GOODS & SERVICES TAX BOARD OF REVIEW

[2023] SGGST 1

GSTBR 5 of 2020

GHY

V

THE COMPTROLLER OF GOODS AND SERVICES TAX

GROUNDS OF DECISION

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GHY

v

THE COMPTROLLER OF GOODS AND SERVICES TAX

[2023] SGGST 1

Before the Hearing Committee of the Goods and Services Tax Board of Review (27 January 2022 to 30 June 2023):

DJ Kenneth Yap, Chairman
Mr Hamidul Haq, Member
Ms Angela Tan, Member

Before the Hearing Committee of the Goods and Services Tax Board of Review (21 July 2023 to 7 August 2023):

DJ Lee Lit Cheng, Chairperson
Mr Hamidul Haq, Member
Ms Angela Tan, Member

21 to 23 February, 9 March 2022, 20 May 2022

30 June 2023

7 August 2023

Background

1 The Appellant is a company incorporated in Singapore on 20 August 1979. It is involved in the wholesale trade business. It claimed to have acquired "Osperia" Micro Secure Digital Cards ("SD cards") and "Osperia" flash drives (collectively termed as "the Osperia Goods") from its supplier, [K], and thereafter exported them to two Malaysian customers, namely [EXT] and [ETM] (collectively referred to as the "Customers").

2 The Appellant claimed $1,341,557.00 in input tax credit refunds from the Respondent for these supplies, which allegedly took place between 1 April 2016 to 31 August 2016 ("the Relevant Period"). The details are summarised in the table below:

Periods	Total value of the Goods exported ($)	Total input tax claimed on purchase of the Goods ($)
1 Apr 2016 to 30 Jun 2016	7,155,748.00	487,109.00
1 Jul 2016 to 31 Jul 2016	7,816,989.00	531,391.00
1 Aug 2016 to 31 Aug 2016	4,752,307.00	323,057.00
Total	**19,725,044.00**	**1,341,557.00**

3 On 3 August 2020, the Comptroller denied the above claims on the basis that there was no conclusive evidence of supply, and that these were not genuine business transactions.

4 The key issues in this appeal therefore concerned whether:

(a) There were actual supplies of the Osperia goods (as stated in the invoices) which the Appellant claims to have purchased from [K]; and

(b) There were actual supplies of the Osperia goods (as stated in the invoices) which the Appellant claimed to have sold to the Customers.

The Applicable Law

5 Section 19(3)(a)(i) of the Goods and Services Act 1993 (2020 Rev Ed) ("GST Act") defines "input tax" as follows:

> "input tax", in relation to a taxable person, means the following tax: (i) tax on the **supply to him of any goods or services**; … being (in any such case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him… [Emphasis added]

6 In order to claim input tax, there must have been an actual supply of goods on which tax is chargeable. A taxable person is required under regulation 61(2)(a) of the GST (General) Regulations to "hold the document which is required to be provided under regulation 10", i.e. a tax invoice, which in turn must state "a description sufficient to identify the goods or services supplied and the type of supply", per regulation 11(1)(f) of the GST General Regulations. Put together, there must be an *actual* supply of goods *as described in the tax invoice* for input tax to be claimed by a taxable person.

7 A taxable person making a supply of goods in the course of business under s 20(2) of the Goods and Services Tax Act 1993 ("GST Act") in Singapore would be entitled to credit for input tax, which may be deducted from any output tax due from him.

> 20. - (1) The amount of input tax for which a taxable person is entitled to credit at the end of any prescribed accounting period shall be so much of the input tax for the period (that is input

> tax on supplies and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2).
>
> (2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business: (a) taxable supplies; …

8 Section 19(5) of the GST Act provides that if there is no output tax at the end of the account period, or the amount of input tax credit exceeds the output tax, then the amount in excess shall be paid to the taxable person by the Comptroller. In a scenario where the goods are exported, s 21(1) of the GST Act provides that the supply of goods is zero-rated if the goods are exported. Hence, a GST-registered exporter would first pay input tax on the goods purchased, and since no output tax is chargeable, he would then be entitled to a full refund of the input tax paid over.

9 For completeness, it should be pointed out that the current provision in section 20(2A) of the GST Act regarding complicity in an arrangement to cause loss of public revenue was introduced in 2021 and was not in force at the Relevant Period. The new provision reads as follows:

> Despite subsection (1), a taxable person is not entitled to credit for any input tax on any supply made to the taxable person which the taxable person knew or should have known was a part of any arrangement to cause loss of public revenue (whether or not the loss was in fact caused).

The Evidence

The Appellant's Evidence

10 The Appellant tendered evidence relating to the purported trading arrangement as follows:

(a) The Appellant would receive inquiries on the pricing and availability of the Osperia Goods from its Customers. These inquiries came through an intermediary known as "Jacky".

(b) The Appellant would then contact its supplier, [K], to obtain the quoted price, and would in turn provide its own quotation to the Customers, applying a mark-up in prices of between 0.96% to 2.88%. The Appellant would invoice the Customers and full payment would be made before delivery. This would be via cash deposit for [EXT], and in the case of [ETM], payment was made by way of bank transfer from another Singapore-incorporated company, [L].

(c) [K] would deliver the goods to the Appellant and the Appellant would then pay [K] via bank transfer, usually made on or around the day of delivery.

(d) The Appellant would then arrange for delivery of the Osperia Goods to the Customers, usually on or around the same day it received the goods.

11 In particular, the director of [K], one [D], testified that he personally hand-delivered the Osperia goods to the Appellant's office for all 30 transactions. The Appellant's director, [J] and one of its administrative staff, [AL], both confirmed that they jointly received the first two supplies. [J] also testified that he had tested goods from the first supply for functionality and determined that the Osperia goods did indeed conform to technical specifications in respect of storage. The subsequent 28 supplies were received by [AL] alone, who had also taken photographs of the boxes and the packaged

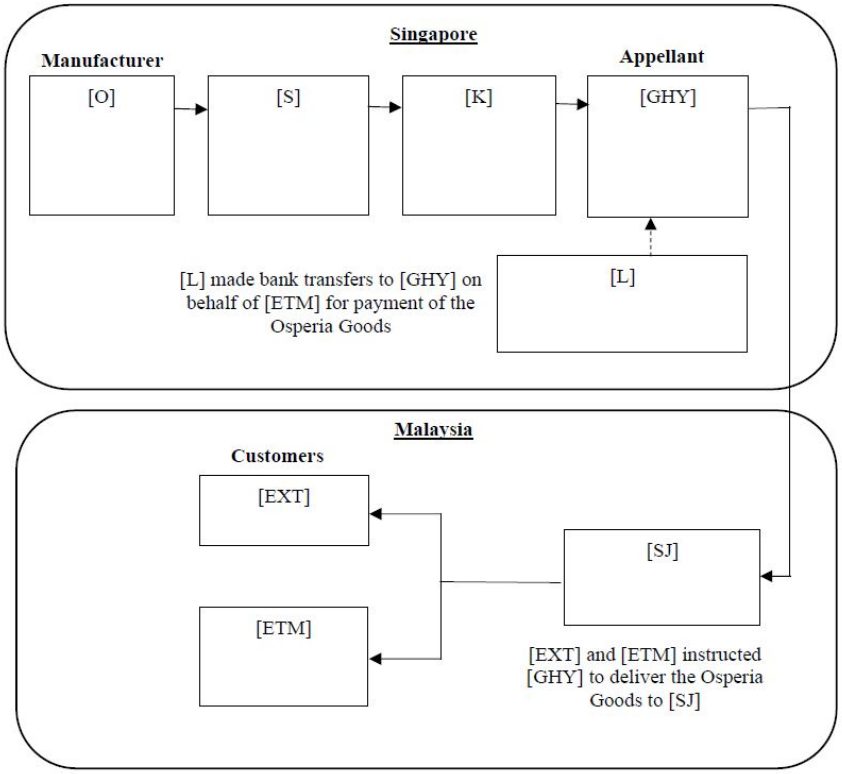
products within (although the actual product packaging was not opened and inspected). Both [J] and [AL] also testified that the supplies were subsequently exported through FedEx to the Customers in Malaysia.

