that Elite sold the products to the appellant and received payment for the goods. The appellant's contention is that these goods were
20 bought in the grey market for 2610s and 76CSs. The appellant was clear that it was not being suggested that the goods were counterfeit.

215. Set against this evidence was Mr Biddlecombe's evidence in relation to production and distribution of the 2610s and 76CSs and evidence from which we were able to make findings in relation to the grey market for 2610s and 76CSs during
25 the period in issue which we shall refer to as "the Garmin evidence".

216. There is a conflict between the Garmin evidence on the size of the grey market on the one hand which tends to show supplies of the relevant goods in the quantities claimed were highly unlikely and, on the other, the transaction documents and inspection reports, which on their face, indicate the supply of the goods as well as the
30 evidence of Mr Farid that the goods were bought, and the evidence of Mr Masood that Elite sold the goods to the appellant and received payment for them.

217. The transaction documents on their face indicate that whichever person prepared the document proceeded on the assumption or belief that such supplies of the particular products described were made. They do not of themselves establish
35 whether the supplies of the goods were in fact made.

218. We have already discussed above that we think the reliability of the inspection report is in question given the discrepancy of the stated weights.

219. Neither Mr Farid's evidence on purchase or Mr Masood's evidence on sale tell us anything more than the transaction documentation. Mr Farid told us that the details

of the products were secondary to him. He did not see or inspect the products himself but relied on Jade to do this. Mr Masood's evidence states that Elite sold a number of Garmin manufactured navigation systems to the appellant and that the sales are evidenced by the appellant's purchase order to Elite and Elite's corresponding invoices to the appellant. We did not have evidence from him which suggests he saw or inspected the goods for himself.

220. In weighing the above evidence against the Garmin evidence we prefer the Garmin evidence. That is to say it seems more likely to us that preparers of the transaction documents, and the directors of the appellant and Elite, were incorrect in any assumption they made that the stated quantities of 2610s and 76CSs were supplied and that the Jade inspection was not as comprehensive or accurate as it purported to be (or what it purported to be at all), than it was that the Garmin evidence which came from a witness who we found highly credible was incorrect.

221. To the extent payment was made for the goods we do not think this establishes that the 2610s and 76CSs were actually supplied.

222. It is for the appellant to show us on the balance of probabilities that the supplies were actually made. The appellant has not provided a plausible explanation backed by evidence for how, in view of the Garmin evidence, the appellant could come to purchase the 2610s and the 76CSs in the quantities they state.

20 *(9) Conclusion on Deal 1*

223. The appellant has not shown on the balance of probabilities that the goods described in the invoices issued to it by Elite were supplied to it. HMRC have shown that it is unlikely that they were.

(10) Conclusion on Deal 2

224. Our analysis in relation to Deal 1 applies equally to Deal 2 with the exception that there was no evidence equivalent to Mr Masood's to factor in with respect to Synergy and with the observation that given the percentages of the European and worldwide market for 76CSs the purported purchase would represent, the supplies of 76CSs in the quantities stated would be even more unlikely.

225. The appellant has not shown on the balance of probabilities that the goods described in the invoices issued to it by Synergy were supplied to it.

Commissioners' discretion under Regulation 29 of the VAT Regulations

If the goods were not supplied is the discretion under Regulation 29 relevant?

226. The Respondents referring to Article 17(2)(a) of the Sixth Directive and section 24(1) of VATA say the appellant has no right to deduct input tax because the goods in respect of which it seeks to exercise that right were not supplied to it. They say there is no scope for them to exercise their discretion to accept "such other...evidence" of the "charge to VAT" as the appellant had failed to prove the supplies as described on

the invoices from Elite and Synergy took place which meant that no “charge to VAT” arose in the first place.

227. The analysis is accepted in other Tribunal decisions for instance the First-tier Tribunal decision of *Plazadome* [27]. At [28] the Tribunal stated:

5 “...The invoice does not itself create an entitlement to input tax but it evidences such an entitlement...”

228. In our view the Respondents’ contention and the view of the Tribunal in *Plazadome* must be right. The reference to “*other* evidence” [emphasis added] in Regulation 29 of the VAT Regulations is consistent with this analysis. In the provisions of Article 18 of the Sixth Directive which the regulations transpose, the discretion of the Member State is clearly limited to the requirements set out in the preceding paragraphs of Article 18 which amongst other requirements set out a requirement to hold an invoice drawn up in specified way. The proviso in Article 18(3) only refers to deduction which the taxable person “has not made in accordance with paragraphs 1 and 2”. It does not extend to dispensing with requirements in Article 17 which deal with the origin and scope of the right to deduct. It cannot be within the Commissioners’ gift to allow a deduction for input tax even though as a matter of fact no supplies were made. Based on our conclusions above on this issue of fact any issue around exercise of the Commissioners’ discretion does not arise if no supplies were made.

