Neutral Citation: [2023] UKFTT 00338 (TC)

Case Number: TC08772

FIRST-TIER TRIBUNAL
TAX CHAMBER

Manchester

Appeal reference: TC/2016/05276

Denial of relief for input tax on the basis that the Appellant knew or should have known that the supplies in question were connected to the fraudulent evasion of VAT – denial of zero rating for supplies made by the Appellant on the basis that the Appellant knew or should have known that the supplies in question were connected to the fraudulent evasion of VAT – Kittel and Mecsek considered

Heard on: 10, 11, 12, 13, 16, 17 & 18 May 2022
Judgment date: 23 March 2023

Before

TRIBUNAL JUDGE JENNIFER DEAN
MRS SHAMEEM AKHTAR

Between

VANROOYEN (ELITE PRESTIGE SUPERCARS) LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr. T. Brown, Counsel instructed by The VAT People Ltd

For HMRC: Mr. C. Foulkes leading Mr. J Carey of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This appeal concerns:

   (1) decisions by HMRC to deny the Appellant the right to recover input tax for the purposes of value added tax ("VAT") in respect of certain acquisitions made by the Appellant ("the *Kittel* denials"); and

   (2) decisions by HMRC to refuse zero-rating for certain supplies made by the Appellant ("the *Mecsek* denials").

   (3) In the alternative, HMRC submit, in relation to the decisions to refuse zero-rating in periods 01/14, 04/14, 07/14, 08/14, 09/14, 10/14 and 11/14, that the Appellant supplied an unregistered EU customer.

2. The combined total value of the appeals is £825,877.89.

3. HMRC' decision to deny the input tax recovery was made on the basis that the transactions in question were connected to the fraudulent evasion of VAT and the Appellant either knew or should have known that that was the case (see *Axel Kittel v Belgian State and Belgian State v Recolta Recycling SPRL* (C-439/04 and C440/04) ("*Kittel*"). The *Kittel* decision involved one trader, Adapt 4 Work ("A4W").

4. The remaining 89 decisions to refuse zero-rating were based on the principle set out in *Mecsek-Gabona Kft v Nemzeti Ado-es Vamhivatal Del-dunantuli Regionalis Ado Foigazgatosaga* (C-273/11) ("*Mecsek*"), namely that the transactions in question were connected to the fraudulent evasion of VAT and the Appellant either knew or should have known that that was the case. The *Mescek* decisions relate to five ROI customers:

- Mr O'Kelly t/a Pyramid
- Mr Colm McNulty
- Mr Thomas Wright
- Mr Martin Burke
- Mr Paul Lynch

5. The alternative submission relied on by HMRC in relation to 66 of the 93 transactions under appeal is that the Appellant supplied individuals without a VAT registration in the EU.

PRELIMINARY MATTERS

6. There were a number of preliminary issues raised during the hearing. Although we provided our decisions at the time with brief reasons, we advised the parties that further reasons would be provided within this decision and therefore the time in which to appeal, should either party seek to do so, runs from the date of this decision.

7. We were grateful to the parties for their indication that the various applications by both parties to admit a number of additional witness statements had been agreed.

8. HMRC applied to amend its Statement of Case during the hearing on the following grounds. It noted that in opening submissions the Appellant positively asserted there was no tax loss in the transactions involving Mr O'Kelly. That argument was extended on the first day of the hearing to include transactions involving Mr Burke and the Appellant contended that the Respondent's case was limited to connection with fraudulent tax loss occasioned by its direct customers in the ROI. HMRC submitted that their case was not so limited and that it included

a connection to fraudulent tax loss either by the Appellant's customer or later in the supply chain.

9. The amendment sought to the Statement of Case clarified that, in the alternative to tax loss being occasioned by the Appellant's customer, the fraudulent tax loss occurred in its customer's transactions chains, which it knew or should have known of, relying on *Italmoda* which clarified the scope of *Mescek* and allows the taxing authority to deny zero rating irrespective of whether the tax loss is occasioned by a direct customer or later trader in the chain of transactions.

10. HMRC highlighted that its case was clear from the evidence served, in particular Mr D'Rozario's witness statements had addressed tax losses in the Appellant's transaction chains in relation to both Mr O'Kelly and Mr Burke.

11. With reference to *Quah Su-Ling v Goldman Sachs International* [2015] EWHC 759 (Comm), which set out the principles to apply to late amendments to pleadings, *Vilca & ors v Xstrata Limited and Xstrata Tintaya AA* [2017] EWHC 2096 (QB) *and CIP Properties (AIPT) v Galliford Try Infrastructure Ltd and Ors* [2015] EWHC 1345 (TCC), HMRC' submissions can be summarised as follows:

> (i) The Tribunal's discretion should be exercised by reference to the interests of justice to both parties;
>
> (ii) The amendment reflects the evidence served that there is a tax loss occasioned by fraud in respect of which the Appellant accepts its customer was a participant. The Appellant has expressly conceded that there was a fraud perpetrated by its customers; whether that fraud is an immediate customer or entity later in the supply chain makes no difference;
>
> (iii) There is no risk to the hearing, the evidence has been served and there is no consequence to the appeal as the issue can be dealt with by way of submissions; the amendment is technical formalising of that which has always been clear from the evidence;
>
> (iv) HMRC do not accept there has been a delay on the basis its case has been clear from the outset. However, if clarification was needed then the omission of it from the Statement of Case was an oversight;
>
> (v) The prejudice to HMRC severely outweighs that to the Appellant.

12. In response, Mr Brown highlighted that the decision letters relating to Mr O'Kelly and Mr Burke referred to a tax loss with the Appellant's immediate customer. The Appellant cannot be expected to determine HMRC' case from witness statements or a footnote in opening submissions. Given the serious nature of the case, the Appellant cannot rely on an administrative oversight as the reason for the failure to make clear its case in pleadings.

13. Having considered the authorities and the principles to apply, we granted the application. We agreed that it was clear from the evidence and pleadings that in denying zero rating, HMRC had relied on *Mescek*, as clarified by *Itamoda*, and that they had considered the Appellants' chains of supply which included entities later in those chains.

14. We considered that there was minimal, if any prejudice to the Appellant as any issues it sought to raise could be dealt with by way of submissions, noting that the Appellant had not taken any issue with HMRC tracing of the supply chains or evidence relating to entities indirectly connected to the Appellant which it had considered in providing its response to the Tribunal's *Fairford* directions. There was no delay to proceedings in permitting the amendments and we accepted HMRC's submission that the amendment was akin to

formalising a point for clarification. Despite the timing of the application, having weighed the relevant factors, we concluded that the overriding objective and interests of justice tipped the balance in favour of permitting the amendment.

15. The Appellant sought to amend its Grounds of Appeal midway through proceedings. The Appellant sought to include an additional ground to address HMRC' alternative argument relating to transactions involving Mr O'Kelly.

16. In summary, the Appellant sought to rely on Article 138(2) of the Principal VAT Directive ("PVD"), s95(3)(ii) Value Added Tax Act 1994 ("VATA") and regulation 147(1)(b) Value Added Tax Regulations 1995 ("the Regulations") in support of the argument that, if the Tribunal rejects the Respondent's case relying on *Mescek* in relation to the Mr O'Kelly transactions, and considers the alternative argument that the supplies were made to unregistered EU individuals, then the Appellant was entitled to supply non-taxable persons and claim zero rating for "new means of transport".

17. In support of its application the Appellant highlighted that there was no delay to proceedings, no additional evidence was required, and the matter could be dealt with in submissions. HMRC submitted that the proposed amendment is bound to fail and should not be permitted.

18. It was agreed that the application and submissions thereon would be addressed in closing in order not to delay proceedings and we address this application and the parties' submissions later in this decision when we turn to consider the Respondent's alternative argument.

ISSUES TO BE DETERMINED

19. The input tax element of the appeals arises out of the denial by HMRC of the Appellant's right to recover input tax on purchases of vehicles made by the Appellant during the VAT accounting periods 04/14, 07/14 and 11/14 from one supplier, Adapt 4 Work ("A4W").

20. The zero-rating element of the appeals arises out of the denial by HMRC of the Appellant's right to zero-rate sales of vehicles made by the Appellant during the VAT accounting periods 01/14 – 12/14, 01/15 – 06/15 to five customers in the Republic of Ireland (the "ROI"), as follows: Mr O'Kelly, Mr Wright, Mr McNulty, Mr Lynch and Mr Burke.

21. The parties agreed, in relation to each purchase or sale ("the *Kittel* transactions" and "the *Mecsek* transactions" respectively) which is relevant to the appeals, that the test to apply is as follows:

> (i) Was there a VAT loss?
>
> (ii) If so, was it occasioned by fraud?
>
> (iii) If so, were the Appellant's transactions connected with such a fraudulent tax loss? and
>
> (iv) If so, did the Appellant know, or should it have known, of such a connection?
>
> (v) In respect of the *Mecsek* decisions, did the Appellant take every reasonable step within its power to prevent its own participation in that fraud.

22. The burden of proof rests with HMRC on the balance of probabilities (*Mobilx* at [81] and [82]).

23. In relation to HMRC's alternative argument, the issue is whether the Appellant supplied an EU customer who was not VAT registered.

OVERVIEW OF THE PARTIES' CASES

24. HMRC contend that the Appellant knew that its transactions were connected with the fraudulent evasion of VAT or, in the alternative, the Appellant should have known of the connection to fraud. HMRC rely on a number of factors which, they submit, when viewed in totality support their case including (but not limited to) poor due diligence, general indicators of contrivance and the lack of contractual terms covering matters such as title to goods and insurance. Furthermore, HMRC contend that the Appellant failed to take reasonable steps to ensure its transactions were not connected to fraud.

25. The Appellant accepted that each of the transaction chains identified by HMRC was accurately traced and that conditions set out at [21] (i) – (iii) above in relation to all transactions, save for those involving Mr Colin O'Kelly t/a Pyramid Auto ("Mr O'Kelly") and Mr Burke, were satisfied.

26. In respect of Mr O'Kelly and Mr Burke, the Appellant explained at the hearing that if there was a tax loss, then it was accepted that this was fraudulent. However, without a tax loss, even if the transaction was "questionable…even more than that", it could not be fraudulent.

27. The Appellant did not accept, in relation to any of the transactions, that it knew or should have known that its transactions were connected to a fraudulent tax loss. It disputes the features relied on by HMRC and highlighted that the Appellants were not advised by HMRC about fraud in its industry until after some of the deals had taken place. The Appellant claimed that it had taken all reasonable steps to guard against connection to fraud and that the evidence relied on by HMRC is insufficient to reach a finding of knowledge or means of knowledge.

28. HMRC submit that the questions of tax loss and fraud are bound up together and cannot be isolated as implied by the Appellant, whose submissions suggest that unless the Tribunal first finds a tax loss, it cannot go on to consider fraud.

29. HMRC alternative case is that the Appellant supplied Mr Cullen and Mr Byrne who, according to Mr O'Kelly, used Pyramid's VAT number. Mr Cullen and Mr Byrne were not VAT registered entities and the economic reality in such a scenario is that the supplies were made to individuals and must therefore be treated as domestic supplies on which standard rate VAT must be charged and accounted for (paragraph 6.1 of PN 725).

30. The Appellant submitted that it supplied the vehicles to Mr O'Kelly t/a Pyramid. However, even if the supplies were to Mr Cullen and Mr Byrne, a VAT registration number is not required to zero-rate dispatched from the UK.

THE LAW

There was no dispute between the parties in relation to the law which is relevant to these appeals.

Kittel and input tax

Relevant provisions

31. Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT (the "2006 Directive") provide as follows:

> "Article 167
>
> A right of deduction shall arise at the time the deductible tax becomes chargeable.
>
> Article 168
>
> In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he

carries out these transactions, to deduct the following from the VAT, which he is liable to pay:

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

32. Article 273 of the 2006 Directive provides that "Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers".

33. The provisions set out above are reflected in domestic law at Sections 24, 25 and 26 VATA 1994.

34. The effect of the provisions is as follows:

(i) An amount of VAT charged by one VAT registered trader to another VAT registered trader should be accounted for as output tax; then

(ii) The amount of VAT previously charged as output tax may subsequently be reclaimed by the purchaser as input tax; and

(iii) When a business' input tax claim exceeds its output tax it will be entitled to make a claim for a repayment of VAT.

35. The regulations referred to in VATA 1994 are The Value Added Tax Regulations 1995 (SI 1995/2518) (the "VAT Regulations").

36. Regulation 13 provides:

"**13 Obligation to provide a VAT invoice**

(1) Save as otherwise provided in these Regulations, where a registered person—

(a) makes a taxable supply in the United Kingdom to a taxable person…

he shall provide such persons as are mentioned above with a VAT invoice."

37. Regulation 29 of the VAT Regulations provides:

"29 Claims for input tax

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

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

(a) a supply from another taxable person, hold the document, which is required to be provided under regulation 13;…

provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other documentary evidence of the charge to VAT as the Commissioners may direct."

Mecsek and zero-rating

Relevant provisions

38. Article 2 of the 2006 Directive provides as follows:

1. The following transactions shall be subject to VAT:

…

(b) the intra-Community acquisition of goods for consideration within the territory of a Member State by:

(i) a taxable person acting as such, or a non-taxable legal person, where the vendor is a taxable person acting as such…

39. Article 138(1) of the 2006 Directive provides as follows:

"Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began."

40. This provision is reflected in section 30(8) VATA:

"Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where—

(a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member States or that the supply in question involves both—

(i) the removal of the goods from the United Kingdom; and

(ii) their acquisition in another member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that member State corresponding, in relation to that member State, to the provisions of section 10; and

(b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled."

41. Regulation 134 of the VAT Regulations 1995 provide as follows:

"Where the Commissioners are satisfied that –

(a) A supply of goods by a taxable person involves their removal from the United Kingdom;

(b) The supplies are to a person taxable in another member state;

(c) The goods have been removed to another member state…

the supply, subject to such conditions as they may impose shall be zero rated."

AUTHORITIES AND GENERAL APPLICATION OF THE LEGAL PRINCIPLES

42. The principles to be applied in appeals involving *Kittel* and *Mescek* denials are well established and have been refined over the years**.** The salient points are set out below.

43. The CJEU in *Kittel* confirmed that a taxable person who "knew or should have known" that the purchases in which input tax was incurred were connected with the fraudulent evasion of VAT would not be entitled to claim a credit in respect of that input tax. Having explained (see [51]) that "traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud" should not lose their right to a credit for the input tax the CJEU held 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, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods."

44. The CJEU explained the rationale at [57] and [58] as follows:

> "That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
>
> In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them."

45. The CJEU concluded at [59]:

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

46. The Court of Appeal addressed the issues raised by *Kittel* in *Mobilx Limited (in Liquidation) v The Commissioners for Her Majesty's Revenue and Customs* [2010] EWCA Civ 517 ("*Mobilx*"). In relation to the test of "should have known", Moses LJ said (at [52] & [59]):

> "If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met. It profits nothing to contend that, in domestic law, complicity in fraud denotes a more culpable state of mind than carelessness, in the light of the principle in Kittel. A trader who fails to deploy means of knowledge available to him does not satisfy the objective criteria which must be met before his right to deduct arises."
>
> "The test in Kittel is simple and should not be over-refined, it embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraudulent evasion of VAT then he should have known of that fact..."