The Respondent's Evidence

12 The Comptroller was alerted to the Appellant's filing due to a sudden spike in the value of its zero-rated supplies and input tax claim within a single quarter. An audit was commenced on the Appellant's business in July 2016.

13 The Comptroller's investigations revealed the following purported supply chain:

Flowchart showing Movement of the Osperia Goods



[O]

14 Based on evidence provided during the audit, the origins of the Osperia goods were purported to be from a company named [O]. However, this was contradicted by evidence from [O]'s incorporator, sole director and shareholder, one [R1], who stated the following:

(a) Other than the business of olive oil trading, [O] was not carrying on any other business.

(b) He did not authorise [O] to conduct any business transaction involving the manufacturing or trading of any SD card, Micro SD card, memory card, flash drive, or any other electronic product. Neither did he have any experience or technical knowledge concerning the production of such goods.

(c) When shown the photographs of the Osperia Goods, he confirmed that he had never seen those boxes and items with the "Osperia" name printed on them.

15 Further investigations into [O] by the Comptroller revealed that its DBS and OCBC bank accounts were largely dormant from the time they were opened on 11 June 2015 and 9 June 2015. During the Relevant Period, only [O]'s OCBC bank account was still open, but there was not a single record of [O] having received *any* monies at all.

16 [O] also appeared to have no discernible presence in the public domain. In particular:

(a) [O]'s Facebook page could not be accessed, while its Twitter and LinkedIn pages had no content or post;

(b) The Comptroller was unable to locate any online product review that mentioned "Osperia" goods;

(c) The Comptroller was also unable to find "Osperia" products in popular marketplace websites hosted by Qoo10, Lazada, Shopee, Amazon, AliExpress and Taobao; and

(d) [O] was neither listed among the list of members registered with the SD Card Association as shown on the website (www.sdcard.org/about-sda/membercompanies), nor was it listed among the list of manufacturers that were granted license with SD-3C LLC under the CLA (Card License Agreement and HALA (SD Host / Ancillary Product License Agreement) as shown on the website (www.sd3C.com/licensees.aspx).

17 While [O] did operate a website, it was notable that [R1] attested that he had never seen it before, nor did he authorise anyone to create a website on [O]'s behalf. Investigations by the Comptroller also revealed that the [O] website appeared to have been copied from the website of one [P], for the following reasons:

(a) Numerous keywords and phrases from the [P] Website, such as "Commercial Grade Storage", "Robust Product Portfolio", "test during burn-in (TDBI)", "DRAM and Flash characterization", "competitive warranties", and "unsurpassed Service and Commitment", were replicated in the now-defunct [O] Website.

(b) In addition, many of the product models, product images, product descriptions and designs of the Osperia-branded products on [O]'s webpages were identical to the products on [P]'s webpages[1].

18 The Comptroller also noted that there were several questions raised in [O]'s aborted GST application process which it had failed to address, raising doubt as to its existence as a manufacturer of the Osperia Goods:

(a) [O]'s First and Second GST Application Forms, as well as email communication with the Comptroller, were purportedly sent by [R1]. However, [R1] categorically denied having ever sent or authorised anyone to send these documents or communications.

(b) [O] claimed to have sold its goods through salespersons known as "Johnson" and "Joan" to several customers. However, [R1] was unaware of such salespersons or any of the purported customers. [O] was also unable to provide any evidence of payment from these customers. In fact, two of the purported customers stated by [O] did not even exist under the records maintained by the Accounting and Corporate Regulatory Authority.

(c) [O] claimed its products were certified for quality by third party inspectors, but when requested, failed to provide any information on such inspections.

(d) [O] claimed that a company based in Shenzhen had provided its start-up capital of $100,000, but was unable to show documentation to substantiate this assertion. [R1] also stated that he had never heard of

[1] Affidavit of Comptroller's audit supervisor, at pages 275-280.

such a Shenzhen company. Neither had he ever travelled to China or had business dealings with any party from that country.

[S]

19 Based on [K]'s GST listings, [K] claimed to have purchased the Osperia Goods from [S].

20 [R2] gave evidence on behalf of the Comptroller as the sole director of [S] at the material time, from 24 March 2016 to 12 October 2016. She revealed that she was unaware that GST F5 forms had been submitted on [S]'s behalf. She was also adamant that she had not authorised anyone to carry out sales or deliver goods on [S]'s behalf, or to carry out any transactions with [K] or [D]. In her own words:

> "I did not engage or authorise anyone to engage on [S]'s behalf, in any business transaction involving the trading of any SD card, Micro SD card, memory card, flash drive, or any other electronic product, with any party (whether based in Singapore or overseas). I also do not have any business experience in trading SD cards, Micro SD cards, memory cards, flash drives, or any other electronic product. I do not have any specialist technical knowledge regarding SD cards, Micro SD cards, memory cards or flash drives."[2]

21 When shown photographs of Osperia Goods, she confirmed that she had never seen any such goods, nor had she traded in or authorised anyone to trade on [S]'s behalf any goods so marked[3].

22 It was also shown that [R2] did not have the financial ability to carry out the transactions purportedly undertaken by [S] in buying and selling the Osperia

[2] AEIC of [R2], at [30].

[3] AEIC of [R2], at [28].

Goods. [R2] was made the sole director of [S] on 24 March 2016, at the young age of 27 years. Her reported income for the Years of Assessment 2013 to 2017 were low or non-existent. She had reported an annual income of $9,603 in 2013 and $4,993 in 2016, with no income at all in 2014 and 2015. She had also never been listed as the owner of any immovable property in her life. Despite such financial limitations, during the period she was listed as the sole director of [S] (i.e. from 24 March 2016 to 12 October 2016), it had purportedly made over $102 million worth of taxable purchases in a period of nine months. It was submitted by the Comptroller that [R2]'s financial ability by reference to her income, assets and age made it clear that she could not possibly have financed [S]'s operations at such scale.