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Was there a supply of other goods?

229. The issue of discretion may however arise to the extent that there was a supply, but a supply of goods which were not as described on the invoice. The invoice, not having described sufficiently any such goods could not be a valid invoice. But, it would in principle have been open to the appellant to put forward other evidence as to what those other goods were and their quantities with a view to HMRC then exercising their discretion to allow a claim for input tax.

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Tribunal’s jurisdiction over the discretion

230. We were not specifically addressed on the Tribunal’s jurisdiction in relation to the discretion but it should we think be uncontroversial that it would be a supervisory jurisdiction as set out by Schiemann J In *Kohanzad v C&E Commissioners* [1994] STC 967. There it was highlighted that when considering a case where the Commissioners have discretion it was established that the jurisdiction of the tribunal was a supervisory one in which it determines whether the Commissioners exercised their discretion in a manner which was not unreasonable on the basis of materials available to them at the time they considered the exercise of their discretion.

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Appellant’s complaint that HMRC’s lack of exercise of discretion amounted to an unreasonable exercise of discretion

231. The appellant says HMRC did not exercise discretion as a matter of fact.

232. The appellant says it was not good enough for HMRC's 3 March 2006 decision letters to state:

“The Commissioners do not believe the goods to be those as described in the invoices numbered dated...received from...”

5 233. The appellant gave the example of an invoice which said the goods were red Range Rovers when in fact they were purple. There would in that situation still be a deduction. There was, it was said, a continuum of descriptiveness. Denying a deduction in this matter showed a lack of proportionality particularly as no allegation of impropriety was being made.

10 234. The appellant says that when the decision to refuse input tax was taken there had been no exercise of discretion. If HMRC have not given decision this amounts to exercise of discretion which is *Wednesbury* unreasonable. It was manifestly irrational to take account of other matters such as failure to assess other suppliers; also the appellant's bona fides was not taken into account.

15 235. The Respondent says no request was made and the Respondent cannot be criticised for not exercising discretion as no request for made and no alternative evidence was provided. If the appellant is complaining about HMRC's conduct in referring to the 3 March 2006 letter then that is a matter for judicial review.

20 236. On the materials before us we cannot see any evidence that HMRC was specifically asked to exercise its discretion. That may not be fatal to the appellant. There is no requirement in the legislation that HMRC must formally be requested to exercise its discretion indeed as a general proposition where public bodies are entrusted with discretion they are we think under a duty to consider exercise of the discretion.

25 237. On the other hand HMRC did not have evidence of supplies of goods other than those described on the invoice being made.

30 238. Having reached the view that the goods were not as described it is not apparent to us that it was incumbent on HMRC, in the absence of further information and evidence of there being other goods from the appellant, to try to surmise what goods, if any had in fact been supplied. We do not think it was unreasonable for HMRC not to have considered exercise of the discretion until the input tax claimant had identified that it wanted HMRC to consider its discretion and identified and, if necessary, provided the relevant alternative evidence, or until information had otherwise come into HMRC's possession that there was a supply of some description.

35 *Would any HMRC exercise of discretion have made a difference?*

40 239. If we are wrong in our view that HMRC's failure to consider exercise of its discretion in circumstances where no evidence of other goods was provided we ought to examine whether it would have made any difference to decision to refuse the input tax claim if HMRC had considered its discretion. We do this on the basis of the supervisory jurisdiction discussed above.

240. We disagree with the appellant's contention that not taking into account other assessments was manifestly irrational. Unless those assessments were made on the basis of evidence of the supply of goods other than the mere issue of an invoice (and there was no evidence we were referred to which suggested this was the case), the making of the assessments was not relevant to the exercise of the discretion.

241. Having reached the conclusion that any goods were not as described on the basis of the evidence before them it would then have been illogical to exercise discretion to say there was a supply of the goods described on the invoice. On the evidence that was before HMRC it would certainly not in our view be unreasonable for HMRC to decline to exercise their discretion on the basis that there was a supply of something else because no evidence was provided of what that something else was. The fact other assessments had been made or invoices relating to supplies of 2610s or 76CSs accepted told the officer nothing about what goods, if any, were supplied in the appellant's transactions.