47. Moses LJ went on to explain that the "should have known" test encompasses a taxable person who has the means of knowledge but chooses not to deploy it, for instance by ignoring obvious inferences surrounding the circumstances in which he has been trading. He explained that where a trader "should have known that there was no reasonable explanation for the circumstances in which the transaction was undertaken other than that it was connected with fraud, then such a trader was directly and knowingly involved in fraudulent evasion of VAT".

48. Moses LJ emphasised (at [81] & [82]) that although the burden of proof rests with HMRC, that:

> "…is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant ...Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud."

49. *Megtian Ltd (In Administration) v The Commissioners for HM Revenue and Customs* [2010] EWHC 18 (Ch) (at [37] – [38]) established that HMRC do not have to prove that the Appellant knew or should have known either the details of the fraud or the identities of the fraudulent traders.

50. The test of constructive knowledge was referred to in *Davis & Dann & Another v The Commissioners for HM Customs and Excise* [2016] EWCA Civ 142 ("*Davis & Dann*") in

which Arden LJ held that in considering "the no other reasonable explanation standard" a court needs to consider the totality of the evidence and not in isolation (see [60] - [65]). It is not sufficient for HMRC to show that the taxpayer should have known that either it was running the risk that by its purchase it might be taking part in a transaction connected with fraud or that it was taking part in a transaction which was likely to have been connected with fraud.

51. As Christopher Clarke J explained in *Red12 v HMRC* [2009] EWHC 2563:

> "109. Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.
>
> 110. To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain of transactions all of which have identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.
>
> 111. Further in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them."

52. In *Fonecomp Limited v HMRC* [2015] EWCA Civ 39 Arden LJ in the Court of Appeal explained at [51]:

> "However, in my judgment, the holding of Moses LJ does not mean that the trader has to have the means of knowing how the fraud that actually took place occurred. He has simply to know, or have the means of knowing, that fraud has occurred, or will occur, at some point in some transaction to which his transaction is connected. The participant does not need to know how the fraud was carried out in order to have this knowledge. This is apparent from [56] and [61] of Kittel cited above. Paragraph 61 of Kittel formulates the requirement of knowledge as knowledge on the part of the trader that "by his purchase he was participating in a transaction connected with fraudulent evasion of VAT". It follows that the trader does not need to know the specific details of the fraud."

53. As to the relevance of an overall scheme to defraud, the UT explained in *HMRC v Pacific Computers Ltd* [2016] UKUT 350 (TCC) at [13] and [76], [81]:

> "The FTT also had the benefit of the judgment of the Upper Tribunal in *Edgeskill Ltd v Revenue and Customs Commissioners* [2014] STC 1174 where Hildyard J considered the relationship between an overall scheme to defraud and actual knowledge that transactions were connected to fraud. At [55], under the heading "Issue (4): was there (a) an overall scheme to defraud (b) to which the appellant was knowingly party?", Hildyard J said:

> "The two parts of the fourth, final and most important question are inter-related; but they were, quite correctly, dealt with in turn by the FTT in its decision, since the question whether the appellant participated in an overall scheme to defraud informs, but does not answer, the question whether the appellant knew or should have known that it was participating in such a scheme."

In the same context, at [63], the judge reiterated that the fact that a taxable person's transactions were found to be part of a wider fraudulent scheme does not mean that the taxable person knew of their connection with the fraudulent scheme. He noted that the FTT in that case had recognised that "[the] Appellant's transactions must be considered on their own merits, which left open the possibility that the appellant was an innocent dupe."

…

HMRC's closing submissions invited the FTT to find that the evidence showed that the level of orchestration in the deal chains was very high. It was then submitted that two questions arose: first, how did the orchestrators of the fraud manage it so well, and secondly how likely was it that an orchestrator of such a fraud would involve an unknowing party and why? The submission was that the only way in which the orchestrators of such a fraud could ensure a carousel pattern and speed was to tell each party from whom to purchase, to whom to sell and at what price. It was argued that the carousel, circularity and timings that occurred simply could not have happened without that level of instruction. It was further submitted that, because a fraudster would wish to retain control of the component parts of such a fraud, it was highly improbable that an orchestrator of such a fraud would involve an unknowing party.

…

It is regrettable that the FTT failed to appreciate the inferences which HMRC was inviting the FTT to make from the orchestrated and contrived nature of the fraud and the presence of fraudulent companies within the deal chains at issue in the appeal…"

54. The plausibility of a crucial position in a transaction chain was also discussed by Judge Brooks in *CF Booth Ltd v The Commissioners for HM Revenue and Customs* [2017] UKFTT 813 (TC) at [318] – [319]:

> "Turning to whether CFB knew or should have known its transactions, other than those with BMC, were connected to the fraudulent evasion of VAT, we find that the only inference that can be drawn, having come to the conclusion that there was an orchestrated or contrived scheme to defraud the revenue, is that CFB did know of the connection to fraud. In our judgment, it is not feasible that an established and experienced business such as CFB could be placed in such a pivotal position, at the top of the transaction chains, without such knowledge.
>
> First, there is the real danger that, with its knowledge of the trade, CFB would have reported the fraud to the authorities resulting in the collapse of the scheme. Secondly, we were not provided with any account of how CFB became involved in the scheme, something that might have been expected had it been argued that CFB had been manipulated or manoeuvred by others into participating in the scheme. Thirdly, the connection with Jonathan France and companies with which he has been associated, which we have found to be fraudulent defaulting traders, to the transactions entered into by CFB."

55. A similar discussion regarding orchestration was also set out in *Tower Bridge GP Ltd v Revenue and Customs* [2019] UKFTT 176 (TC) in which the FTT stated at [1411] – [1415]:

"As the Tribunal has concluded that all of the Appellant's transactions that are subject to this appeal were part of such an overall scheme to defraud the Revenue, the Tribunal is also entitled to ask – why is it that the orchestrators of this scheme chose CFE to be involved? Why were so many different suppliers who were engaged in the fraud attracted to CFE?

One answer is: because CFE knew the purpose of the transactions. However, the Tribunal has not been satisfied of this.

The Tribunal finds the more likely answer to be: the fraudsters knew that CFE would trade with anyone with a certificate of incorporation, not investigate or conduct effective enhanced due diligence into transactions that appeared extraordinary, make insufficient enquiries if any of the companies they were using to facilitate the fraud and would be unlikely to report any suspicions to the authorities.

Again, the existence of an overall scheme is of relevance to whether the Appellant should have known that the transactions were connected with fraud. These were not one-off deals or small sums of money being dealt with.

Another way of looking at it is this: if the existence of the overall scheme to defraud the Revenue was obvious from its cumulative features by 15 June 2009, how and why is it that CFE failed to understand what it was part of? Again, the existence and features of an overall scheme to defraud the Revenue go to the question of whether the Appellant should have known that the transactions were connected with the fraudulent evasion of VAT."

56. In *Mecsek-Gabona Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Foigazgatósága* (C-273/11) [2013] STC 171 ("*Mecsek*"), the CJEU addressed the question of the lengths to which a trader was required to go in order to fulfil its obligations. Following the decisions in *R (Teleos plc and others) v Customs and Excise Commissioners* (Case C-409/04) [2008] QB 600 *("Teleos")* and *Mahagében kft v Nemzeti Adó-es Vámhivatal Dél-dunántúli Regionális Adó Föigazgatósága and Dávid v Nemzeti Adó-es Vámhivatal Észak-alföldi Regionális Adó Föigazgatósága* [2012] STC 1934 *("Mahagében")* and recognising that stringent requirements could be justified for the purpose of preventing tax evasion, avoidance and abuse, the Court stated (at [54] & [55]):

"54. If the referring court were to reach the conclusion that the taxable person concerned knew or should have known that the transaction which it had carried out was part of a tax fraud committed by the purchaser and that the taxable person had not taken every step which could reasonably be asked of it to prevent that fraud from being committed, there would be no entitlement to exemption from VAT.

55. In light of all the foregoing considerations, the answer to Questions 1 and 2 is that art 138(1) of Directive 2006/112 is to be interpreted as not precluding, in circumstances such as those of the case before the referring court, refusal to grant a vendor the right to the VAT exemption for an intra-Community supply, provided that it has been established, in the light of objective evidence, that the vendor has failed to fulfil its obligations as regards evidence, or that it knew or should have known that the transaction which it carried out was part of a tax fraud committed by the purchaser, and that it had not taken every reasonable step within its power to prevent its own participation in that fraud."

57. The CJEU approved the principle set out in *Mecsek* (at [54]) in *Staatssecretaris van Financien v Schoenimport 'Italmoda' Mariano Previti vof and other cases* ("*Italmoda*") (C-131/13, C-163/13, C-164/13) [2014] 12 WLUK 662:

> "49. In the light of the foregoing considerations, it is, in principle, the responsibility of the national authorities and courts to refuse the benefit of the rights laid down by the Sixth Directive when they are claimed fraudulently or abusively, irrespective of whether those rights are rights to a deduction, to an exemption or to a VAT refund in respect of intra-Community supplies, as at issue in the case in the main proceedings.
>
> 50. It must further be noted that, according to settled case-law, that is the position not only where tax evasion has been carried out by the taxable person itself but also where a taxable person knew, or should have known, that, by the transaction concerned, it was participating in a transaction involving evasion of VAT carried out by the supplier or by another trader acting upstream or downstream in the supply chain (see to that effect, inter alia, judgments in *Kittel*... paragraphs 45, 46, 56 and 60, and *Bonik*… paragraphs 38 to 40).
>
> …
>
> 69… the Sixth Directive must be interpreted as meaning that a taxable person who knew, or should have known, that, by the transaction relied on as a basis for rights to deduction of, exemption from or refund of VAT, that person was participating in evasion of VAT committed in the context of a chain of supplies, may be refused the benefit of those rights, notwithstanding the fact that the evasion was carried out in a Member State other than that in which the benefit of those rights has been sought and that taxable person has, in the latter Member State, complied with the formal requirements laid down by national legislation for the purpose of benefitting from those rights"

58. Although the test as set out in *Mecsek* differed slightly from the way in which the CJEU expressed the test in *Kittel*, neither party sought to make a distinction as to the test to apply which accords with the view taken by the CJEU in *Italmoda* (see [49] and [50]) and the UT in *Infinity Distribution Limited (in administration) v The Commissioners for Her Majesty's Revenue and Customs* [2019] UKUT 405 (TCC) at paragraph [72]:

> "…First, it is clear from the decision of the CJEU in *Mecsek-Gabona Kft v Memzeti Ado Foigazgatosaga* (Case C-273/11 [2013] STC 171) that an entitlement to zero-rating can be denied on the basis of the doctrine in *Kittel*, with the burden of establishing such a denial resting on the taxing authorities. Second, *Teleos* is relevant only to a situation where the evidentiary requirements for zero-rating are apparently satisfied within the applicable time limits but it subsequently transpires that those requirements were not met. The burden of proving that the relevant requirements are satisfied within the applicable time limits rests, in the usual way, on the taxpayer."

ADVERSE INFERENCES

59. HMRC invited us to draw adverse inferences from the Appellant's failure to call evidence from its customers. The Appellant submitted that it would be inappropriate to draw such inferences in this case; even if the Appellant were able to locate the customers, there is nothing to be gained from calling evidence from persons the Appellant has accepted have fraudulently evaded VAT.

60. The principles to be applied in considering whether to draw adverse inferences were set out by Broke LJ in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324:

> "(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
> (3) There must, however, have been some evidence, however weak, adduced by the

> former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

61. Having carefully considered the guidance set out in *Wisniewski* we concluded that it would be inappropriate to draw any adverse inferences. We accepted the Appellant's explanation that its customers could not be located, and we agreed that, the Appellant having accepted that those customers were fraudulently defaulters, it was highly unlikely that they would assist the Appellant. Furthermore, given the allegations by HMRC that they were involved in a scheme to defraud the Revenue, we would not expect the customers to give evidence as they would no doubt have significant concerns regarding self-incrimination.

CHRONOLOGY

62. The following facts are not in dispute.

63. The Appellant was incorporated on 7 December 2011. On that date Mr Martin Rylands was appointed a company director. Mr Steven Hibbert was appointed on 1 July 2012. Mr Andrew Leadbetter and Mr Glen Mason were appointed on 13 August 2013 and Mr Neville Goddard was appointed on 1 October 2015.

64. The Appellant was registered for VAT with effect from 1 January 2012 with an estimated turnover for the following 12 months of £300,000.

65. HMRC visited the Appellant on 25 March 2014 where they identified a business which predominantly sold second hand high-end prestige cars. Funding was secured from an associated company, Pinnacle UK Ltd and most of the cars were transacted under the second-hand margin scheme although there were some purchases of new vehicles from dealers and purchases of VAT qualifying cars. HMRC identified that there had been new purchases from Northern Ireland and sales of those same cars to the Republic of Ireland. Some prestige cars were sold on at cost with the Appellant charging a finders' fee.

66. On 26 August 2014 HMRC visited the Appellant because its VRN had been verified by M&M (Cambridge) LLP, which HMRC deemed a 'known MTIC trader'. The main business activity was identified as the purchase and sale of high end prestige cars with the majority of sales being to private individuals. The Appellant offered credit to customers through BMW Financial Services and there was no direct lending from the Appellant.

67. Mr Rylands stated that no due diligence was carried out on suppliers although the supplier's website might be checked on occasion. In relation to the transaction with M&M (Cambridge), Mr Rylands stated that an HPI check on the vehicle had been carried out prior to purchase.

68. There was no challenge to Mr D'Rozario's evidence regarding M & M (Cambridge) LLP ("M&M") in which he outlined that its main business activity was declared as "general trading company" which it later clarified as "including selling motor vehicles" and "property development construction". M&M received vehicles from A4W (a supplier to the Appellant) and it made supplies to Mr O'Kelly (a customer of the Appellant in the ROI). It was denied zero-rating relief under the *Mescek* principles on those supplies, amongst others, and had a VAT debt of in excess of £500,000. M&M was an immediate supplier to the Appellant in three transactions in which the Appellant then supplied Mr O'Kelly.

69. It was at the meeting on 26 August 2014 that HMRC officer Lawrence first mentioned the importance of due diligence checks on both suppliers and customers and explained the risk of MTIC fraud in respect of high value commodities. Public Notice 726 was issued to the Appellant. The Appellant advised that paperwork to establish an audit trail "would be easy due to the small number of transactions the company would undergo in a VAT period".

70. Two invoices with incorrect VRNs relating to A4W were identified and HMRC considered that the Appellant posed some potential MTIC risks as a result of the way in which it conducted its business.

71. On 16 September 2014 HMRC issued missing trader awareness information to the Appellant. Further information was provided on 14 January 2015.

72. On 15 January 2015 HMRC advised the Appellant that Mr O'Kelly was using a VRN which had been cancelled with effect from 1 September 2014. A visit followed on 28 January 2015 by Mr D'Rozario accompanied by HMRC officer Mr Hopkins due to concerns regarding the Appellant's due diligence. At the meeting the Appellant advised that all margin scheme vehicles go to the Appellant's main premises for checks, photographs and to be placed on the company's website. The Appellant receives calls from various brokers offering prestige vehicles and would then call their EU contacts to find a purchaser. Negotiations lasted between a couple of hours to a couple of days. The Company provides aftercare services to private customers with all used vehicles. Mr Hibbert advised that there was no set mark-up or margin but they aimed to make 10% on all vehicle sales but around 3% on sales of high value vehicles.