23 In a similar vein, [AR], who served as the next sole director of [S] from 13 October 2016 onwards, likewise testified that he had no knowledge of the sale of supplies of the Osperia Goods:

> "I did not conduct or authorise anyone to conduct on [S]'s behalf, in any business transaction involving the trading of any SD cards, Micro SD cards, memory cards, flash drives, or any other electronic product, with any person (whether based in Singapore or overseas). I do not have any specialist technical knowledge regarding SD cards, Micro SD cards, memory cards or flash drives." 4

24 [AR] also did not know that [S] was a GST-registered business, or that it had submitted GST listings to the Comptroller[5], despite the e-mail to the Comptroller containing [S]'s GST listings being made out in his name. In fact, [AR] revealed that he did not even know how to use a computer[6].

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[4] AEIC of [AR], at [24].

[5] AEIC of [AR], at [17].

[6] AEIC of [AR], at [17].

25 The Comptroller also pointed out that [S]'s bank account with the United Overseas Bank was only open from the period of 1 January 2016 to 17 May 2016. There was no evidence of any other bank account in operation thereafter. In the brief period of 8 eight days between 10 May 2016 and 17 May 2016, when the operation of the account overlapped with the Relevant Period, there was no movement of monies at all in [S]'s UOB bank statements which might have corresponded with any purported receipt of monies from [K] in respect of the Osperia Goods. Notwithstanding this, in its GST returns for the accounting period of 1 April 2016 to 30 September 2016, [S] claimed to have made over $90.5 million worth of taxable supplies and $90.3 million of taxable purchases.

26 In addition, the officer supervising the audit noted that there was no known GST-registered person who had claimed to have supplied the Osperia Goods to [S][7].

27 The totality of the Comptroller's evidence in relation to [O] and [S] therefore suggested that [O] did not manufacture the Osperia Goods, and that neither [O] nor [S] had traded in the Osperia Goods during the Relevant Period.

The Appellant's Case

No Duty on Appellant to Prove the Source of Osperia Goods

28 The Appellant's case was that as long as a supply of goods was made in the course of its business, and such goods were exported, it was entitled as a matter of law to the refund of input tax from the Comptroller. There was no statutory duty placed on a GST-registered trader to trace the source of the goods

[7] AEIC of Comptroller's audit supervisor, at [46].

beyond its immediate supplier in order to claim input tax, nor was it the market practice to do so. Neither was the need to trace goods to source or conduct due diligence on the upstream chain of supply spelt out in any e-Tax guides published by the Comptroller on or before the Relevant Period. In the Appellant's view, its input tax credit was due as long as it complied with the regulations and processes specified under the GST Act – i.e. by retaining and submitting the invoices that showed the purchase and export of the Osperia Goods.

The Appellant had Provided Sufficient Proof to Show that the Business Transactions were Genuine

29 In any case, the Appellant took the view that it had satisfactorily demonstrated that the business transactions had taken place for the following reasons:

(a) [J] had provided documentary evidence, including emails, purchase order, invoices, airway bills and other documentation, to show that the Osperia goods had been purchased from [K], shipped to the Appellant and thereafter on-sold and exported to its two Malaysian customers, [EXT] and [ETM], in the 30 transactions in question.

(b) A sample of the sales transactions was examined by [B], a professional tax adviser on GST matters, and no inconsistencies or deficiencies were found.

(c) A functional check was performed by [J] on the first shipment received by the Appellant, which confirmed that the SD cards were functional and compliant with storage specifications.

(d) [D] from [K] had corroborated the purchases and the supply of goods to the Appellant. He had also attested that when he first started

purchasing the goods in question from [K]'s supplier, [S], he would open each box to check if the goods were genuine.

(e) Photographic record of exterior checks was made for all transactions by [AL].

The Comptroller had failed to prove that the supply of goods was fraudulent or a sham

The Burden of Proof of Fraud lay with the Comptroller

30 The Appellant submitted that, while the legal burden of proof lay with the Appellant under s 52(3) of the GST Act, having submitted comprehensive documentary evidence and witness testimony to show that the supply of goods is genuine, the evidential burden then shifted to the Comptroller to prove that the business transactions are not genuine (per the Court of Appeal case of *Britestone Pte Ltd v Smith & Associates Far East Ltd* [2007] 4 SLR(R) 855, at [58] and [60]). In addition, the Appellant made reference to UK authority in the context of missing trader fraud to demonstrate that the taxpayer is prima facie entitled to input tax if its provided documentation appeared to be correct on its face. This proposition was drawn from the High Court level decision of *Revenue and Customs Commissioners v Infinity Distribution Ltd* [2015] STC 2374 ("the Infinity Distribution case"), where Peter Smith J noted at [24] that:

> **(1) The presentation of documentation which appears on its face to be correct raises a prima facie piece of evidence that the trader in question is entitled to the relief sought and that the documents are genuine.**
>
> (2) Those documents are not conclusive and can be challenged if it can be shown that the trader either
>
> (3) **In accordance with established principles if it is going to be alleged that there was wrongdoing or failure to take reasonable care the burden is on the party which alleges that**. That party in question is HMRC and it is not for the trader

> to prove that he was not fraudulent nor that he had taken reasonable precautions to avoid being involved in a fraud." (**emphasis added**)

31 On appeal to the English Court of Appeal, reported at *Revenue and Customs Commissioners v Infinity Distribution Ltd* [2017] STC 915, Counsel for the Appellant noted that Lord Justice Briggs, at [15], did not affirm or disagree with Peter Smith J's summary of evidential principles in missing trader fraud cases.

The Comptroller had Failed to Prove that the Appellant had Knowledge of or Ought to Have Known about the Fraud

32 The Appellant cited further UK and European authority to show that it was incumbent upon the Comptroller to show that the taxpayer knew or ought to have known about the fraud that was alleged. In the decision of the Court of Justice of the European Union ("CJEU") in *Axel Kittel v Belgium; Belgium v Recolta Recycling* [2008] STC 1537, the court noted at [56] that "a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must … be regarded as a participant in that fraud, irrespective of whether or not he profited by the sale of the goods." The Appellant also brought the attention of the Board to the European Court of Justice case of *Optigen Ltd v Customs and Excise Commissioners* (C-354/03) [2006] STC 419, where it was held by the Advocate General M Poiares Maduro, at [55], that "(t)he right to deduct input VAT of a taxable person … cannot be affected by the fact that in the chain of supply of which those transactions form part another prior or subsequent transaction is vitiated by VAT fraud, without that taxable person knowing or having any means of knowing."