242. On the contrary it would appear to us irrational for HMRC, in the absence of evidence of the other goods to have exercised their discretion to allow the input tax claim. To use the appellant's example it would be as if, having come to the view that no red Range Rovers were supplied, HMRC ought to allow a claim for purple Range Rovers even though there was no evidence that purple Range Rovers had been supplied. None of the transaction documentation and inspection reports that were before HMRC would have enabled HMRC to determine what goods if any were supplied if they were not 2610s or 76CSs.

243. In relation to the appellant's argument that its bona fides, which was not challenged, ought to have been taken into account we do not think that would mean that HMRC should have accepted that this could overcome the lack of evidence showing that goods were in fact supplied and if so what the goods were if they were not 2610s or 76CSs.

244. Accordingly to the extent there was any failure on HMRC's part in not considering it discretion as to accepting other evidence in relation to a supply of goods other than those described on the invoices we think this would not have made any difference given there was no cogent evidence of the making of a supply of goods and no evidence before HMRC of what those other goods were.

Non-discrimination

245. The appellant argues that by favouring one taxable person over another the Respondents are breaching Article 22(8) of the Sixth Directive in that they are allowing those companies engaged in domestic transactions (Synergy and Elite) to have their input tax credited whereas they have disallowed the input tax credits of the appellant, the one company that was involved in intra community trade.

246. In response the Respondents refer to the First-tier decision in *Powa Jersey* [116-120] and to [59] and [60] of the Upper Tribunal decision

5 “As to non-discrimination, this appeal concerns the decision by HMRC that the objective criteria determining the right to deduct input tax were not met as regards these claims for repayment by PJJ. If that is the case, PJJ were not entitled to such repayments, irrespective of the position of anyone else. The FTT’s dismissal of this argument was therefore entirely correct: see at para 120... whether HMRC could have applied a similar approach to traders who served as buffers in the chains does not affect the conclusion; and whether HMRC should have pursued those traders for an account of the output tax received is a question of policy regarding the effective enforcement of the VAT regime, with no doubt limited resources. Accordingly, I consider that the process of non-discrimination is not engaged.

15 247. The Respondents also drew our attention to the Upper Tribunal’s decision in *S&I Electronics* [35] and [36] which after quoting from a First-tier decision (*4 Distribution Ltd v HMRC* [2009] UKFTT 242) which rejected a non-discrimination argument and referring to Roth J’s rejection of such an argument in *Powa Jersey* as set out above went on to say that it agreed with the First-tier Tribunal’s decision in *S&I Electronics* that the principle of non-discrimination was not engaged.

20 248. The appellant says these cases, all of which relate to MTIC fraud, and where the denial of input tax was about prevention of fraud, do not assist in the circumstances here. In particular the appellant says that *Powa (Jersey)* does not assist because that was about a right to deduct which was then lost under *Kittel* (Joined Cases C439/04 and C-440/04) [2008] STC 1537. That case can be distinguished from the situation here where there is no removal of a right to deduct.

25 249. We are not persuaded that the rejection of the non-discrimination arguments in the above cases is to be restricted as the appellant suggests. The broader point is that once it is established that an input tax claim is found to have been correctly denied the way in which HMRC have treated others does not somehow reverse the position that would otherwise apply to the appellant.

30 250. We were not clear whether the appellant’s argument that cases where a right to deduct has been lost are to be distinguished from cases where there is no right to deduct in the first place is an additional argument or another way of highlighting that the cases involve MTIC fraud whereas here no such allegation is made. If it is an additional argument it would seem to us that there would if anything be more hurdles to overcome in explaining why a right to deduct should be created where none was available as compared to a situation where a right was originally provided for but then lost.

40 251. In any case even if we were wrong in our interpretation of the cases referred to by the Respondents the appellant has not put forward any authority which explains the legal basis for being able to find that the appellant is entitled to input tax in relation to supplies that we have found were not made.

252. In making its argument that the Respondents are favouring one taxable person over another the appellant in its skeleton argument maintains that Article 22(8) of the Sixth Directive is breached. Article 22(8) states:

“Member States may impose other obligations which they deem necessary for the correct collection of the tax and for the prevention of evasion, subject to the requirement of equal treatment for domestic transactions and transactions carried out between Member States by taxable persons...”

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253. The primary issue in this appeal has been about whether goods as described on the appellant’s invoices were in fact supplied. It is therefore not clear to us how Article 22(8) can be said to have been breached. That there must be goods or services supplied for there to be input tax is not a Member State option under Article 22(8). It is not clear to us what “other obligations” can be said to have been imposed that would engage Article 22(8).