73. In relation to vehicles dispatched to the ROI, Mr Rylands stated that he or others from the Company would drive the vehicles to the ports (Heysham or Holyhead) and hand over the vehicle to officials at the port who would drive the vehicles onto the ferry. If a carrier company was used it was 'Moveex'. Due diligence was limited to overseas customers in respect of which they would obtain a VIES check, copies of driving licences, passports, VAT and Company registration documents and they re-checked VIES each quarter. As the majority of their suppliers are long established businesses (main/franchised dealers) they did not carry out due diligence on these companies.

74. Mr Rylands explained that the Appellant had fist dealt with Mr O'Kelly in December 2013 when he called to enquire about a Range Rover on their website. He stated that they had never met him or been to his premises nor had Mr O'Kelly visited them. Mr Rylands stated that it was Mr Mason who mainly dealt with him.

75. On 29 January 2015 the Appellant's representative wrote to HMRC outlining changes the Appellant intended to make to its due diligence. On 30 January 2015 the Appellant's representative advised that a VAT validation template would be used, due diligence should be undertaken on suppliers, credit checks would be extended to include the financial health of a customer and that VAT validation checks would be carried out prior to transactions.

76. In a telephone call with Mr Rylands on 3 February 2015 Mr Rylands explained to Mr D'Rozario that he would prefer to concentrate on UK sales as his confidence had 'wobbled' following the deregistration notification in respect of Mr O'Kelly which had been issued on 15 January 2015.

77. In February 2015 HMRC issued a tax loss letter in respect of Mr O'Kelly. In the same month HMRC requested all records for period 11/14 and advised they did not accept the adequacy of the Appellant's due diligence, stating that it was for the Appellant to satisfy itself as to the underlying nature of its transactions and that the motor vehicle trade is a sector tainted by missing trader fraud.

78. A letter from HMRC to the Appellant dated 10 March 2015 advised that a verification attempt on Mr Paul Lynch showed a valid VRN but a different business activity to that stated (the business activity was the manufacture of sanitary goods) and that it may wish to make further enquiries.

79. On 19 March 2015 HMRC notified the Appellant that Meridian Strategic Consultancy Ltd was de-registered for VAT with effect from 1 March 2015.

80. On 24 April 2015 HMRC issued a veto letter to the Appellant regarding its trade with Mr Colm McNulty and advised that he had been de-registered for VAT with effect from 9 March 2015.

81. On 2 June 2015 the Appellant advised HMRC that prior to February 2015 the focus of its due diligence had been verifying VRNs of customers located in other EC countries as this was where it considered the VAT risk to be. He stated:

> "We only began to carry out detailed due diligence on UK suppliers and customers in February 2015 following your advice at the visit of late January 2015. As you are aware since this visit we have improved processes in line with your advice."

82. On 10 June 2015 Mr Rylands advised HMRC that the Appellant had revisited all of its traders and found all suppliers were operating valid VRNs. He added that exports had:

> "always been and remains a small part of our business, and that any apparent VAT risk would be minimal and does not justify the additional hoops that we are jumping through each month."

83. At a visit on 10 July 2015 Mr Chris Griffiths, who the Appellant stated was a 'driver logistics guy who moves cars up and down the country for us', was discussed. Mr Rylands believed that the Appellant did not pay Mr Griffiths but that he was engaged by Mr O'Kelly and any payments by the Appellant were balances of payments from Mr O'Kelly or other ROI customers. He did not know about the business A4W, but having left the meeting to speak to Mr Mason, he described it as a "training school type thing" and Mr Mason's contact was Mr Harrisons, who he had known for 15 – 20 years. VRNs had been crossed out on the invoices which the Appellant explained was because the first VRN was invalid; when this was raised with A4W a different VRN had been provided.

84. On 30 July 2015 the Appellant provided due diligence for Mr Paul Lynch and Mr Martin Burke advising that they had approached the Appellant as a result of advertisements on its website. The Appellant explained that the 328% increase in EC sales between January and May 2015 queried by HMRC was the result of there being an increase in vehicles produced and available for sale; "supply and demand".

85. On 22 March 2016 the Appellant was notified that Mr Paul Lynch's VRN had been de-registered with effect from 22 September 2015.

86. On 7 September 2016 the Appellant was notified that Mr Martin Burke's VRN had been de-registered with effect from 6 July 2016.

THE *KITTEL* TRANSACTIONS

87. The Appellant purchased from one company, A4W, in VAT periods 04/14, 07/14 and 11/14 in three transactions. The statement of HMRC officer Geraldine Fazakerley was agreed and there was no dispute that A4W was a fraudulently defaulting trader. The salient points are summarised below:

(1) A4W was incorporated on 14 January 2013. The directors at that time were Mr John McEvoy and Mr Conrad Alastair Howard.

(2) The VAT1 received on 12 March 2013 gave the PPOB as Unit 15 Arrowe Commercial Park, Arrowe Brook Road, Upton, CH49 1AB.

(3) The main business activity was described as "Training services to unemployed and school children" and there was no indication of buying/selling to/from the EU;

(4) A4W was registered with effect from 14 January 2013;

(5) On 1 November 2013 Mr Howard resigned;

(6) The sales made to the Appellant were made under one VAT number which was then varied. The first belonged to A4W and the second to Flexible Vehicles Ltd ("Flexible").

(7) Ms Rebecca McEvoy was the initial director of Flexible, followed by Mr Harrison and Mr Caplin between October 2011 and March 2012 when Ms McEvoy became director again. The company was run by her partner Mr Ian Harrison who ceased being director due to an IVA. The compliance history of Flexible was poor.

(8) Flexible was de-registered with effect from 14 January 2014 for failure to respond to requests for information and failing to submit its 10/13 VAT return.

(9) On 11 May 2015 A4W submitted its late returns for 07/14, 10/14 and 01/15 which omitted the sales of vehicles.

(10) At a meeting on 12 May 2015 Mr McEvoy explained that A4W was a mechanic training school for children and young adults. He stated that he had helped his daughter's former partner (Mr Harrison) because he was bankrupt and unable to open a bank account in his own name.

(11) Mr McEvoy stated that Mr Harrison acted as a sole trader buying and selling second hand cars. He was not involved in the business which did not have premises as Mr Harrison operated out of his car using a mobile phone.

(12) Mr McEvoy provided HMRC with copies of his company's invoices which were a different design layout to those provided to the Appellant.

(13) HMRC formed the view that the VRN had been hijacked.

(14) A4W continued to trade between May 2014 and October 2015 using both the hijacked VRN from the legitimate A4W company and the VRN from Flexible which had been de-registered with effect from 14 January 2014.

(15) The hijacked trader failed to declare output tax in the sum of £119,416.

(16) On 16 June 2016 HMRC issued an assessment to the taxable person purporting to be A4W. It was acknowledged that it was purporting to trade as Adapt4Work t/a Flexible, Adapt4Work being a properly registered trader.

(17) The assessments included the two sales made to the Appellant which had not been declared or accounted for. The third transaction was out of time to be assessed however, HMRC highlighted, it was nevertheless connected to a fraudulent tax loss.

(18) The letter was returned as "addressee gone away".

(19) On 16 June 2016 HMRC advised A4W that it had failed to file VAT returns for 04/15 – 01/16 and requested information to show an intention to make supplies or evidence of trade by 23 June 2016.

(20) In the absence of any evidence being provided by the due date, A4W was de-registered with effect from 24 June 2016. The letter was returned by Royal Mail.

FINDINGS OF FACT (KITTEL TRANSACTIONS)

88. We accepted the unchallenged evidence of HMRC officer Fazakerley in relation to A4W and we found it as fact. We were satisfied that A4W had supplied the Appellant in the relevant transactions and fraudulently failed to declare or account for the tax due on those supplies.

89. In those circumstances, we were satisfied that the relevant limbs of *Kittel* in relation to connection to a fraudulent tax loss were satisfied.

THE *MECSEK* TRANSACTIONS

90. HMRC' decisions to deny zero rating on the grounds of *Mescek* involved the Appellant's supplies to five traders:

- Mr O'Kelly t/a Pyramid (VAT periods 01/14, 04/14, 08/14, 09/14, 10/14, 11/14)
- Colm McNulty (VAT periods 01/14, 04/14, 09/14, 01/15)
- Thomas Wright (VAT periods 10/14, 11/14, 12/14)
- Martin Burke (VAT periods 10/14, 03/15, 05/15)
- Paul Lynch (VAT periods 02/15, 03/15, 04/15, 05/15, 06/15)

91. The Appellant accepted the relevant limbs in relation to connection to fraudulent tax losses were satisfied in respect of Mr McNulty, Mr Wright and Mr Lynch. In those circumstances there is no need to set out the facts relating to connection to a fraudulent tax loss in any significant detail and we have summarised the relevant evidence below.

Colm McNulty

92. Mr McNulty t/a SFP Cars & Commercials based in Co. Meath was registered for VAT with effect from 1 September 2013. The VRN was cancelled with effect from 9 March 2015.

93. Information provided by the Irish Tax Authority ("ITA") established that in 4 of the 6 transactions with the Appellant, Mr McNulty sold the vehicles to an independent car dealership in Ireland (MML, a company which he told the Appellant he worked for) and charged standard rate VAT which he failed to declare and account for. HMRC submit that on the balance of probabilities, it is more likely than not that the remaining deal followed the same course.

94. A letter regarding VAT registration from the ITA to Mr McNulty dated 25 October 2013 set out concerns relating to Mr McNulty's "new vehicle sales business and exporting same to Uganda…about running the business from your home address…that this would not be possible. A storage yard or unit would be needed to run this type of business". Despite the concerns, Mr McNulty was registered. He did not remit any VAT returns declaring the purchases and sales made nor did he pay the tax due. Mr McNulty failed to contact the Irish tax authority despite requests to do so. Mr McNulty was linked to other businesses involved in MTIC fraud and the extent of investigations with which he was linked amounted to tax losses in excess of 3,000,000 euros.

95. HMRC submitted that Mr McNulty was a fraudulent defaulter for the following reasons:

(1) He failed to contact the Irish tax authority when requested to do so;

(2) He did not remit any VAT returns declaring the purchases and sales he had made;

(3) He did not pay any of the associated taxes that he was required to;

(4) He produced documentation inconsistent with how the business actually traded (i.e. it was only going to source cars in Ireland);

(5) He was suspected of being involved in missing trader fraud for multiple companies; and

(6) There was a significant investigation amounting to at least €3M for evasion of VAT.

Paul Lynch

96. Mr Lynch was registered for VAT with effect from 1 January 2015 and de-registered with effect from 22 September 2015. At the time of registration, the business activity was stated on the Tax Registration form (TR1) as the production of toilet roll and kitchen paper.

97. Information provided by the Irish tax authorities stated that the real main business activity was "Importation of vehicles from the UK". A visit by the ITA to Mr Lynch's address established that it was occupied by his ex-wife, who stated Mr Lynch had not lived there for 15 years, she had limited contact with him but was aware he used the address as official letters arrived for him and he had stated he needed an address to register his Irish business.

98. Examination of the VAT transactions identified that the VAT number was not used for the business indicated on the TR1but rather for the importation of a significant number of high value vehicles from the UK. The newly incorporated business never traded in the activity declared, no VAT returns were submitted for significant purchases from the UK and all attempts to contact Mr Lynch were unsuccessful.

99. Mr Lynch was eventually interviewed in November 2015. He claimed to be involved in a number of different businesses in China and N. Ireland. Following interview Mr Lynch could not be contacted, no tax returns were submitted and no payments for tax owing were ever made.

100. HMRC submitted that Mr Lynch was a fraudulent defaulter for the following reasons:

(1) He had a newly incorporated business;

(2) That business declared a particular type of trade activity that it never traded in;

(3) The business premises was a semi-detached house with no apparent space to store second-hand vehicles;

(4) It was not an address that Mr Lynch actually used, it being his ex-wife's property and they had not had any significant contact;

(5) No VAT returns were submitted;

(6) No payments for the tax owing were ever made; and

(7) Mr Lynch did not engage for a long period of time, before being interviewed once, and then disappearing.

Mr Wright

101. Mr Wright, a British citizen with an address in Warrington, was registered for VAT in Ireland with effect from 22 August 2014. Correspondence from Mr Wright to the Irish Tax Authorities stated his intention to move back to Ireland with his partner, lease/hire plant owned by his company to clients in the ROI involving the contract hire of vehicles.

102. In a telephone call on 29 September 2014 Mr Wright informed the registration section that he was carrying out IT work for a bank in Ireland which formed the basis of the decision to register him for VAT. The Irish Tax Authority report states:

"With the benefit of hindsight, the contract looks very questionable, the rate appears extremely high, the team composition is contradictory and the contract looks dubious."

103. Mr Wright submitted only one nil VAT return and his VAT number was cancelled following review in March 2015 as he was suspected of being involved in fraudulent activity. The five transactions with the Appellant were not declared or accounted for.

104. Mr Wright received goods valued in excess of £350,000 from the Appellant in addition to in excess of £300,000 of goods from two other traders, one of which was a missing trader with an outstanding VAT liability of £6.8million. The VIN numbers and UK registration numbers of the vehicles were checked and there was no trace of them being registered in Ireland, however Mr Wright's company, Wright Solutions EU, received post relating to London Congestion charges and non-payment of the charges in 2014 and the first half of 2015 in relation to one of the vehicles supplied by the Appellant.

105. HMRC submitted that Mr Wright was a fraudulent defaulter for the following reasons:

(1) He lied to the Irish tax authority about his trade;

(2) He lied to the Irish tax authority about property that he was leasing for the business;

(3) He provided false documentation to them to obtain a VRN;

(4) He has claimed benefits using two different names;

(5) He failed to submit any VAT returns including in respect of acquisition tax;

(6) Thomas Wright does not have any obvious experience in trading second hand cars (previously working for an online digital company);

(7) The cars do not appear to have ever been used in Ireland; and

(8) One of the cars appears to have been being used in London despite its alleged sale to Ireland.

Colin O'Kelly t/a Pyramid

106. Mr O'Kelly was registered for VAT with effect from 1 January 2009 as a plumber and heating contractor. The VRN was cancelled on 15 October 2014. The business address was his home on a housing estate.

107. There were 66 dispatches of vehicles from the Appellant to Mr O'Kelly between 23 January 2014 and 24 November 2014.

108. The value of supplies exceeded £3,500,000 and the vehicles were sourced from 34 UK suppliers, the majority of which were long established companies (independent or franchised dealerships) save for the following:

- In one deal the invoice showed that a proxy supplier, D&E Office Solutions Ltd, had sourced the vehicle from a main dealer however there were no MTIC concerns relating to this trader;
- Two other proxy suppliers were used, namely Meridian Strategic Consultancy Ltd and Pinnacle (UK) Ltd; the latter associated with Mr Hibbert. Main dealer invoices were provided in relation to the 4 deals involving Meridian but not in respect of the one deal using Pinnacle.
- In 2 deals the Appellant sourced the vehicles from A4W.