33 The Appellant also turned to the decision of the UK Court of Appeal decision in *Moblix and others v HMRC* [2010] STC 1436 to assert the proposition that a taxpayer should only be found to be a participant in a fraud if the *only* reasonable explanation for the transaction was that it was connected with fraud, per [56] and [60]:

> 56. It must be remembered that the approach of the court in Kittel was to enlarge the category of participants. A trader who should have known that he was running the risk that by his purchase he might be taking part in a transaction connected with fraudulent evasion of VAT, cannot be regarded as a participant in that fraud. The highest it could be put is that he was running the risk that he might be a participant. That is not the approach of the Court in Kittel, nor is it the language it used. In those circumstances, **I am of the view that it must be established that the trader knew or should have known that by his purchase he was taking part in such a transaction…**
>
> 60. The true principle to be derived from Kittel does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But **a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion**." [Emphasis added]

34 Further, the Appellant notes that in an allegation of "fraud in the chain", four distinct factors needed to be proven, notably (1) a loss of VAT, (2) which loss resulted from fraudulent evasion, (3) that the fraudulent evasion was connected to the transactions in question, and (4) that the taxpayer knew or ought to have known about the fraud, per the English High Court in *Blue Sphere Global Ltd v Revenue and Customs Commissioners* [2009] STC 2239, at [29]. It was submitted that in this case, there was no proof of GST loss or fraudulent evasion of GST. There would only be loss to the GST regime if there was a "missing trader", i.e. one of the intermediary traders collected GST from its

customers but failed to pay the tax collected to the Comptroller. However, if the Comptroller denied every trader along the supply chain its input tax claims, it would end up in a fiscally positive position since every non-missing trader would have had to pay GST to the Comptroller, without being able to claim its input GST.

35 The Appellant also expressed doubt whether the Comptroller should even be permitted to succeed on the basis that the taxpayer *should* have known about missing trader fraud in order to deny its input tax claims. It was pointed out that the power to dismiss claims on the basis that the taxable person knew or ought to have known about an arrangement to cause loss of public revenue only came into force with the passage of section 20(2A) of the GST Act in 2021.

36 It was suggested by the Appellant that allowing the Comptroller to dismiss an input tax claim prior to 2021 on the basis that the taxpayer *should have known* about the fraud would be implicitly giving effect to the provision before its enactment.

The Comptroller had Failed to Contradict the Testimony of Staff from the Appellant and [K]

37 In this regard, the Appellant noted that the Comptroller had not led evidence to directly contradict the testimonies of its staff [J] and [AL], as well as [D] from [K], with regard to the receipt and export of the Osperia goods by the Appellant. There was also no evidence to prove that the goods did not involve at least functional SD cards and flash drives, given that the first supply was tested by [J] in person. The Appellant pointed out that the Comptroller had only cast doubt on the manufacture and upstream supply of the Osperia Goods, as well as their onward export to the Customers. However, the Comptroller had

not taken a precise position as to whether there were no goods, or whether the goods were not functional as Micro SD cards or Flash Drives, or whether they were functional goods albeit not "Osperia" branded goods. In this regard, the Appellant submitted that goods marked with the "Osperia" brand did not necessarily have to be manufactured by [O], nor did they need to have been sold by [O] or [S]. Further, the Appellant submitted that the "Osperia" brand was not even material to the transactions between the parties. The testimony of [J] and the email correspondence between [J], [D] and the Malaysian customers suggested that the label "Osperia" was not a condition of the purchase and resale transactions, as the focus of the discussions was compliance with the technical specifications of the goods.

38 The Appellant further dismisses the evidence of the office holders of upstream suppliers [S] and [O] as circumstantial. Even if they were unaware of any supplies having been made, the Appellant's relationship was with [K], and any suspicions in relation to the upstream supplier did not prove that the Appellant did not genuinely purchase such goods from [K], nor did they imply that the goods were not exported to [EXT] and [ETM].

39 As to doubts cast on the Customers in the credit report provided by the Comptroller ("the Experian report"), the Appellant noted that Mr Lim Shock Chin of Experian who tendered the report was not the maker of the Experian Reports issued on [K] and [EXT]. Neither did Mr Lim actually comment on the creditworthiness or business operations of both companies. On this basis, the Appellant submitted that the Experian report should be disregarded.

40 As regards the inference that the Comptroller sought to draw from the Appellant being unable to provide the import permits for the alleged export of

goods to Malaysia, the Appellant stressed that there was no express statutory requirement or guidance for the taxpayer to provide such an import permit generated by a foreign jurisdiction, and that it was unfair to so require because such permits were issued to the Malaysian importer, and were not within the possession or control of the Appellant.

The Comptroller did not Prosecute the Appellant or its Supplier [K] for Overstating Input Tax

41 Next, the Appellant submitted that Comptroller's failure to prosecute either the Appellant or its supplier [K] for making false input tax claims under sections 59 and 62 of the GST Act suggests that it did not have sufficient evidence that the supplies did not take place.

42 The Appellant points out that the penalties for this offence are severe and would surely have been proceeded with if the Comptroller had sufficient evidence that goods were not supplied. Under s 59(1) of the GST Act, a person who incorrectly overstates input tax in his return may be liable to an offence, with the mandatory penalty upon conviction being the repayment of tax undercharged. This penalty can be double the tax undercharged if the incorrect return was made without reasonable excuse or through negligence, and the offender may face a fine of up to $5,000 and/or imprisonment of up to three years under s 59(2)(c) and (d). Where the incorrect return was wilfully made, the penalty is treble the tax charged, and the offender could face a fine of up to $10,000 and/or imprisonment of up to seven years under s 62(1)(f) and (g).

Imposing too Onerous a Standard of Care on Traders

43 Finally, the Appellant points out that should the Comptroller's case prevail, the standard of care required of traders would be too onerous – as they

would have to go beyond their direct supplier and ascertain the source of the goods traded. They would also have to ascertain whether such goods met industrial standards and had indeed been marketed in the industry, as well as verify the authenticity of its export customers. In the Appellant's view, this would be inimical to trade and represent an absurdly high standard of care. It was pointed out that there was no requirement under the law for due diligence to be carried out before an input tax credit claim is sustained. The position adopted by the Comptroller would also mean that businesses would be liable even if they themselves were innocent parties to a fraud.

44 In support of this view, the Appellant called [B], a tax partner at Baker Tilly TFW LLP, as an expert witness to give evidence that it was only *after* the publication of IRAS' e-Tax Guide on Due Diligence Checks to Avoid Being Involved in Missing Trader Fraud on 1 January 2021 that [B] advised her clients to perform due diligence checks on the supplier or parties earlier up the supply chain. Prior to this, she had not in the course of her work advised clients to perform such due diligence checks on their immediate supplier or beyond before making input tax claims in their GST returns[8].

The Comptroller's Case

The Burden of Proof

45 The Comptroller's case is that under s 52(3) of the GST Act, the Appellant bears the burden of proof to show that input tax is claimable, and that this legal burden carries through to the appeal. Accordingly, to claim input tax net of any output tax, the Appellant must show that (a) [K] made actual supplies

[8] Affidavit of [B], at page 16.

of the Osperia Goods as stated in the tax invoice to the Appellant, and (b) the Appellant made actual supplies of these Osperia Goods to the Customers. It therefore follows that the Comptroller is not required to prove that the transactions were in fact sham or fraudulent transactions, such as a missing trader fraud scheme, or that the Appellant had participated in or had knowledge of the same, in order to justify its dismissal of the tax claim. Neither was it incumbent on the Comptroller to identify or prove the goods that the Appellant had purportedly traded (if at all). The burden lay on the Appellant to prove, on a balance of probabilities, that there were actual supplies of the Osperia Goods.

46 Nevertheless, the Comptroller submitted that evidence which suggested that the parties had knowingly participated in or at least were wilfully blind to a fraudulent scheme such as a missing trader fraud, may cast doubt on the genuineness of the purported transactions in question.