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254. In [34] of *S&I Electronics* the Upper Tribunal quoted the following with approval from the First-tier decision

“the effect of the *Kittel* principle is to limit a trader’s right to repayment of VAT” rather than confer a discretion on HMRC with the result that “HMRC’s action cannot affect the proper amount of tax in this case”.

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255. As discussed above at [228] discretion on the part of HMRC is not relevant until there are some actual supplies. Whether or not there are supplies is a question of fact. On the basis that we found there were not supplies then there was no discretion to apply and therefore no discretion that could have been exercised in a discriminatory way.

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256. We reject the appellant’s arguments in relation to non-discrimination and find that they do not alter our view that the appellant was not entitled to input tax.

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Fiscal neutrality

257. The appellant says that it is clear that some goods were supplied and that the principle of fiscal neutrality precludes the generalised differentiation between lawful and unlawful transactions except in limited situations.

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258. The principle of fiscal neutrality, which derives from Article 2 of the First Directive, has been given particular expression in the circumstances of different transactions. Thus it applies to require that taxable persons in the distribution chain are to be tax neutral, to ensure that the overall VAT collected is on the amount of the consideration given by the supply by the final consumer, to require that "similar goods should bear the same tax burden whatever the length of the production and distribution chain" and, as a result, to prevent any general distinction in the levying of VAT between lawful and unlawful transaction (*Staatsecretaris v Coffeeshop Siberis* [1999]STC 742 at [14]) where competition between such transactions is not precluded. Thus we accept the emanation of the principle cited by the appellant.

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259. However we see no application for any aspect of that principle to the facts of this appeal. This is not a case where there is any dispute about the amount of the

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consideration for a supply, or the burden of VAT borne by a trader by reference to supplies shown to be made and received by him in a chain of supply, or about competition between two similar supplies, or about the difference between the treatment of a legal and an illegal supply; it concerns instead whether or not there was a supply, and if so whether the invoice adequately described it or other evidence of the supply was received.

260. We have found that it was not proven that there was a supply and even if there was neither the invoice conditions were satisfied nor was such other evidence of the supply provided. The principle of neutrality has no application.

10 *Appellant's application to adduce evidence from Jade in relation to pallets used to stack boxes of the purported supplies*

261. On the third day of what was a 5 day hearing, after evidence had been given in examination by way of further questions to Mr Biddlecombe on the issue of the size of pallets used for Garmin products, the appellant made an application to adduce evidence from Jade on the size of the pallets used.

262. The appellant argued it had not put this evidence in as it did not know until Mr Biddlecombe had answered further questions on the issue (that were not in his witness statement or that of Mr Forward) that the size of the pallets was in issue. The Respondents opposed the application saying the issue was peripheral, they did not need to rely on evidence on pallet size, that such evidence was an opinion of Mr Biddlecombe as he had not seen the pallets used, and that the Tribunal could choose to give such evidence whatever weight it saw fit.

263. The following day we ruled as follows. We tended to think that it would not be fair to allow the application at this stage as there had been ample opportunity in the run up to the hearing to adduce evidence from Jade. But, we were not convinced, as the Respondents argued that the issue of pallet size / box size could be treated as irrelevant simply because the Respondents chose not to rely on it. The question of the size of boxes and pallet size and how many boxes could be fitted on a pallet was a relevant issue.

264. Nevertheless, we thought it would be disproportionate to take into account evidence on pallet size, at this stage of the proceedings, without seeing if we could determine the issue on evidence that had already been put in without having regard to pallet size.

265. We ruled that if the Tribunal were able to find in favour of the Respondents on the basis of the evidence that had been put in but disregarding evidence on box size and pallet size then that would dispose of the matter. If we were not persuaded on the evidence that was put in that the Respondents succeeded then the appellant would have leave to adduce additional evidence from Jade dealing with box and pallet size and a further hearing would be arranged to hear that.

266. Our decision in the substantive appeal as set out above does not deal with evidence relating to the size of the boxes of the 2610s and 76CSs, or the size or number of pallets used in relation to the purported supplies and we have not taken those matters into account.

5 267. In the event, we have been able to find in favour of the Respondents on the basis of the evidence that was already before us, disregarding the issue of pallet/ box size so no further hearing is required.

Conclusion

268. We dismiss the appeal.

10 269. 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
15 “Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)” which accompanies and forms part of this decision notice.

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**CHARLES HELLIER
TRIBUNAL JUDGE**

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**SWAMI RAGHAVAN
TRIBUNAL JUDGE**

RELEASE DATE: 9 January 2013

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