109. A SCAC from the ITA provided on or about 3 September 2014 indicated that in an interview under caution, Mr O'Kelly had denied purchasing a Rolls Royce from M&M (Cambridge) (see [70] above). He further stated that he had not allowed use of his VRN for the purchase of that vehicle but that he had allowed his VAT number to be used for other car purchases from the same UK trader. He stated he did not import or pay for the Rolls Royce but confirmed that his name and VRN were on the invoice.

110. Mr O'Kelly stated, in respect of other UK vehicles purportedly sold to him, he allowed Mr Lee Cullen and Mr Martin Byrne to use his VRN for the purchase of UK zero rated cars which he then sold to Mr Christopher Griffiths at Ikonic Solutions Ltd. He produced sales invoices to Ikonic Solutions when requested to do so by Mr Cullen and Mr Byrne and allowed the transactions to go through his bank account. Mr O'Kelly was unable to provide any information in relation to the 66 vehicles purportedly sold by the Appellant to Mr O'Kelly and stated that he had no personal dealings with car dealers in the UK. The ITA concluded that it was unlikely that Mr O'Kelly received the cars purchased from the Appellant.

111. A further SCAC report dated 15 February 2016 confirmed that Mr O'Kelly had not accounted for or declared the transactions on tax returns.

112. As result of the admittance under caution that his VAT number had been compromised the VRN was cancelled.

113. HMRC submitted that Mr O'Kelly was a fraudulent defaulter for the following reasons:

(1) He registered as a plumber and heating contractor but became involved in buying and selling second-hand cars;

(2) He had no obvious experience in the industry;

(3) He allowed his VRN to become compromised by permitting other people to use it to buy and sell vehicles;

(4) He had no connection with the deals under appeal;

(5) He appears not to have particularly known those who used his VRN and bank account;

(6) He did not submit any VAT returns showing the transactions purportedly done with the Appellant; and

(7) The goods appear to have been immediately returned back to the United Kingdom and sold to fraudulent defaulters from the Appellant's transaction chains.

Other traders in transaction chain

Ikonic Solutions Ltd ("Ikonic")

114. Ikonic registered for VAT with effect from 14 March 2012. The director was John Brian Capper and the declared main business activity was "vehicle sales; vehicle tracking, logistics, and health and safety assessments". The sale of new cars and light motor vehicles was the main activity. An urgent unannounced visit to the PPOB was carried out, HMRC officers found a residential flat with no one present and concluded Ikonic "...is likely to be a defaulter. The PPOB is a residential flat with no sign of economic activity (the sale of prestige cars)."

115. Mr Griffiths registered for VAT with effect from 1 September 2012 as a sole proprietor "Christopher Griffiths, T/A Chris Griffiths Car Sales". The main business activity declared on the VAT application was "Building and Construction". No returns were submitted after period 01/14 and central assessments were raised. A visit was carried out by HMRC to the PPOB on

8 December 2014 but Mr Griffiths was not present and no contact was made by him to the HMRC contact letter. The VRN was cancelled with effect from 9 December 2014. A further assessment was subsequently raised in respect of the sale of a vehicle in 07/14 which was not declared or accounted for.

116. Companies House does not record Mr Griffiths as a responsible officer at Ikonic however, Mr D'Rozario exhibited an SCAC report which stated that Mr O'Kelly sold cars to "Christopher Griffiths, Ikonic Solutions…Guisley, Leeds". Mr Griffiths was disqualified as a director. Companies House records show that a Court Order (under the Company Directors Disqualification Act 1986, section 2) was made to disqualify him for a period commencing 17/05/2010 to 16/05/2018 for the reason of '…on conviction of indictable offence'. Mr D'Rozario was unable to identify through Companies House the company of which Mr Griffiths was director.

117. A visit report on 23 July 2014 recorded that Ikonic had sold vehicles to M&M Cambridge "charging £365k VAT during P12/14". The PPOB was a residential flat with no one present. A contact letter was left and the report concluded that Ikonic was likely to be a defaulter and there was no sign of trade in the sale of prestige cars. On 29 August 2014 HMRC raised an assessment of in excess of £500,000 relating to the supplies of high value cars.

118. On 12 July 2012 Mr Capper, the director, was found guilty at Cardiff Crown Court of three counts of fraud, one of which related to the submission of a false repayment VAT return. Mr D'Rozario noted that there was a link between the Appellant and Mr Capper via one of the Appellant's bank statements where many payments received, generally alongside the name 'O'Kelly' show "Capper JB, Guisley", for instance £18,000 and £50,000 received on 21 January 2014.

119. A tax loss that was caused by Ikonic in the sum of £582,673.73,

Exclusive Exports Ltd ("EEL")

120. The ITA response in relation to M&M (Cambridge) which recorded that Mr O'Kelly allowed his VRN to be used by Mr Cullen and Mr Byrne, gave an address for Mr Cullen at St Peters Lane, Solihull, Birmingham. Mr D'Rozario checked Companies House records for Mr Cullen and identified a UK company named Exclusive Exports Limited which was incorporated on 20 July 2015 with its business declared as sales of new and used cars and light motor vehicles. EEL was registered for VAT with effect from 1 September 2015. The director at VAT registration date was Mr Adam Cullen who resigned on 25 October 2016 and Mr Lee Cullen was appointed director on 27 April 2016.

121. EEL's VAT application shows the main business activity of "Second hand car sales" and the PPOB was the address given for Mr Cullen. An announced MTIC visit was undertaken to EEL on 21 April 2016 when HMRC officers interviewed both Adam Cullen (director at that time) and Lee Cullen who was described as father (of Adam) and 'Co Operator' of the company. Its main business activity was the supply of used high value cars. Lee Cullen stated that he had been in the motor trade for over 25 years in Ireland and 3 years in the UK and he was in the process of taking over EEL from his son. The visit report noted:

> "This trader's record keeping is very poor and enquires into all aspects of their trade highlighted numerous areas for improvement. Their VAT returns appear to always be submitted late…This trader is a serious concern".

122. The report shows that EEL had purchased vehicles from Flexible Vehicles Limited, (FVL) and that their contact was Ian Harrison. Another supplier was DFMS (NI) Ltd against which many assessments have been raised for undeclared VAT relating to the supply of vehicles and which has a VAT debt outstanding of £1,431,591.74.

123. EEL was compulsory deregistered with effect from 31 January 2017 after a visit to the PPOB when HMRC could not locate anyone from the company. HMRC's VISION database shows that EEL did not submit it VAT returns for periods 09/16 and 10/16. Assessments were raised in periods 03/16, 04/16 and 07/16 and it has an outstanding VAT liability of £147,580.19.

Martin Burke

124. Mr Burke was registered for VAT with effect from 1 December 2013 trading as MB Motors and de-registered on 6 July 2016.

125. There were four vehicles sold by the Appellant to Mr Burke in VAT periods 10/14 to 05/15 with a total value of £172,184.00. The vehicles were sourced from four UK suppliers; Country Sales, Sycamore (Peterborough) Ltd, Global Autocare Ltd and LFS (which acted a a proxy supplier).

126. At a visit by the Irish tax authorities on 21 and 22 June 2016 Mr Burke claimed he had never visited the UK to purchase cars but had spoken to someone on the telephone at the Appellant although he could not say recall the person's name. He stated he paid the Appellant by bank transfer and sold the vehicles to 'Mountain View Mts' in County Tyrone but he could not recall the town although it began with "C". He stated that he picked up the cars at Dublin Port and delivered them to someone called Cathel Corr on "the side of the road". Payment was received into his bank account.

127. The evidence of Mr D'Roasario was that the initial response from the ITA only included three vehicles. At that point Mr D'Rosario was unaware of the fourth supply from the Appellant to Mr Burke on 10 October 2014 (deal 1) which was later raised by the Appellant on 3 February 2017 in response to Mr D'Rosario's letter dated 25 November 2016.

128. In a letter dated 30 July 2015 the Appellant advised HMRC that they had sold vehicle registration FT14 DBY to Mr Burke but had received payment from Mr McNulty. The Appellant explained that "as MB Motors was the reference displayed on our online banking system when the credit appeared, the actual source of payment did not become clear to us until the printed bank statements arrived to our business."

129. Mr D'Rosario made a further request for information from the ITA. The response stated that Mr Burke had avoided meeting with officer Robinson since his bank statements were requested. The bank statements were not provided and at a visit to his house officer Robinson was told by his partner that Mr Burke now resides in Northern Ireland and she did not hold an address for him. Officer Robinson confirmed that Mr Burke had not accounted for or declared in his VAT returns the sale of the 3 vehicles from the Appellant, his VRN was cancelled, and he was under investigation by the Revenue.

130. HMRC identified no concerns in relation to LFS, Global or Sycamore. In relation to the one transaction involving Country Sales, Mr D'Rosario followed the chain of supply in respect of FT14 DBY and noted that the Appellant's supplier in respect of this vehicle was Gordon Stinson t/a County Sales which sourced the vehicle from Michael Robinson t/a TM Autos Commercials. As he was unable to identify any companies with the name 'Mountain View Mts' from HMRC's relevant databases, Mr D'Rosario initially formed the view that Mr Burke's statement that the three vehicles sold to 'Mountain View Mts' which were based in a town beginning with "C" in fact referred to TM Autos Commercials which was based at Mountain View Terrace, Cookstown.

131. The Irish tax authority confirmed that Mr Burke failed to account for and declare the purchase and sale of three vehicles sourced from the Appellant. It was the Respondent's case that on the balance of probabilities the fourth vehicle was also not declared or accounted for.

132. HMRC submitted that Mr Burke was a fraudulent defaulter for the following reasons:

(1) He was a newly established company;

(2) He failed to submit any VAT returns;

(3) He failed to pay any VAT that was owing;

(4) He was interviewed by the Irish tax authority but provided scant detail about the transactions;

(5) He promised to provide bank statements but these were never provided; and

(6) He then lost contact with the Irish Revenue authority who were investigating him.

Other traders in the transaction chain

Cathal Corr t/a Mountain View Autos

133. Mr D'Rosario received further information on 25 April 2022 which caused him to review his evidence relating to the deal involving 'Mountain View Mts'. He adduced a fourth witness statement dated 3 May 2022 in which he set out the following.

134. A business called Mountain View Motors which relates to an individual called 'Cathal Corr trading as Mountain View Autos' was visited by HMRC in May 2015. Mr D'Rosario reviewed HMRC's electronic file and found that the PPOB was Camaghy Road, Dungannon in County Tyrone and the main business activity was 'motor vehicle servicing'. An HMRC report following an unannounced visit on 22 May 2015 recorded that the company had not submitted a VAT return to include output tax on a sale to Country Sales which had been identified from an invoice at a visit to Country Sales. No one was found at Mountain View Motors and no response was received to the Inspection Notice posted through the door. Consequently, the VRN was cancelled with effect from 22 May 2015 as there was no evidence of trade. A VAT assessment was subsequently issued on 6 June 2016 for the failure to submit a return for period 02/15 and failing to declare or account for the sale of 9 vehicles between 14 December 2014 and 31 March 2015. A tax loss was occasioned by MVL in excess of £60,000.

135. Mr D'Rosario clarified that his tracing of the transaction chains, on the balance of probabilities based on the new information and the information provided by Mr Burke in interview, should have shown that Mr Burke sold the vehicles to Cathal Corr T/A Mountain View Autos and not Mountain View Mt's who Mr D'Rosario had concluded was Mr Robinson T/A TM Autos Commercials.

Country Sales

136. County Sales was VAT registered and declared its main business activity as the sale of tyres and second hand VAT qualifying vehicles. The company had a poor history of compliance and on 8 February 2016 a letter denying zero rating on Mecsek grounds was issued to Country Sales. The company did not appeal the decision and a VAT debt of £19,367.48 remains outstanding. The VRN was cancelled with effect from 30 June 2016.

TM Autos

137. TM Autos was VAT registered as a 'garage selling used motor vehicles (retail)'. Mr Robinson was the sole proprietor. It was established by HMRC at a visit on 1 December 2014 that that Mr Robinson was a mechanic by trade and that his business activity was the "buying and selling of cars mainly from and to other car dealers" and that he would "occasionally sell to private individuals". Amongst his suppliers was Kylestone and his declared customers were JRS and Country Sales. Having analysed Mr Robinson's records, HMRC established that all

of the company's transactions in VAT periods 10/13 to 01/15 had commenced with a tax loss exceeding £218,000. TM Autos failed to submit VAT returns for periods 01/14 to 04/15 and was compulsorily de-registered for VAT with effect from 6 July 2015 on the basis that it failed to respond to requests for business records and evidence of continuing trade.

Keystone

138. Keystone, based in Cookstown, Belfast, was registered to trade as a public house although the trade declared on Companies House was "sale of used cars and light motor vehicles." Keystone failed to submit VAT returns and failed to declare or account for significant purchases made from other EU countries, including ROI. Keystone was subsequently assessed on 12 November 2015 in the sum of £453,424.00 and was compulsorily de-registered with effect from 13 January 2015 as a missing trader with a VAT debt of £610,322.94 which remains outstanding.

FINDINGS OF FACT (*MECSEK* TRANSACTIONS)

139. We accepted the unchallenged evidence in relation to Mr Wright, Mr Lynch and Mr McNulty and we were satisfied that HMRC had traced the chains of supply accurately and identified fraudulent tax losses. We were satisfied that Mr Wright, Mr Lynch and Mr McNulty were fraudulent defaulters for the reasons set out at [107], [102] and [97] respectively and that the Appellant's transactions were therefore connected to fraudulent tax losses.

140. In relation to the transactions involving Mr O'Kelly and Mr Burke which were disputed, we concluded that the test of connection to fraudulent tax losses was, in both cases, satisfied for the following reasons.

141. We accepted the evidence of Mr D'Rozario. We bore in mind that the information set out in the SCAC report from the ITA was hearsay evidence in considering the appropriate weight to give it. We were satisfied on the material before us that Mr O'Kelly was a defaulting trader for the following reasons:

- He registered as a plumber and heating contractor but became involved in buying and selling second hand cars despite no apparent experience in the industry;
- He allowed his VRN to be compromised by permitting other people to use it to buy and sell vehicles.
- He claimed not to have known details of those who used his VRN and bank account and that he had no personal involvement in the deals under appeal.
- He did not submit any VAT returns showing the transactions with the Appellant.

142. Furthermore, we accepted Mr D'Rozario's evidence that the vehicles appear to have immediately returned to the UK as the registered keepers for the majority were in the UK after the date of the Appellant's sales, and on the evidence before us we were satisfied that they were sold to fraudulent traders.

143. We were satisfied on the material before us that Mr Burke was a defaulting trader for the following reasons:

(1) He was a newly established company.

(2) He failed to submit any VAT returns.

(3) He failed to pay any VAT that was owing.

(4) He was interviewed by the Irish tax authority but was provided little information, failed to produce the bank statements requested and then evaded contact with the Irish

Revenue authority who were investigating him and which we inferred was deliberate on his part.