47 Insofar as the Appellant relied on UK authority on the burden of proof being placed on the Comptroller to prove fraud, the Comptroller points out that the line of authority is distinguishable because no equivalent provision to s 52(3) of our GST Act exists in UK legislation, which has the statutory effect of placing the burden of proof on the appellant. The Comptroller further distinguished the *Infinity Distribution* case on the basis that it concerned an appeal over an interlocutory decision by the tax authority to strike out certain evidence, and it was unclear whether it had any relevance to the determination of a substantive appeal such as the present one. The Comptroller also points out that the UK Court of Appeal did not actually decide on whether Peter Smith J's views were correct or not (per [2017] STC 915 at [15]).

The Appellant Failed to Prove that there were Genuine Transactions

48 The Comptroller submitted that the Appellant failed to show that there were genuine supplies of the Osperia Goods for the following reasons:

(a) **Doubts concerning Osperia Goods:** Investigations had revealed there was no actual trading of the Osperia Goods on the market, and the directors of both [O] and [S] denied ever transacting in such goods. The bank accounts of [O] and [S] also did not reflect movement of monies consonant with the volume of transactions in this case. Neither did the attempted GST Filings for both companies reveal any such transactions. In fact, the GST filings were not made by the respective directors of both [O] and [S] – and there would have been no reason for subterfuge should these be genuine business transactions.

(b) **[K]'s Director not creditworthy:** The evidence of [D] should be given little weight as he was not a creditworthy witness.

(i) Given that his annual reported income did not exceed $100,000 over the Years of Assessment from 2013 to 2018[9], he could not as the sole director of [K] have the financial ability to finance the purchase of more than $176 million worth of goods over 245 transactions within a period of less than one year.

(ii) [D]' account of the business arrangements was highly dubious. He had apparently been told by a friend that he would be guaranteed a ready supplier of Osperia products and a ready buyer in Malaysia, as long as he sold the products to the

[9] Transcript of Hearing for 22 February 2022, at page 102, line 21 to page 105,line 8.

Malaysian customers through another local company. Further, these profits could be made without assuming any commercial risk whatsoever[10], as [S] would leave the goods with [D] for two days without payment or security. [D] would only pay [S] after he had on-sold the goods to the Appellant and received payment thereunder. It was also very unusual that all payments – involving hundreds of thousands of dollars - were made in cash. The Comptroller submitted that these business arrangements simply made no commercial sense – it was incredulous why such a risk-free arrangement with generous credit terms was made by a friend (whom [D] could no longer identify) to [K], without there having been any pre-existing trading relationship.

(iii) There was hardly any contact between [D] and the representatives of [S] despite the high volume of transactions (245 separate occasions over the course of a year). [D] admitted that he had never spoken to "Ros" in person or over the phone, and had only spoken to someone identifying himself as "[AR]" for just five minutes[11].

(iv) Despite the high value of transactions, [D] admitted that he did not even open up the sealed boxes, much less conduct any functional checks on Osperia products. Neither was there any due diligence checks done on its supplier, [S].

[10] Transcript of Hearing for 22 February 2022, at pages 112 to 118.

[11] Transcript of Hearing for 22 February 2022, at pages 137, lines 7-16 and 126, line 24 to page 127, line 22.

(v) [D] testimony during cross-examination that he was *not* the person who controlled the prices to be charged by the Appellant to its Customers was inconsistent with phone chat messages between [D] and [J], which revealed that it was the former who would set the prices charged by the Appellant to the Customers[12].

Taken in totality, the inconsistencies in [D]' testimony and the incredulity of the business arrangement cast doubt on whether [K] did in fact trade in the Osperia Goods.

(c) Doubts over [K]'s credibility as the purported supplier of Osperia Goods: It was unbelievable that [K], having only started trading on 28 March 2016, could manage to make sales worth more than $177 million within a period of less than one year. In a contemporaneous credit report tendered by the Comptroller by Experian, a credit rating could not be given to [K] as Experian was unable to obtain sufficient information regarding [K]'s business operations – for example, its registered phone number could not even be found[13]. [K] also inexplicably ceased all business abruptly from 17 March 2017. The explanation provided by [D], namely that the banks had closed [K]'s corporate accounts without his permission, did not explain why he could not open new accounts in order to continue trading.

(d) **The characteristics of the transactions between [K] and the Appellant**, when considered in totality, rendered it hard to believe that

[12] Appellant's Bundle of Documents, at pages 757 – 760.

[13] Affidavit of Ms Lim Shock Chin, at page 20.

the transactions were genuine. The suppliers and customers for the Appellant were already pre-sourced without any effort required on [J]'s part. No commercial risk was borne by the Appellant because it would only place orders with [K] only *after* it had received confirmed orders from the Customers, and payment would be collected *first* from the Customers before payment was made to [K] upon delivery of the Osperia Goods. Yet for this entirely risk-free business transaction, the Appellant would receive a profit margin of about 1-2% per transaction[14]. It was also evident that [D] knew the Customers' representative Jacky, with whom [D] dealt with, and even set the price at which the Appellant was to on-sell the Osperia Goods to the Customers. If so, it would have made no sense that [D] would still choose to enlist the Appellant to act as intermediary between [K] and the Customers, or to bear all commercial risk only to allow the Appellant to make profits as a middleman.

On the part of the Appellant, despite the high value and frequency of the transactions, no written contract was ever entered into between [K] and the Appellant. Neither did the Appellant conduct any due diligence checks on the market (with which it was unfamiliar), the products in question, or on its supplier [K], other than conducting an ACRA Bizfile Search (which in any case was conducted on 23 May 2016, which post-dates the start of the Relevant Period on 10 May 2016). When asking for price quotations, the Appellant had failed to specify the exact brand of the goods involved – which seemed bizarre considering that there was a clear correlation between brand and pricing for such electronic

[14] Affidavit of [J], at paragraphs 15 and 16.

products. Further, the only evidence of functional testing was during the first supply, and it was admitted by [J] that even though the cards were specified to be "Class 10" in terms of their speed and could perform the "RWFS" function, no such functional test was conducted to ascertain these particular characteristics[15]. In fact, for the latter 28 transactions in the Relevant Period, the product packaging of the Osperia Goods were not even opened by [AL] upon receipt. This lack of due diligence exhibited by [J] was surprising considering that he was an experienced businessman doing business since 2009. According to the Comptroller, the blithe disregard with which the Appellant had conducted its transactions with its supplier [K] did not accord with commercial reality. The fact that the Appellant completely gave up the business of trading in micro SD cards or flash drives from August 2016 further buttressed the suggestion that the transactions were not bona fide in nature.

(e) **The characteristics of the transactions between the Appellant and the Customers**, when considered in totality, also suggested that the Appellant did not sell the Osperia Goods to the Customers. It made no commercial sense that the foreign Customers would make advance payment in full before the delivery of the Osperia Goods, especially since the value of each transaction fell between the range of $402,221.82 and $957,546.59. This was all the more telling considering that there was no previous trading relationship between the Appellant and the Customers, as well as the fact that the Appellant did not have any established track record in the trade of micro SD cards or flash drives. It also made no sense that [EXT] would have paid the

[15] Transcript of Hearing for 22 February 2022 at page 5, line 22 to page 6, line 3.

Appellant in cash, given that the transactions ranged from $565,565.00 to $957,546.59. The mode of payment adopted by EST was also unusual – transfers would be paid over by [L], a company which was unaffiliated with [ETM]had only been freshly incorporated in Singapore on 26 May 2016, with a paid-up capital of $1,000, and whose stated business was the selling motor vehicles in Malaysia. Further, the Osperia Goods were delivered by Federal Express not to the registered business addresses of the Customers, but to the Customer's freight forwarder in Selangor, a company known as [SJ]. This made no practical sense as the goods were small in size and did not require special warehousing or storage. Despite these irregularities, the Appellant did not conduct any due diligence check. [J] admitted that he did not visit the Customers' premises before commencement of trade[16], nor did he conduct any background checks on the Customers[17] or [L][18]. Neither was there any written contract between the Appellant and the Customers.

There were also serious red flags raised on the part of the Customers. [EXT] was a sole proprietorship whose business address was its sole-proprietor's home address, and did not have the characteristics of a business capable of making 147 transactions worth more than $71 million within 15 months, merely one year after it was first registered on 5 August 2015. It also ceased its business a mere two years after registration. [EXT]'s website was also substantively similar to another SD card manufacturer's website (http://strontium.biz). [EXT]'s

[16] Transcript of Hearing for 21 February 2022 at page 150, lines 4-19.

[17] Transcript of Hearing for 21 February 2022 at page 152, lines 5-8.

[18] Transcript of Hearing for 22 February 2022 at page 2, lines 8-11.

purported address as stated in its purchase order dated 8 May 2016 was a location in Selangor that belonged to another business altogether. With regard to [ETM], it was similarly a sole-proprietorship registered to the proprietor's home address, and had been in existence for only three months when it began trading with the Appellant – yet was able to execute 56 purchase transactions worth more than $34 million within a period of 15 months. It was also inexplicable that despite such scale of transactions, it ceased its business about two years after registration.

Finally, both Customers made orders without providing sufficient specifications regarding the products – there was not even mention of the brand of the goods to be supplied, which would have affected the price of the goods. Neither did the Customers acquire warranty protection from the Appellant, or to safeguard against loss or damage. It was apparent that the Customers had conducted the transactions with the Appellant in a manner which was severely detrimental to their own commercial interests.

49 The Comptroller submitted that where there was evidence suggesting that the transactions in question was dubious, there was ample case law precedents which showed that the input tax claim should be disallowed, on the ground that the taxpayer company had failed to prove that it had actually traded the goods as claimed in the invoices.

No Inference from Failure to Prosecute Appellant and [K] for Offences under the GST Act

50 The Comptroller rejected the argument by the Appellant that the lack of prosecution connoted insufficient evidence on its part. The Comptroller's audit

supervisor explained that the emphasis of her audit was on whether the input tax claims should be allowed, not whether there had been a fraud disclosed (which would have required additional investigation on the relevant guilty state of mind)[19]. It was further submitted that the exercise of prosecutorial discretion took into account a wide variety of factors, some of which were unrelated to the sufficiency of evidence, and it was not fair to draw any kind of inference from the exercise of prosecutorial discretion.

Not Unfair to Disallow the Appellant's Input Tax Claims

51 Counsel for the Comptroller argued that the Appellant's complete disregard for its commercial interest and its failure to take steps to conduct due diligence and safeguard its own commercial interests renders it a reckless, or grossly negligent, trader. Had the Appellant been the victim of a fraud, it should look to its supplier, and not the Comptroller, to make good its losses.

52 As regards the "expert" evidence provided by [B], the Comptroller notes that she is not a witness of fact, nor was she a forensic accountant who was able to check on the authenticity of the documents provided to her. Her evidence in relation to purported industry practice as far as due diligence checks were concerned was not relevant to the issue in contention, i.e. whether genuine transactions had occurred.

[19] Transcript of Hearing for 9 March 2022, at page 65, line 16 to page 66, line 2.

The Board's Decision

The Legal & Evidential Burden of Proof

53 Under s 52(3) of the GST Act, the Appellant bears the burden of proving that the Comptroller's decision to disallow its input tax claim is wrong.

> 52(3) - The onus of proving that the decision of the Comptroller on the application for review and revision under section 49 is incorrect shall be on the appellant.

54 The rationale for this burden being placed on the taxpayer was explained by Buttrose J in *ABC v Comptroller of Income Tax Singapore* [1959] 25 MLJ 162, who commented on the predecessor to s 80(4) of the Income Tax Act 1947 (2020 Rev Ed), which is *in pari materia* with s 52(3) of the GST Act, as follows, at p 166:

> It was argued further that such a construction would place an oppressive and intolerable burden on the taxpayer. By section 80(3) of the Ordinance the onus of proving that the assessment is excessive is placed on the appellant taxpayer. The principle involved was enunciated by Ag. C.J. Isaacs of the Australian High Court in Federal Commissioner of Taxation v. Clarke (1927) 40 C.L.R. 246 at p. 251 as follows:
>
> 'The justice of that burden cannot be disputed. From the nature of the tax, **the Commissioner has, as a rule, no means of ascertainment but what is learnt from the taxpayer, and the taxpayer is presumably and generally, in fact, acquainted with his own affairs**. The onus may prove to be dischargeable easily or with difficulty according to the circumstances.' [Emphasis added]

55 This peculiar nature of tax appeals was underscored by Macpherson J in the UK case of *Tynewydd Labour Working Men's Club and Intitute Ltd v Customs and Excise Commissioners* [1979] STC 570, in relation to value added tax tribunal proceedings (the provisions for which are similar to those under our GST Act), at 580 as follows:

> If the taxpayer wishes to have the assessment altered, he must go to the tribunal, and unless the tribunal finds the commissioners are wrong, the assessment still stands. It seems to me, in those circumstances, that **any taxpayer who appeals to the tribunal takes upon himself the burden of proving the assertion he makes, namely that the assessment is wrong,** because unless he proves this there is nothing on which the tribunal can find an error in the assessment." [Emphasis added]

56 That the legal burden remains with the Appellant throughout the appeal was underscored again by Macpherson J in the UK case of *Grunwick Processing Laboratories Limited v Commissioners of Customs and Excise* [1986] STC 441, at 445:

> At no time do the Commissioners have any burden to prove anything before this tribunal. Neither its case nor any aspect of the matter, factually or evidentially, carries any burden imposed on the Commissioners. It is throughout, in my judgment, up to the taxpayer company, if it can, to attack the assessment in whole or in part.

57 Macpherson J's observations were later endorsed by the UK Court of Appeal in *Grunwick Processing Laboratires Limited v Commissioners of Customs and Excise* [1987] STC 357 at 361.