Tax loss

144. We rejected the Appellant's argument that, even if there was fraud, there was no tax loss as the vehicles were exported and then returned to the UK which did not result in a loss of VAT. We agreed with the submissions made by HMRC; Mr O'Kelly's failure to declare acquisition tax gives rise to a loss of tax and the fraudulent nature of the failure to declare has the taxable consequence that the Appellant is not entitled to deduct its input tax and set it off against the acquisition tax. We consider that in such circumstances the objective criteria are not met and the right to deduct does not arise. In so finding, we relied on Case C-32/03 *Fini H* [2005] ECR I-1599:

> "33. If the tax authorities were to conclude that the right to deduct has been exercised fraudulently or abusively, they would be entitled to demand, with retrospective effect, repayment of the amounts deducted (see, inter alia, Rompelman, paragraph 24; INZO, paragraph 24; and Gabalfrisa, paragraph 46).
>
> 34. It is, in any event, a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent or abusive ends."

145. Mr Burke accepted in interview he sold 3 vehicles to Mountain View Mts. He removed all three from the ROI to Northern Ireland without declaring the sales, to a dealer who in turn supplied them on in either Northern Ireland or the UK mainland without accounting for VAT.

146. We also considered the scenario that the Appellant supplied Mr Cullen and Mr Byrne, and not Mr O'Kelly. If, as stated by Mr O'Kelly, Mr Cullen and Mr Byrne purchased vehicles by using Mr O'Kelly's VRN, we were satisfied that there was still a tax loss.

147. We concluded that, on the balance of probabilities, the evidence demonstrates that there was a pattern of trade whereby if the goods were supplied to Mr Cullen and Mr Byrne instead of Mr O'Kelly and in respect of the deals with Mr Burke, the vehicles returned from the ROI to the UK and tax losses were occasioned by Ikonic Solutions Ltd, Exclusive Export Ltd ("EEL") and Cathal Corr t/a Mountain View Autos.

148. We were satisfied that it was reasonable to infer that the pattern of trading by which the vehicles were sold to defaulting traders in the UK who have not accounted for acquisition tax or output tax on the onward domestic supplies, being part of a fraudulent scheme, was followed in respect of all of the vehicles and that there were fraudulent tax losses later in the chain of supply, per *Italmoda*:

> "49. In the light of the foregoing considerations, it is, in principle, the responsibility of the national authorities and courts to refuse the benefit of the rights laid down by the Sixth Directive when they are claimed fraudulently or abusively, irrespective of whether those rights are rights to a deduction, to an exemption or to a VAT refund in respect of intra-Community supplies, as at issue in the case in the main proceedings.
>
> 50. It must further be noted that, according to settled case-law, that is the position not only where tax evasion has been carried out by the taxable person itself but also where a taxable person knew, or should have known, that, by the transaction concerned, it was participating in a transaction involving evasion of VAT carried out by the supplier or by another trader acting upstream or downstream in the supply chain (see to that effect, inter alia, judgments in Kittel and Recolta Recycling, EU:C:2006:446, paragraphs 45, 46, 56 and 60, and Bonik, EU:C:2012: 774, paragraphs 38 to 40).
>
> …

> "69…the Sixth Directive must be interpreted as meaning that a taxable person who knew, or should have known, that, by the transaction relied on as a basis for rights to deduction of, exemption from or refund of VAT, that person was participating in evasion of VAT committed in the context of a chain of supplies, may be refused the benefit of those rights, notwithstanding the fact that the evasion was carried out in a Member State other than that in which the benefit of those rights has been sought and that taxable person has, in the latter Member State, complied with the formal requirements laid down by national legislation for the purpose of benefitting from those rights."

149. In those circumstances, as HMRC are permitted to rely on a fraudulent tax loss by an entity on the transaction chain irrespective of whether it was an immediate customer or supplier or elsewhere in the transaction chain, we were satisfied that the relevant limbs of the test to be applied were satisfied.

CONCLUSIONS ON CONNECTION TO FRAUDULENT TAX LOSSES

150. We have set out our findings in relation to the *Kittel* and *Mescek* transactions. In summary, we are satisfied that in each transaction, HMRC accurately trace the chains of supply and that the relevant connection to fraudulent tax losses within the chains (even if that connection was not the Appellant's immediate customer) was made out.

151. We rejected the Appellant's new argument that it was eligible to zero rate under the new means of transport provisions.

152. We accepted the Respondent's alternative basis for the assessments arising out of the Mr O'Kelly transactions, namely that if the vehicles were supplied to Mr Cullen and Mr Byrne, who were not VAT registered entities, the supplies were made to unregistered EU individuals and must be treated as a domestic supply in respect of which the standard rate of VAT should have been, but was not, charged and accounted for.

EVIDENCE

153. The oral evidence principally addressed the issue of actual or constructive knowledge. We received witness statements and heard evidence from the following witnesses:

(1) For the Appellant:

  (a) Mr Rylands, director

  (b) Mr Mason, director

  (c) Mr Hibbert, director

  (d) Mr Lee, FCCA accountant.

(2) For HMRC:

  (a) Mr D'Rozario, officer of HMRC

154. As stated above, we also had a witness statement from the HMRC officer Ms Fazakerley whose evidence in relation to A4W was agreed and is set out at [89] above.

155. Due to the significant volume of evidence before us, we have not referred to each and every aspect of the evidence but rather we have focussed on those aspects of the evidence which were relied on by the parties and highlighted to us. However, we considered all of the material before us in carrying out our assessment of the evidence as a whole.

156. We should note that where any witnesses proffered opinions, we disregarded such evidence adopting the approach set out in *Megantic Services Limited v HMRC* [2013] UKFTT 492, at [15] that such evidence:

> "… is not a matter of fact but a matter of opinion. It is merely a view of a witness on a matter on which the tribunal itself must reach its own conclusion, and as such is of no value as evidence. Such evidence may rightly be excluded on that basis. In most cases, however, we would not see it as necessary, or indeed proportionate, for a forensic exercise to be undertaken, either by the parties or by the tribunal, to identify any such matters in each witness statement and for the tribunal formally to direct that they be excluded. Generally speaking, we think that the parties can rely upon the good sense of the tribunal to disregard purported evidence that represents conclusions that the tribunal itself must reach. That can usually conveniently be the matter of submission at the substantive hearing, rather than a formal application to exclude."

Overview

157. Before we turn to our analysis of the evidence, we will set out our conclusions on the evidence of the witnesses.

158. We found Mr D'Rozario's reliable, and we accepted it. It was clear that Mr D'Rozario had carefully traced the chains in the Appellant's relevant transactions and considered the information gathered pertaining to the traders involved in those chains. Mr D'Rozario kept his evidence under review and when further information became available, for example in relation to Cathal Corr, he reviewed his evidence and provided amendments where necessary to ensure his evidence accurately reflected the position. As stated above, we disregarded all opinion evidence given by Mr D'Rozario.

159. We found Mr Rylands' evidence provided limited assistance as to the details of the transactions under appeal. As will become clear from our findings below Mr Rylands made clear that he was not responsible for the transactions relevant to this appeal and regularly deferred to Mr Mason as the person who had undertaken the transactions and therefore the person who had the most detailed knowledge of them. The difficulty for the Appellant is two-fold. First, Mr Mason's evidence was, in in many parts, vague and inconsistent with other aspects of his evidence and that of Mr Rylands. Although we took into account the passage of time that has elapsed, we noted that Mr Mason was able to recall customers' names and details of exports from his previous employment and the circumstances of meeting the customers in the deals under appeal which was at odds with his inability to recall aspects upon which he was cross-examined. Second, Mr Mason claimed on numerous occasions that he was unaware of fraud within the industry and was not informed about the reasons for HMRC's involvement and monitoring of the Appellant's transactions. In circumstances where Mr Rylands had claimed that he felt harassed by HMRC to such an extent that a complaint was made, we found it implausible that Mr Mason, a director who attended board meetings, would be entirely unaware of the situation as he claimed. We found these inconsistencies and contradictions significantly undermined the Appellant's evidence as a whole and that the evidence lacked credibility on material aspects such that it was not reliable.

160. The evidence of Mr Hibbert and Mr Lee did not assist in determining the issues before us for the reasons we will set out below. In summary, it was clear Mr Hibbert had little to no involvement in the day to day running of the company or the transactions under appeal. Mr Lee, at the request of Mr Hibbert, provided limited advice to the Appellant in relation to its due diligence but ultimately, as Mr Lee accepted, he added little value as he was not aware of the reasons for HMRC's involvement nor was it his area of expertise.

Evidence and findings of fact

161. HMRC relied on, inter alia, the following features in support of its case that the Appellant knew or should have known that its transactions formed part of a contrived scheme to defraud the Revenue and that the factors equally applicable to the *Mescek* and *Kittel* deals.

Background and roles within the company

Mr Rylands

162. Mr Rylands has worked in the motor trade since he was 17, working for brands such as MG Rover, Nissan, Honda and BMW; it was while working at BMW that he had his first experience of exporting to the ROI, Malaysia and Thailand.

163. Mr Rylands started the Appellant company in 2011 as a customer centric 'boutique' style dealer specialising in prestige vehicles. Mr Rylands explained that the Appellant was able to secure cars with waiting lists by using proxy buyers that are not in the car industry and in doing so was able to charge a premium over the list price. Proxy buyers were able to get the vehicles out of the main dealerships who would not sell to other car dealers. Furthermore, UK based main agents do not export vehicles as manufacturers sell to different world markets at different prices. He explained:

> "The problem you have with trying to get these cars out of a Land Rover main agent is if they know you are a reseller, they just won't sell to you, because they fear that the car will be exported. I think further on into my statement I talk about manufacturers territorising the world. There is a fear of that from Land Rover. Also they just don't like other agents selling their cars for over and above list price. They like to try to keep, I say their foot on the neck of the market. If they control all of the supply, then they are in the most powerful position."

Transcript 13 May 2022 page 14

164. Mr Rylands did not intend the Appellant to specialise in exports but was aware of it as a market for the vehicles the Appellant was selling. Although Mr Rylands, as MD, was involved in the day to day running of the company he clarified that it was Mr Mason who was more involved in the export market. He explained how the Appellant saw the opportunity as follows:

> "Q. At what point did you conclude that the market in brand new vehicles was one that you wanted to enter into?
> A. The main driving force behind going into the -- it was predominantly Range Rovers is something that's -- a cycle that's come around again with the new launch of a new model Range Rover…Because there was waiting lists for these vehicles, because they were quite difficult to get hold of, we saw that there was a gap in the market to sell these vehicles above and over list price...
> …
> Q. But when you realised that there was this gap in the market, was this around the time Mr Mason joined the company?
> A. Yes.
> Q. Because Mr Mason is the gentleman, as I understand it, on his evidence and yours, he is the one with the real export experience, you had done some at BMW but he was the expert if you like?
> A. Yes. And it is probably quite key to say that Mr Mason had been in the motor trade for quite a lot longer than me. So he's seen these types of new model cycles and this sort of business before. So he was -- he spotted it alongside all of us. We make a decision as a team.
> Q. But he had already come on board at that point to join the sales team more broadly?
> A. Yes.
> Q. Then when this particular market was spotted, he was obviously a driving force in that respect, or a very useful source of information?
> A. Absolutely. Q. He is described at the time on your website as the person for exports?
> A. Yes.
> Q. Certainly we can see from the correspondence that that was very much his baby and he was the contact?

A. Yes.
Q. Thank you. Is it fair to say that you relied on at that experience of his, although you had some experience of your own? You relied on his greater experience in that way?
A. That would be fair to say, yes."

Transcript 13 May 2022 pages 7 – 10

165. He explained that the transactions under appeal were the responsibility of Mr Mason:

"Q. Again so we are clear, when you say – you talk about what Mr O'Kelly wanted, etc. Mr Mason was plainly essentially in charge of these transactions. That was his area or one of his areas?
A. Yes. That's not to say that other people from the business didn't talk to Mr O'Kelly. He made a lot of the phone calls. So we did speak to him but yes, on a transactional basis it was Mr Mason that looked after that client. That was his customer, as it were.
…
Q. But in terms of understanding how you, Vanrooyen, the company knew that you were dealing with Mr O'Kelly as opposed to anyone else, would it be better to talk to Mr Mason about that presumably?
A. As I said, Mr Mason dealt with Mr O'Kelly more than I did."

Transcript 13 May 2022 pages 30 – 31

Mr Hibbert

166. Mr Hibbert retired from full time work in 2012 and began investing in businesses in which he takes a role as a non-executive director/chairman and shareholder. He had little involvement in the day to day running of the Appellant although he attended monthly board meetings and would be involved with strategy planning and discussions with banks/lenders.

167. Mr Rylands had sold cars to Mr Hibbert for many years and having researched the market and considering Mr Rylands' business plan, together with his personal passion for cars, Mr Hibbert invested in the Appellant.

168. Mr Hibbert was told about HMRC's visit in August 2014 by Mr Rylands after the event. It was Mr Hibbert who suggested that Mr Rylands met with Mr Lee. In cross examination Mr Hibbert could not recall but believed he met Mr Lee on arrival but then left the meeting to Mr Rylands and Mr Mason. It was as Mr Lee left that he told Mr Hibbert that the Appellant's due diligence processes looked robust however a questionnaire was suggested as an addition and specialist advice was sought as Mr Lee explained he was not an expert in VAT.

169. Mr Hibbert attended meetings in January and July 2015 with HMRC and Mr Rylands but could not recall the discussions although he recalled telling Mr Rylands that he should consider appointing The VAT People due to the complexity of the HMRC discussions. He did not recall any discussion about MTIC fraud

Mr Lee

170. Mr Lee is a FCCA qualified accountant who founded Mike Lee & Co in 2016, prior to which he was a director in LC Corporate Strategies/Leonard Curtis and then senior manager at Kroll (formerly Duff & Phelps) and a director at a2e Venture Catalysts.

171. Mr Lee confirmed that whilst at Duff & Phelps he was asked by one of the partners to attend a meeting on 18 September 2014 with Mr Mason who was an acquaintance of the partner. Mr Lee no longer has access to his notes of the meeting however he recalled his understanding that the Appellant had received an enquiry from HMRC about potential deficiencies with its paperwork in relation to imports/exports.

172. At the meeting, Mr Lee was advised that the company had already retained the services of a VAT specialist and implemented a number of changes to enhance the paperwork trail. He was shown a new questionnaire said to have been recently introduced which appeared to Mr Lee very detailed and appropriate to the circumstances. He described it as follows:

> "Mr Lee: It was a few pages, and it was really trying to establish the credentials of the other side of the transaction. So it was more about identification and (inaudible) status and that kind of thing really. Very similar to anti-money laundering type sort of requirements…so it was about establishing those credentials and making sure that they were bona fide.
>
> …
>
> It just seemed like a fairly complete document to me at the time. It seemed sensible. I guess that was the point I was trying to make. My advice at the time was because it was more of a technical matter, I did say that it was beyond my skillset, and that they should continue with their enquiries with the specialists that they had already engaged at the time."
>
> Transcript 16 May 2022 pages 21 – 23

173. Mr Lee recalled discussing some new procedures and did a test on one transaction which indicated to him that the procedures were both sensible and reasonable. He did not recall the phrase "MTIC fraud" being used and stated he had not heard of the expression.

174. Mr Lee added that during the meeting he explained that although he is a qualified accountant with an awareness of general VAT principles, he was not a technical VAT specialist in this area. He advised that the appellant continue to consult the VAT specialist and follow that advice as he was unable to add any value to the process.

Mr Mason

175. Mr Mason has been in the motor trade most of his working career since opening a car showroom and workshop in 1984 in partnership with his father-in-law. Prior to joining the Appellant as director in May 2013, he worked as sales manager at Boss Performance Ltd in Lancashire which sold high end vehicles and where he was involved in the export of used cars worldwide. Mr Mason exhibited a database taken from Boss Performance which set out the exports he had carried out. In oral evidence it was clarified that he was responsible for exporting all of the vehicles on the document shown as exported save one. Mr Mason stated he could recall the customers and there were approximately 14 used vehicles he sent abroad, which he agreed was a different model to the exports of new vehicles by the Appellant. In cross-examination, Mr Mason claimed that he was not involved in the back office or accounts at Boss and could not therefore explain why there appeared to be an inconsistency as identified by Mr D'Rozario between the exports he said he had carried out and the VAT returns which indicated there were no exports.

176. Mr Mason agreed he had a wealth of experience of how the motor trade works, from relationships with others in the trade to sourcing vehicles and that the exports side of the Appellant's business was his responsibility, and the deals were his, which amounted to approximately a third of his work overall.

177. It was Mr Mason who introduced the export business model to the Appellant. He had been advised prior to the release of new Range Rover Models that they would be in high demand but short supply and he realised there would be an opportunity to advertise for new build slots and get a premium over the list price. He explained that it was easier for the Appellant to obtain range Rovers in the UK than for dealers in the ROI to obtain the same

vehicles plus the cars in the UK were less expensive than those in the ROI so he found it unsurprising that dealers in the ROI wanted to source vehicles through the Appellant.

178. Mr Mason explained how the exports came about as follows:

> "A. Yes. Just to clarify, when we started to do this with the new Range Rovers, we had no idea that any of these were going to be exported. This was solely to sell to UK people.
> Q. Right. Can I ask you then why you had no idea that they were going to be exported, if you were, with your experience, knowledgeable about that lucrative market in Ireland?
> A. Well, we advertised the first vehicle that we had a build slot for on the Autotrader, which we knew wouldn't arrive for probably six to ten months. We placed an advert to test the water, to see the desirability. That one car, we could have sold it ten times.
> Q. Forgive me for asking the same question again. From what you say in your witness statement, you knew from your experience that there's a big market in crossing the borders because of the different list prices in different countries?
> A. Yes.
> Q. Was that not, therefore, an obvious target for you from the start?
> A. No, that's not what we set up to do.
> Q. Why not?
> A. We didn't feel we needed to at the time.
> Q. What changed?
> A. We had an enquiry from an overseas customer, asking would we export.
> Q. So, in short, you had more demand from Ireland than you did from elsewhere?
> A. Not initially, no."
>
> Transcript 17 May 2022 pages 25 - 26

179. Mr Mason agreed that the Appellant could have kept to UK sales given the demand which would have avoided the six hours round trip to transport the vehicles to Ireland but he stated exporting was a commercial decision which he discussed with Mr Rylands.

Due diligence and knowledge of fraud

180. Mr D'Rozario stated that he had highlighted to the Appellant fraud within its industry and provided PN 726:

> "Q. That is the beginning of a document with which I think we're probably all familiar, is that right, the notice 726?
> A. Yes.
> Q. And you accepted, we can see that this copy is published on 2 April 2008, when you indicated the particular goods of concern were not cars, mobile phones, CPUs and such matters, classified goods?
> A. Yes.
> Q. And that the guidance was developed at that stage, but please could you take us to chapter 6, or part 6, that you say was the one that you would be anxious to bring to the attention of traders in later years when you were doing the visits in question?
> A. Yes. We'd always direct them to section 6, because --
> …
> Q. Just help us with what you were saying about that, and how that helps with the issue of supply chains and customer chains?
> A. Well it gives a, as the heading says, dealing with other businesses, how to ensure the integrity of your supply chain, and it spells out at paragraphs 6.1 what checks can I undertake to ensure the integrity of my supply chain. There's a whole raft of examples there. Nothing prescriptive as it were, but we ask our traders to read carefully and take cognisance of. We obviously can't tell them to perform each and every check, but it gives them an alert as to a reasonable idea of what checks they can do."

181. Mr D'Rozario made the point that section 6 of PN726 refers to both customers and suppliers. He confirmed that at the time of his telephone conversation with Mr Rylands in January 2015 he did not mention checks on customers as he had been focussing on the supply side of the business at that point despite having been made aware by the Irish tax authority that Mr O'Kelly was suspected of tax fraud. He explained that HMRC were unable to dictate what checks a taxpayer should undertake but the information was provided from which the Appellant was expected to consider and assess the credibility of a transaction in order to protect themselves. Mr D'Rozario accepted that MTIC fraud had not been explained to the Appellant prior to some of the transactions under appeal but he noted that even after warnings were given the Appellant continued to trade with customers in the ROI.

182. On 29 January 2015 Mr D'Rozario was notified in an email from the its representative that the Appellant intended to make changes "in an attempt to enhance the robust processes that are already in place". This was said to include completion of the due diligence questionnaire provided to Mr D'Rozario at his meeting in January 2015 for every new client based outside the UK, validating the EC VAT number of any new EC based clients to be repeated on a quarterly basis and checks of the VRN using VIES with a copy retained with the deal file. The questionnaire required detailed information including the registered office address, full residential address, PPOB together with copies of their certificate of incorporation, VAT certificate, photo ID and a declaration that all accounts and returns have been filed and due diligence checks undertaken on their supplier.

183. On 30 January 2015 the Appellant's representative confirmed to Mr D'Rozario that due diligence would be carried out on suppliers as well as customers and credit/Experian checks would be extended to include information regarding the customer's financial position. Mr D'Rozario noted that no evidence of such financial checks was provided to HMRC in relation to the transactions under appeal.

184. Paperwork uplifted at a visit by HMRC officer Fazakerley on 3 June 2015 included a letter dated 2 June 2015 from Mr Rylands which stated:

> "Prior to February 2015 our focus was on verifying the VAT registration numbers of customers located in other EC member states as this is where we considered a risk from a VAT point of view…We only began to carry out detailed due diligence on UK suppliers and customers in February 2015 following your advice at the visit of late January 2015…"

185. Mr D'Rozario noted that the "enhanced" due diligence procedure said to be implemented following HMRC's visit on 28 January 2015 was only completed for two of the Appellant's five EU customers in the deals under appeal; Mr Lynch and Mr Burke. Deals with Mr Wright, Mr McNulty and Mr O'Kelly had taken place prior to this visit.

186. Mr D'Rozario highlighted the importance of due diligence as follows:

> "Q. …There's a lot of information there?
> A.There is, yes. But, if I may add, it is what Vanrooyen does with it. You know, that's all fine and well on a piece of paper. Have they checked the principal place of business? Do they know what it is? Have they Google mapped it?
> Q. Do you expect every business to Google map where its suppliers and customers are, in 2014?
> A. If a business was going to supply over £3 million worth of high prestige vehicles to one small business, as it were, one Mr O'Kelly, yes, I would. I would be circumspect to ensure that he has got the history and the foundations of, you know, a secure and established business."

Transcript 11 May 2022 page 39

187. Mr Rylands explained that he believed the meeting with HMRC on 26 August 2014 was fairly routine; the main focus was the Appellant's purchases from M&M (Cambridge). He was told at the meeting about MTIC fraud and the associated risks which was the first time he had any idea about such fraud in the car industry. However, Mr Rylands believed that, as the vehicles were being exported and the VAT numbers of trading partners were checked, the Appellant was at no risk.

188. He stated that although he did not understand how the fraud worked, he did not ask the HMRC officers who visited. He explained it was his first experience of dealing with HMRC and he found asking any questions difficult and was often met with the same response about doing due diligence and finding out for himself. However, he agreed he could have asked generally about MTIC fraud in the industry rather than questions about specific traders. He stated he had called The VAT People, the Appellant's representatives, for advice and although he would have spoken about how the fraud works, he could not recall the conversations, adding that he did not have full involvement with the deals, but he knew due diligence was important.

189. Mr Rylands stated that when carrying out the checks the Appellant was satisfied in each case that their clients were cars dealers and VAT registered in the ROI. After the visit from HMRC he spoke to Mr Lee of VAT experts Duff and Phelps who was satisfied with the Appellant's checks but stated that to be extra careful a questionnaire should be completed which the Appellant supplied. Mr Rylands stated his confidence had been shaken by the number of letters received from Mr D'Rozario, including veto letters, and he had expressed his intention to focus on UK sales as a result, despite which, in cross-examination he accepted that further exports were carried out:

> "Q. But having told him that you would rather concentrate on UK sales, you through your business conducted a number of further transactions, didn't you, for some further months?
> A. Yes.
> Q. With the Republic of Ireland?
> A. Yes.
> Q. With other individuals. Did you not at that stage consider that there was some substance potentially to the concerns that the Revenue had and all the attention they had been paying you, your number one customer in the Republic of Ireland was no longer registered for VAT?
> A. Yes.
> Q. And maybe you, through a lack of understanding of the problem of the VAT fraud or for any other reason, were, in fact, operating in a way that was clearly dangerous, if you like, in terms of being tainted with fraud?
> A. I think, going forward from that point, Mr Lynch and Mr Burke were people we were still supplying cars to, which -- we had gone through the VAT verification process with HMRC to give ourselves the confidence that again they were bona fide traders. We were checking the VIES system constantly to make sure that they were still operating and again we'd send off the documentation of what we had been asked to do over to HMRC.
> …
> A. Again we didn't know they were fraudulent when we have sent over all of our due diligence to be checked over by HMRC for them to not tell us there was any issues with those clients.
> Q. They told you that they were VAT registered?
> A. Yes.
> Q. And that they couldn't give you any guarantees. It was a matter for you to assess, didn't they?

A. Correct, which again they told me for Mr John Murphy. Exactly the same. I sent the same documentation and that deal was absolutely fine.
Q. So you knew that although you had given this documentation to the Revenue all they could tell you was it was a valid number and couldn't give you any other help?
A. Unfortunately, yes."

…
Q. But the impression one gets is that you were told of certain checks you could do?
A. Yes.
Q. That you have described as due diligence. You have asked if there is anything particular more that you can do?
A. Yes.
Q. You have been told it is a matter for you to assess your chains, your market, your position?
A. Yes.
Q. And we will come to the notices that you were given in a moment, but you took away from that that if the customers weren't going to give you any more information as to what you could do, then you were going to do what they suggested and gather it in a file and that was your position covered. Is that fair or not?
A. I wouldn't say covered. I didn't believe there was any other things we could do going forward. I genuinely didn't believe that at the time…
Q. We will perhaps have a pause in a moment, but just before we do, the response that you got from the Revenue when you did send those documents through later was "Yes, it's a valid VAT registration number."?
A. Yes.
Q. "That doesn't mean we are giving you the all clear. It means that it is a valid VAT registration number and the onus is still on you to satisfy yourself."?
A. Yes.
…
Q. I think you had agreed that the customs' position was always that ultimately you must make an assessment yourself.
A. Yes."

Transcript 13 May 2022 pages 74 – 76, 49 – 51, 53

190. In terms of assessing the information obtained, Mr Rylands stated:

"JUDGE DEAN. You were asked about the following being told that Mr O'Kelly had been deregistered -- I think it was put to you that did it not concern you at that point you might be in dangerous territory that there might be something going on? You said going forward you were dealing with Mr Lynch and Mr Burke and you had done various checks on them.
A. Yes.
Q. Which I think you said gave you confidence they were bona fide?
A. Yes.
Q. What I just want to clarify is you had done the same or similar checks to those which you had done for Mr O'Kelly?
A. Yes.
Q. But obviously he had been deregistered?
A. Yes.
Q. What gave you the confidence that the same was not going to happen to these two. Was there anything different about them?
A. So in my mind we had obviously received details and documents from Mr O'Kelly but we had never put them through HMRC's verification check, because we weren't aware that was something you could do. Obviously we were talking with HMRC about how to bolster up our due diligence. We had had our new questionnaire suggested to us by Duff & Phelps. So we had got that. We had those filled out by both Mr Lynch and

Mr Burke. We had sent those over to HMRC so although Mr O'Kelly had been deregistered for VAT, obviously we didn't know why that had happened, but we thought "There getting exported around the globe, especially Range Rovers, which are difficult to get hold of. We have done our relevant checks with HMRC". I don't think we thought there was that much of a risk.
Q. Did you understand that when you say the document stage at HMRC, they weren't checking them?
A. I think this is where the difficulty lies. HMRC -- you send documents off to HMRC and ask them for a VAT verification, which they then give you, but they wouldn't tell you if there was anything wrong with that client. I don't really know how we would be able to find out things that they know. That is the thing I have always found quite difficult.
…

Q. Perhaps just linked to that point what did you take from -- I just talk about due diligence generally on each of the various traders he did it on. What did he glean from it when he got a valid VAT registration number? What did that mean to you? What then did you think was the purpose of doing that?
A. Again we were asked to -- we were advised the best way to protect our business was to perform these checks, which is what we went on to do.
Q. Okay. So how it did protect you?
A. Well, from what we were told regarding the notices that were issued, that if there was any denial of any zero rating or input tax or output tax, if there's any fraudulent activity, then we can rely on the zero rating.
…

Q. So is it fair to say as far as you were concerned -- and I completely accept and take on board the fact that I think you had quite a limited involvement, because Mr Mason dealt with quite a lot of the things --
A. Yes.
Q. -- but in your word you were complying -- I think you used the word "compliance" quite a lot -- you were complying with HMRC's requests for documents. You had ticked the various boxes. You had got the documents. You had sent them to HMRC. In your mind that was protecting yourself as much as you felt you could with your understanding at that time?
A. Yes. I mean, the only other body we deal with, which I would liken HMRC to, is the Financial Conduct Authority. They set out rules and regulations that we follow when it comes to financial conduct in the market. When they set their rules and regulations out, we follow them as we are told to do.
Q. So in a similar vein you followed what you thought were the –
A. Yes. We thought "That's how to protect yourself is to make sure that rules and regulations are followed". The same way that when Mr D'Rosario asked us for anything we have supplied it as quickly as we can do, because we thought, again maybe naively, that we were trying to help, but unfortunately we are sat here."

Transcript 13 May 2022 pages 121 – 124

"Did you consider you may need to assess what it means and what it tells you and what it can't tell you?
A. I don't understand what you are asking me. If I ask a UK based client for his driving licence for a finance company, I will look at his driving licence and go "That's the client's driving licence. That's who I am dealing with", and that is that.
…

We wanted to make sure that we had the correct documentation in place to make sure that we knew that client or customer was bona fide and that's what we did."