58 To our minds, placing the burden of proof on the Appellant is readily justified as the GST collection system operates on a self-assessment basis. The Comptroller is not privy to the contemporaneous circumstances or details behind the purported transactions. It should rightly not be called upon to prove that goods as described in the tax invoices were not supplied. Neither was the Comptroller required to prove what goods were actually traded, or whether there were non-existent, non-functional, or of a counterfeit or different brand. In the case of *Premier Joint Ventures*, the UK tax tribunal notably dismissed the appeal even though the HRMC did not know or prove the actual goods which were traded by the appellant company, at [33]:

> We accept that HMRC has not proved what was actually in the four relevant boxes. HMRC did however know that the boxes simply cannot have been sealed factory-packed boxes of genuine Intel CPUs because we accept the Intel evidence that the box and lot numbers on the four boxes had never been supplied by Intel to anyone. The fact that is then decisive, to our minds, is that the boxes had been faked to appear to be Intel boxes, and to have what appeared to be genuine box and lot numbers.

59 As the legal burden rests with the Appellant to prove that such goods were transacted, it is the Appellant which has to tender satisfactory evidence to convince the Board on a balance of probabilities that the described goods were indeed purchased and exported. In the present case, it means the Appellant has to prove that (i) [K] had made actual supplies of the Osperia Goods to the Appellant, and (ii) the Appellant had made actual supplies of the Osperia Goods to the Customers. If this Board is not convinced by the Appellant on a balance of probabilities that these transactions had occurred, it should dismiss the appeal without more.

Whether the Appellant has Discharged its Burden of Proof

60 As a starting point, we were of the view that the Appellant had provided *prima facie* evidence showing that the transactions were genuine. In particular, we note that there was:

(a) Detailed documentary evidence in relation to all 30 transactions was provided to show that the Osperia goods were received from [K] and on-sold to the Customers;

(b) Oral testimony was provided from both [D] and [J] that [K] had indeed supplied goods to the Appellant.

(c) Oral testimony was provided from [J] that a functional check was performed on the Osperia goods at least for the first shipment.

(d) Oral testimony from [J] and [AL] that photographic records were kept of the exterior checks of the goods for the latter 28 transactions, without opening the packaging for any individual item itself.

61 Once the Appellant produces *prima facie* evidence demonstrating that there had been proper supplies of the goods, the *evidential* burden shifts to the Comptroller to convince the Board why it should reject the evidence introduced by the Appellant. We had earlier laid out the plethora of evidence tendered by the Comptroller that cast doubt on the genuineness of the transactions. We do not propose to traverse the evidence in detail, save to note that we are in agreement with the observations made by the Comptroller that these red flags cast serious doubt on the veracity of the transactions. In particular, we found the following issues particularly glaring:

(a) The sudden and anomalous surge in both the volume of transactions and value of the tax claims over the Relevant Period.

(b) The inability to trace the goods to the purported manufacturing source ([O]) or the supplier which sold the products to [K] ([S]).

(c) The inexplicable reason why Osperia products were not known or traded in the market despite the high transaction volumes involved in the present case, as well as the dubious nature of the [O] website. Further, [O] was not a registered member of the SD Card Association, nor listed among other licensed manufacturers under the CLA (Card

License Agreement and HALA (SD Host / Ancillary Product License Agreement).

(d) The lack of a business rationale behind the transactions. We were of the view that the commercial arrangements involved were truly bizarre and incredulous. Should the Appellant's account be believed, [J] was offered a deal which was too good to be true, namely, a risk-free arrangement where he would earn a marked-up profit as a middleman without doing any more than to serve as a mailbox for the claiming of input tax. It beggars belief why [D] did not cut out the middleman and deal directly with Jacky and the Customers himself, since he was privy to the upstream and downstream aspects of the sale.

(e) The elusive nature of the Customers and the inexplicable nature of the arrangements made, including the modality of payment and delivery, the doubts as to whether the Customers had the financial ability to make the purchase, their complete lack of presence or experience in the industry just prior to the Relevant Period, as well as their de-registration once the Comptroller's audit put a stop to further shipments.

62 To our mind, once the Comptroller has cast sufficient doubt on the account put forth by the Appellant, the evidential burden shifts back to the Appellant to do more to allay such concerns and prove its case. Had the transactions been genuine, it would clearly have been in the Appellant's power to provide further proof to close the gaps raised. For example, the Appellant could have traced and produced some of the missing personalities in this case, including the persons who offered the arrangement to [D], the person known as Jacky who allegedly represented the Customers, as well as any of the true controlling minds behind [O] and/or [S]. The Appellant could have also

provided further evidence of communications between the parties apart from purchase and export, for example, aftersales support or warranty issues, which would surely have arisen given the volume of transactions involved. The Appellant's response to the Comptroller's evidence is that it has no duty to perform due diligence under the tax regime. While that would be true in the usual case, where the Comptroller has cast sufficient doubt on the veracity of the transactions, the Appellant does itself no favours if it does not find alternative ways to bolster its assertion that the transactions were genuine.

63 In a similar vein, we were not particularly persuaded by the Appellant's explanation that the Osperia-branded goods could have originated from some other source rather than [O]. This appeared to be mere speculation, as no further evidence was tendered as to identify this separate upstream source, or why it had no presence in the public domain or remained shrouded in secrecy from its downstream purchasers. We find it quite incredible that $19.7 million of Osperia goods had materialised seemingly from thin air, beyond the knowledge of the Appellant or [K]. This seems even more unlikely in the trade of electronic products, where quality and reliability would be key considerations on the mind of the purchaser.

64 Indeed, there is ample authority for dismissal of input tax claims if the taxpayer cannot show that the described goods were transacted. In the UK case of *Pexum Limited v HMRC* [2007] Lexis Citation 609 ("*Pexum"*), the appellant company claimed to have purchased and exported Central Processing Units ("CPUs") manufactured by Intel Corporation. However, it was shown that the CPUs did not originate from Intel Corporation, nor could they actually function as microprocessors. The VAT Tribunal therefore denied the input tax claim as the invoices did not sufficiently identify the goods supplied. In the case of *GSM*

Intertrade Ltd v HRMC [2014] UKFTT 399 (TC) ("*GSM Intertrade*"), the appellant company claimed to have purchased and exported Samsung Serene mobile phones. However, the evidence revealed that the mobile phones did not in fact originate from either Bang & Olufson or Samsung, under whose joint venture they were supposed to have been produced. The input tax claim was dismissed on the basis that the taxpayer had failed to discharge its legal burden of proving on a balance of probabilities that it had traded "Samsung Serene" mobile phones. It is therefore no answer for the Appellant to show that *generic* SD cards and flash drives had been transacted. The evidence provided by the Appellant clearly shows the goods to be Osperia branded goods, and if there are serious doubts as to their origin, the Appellants should be put to strict proof that the goods indeed matched such description.