Transcript 13 May 2022 page 59 – 60

191. Mr Mason explained that he was never directly involved in any of the meetings with HMRC. His understanding was that the focus of the first meeting was purchases from M&M (Cambridge):

> "A. How the business runs, Martin and his team run the day-to-day accounts. Anything to do with things like this, I was not aware until probably way after the second visit that there was any enquiries from the HMRC.
> Q. You were only aware -- sorry. I missed that?
> A. I think it was probably several days – it might have been weeks -- after the first -- sorry -- after the second visit from HMRC that we had the discussion about this.
> Q. So Mr Rylands had a visit from the Revenue in August of 2014. They raised the question of something that you say no-one had heard of in your business?
> A. That's correct.
> Q. Which is fraud, and a particular kind of fraud relating to VAT, and a concern from the Revenue that this is an area of the market that you are trading in that may have fraud within it or does have fraud within it, and Mr Rylands did not talk to you about it for weeks?
> A. No, he didn't.
> Q. When he did talk to you about it, when was that?
> A. From my recollection, it was after the meeting with Mike Lee.
> Q. After the meeting with Mike Lee --
> A. No, sorry. We talked about HMRC, but the actual fraud, MTIC fraud, was after the meeting with Mike Lee.
> …
>
> A. In the early conversations I had with Mr Rylands, I think there was a discussion about "Make sure that your paperwork is correct with whoever you are going to export to, and we are going to have to get some outside help". He shielded me from things like that so I could concentrate on doing the sales.
> Q. Okay. So your understanding was that you didn't need to know what was going on with Customs -- and if this is wrong, please say so. It is obvious, but it is important.
> A. Yes.
> Q. Mr Rylands was taking care of that side of it, and as long as you had your paperwork in order, then that was the extent of your need to worry?
> A. Yes. It was discussed a few times. "Just make sure you have got the due diligence on the customer correct".
> Q. All right. Well, I think in those early days when you say "due diligence", you have said in your witness statement that you wanted to make sure they had a VAT registration?
> A. Yes.
> Q. And that was essentially it, identity and VAT?
> A. We identified the customer, made sure that he was a bona fide trader, and got as many proofs, driving licences, passports, operator's licences, VAT references as possible.
> Q. Right at the beginning of these transactions?
> A. We did, yes.
> Q. Why was it in your mind important to get that information?
> A. Well, this is what I had been told to do when was at Boss. The owner of Boss, when we started to do the exports, he controlled that as well, and he gave me a directive of the things that we needed.
> Q. Right. Did he explain why you needed them?
> A. Because that was the law.
> Q. Because it was the law?
> A. It was the law.

Q. But from your own perspective, as an experienced businessman in this trade, did you give any thought as to why it was important to understand whether someone was a car trader and did have a valid VAT number?
A. Yes. Well, if you haven't got a VAT number, from my experience, and you are not a motor trader, you cannot export a car from the country.
Q. Can't export it at all?
A. Not within the EU.
Q. That was your understanding?
A. Yes.

…

Q. Right. So you were asked by Mr Rylands: "We are going to get an expert in to help us with this". At this point had he mentioned fraud?
A. No, not at all.
Q. Still hadn't mentioned fraud at the point that Mr Lee arrived?
A. No.
Q. "We are going to get an expert in to help us to make sure that we comply with the law"? What did he say?
A. To make sure we are doing everything correctly.
Q. "Can you, please, Glen, do us a list of what you think is appropriate for us to ask for"?
A. No, he didn't say that. It was left to me to produce the form.
Q. He asked you to produce a form?
A. No, I don't think he asked me to do it. I did it on my own.
Q. I see. Did you know at that stage you were going to have the meeting with Mr Lee?
A. Yes. I did this in anticipation of the meeting coming up with Mr Lee."

Transcript 17 May 2022 pages 49 – 50, 56

192. Mr Mason stated that at the time of the meeting with Mr Lee he still knew nothing about HMRC's MTIC concerns nor did Mr Lee. The first-time fraud was mentioned to him was "probably several months later, after a visit from one of the HMRC people" (17 May 2022 page 65). Mr Mason stated that despite his 30 plus years' experience in the trade he was unaware that fraud was a risk in the market, had not heard of MTIC fraud and had only heard of carousel fraud within the mobile phone industry from conversations ten years earlier possibly with other car dealers. Mr Mason only became aware of PN726 when preparing for the appeal and fraud had never been mentioned by Mr Rylands before 2015. He stated that, as a director, he attended monthly board meetings but there had been no discussion about fraud, nor had he been shown letters from HMRC in September 2014 and January 2015 to the Appellant which discussed MTIC fraud.

"Q. It's a small board. You are at the board meetings on a monthly basis. Was there no discussion about the troubling news from the Revenue that this is a market that some fraudsters act in?..
A. Not really, no.
Q. Not really?
A. It would have been discussed in some board meetings that we have taken on The VAT People, because there would have been a cost for that, so we all had to -- but insofar as me getting involved in the day-to-day of this. I am a salesman. I am based on sales. This was probably about a third of the actual sales I did in that period, so I was a busy person.
Q. I am sure you were, Mr Mason. But board meetings you attended?
A. I did, yes.
Q. You say, to the best of your recollection, a long time ago, no mention of fraud at board meetings in 2014?

A. No. We didn't think there was any fraud going on, so that would not have been mentioned.
Q. Well, we know, don't we, that the Revenue were warning Mr Rylands at least?
A. But that wasn't being communicated down to me.
Q. That's what I was asking you about. So no communication even at board meetings?
A. No.
Q. To say: "This is something that's arisen. This is something we need to be alive to"?
A. No."

Transcript 17 May 2022 pages 70 – 71

193. He stated that there was a discussion regarding engaging The VAT People to oversee "what we are doing" but no specifics were given and "it wasn't my department" (17 May 2022 page 73)

"Q. -- over a period of months. You have been oblivious to any discussion from the Revenue or anyone else that this is a market that some people practice fraud in. Yes? You learn at some point in 2015 that it is a market that some people practice VAT fraud. All right? Wasn't that a bit of a shock?
A. No. We still didn't believe at that time that there was VAT fraud going on.
…

Q. Right. Well, we will come on to that this afternoon. Of course, they weren't going to Mombasa and Kenya and that's really the issue, but it didn't worry you that this business you have been for over 30 years you are learning about a new form of fraud that the Revenue have been alerting your company to and asking questions about your deals?
A. I was not privy to the conversations with HMRC about fraud. I don't know at what point they told Mr Rylands about the fraud. I don't know.
Q. And you don't know for sure at what point Mr Rylands told you?
A. No.
Q. But it didn't trouble you at all?
A. It did when I learned about it.
Q. Right. Well, that was my question a little while ago. It troubled you when you learned about it?
A. It did trouble me, yes.
Q. So what did you do? Did you ask questions of Mr Rylands and say, "Well, tell me more about this fraud in our market that we need to be alive to"?
A. No, I didn't ask the question. I still say we did not understand where the fraud was taking place.
Q. Well, Mr Mason, on your evidence you didn't even know about fraud when most of these --
A. No.
Q. So it wouldn't be a question of you not understanding. You knew nothing about the risk.
…

Q. But no-one mentioned fraud to you until very late on?
A. No. Fraud was only mentioned when everybody started to investigate this several months, maybe a year, down the line.
Q. You have been rather kept in the dark, haven't you, Mr Mason, throughout this period?
A. I have, yes, but that was my role. I was brought in to Vanrooyen to sell cars. Mr Rylands didn't burden me with the day -- still to this day I don't get involved in the day to day running. I~don't have access to the bank or the accounts. I just buy and sell cars.
Q. Do you understand today that the essence of what the Revenue were then telling you -- you didn't know at the time --
A. Yes.

Q. -- is that you, the trader, the man or company with the experience, is in the place to make the assessment as to whether this deal makes sense, whether you have done all the sensible checks that you can in order to avoid any connection with fraud? Do you understand that now today?
A. Yes. I brought the information in. We decided as a business that the information that we had was correct and we did the business, but it was my responsibility to get the information.
Q. But it is not just about getting the information in and making sure you have all the things that you promised Customs you would collect. It is looking at that information as an experienced car dealer and assessing whether there's anything else you can do, not what Customs have told you to do, but what you can do to satisfy yourself. Do you understand that today?
A. I was satisfied and we as a company were satisfied that there was not much else that we could do.
Q. Do you understand today that that was the responsibility of the company as a whole?
A. I understand that what we were doing was correct at the time. I don't know which other avenue we could have gone down to get any other information."

Transcript 17 May 2022 pages 107, 111

194. Mr Mason claimed that he was not informed of The VAT People's correspondence to HMRC dated 29 January 2015 which advised that checks would be extended to cover the financial position and status of a customer, which, Mr Mason stated, was not practice within the industry, nor was he aware that the Appellant confirmed it would send bank statements cross-referenced to invoices confirming payments made and received.

195. He claimed he was not aware of HMRC's next visit on 18 February 2015 and he stated Mr Rylands was incorrect when he told Mr D'Rozario at the meeting that there had been conversations between Mr O'Kelly and Mr Mason after Mr O'Kelly's de-registration came to light in which Mr O'Kelly had advised he was in the process of obtaining a new VAT number.

196. On the issue of due diligence generally, Mr Mason stated:

"Q. Sorry, so looking at -- you see an advert on Autotrader selling a car. Yes? It is a car you are interested in?
A. Yes.
Q. You decide: "Okay, they are not a main dealer on this occasion. Many of my suppliers are. So I need to make sure they are a reputable dealer".
Q. How did you do it. You looked in Autotrader?
A. We would do a VIES check, which made sure he could sell me a vehicle with the VAT, and just look at their history from the website.
Q. From which website. Autotrader?
A. Their own probably website or the Autotrader.
Q. What would the Autotrader tell you about their history and whether or not they are a reputable dealer?
A. Nothing really.
Q. Checking the Autotrader is not going to help. So you look at their own website?
A. Yes.
Q. How does that tell you whether they are a reputable dealer?
A. The volume of vehicles that they have got for sale, and usually they have some feedback with Google. I think there was probably only two or maybe three cars that was bought from outside the main dealer network.
…
A. I don't know what you are asking me to say. In the course of my business, I buy sometimes 100 cars a month from people all around the country. You go on to the

Trade Mail system that we have. They are vetted by the people that allow them to put them on the Trade Mail. They have to be proper car dealers to put cars up there.
Q. Do they?
A. In all the deals that we have ever done, nothing has ever come wrong.
Q. What do you mean by they have to be reputable dealers to be able to put an advert on --
A. There is a trade only site, not Autotrader. It is called Trade Mail, which is part of the Autotrader. Autotrader will not allow them to put vehicles on there if they didn't have a trading history with them.
Q. How do you start then? How do you put your first advert on trade mail if you have not got a trade history with them?
A. You might have to give trade references to these people. I don't know.
…
Q. I was asking you, how do you see that they are a reputable dealer. You said: "Well, the site they are advertising with would not have them unless they were, unless they had a trading history with them". Is that your evidence?
A. Yes, and I think it is experience. You know if you are buying from someone that's okay.
Q. You don't, do you, Mr Mason, because you got caught up in a huge volume of fraud during 2014 and 2015.
A. Not from our suppliers, which we are talking about at the moment.
Q. We will come to your suppliers in due course. Equally important that they are reputable, have a history in trade, etc. Did all of your customers have long histories in car trading?
A. I wouldn't know.
Q. No, you wouldn't, would you?
A. No.
Q. Because you didn't look. But on your own evidence, Mr Mason, this was something that you considered important, wasn't it?
A. If you, as a private person, came into my showroom to buy a car today, I wouldn't do due diligence on you.
Q. We are not talking about private end users. We are talking about motor dealers in Ireland, aren't we?
A. But he was a customer.
Q. Again, I put to you a moment ago, it is equally important for the customers and you agreed.
A. Yes.
Q. Did you do checks that would allow you to see whether this customer had a long and reputable history in car dealing?
A. I did the best that I could with the information that was available."

Transcript 17 May 2022 pages 85 - 88

197. Mr Mason clarified that the questionnaire or document presented to Mr Lee was a draft made by Mr Mason for the purpose of Mr Lee's visit without being asked but which did not more than reflect what he was already doing:

"A. Well, on the questionnaire it was no more different to the information that I had already got from Mr Kelly, except we were asking them to fill it out themselves, rather than just get a driving licence, to get a passport. So I wanted it coming back from them with the details on. So there was no more paragraphs on there from the difference that we already had.
Q. Okay.
A. It just looked more formal."

Transcript 17 May 2022 page 57

198. As to the description of the questionnaire as 'enhanced' due diligence, the evidence of Mr Mason was:

> "Q. Because, you see, it's been described as an enhanced due diligence questionnaire, but from what you tell us there was nothing to enhance. You had it all already?
> A. There was a difference of getting the customer to fill this out himself or just sending me via e-mail his driving licence, you know. We thought he would fill this out and return it to us, more like an official document rather than a driving licence here, you know, a pile of documents just coming as an e-mail.
> Q. So getting them to fill it in themselves, so admin?
> A. Yes".
>
> Transcript 17 May 2022 page 62

Findings in relation to due diligence and knowledge of fraud

199. Whilst we found both Mr Hibbert and Mr Lee credible witnesses, their evidence did not assist us in determining knowledge or means of knowledge. Neither had any involvement in the transactions under appeal nor were they involved in the day to day running of the company. Mr Hibbert could not recall any discussions regarding fraud and it was clear to us that he did not know the details of the sales and purchases relevant to this appeal. Mr Lee's involvement was also minimal. We accepted his evidence that his understanding of the meeting with the Appellant was to consider deficiencies in paperwork, that they had engaged a VAT specialist to assist and that as the technical aspect of VAT was not within his area of expertise, he could add little value.

200. We were satisfied that the transactions under appeal were the responsibility of Mr Mason and that there was little to no input of any substance from Mr Rylands.

201. That said, it was clear from Mr Rylands evidence and the documentary evidence before us that it was Mr Rylands who dealt with HMRC and we found it wholly unconvincing that Mr Rylands would have such a significant level of contact with HMRC, described by him in evidence as onerous and which left him feeling harassed, but yet had failed to mention the reason for HMRC's involvement. Moreover, the evidence on this point was contradictory; Mr Rylands stated that he had spoken to Mr Mason about the issue of fraud and concerns raised by HMRC, but Mr Mason was adamant that he had been "shielded" and "kept in the dark", for example:

> Q. They raise this issue. Now that must have been a bit of a shock --
> Mr Rylands: Yes.
> Q. -- to say the least --
> A. Yes.
> Q. -- because until then you had no idea that something that some of your customers had mentioned in terms of mobile phones was actually happening with the vehicles?
> A. Yes.
> Q. And the sort of business that you were in?
> A. Yes.
> Q. So that would have put you on alert straightaway I suggest?
> A. Correct.
> Q. As a gentleman who has experience in the industry, who has their own company that they clearly hold very dearly and hope to progress and develop?
> A. Correct.
> Q. You would have been anxious I suggest to determine as much as you possibly could about how this fraud that you heard of in another context --
> A. Yes.
> Q. -- had found its way into your business, or at least your market, should I say?
> A. Yes.