65 Needless to say, if it was shown that the goods were not manufactured as described, an input tax claim would be denied even if the price and output tax had been paid over. Notably, in the UK VAT case of *Howard v Commissioners of Customs and Excise* [1981] Lexis Citation 363, the VAT Tribunal found that the containers that were allegedly transacted were never manufactured and that no supply had therefore taken place on which any tax was chargeable, at pages 6-7:

> We take the view, on the evidence presented to us on this appeal that the 13 'missing' Containers never existed at all. In this respect we accept the evidence of Mr Williams to the effect that no record of these Containers is to be found with D H Edwards & Son (Structures) Ltd, by which company they were to be manufactured for sale to Carters. We infer from this evidence that none of the 'missing' Containers was ever manufactured…
>
> in our view, **if the goods comprised in an agreement between two taxable persons do not exist at the date of that agreement, and do not exist at the time when the agreement provides for their transfer, no supply takes place upon which any tax is chargeable …** [Emphasis added]

66 It is clear then that the payment of any purported GST output tax does not *in and of itself* give rise to an entitlement to claim input tax. In the case of *Customs and Excise Commissioners v Pennystar Ltd* [1996] STC 163, Cluny J found that even though the taxpayer had been a victim of fraud and had paid value added tax as stated on the tax invoice, the taxpayer still could not claim the input tax if there had not in fact been any supply as purported in the tax invoice (at 165f – 165g).

67 In the final reckoning, where sufficient countervailing evidence had been provided by the Comptroller, it behoves the Appellant to bolster its case with more convincing evidence of the supply. It is for the Appellant to convince the Board in any way it deems fit from the evidence within its remit that the transactions were indeed genuine. We find that the Appellant has not succeeded in doing so.

Whether the Comptroller Needs to Prove Fraudulent or Sham Transactions

68 As for the Appellant's argument that the Comptroller had not proven that the transactions were fraudulent or sham transactions, we are of the view that the Comptroller need not prove the existence of a missing trader fraud scheme, or indeed any other attempt to defraud the collection of public revenue, in order to succeed in this appeal. As earlier explained, the legal burden rests on the Appellant to prove that the transactions were genuine, and it is sufficient for the Comptroller to simply rebut the evidence brought forth by the Appellant without more.

69 It follows then that there would certainly not be a need for the Comptroller to prove that the Appellant was complicit in or had knowledge of any kind of fraud. Moreover, even if the Appellant was an innocent victim who

was duped by a dishonest trader further upstream, he cannot expect the Comptroller to grant his input tax claim and insulate him from loss simply on that basis alone. We emphasise again that the legal right to claim input tax can only arise if actual supplies as described were made. Had the Appellant truly suffered loss as a result of a fraud perpetrated on him by an upstream supplier, his legal recourse lies rightly against that party alone.

70 We therefore find the intense discussion wrought by the Appellant as to the requirements of proof of fraud to be unhelpful in the present appeal. It is, however, a separate matter if the Comptroller raises red flags in the business arrangements that call into question the veracity of the transactions. We did note the similarity between some aspects of the evidence with the hallmarks of typical missing trader fraud cases – namely the use of electronic goods which were small in size but high in paper value, which could be efficiently round-tripped through a series of shell companies to create the illusion of supply. The appearance of such features adds to the overall sense of doubt as to the genuineness of the transactions, which, as explained earlier, the Board is entitled to and did take into account in its finding. Taking into account suspicious characteristics that are the hallmark of missing trader fraud is quite separate from having to prove that it had taken place – and indeed this difference was similarly recognised by the tribunal in the *Premier Joint Ventures* case, at [34]"

> No particular evidence was given by the Respondents in relation to general experience in relation to Missing Trader fraud, and it was clear in this case that HMRC were not alleging in any way that the particular Appellant was aware that the purchases and sales that it made were part of an MTIC fraud. Nevertheless we consider that the HMRC officer was certainly entitled to note that the facts of this case had many of the conventional attributes of an MTIC fraud transaction by others than the particular Appellant. In view of this, and the obvious knowledge that the officer would have had that there were many examples of MTIC fraud transactions being effected with fake goods, we

> consider that the officer was entitled to make his judgment based on the information that he had, referred to in paragraph 33 above, all in the context that the feature that the goods in question might well be fake. We do not base our decision on this feature, though we do consider it realistic.

Whether the Omission to Prosecute the Appellant for GST Offences is Relevant

71 As a post-script, we add that we were not persuaded to draw any inference against the Comptroller arising from its omission to take prosecutorial action against any party for offences under the GSTA for fraud. Whether to prosecute is a matter of discretion and this decision could have been made for a multitude of policy or practical considerations which are unrelated to the strength of evidence. We therefore decline to read from the absence of prosecution that there was any evidential weakness on the part of the position taken by the Comptroller.

72 Accordingly, we find that the Appellant has not sufficiently proved that actual supplies of Osperia Goods as were claimed by the Appellant had occurred. Neither have they proved that those supplies were in turn made to the Customers. We note, in so finding, that this case is consonant with broad case authority in *Pexum*, *Premier Joint Ventures* and *GSM Intertrade* where a taxpayer's input tax claim was disallowed on the ground that it had failed to prove that it had actually traded the goods as described claimed in the invoices.

73 For the above reasons, we dismissed the appeal and invited parties to agree on costs.

Costs

74 Parties were subsequently unable to agree on costs and made submissions on costs in writing.

75 The Comptroller requested for costs in the sum of $100,000 (inclusive of disbursements amounting to about $8,500). As the quantum involved in the present case ($1,341,557.00) was within the High Court's civil jurisdiction, the Comptroller took reference from Appendix G of the Supreme Court Practice Directions ("Appendix G"), and proposed $50,000 in pre-trial costs, $11,000 as a daily trial tariff (amounting to $38,500 over 3.5 hearing days), and post-trial costs of $1,500.

76 The Appellant proposed costs of $32,500, exclusive of reasonable disbursements. It took the view that Appendix G should not apply as this Board should be regarded as the equivalent of the District Court (since the matter is appealable to the General Division of the High Court), and that Appendix G should at best form the upper limit of what any party can be ordered to pay before the GST Board of Review. The Appellant also submitted that the Comptroller should not be entitled to *full* costs, as the lack of clarity of the legal and factual positions taken by the Comptroller compelled the Appellant to run a wide case. It was also pointed out that in *GDY v Comptroller of Goods and Services Tax* [2021] SGGST 1 ("GDY"), which involved a disputed sum of almost $27 million and took three hearing days, a benchmark tariff of $25,000 per day was adopted, with the cost order amounting to $75,000. As the present case was far less complex than *GDY*, the Appellant took the view that $10,000 per day of trial was the fair measure, and as the matter involved 3 ¼ days of hearing (i.e. three days and 2 hours of hearing), $32,500 would be justified.

77 We note that while this Board sits at a level equivalent to a District Court, cases going far above the District Court's civil jurisdiction should tend towards the guidelines in Appendix G, to properly reflect the greater effort incurred by parties. As this matter was less legally and factually complex as compared to *GDY*, a daily tariff of $15,000 would be appropriate. Adopting a multiplier of 3 ½ court days, and with the inclusion of reasonable disbursements, we would fix costs all-in at a round figure of $60,000 in favour of the Comptroller.



Mr Kenneth Yap	Mr Hamidul Haq	Ms Angela Tan
Chairperson	Member	Member
(Hearing Committee for *27 January 2022 to 30 June 2023)*		



Ms Lee Lit Cheng	Mr Hamidul Haq	Ms Angela Tan
Chairperson	Member	Member
(Hearing Committee for *21 July 2023 to 7 August 2023*)		

Mr Liu Hern Kuan and Mr Vincent Ooi (ZICO Insights Law LLC)
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