Q. So what did you do?
A. So I obviously spoke to my colleagues. The focus very much from Mr Lawrence and Mr D'Rosario was always on making sure we had due diligence in place…Once I had spoken to my colleagues and asked if that was the case, in every case we were doing VIES checks, we were making sure they were live, and also that we had due diligence documentation that HMRC had suggested, I believed at the time and still now that we were comfortable with the business that was being written.
Q. Having your due diligence in place?
Mr Rylands. Yes.
Q. Is one part of what you were told is very much a question of you assessing your market, your trading counterparties, your trading chain insofar as you were able to determine that. It wasn't simply about getting your due diligence in a file, was it?
A. So as I understand -- the one thing that has always evaded myself, my colleague Mr Mason and everybody else at Vanrooyen was after this entire case obviously has taken quite some time was where the actual fraud was being taken place. We were a little bit confused as to what had actually gone on, if anything, and one thing we have said quite a bit is we didn't really know where the fraud was. You know, call us naive, but at the time and now I couldn't tell you what had actually happened going forward. As we were aware, the cars were being sold to a client, who was then exporting them further on, very high end demand vehicles, which were very difficult to get hold of, and that is what our market was.
Q. You mention "We" and you talked about colleagues. Who did you have discussions with about this issue?
A. Again we are a small company. So when it comes to who, obviously I would talk to Mr Mason, because Mr Mason has experience in this sector.
Q. Had he not heard of MTIC fraud in this sector either?
A. I don't believe so. It is something that -- I don't know. It is something that you will have to ask Mr Mason.
Q. Did you ask him? "I have just had this meeting, in August 2014. I have just been told there is VAT fraud in the car market? Did you know anything about this? Have you heard anything about this, Mr Mason"?
A. Perhaps I could have asked him that question.
Q. Did you?
A. Again I don't know whether I asked a specific question in 2014. It is quite a while ago.
Q. You were saying you and your colleagues. Who else?
A. At the time more than likely I will have asked Emily, who was our administrator, and Mr Mason, and that would have been that.

Transcript 13 May 2022 page 40 – 43, 44 - 46

202. In our view, it is wholly implausible that within a small company which holds monthly board meetings attended by the directors such an important issue would not have been raised. Either Mr Rylands raised the issue but failed to take any action of substance to address it or he simply never mentioned it. Either way, we consider that Mr Rylands turned a blind eye to the transactions that the Appellant undertook having been warned about fraud in the industry and HMRC having made it clear that there were concerns regarding the Appellant's transactions from at least August 2014.

203. We queried why if, as Mr Rylands claimed, he was unaware of fraud within the industry, when confronted with this information and HMRC's clear concerns regarding the Appellant's transactions, he failed to ask HMRC to explain the fraud, even in general terms. Although Mr Rylands claimed he would have spoken to The VAT People about the issue, he could not recall the conversation because he did not have full involvement in the deals.

204. We also noted that Mr Rylands was aware of the importance that the customer correctly declared and accounted for VAT (13 May 2022 page 37) yet having been warned, having received information regarding fraud and having recognised the importance of due diligence and the limitation to the verification HMRC could give, he took no steps to assess the limited information obtained. It was clear from the evidence, and Mr Rylands accepted, that HMRC made it plain on numerous occasions that it was for the Appellant to satisfy itself as to the integrity of its suppliers and customers, yet Mr Rylands failed to take any action to do so. As we will set out in due course, even where it was highlighted to Mr Rylands that he might wish to carry out further checks on a customer whose trade classification was at odds with car sales, he did not do so. We formed the impression that Mr Rylands was reluctant to accept responsibility for the transactions instead trying to distance himself from them. In our view, any reasonable trader, having been warned about the dangers, would have done all he could to learn about the risks and taken proactive steps to guard the company against it.

205. We consider that Mr Mason's repeated denials of any knowledge regarding HMRC's involvement lacked credibility and we formed the view that he was trying to distance himself from the transactions, for which he was solely responsible, under the claim of ignorance. In addition to being inconsistent with Mr Rylands' evidence, we also found that Mr Mason's evidence was itself inconsistent, stating it was days, possibly weeks or months then later "maybe a year" after HMRC's visit that he was informed about fraud.

206. We did not accept that the Appellant may have been "unwittingly" caught up in fraud, as submitted by Mr Brown, relying on *Citibank*. We found the evidence of Mr Rylands that he may have been "naïve" and both Mr Rylands' and Mr Mason's evidence that they were wholly unaware of fraud unpersuasive and, given our finding that the Appellant's evidence lacked credibility overall, we did not accept it. Mr Rylands had worked in the industry since he was 17 and Mr Mason had an even greater amount of experience. Both were clearly intelligent and successful businessmen. It was clear from the evidence that the Appellant was alive to VAT risks in the industry, Mr Mason had carried out due diligence checks in his earlier employment at Boss and the letter in June 2015 to HMRC described that due diligence had, prior to HMRC's advice in January 2015, been focussed on verifying VRNs of EU customers. The Appellant had limited experience in the market it entered in the relevant transactions, and we consider that their actions did not reflect those of a reasonable businessman but rather the cavalier attitude and lack of attention to features clearly indicative that all was not as it should be together with the Appellant's failure to make reasonable enquires, for instance in the case of Mr Harrison, led us to conclude that the Appellant had deliberately closed its eyes to the obvious. The only reasonable explanation for doing so, in our view, was that the transactions were connected to fraud and that the Appellant was aware of this.

207. Similarly, we found Mr Mason's repeated claims that he was just a salesman brought in to buy and sell cars and that he had no further involvement was unconvincing. Mr Mason was a director of the company and responsible for all of the transactions relevant to this appeal. We formed the view he was trying to minimise his responsibility for and involvement in the transactions which was not supported by the evidence.

208. We also noted that HMRC's involvement after the 26 August 2014 meeting led the Appellant to seek specialist advice from both The VAT People and Duff & Phelps. We considered it a reasonable inference that by that point, at the latest, the Appellant was aware that there were concerns regarding its transactions (in particular the exports to the ROI) its due diligence and fraud. In those circumstances we were satisfied that the Appellant was on notice about the concerns raised yet, as we will set out, it nevertheless continued to trade in the same manner with ROI customers which we found reflected its cavalier approach and was indicative of knowledge on its part.

209. Both Mr Mason and Mr Rylands claimed they did not know what further information they could have sought. However, we found as a fact that there was no assessment of the information that was obtained which, in our view, clearly raised 'red flags' but about which nothing was done. By way of example, having received invoices with invalid VRNs, Mr Mason visited A4W. He found no one from the company present nor was there any evidence of trade. The building was shared with Kenwright Accountants and Mr Mason left his business card with two receptionists. He stated he was provided with an Agency Agreement before any transactions. However, we had doubts that this was the case as there was no mention of it to HMRC officer Fazakerley at the time of her visit to A4W in early 2015 and it was not produced to HMRC until 2016.

210. In any event, we did not accept that the agreement, without any other enquiries and taken together with the different trade classification of A4W and invalid invoices provided, could have given Mr Mason any reassurance about who he was trading with and the legitimacy of that trade. The fact that Mr Mason failed to carry out any further enquiries to ascertain the true position and the lack of any credible explanation for his failure to do so led us to conclude that he knew that the transactions formed part of a contrived scheme to defraud the Revenue. In the alternative, if there was no actual knowledge, we were satisfied that the circumstances of this transaction support a finding that the Appellant should have known that the trade with A4W was connected to fraud.

211. We should note that we did not accept Mr D'Rozario's suggestion that the Appellant could have employed an independent third party to check its lines of supply. We consider the suggestion was uncommercial and we had doubts as to whether traders in the Appellant's chains would have willing provided such information.

212. A further example of the contradictory nature of the Appellant's evidence was the letter sent in January 2015 to HMRC in which the Appellant's representatives advised that checks would be carried out on suppliers, including financial checks. Mr Mason claimed he was unaware of this, yet he was the person carrying out the deals and the person who would be in a position to carry out those checks. There was also Mr Rylands' statement to Mr D'Rozario that Mr O'Kelly had been in contact with Mr Mason after his de-registration. In both instances, HMRC were provided with specific information which Mr Mason claimed he was either unaware of or that was incorrect. We found that these inconsistencies undermined the Appellant's evidence and credibility as a whole.

213. Despite the Appellant's claims that it introduced "enhanced" due diligence processes, there was no evidence upon which we could be satisfied that this was the case, rather the Appellant continued to trade in the same manner. The evidence regarding the enhanced due diligence was, in our view, contradictory and confused. The Appellant's representatives had advised HMRC of the intention to introduce further due diligence. However, Mr Mason's evidence was that he knew nothing about this and, moreover, the questionnaire he produced to Mr Lee was something he had produced without any discussion or prompting which begs the question why it was produced if Mr Mason had so little knowledge of the reason for Mr Lee's involvement.

214. In the end, Mr Mason clarified that the form was just a more formal version of the due diligence he claimed to already carry out and which was, in reality, no more than an administrative matter which placed the onus of filling out the form on the customer rather than the Appellant. We consider that rather than enhancing the due diligence, the form did nothing beyond the limited due diligence already carried out. The forms that were completed were only partially filled out and there was no evidence to demonstrate that the Appellant took any heed of or made any checks into the information provided. We concluded that the Appellant's due

diligence was, from the outset and remained, poor; basic information was collated but there was no effort to assess that information and no evidence that it was even considered by the Appellant. To the contrary, the evidence of Mr Mason was that he simply collected information and passed it to Mr Rylands, yet Mr Rylands claimed he had no involvement in the detail of the transactions.

215. We consider that a reasonable person of business would have concluded that "red flags" were present and that the Appellant ignored those signs because it was complicit in fraud. The checks conducted were perfunctory and minimal and, contrary to the Appellant's claim that due diligence processes were improved following HMRC's visit, the evidence clearly demonstrated that the due diligence remained woefully inadequate, and the information obtained could not have provided any assurance to the Appellant about the legitimacy of the transactions it was entering into. In our view the Appellant chose not to make the necessary enquiries that would be expected of a reasonable businessman from which we inferred actual knowledge; the Appellant did not need to make reasonable checks because it was aware that the transactions were contrived. If our conclusion on actual knowledge is not correct, we were satisfied that, taking all of the evidence into account, the Appellant, from the outset, should have known that its transactions were connected to fraud and that our findings above support such a conclusion.

Mr O'Kelly

216. The due diligence carried out included:

- 4 VIES checks (all valid)
- EORI issued by the Revenue, Ireland
- Passport copy
- Company Information Direct Business report for Pyramid Auto showing Mr O'Kelly under address details, date of registration and trade activity as "truck/car exports".

217. Mr D'Rozario noted that 34 dispatches were made before the Appellant's first VIES checks.

218. Mr Rylands stated that Mr O'Kelly contacted Mr Mason after seeing Range Rovers advertised on the Appellant's website and Autotrader. He stated that Mr Mason asked for proof of ID and carried out VIES checks. Both Mr Rylands and Mr Mason had numerous telephone calls with Mr O'Kelly and there was a good working relationship between them. Mr O'Kelly was always in a rush to obtain the vehicles as he told the Appellant that his overseas clients in Malaysia wanted them as soon as possible. According to Mr Rylands:

> "This all painted the picture that what he was doing was not only above board but also in high demand. We knew Mr O'Kelly bought many cars from around the UK to supply his trade, many of which are from British Car Auctions. Mr O'Kelly had a GOLD buying account…meaning he was buying circa 12 – 99 vehicles a year, also proving that he is a car dealer.
>
> …
> Q. Just dealing with the chronology here, are you talking about from the get-go when you dealt with Irish sales you were doing these enhanced business identity checks, etc?
> A. Yes. So when we enter into any transaction with any type of client, there is an element of making sure you know who your customer is…"
>
> Transcript 13 May 2022 page 32

219. Mr Rylands stated that it was of no concern that Mr O'Kelly appeared to trade from a residential address. He did not know who collected the vehicles exported to Mr O'Kelly nor where they were taken to be shipped to Malaysia although Mr Mason may have asked the question. Although Mr O'Kelly put pressure on the Appellant to send the vehicles quickly, Mr Rylands assumed Mr O'Kelly wanted them exported to the ROI rather than directly from the UK to Malaysia so that he could take photographs.

> "Q. Why the importance of identity checks and VAT registration checks with your Irish customers?
> A. I think mainly because we had not physically met them. It wasn't somebody who had physically come into our showroom and we had met. So we wanted to make sure that the people we were dealing with as bona fide car dealers, we wanted to make sure we knew who they were dealing with.
> Q. So by -- how did you do that? This is before you learned about MTIC fraud?
> A. So we just asked for proof of identity, which we believed at the time were sort of fairly regular things, the thing we would get asked for by a main agency if we were to buy a car.
> …
> Q. That's in on a UK to UK trade?
> A. Yes.
> Q. So here you are going abroad. You yourself have pointed out that you don't know these people?
> A. Yes.
> Q. You have not visited them. So a copy of a passport you said?
> A. Yes.
> Q. And then checking that they are VAT registered?
> A. Yes.
> Q. Why is it important to check that they are VAT registered?
> A. Because if we are selling cars zero-rated and exporting them out of the country, we need to make sure that they correctly declare their VAT on the other side.
> Q. So before you learned about MTIC fraud you were aware of the significance and importance of trying to make sure as best you could that your Irish business customer was going to account properly for VAT?
> A. Correct."
>
> Transcript 13 May 2022 page 36 – 37

220. Mr Rylands agreed that business premises, such as that of Mr O'Kelly could have been visited but he disagreed that a lack of business premises was a cause for concern as the vehicles were sold to order and not stored. A large forecourt or warehouse is not needed, and many traders deal from their homes which keeps overheads down.

221. Mr Mason explained that Mr O'Kelly introduced himself as a motor trader and vehicle exporter from Dublin trading as Pyramid Autos. He told Mr Mason that he exported vehicles to Malaysia. Mr Mason asked for proof of his Irish VAT number and he was satisfied with the information provided A VIES check was also carried out every time an invoice was sent, although paper copies were not retained.

222. In cross examination Mr Mason stated he had carried out a Google search of the address given by Mr O'Kelly which was a mews house on a new housing estate. That Mr O'Kelly was based from his home address did not cause Mr Mason any concern. He accepted that the documents he had obtained indicated that Mr O'Kelly had been registered as a truck and car exported since 2009 and that he did not know what actual business Mr O'Kelly had done. However, he stated, he had been referring to suppliers not customers when he had claimed it was important for him to see that a counterparty had been trading:

Q. What is the difference then, Mr Mason?
A. Well, the supplier is somebody that's in this country that it is quite easy to find some information for. This was in a different country, where there is only so much information I can get.
Q. Right. What is it in the UK that you can get that you can't get in Ireland?
A. I don't really know.
Q. Well, there isn't, is there? There is no difference?
A. They are similar customers.

…

A. I am in the business of selling vehicles. A customer makes an enquiry to buy a vehicle off me. I don't know who he is. So I have got no history because I have never dealt with him. I have to start somewhere.
Q. Yes.
A. I have got everything in my power, information wise, from that man that convinced me that he had been doing this for quite a while.
…

Q. Trade Mail. If they are advertising on Trade Mail you would be able to determine their trading history from Trade Mail?
A. I would probably see that he's had quite a few cars on there. Even so, I wouldn't not trade with a person who only had one car on, if that was the correct car and all the checks that we did, which were minimal in the UK, we would just check a VAT number, and we do business with him on a first occasion.
Q. Right. So history doesn't matter then?
A. Not that much, no.

Transcript 17 May 2022 pages 119 - 120

223. Mr Mason stated he would not have gone to visit Mr O'Kelly as it is "not something that is done in the industry. It definitely wasn't in Vanrooyen's remit to go across to Ireland to see someone" (17 May 2022 page 123) nor did the Appellant carry out credit checks on customers.

224. Generally, payment was made and the Appellant took the car to the Holyhead port where it was shipped to Dublin. Mr O'Kelly was given the shipping reference to collect it, on other occasions the shipping reference was given to Mr Griffiths to collect the vehicle. Mr Mason described that negotiations took place by email but he also spoke to Mr O'Kelly in "hundreds of phone conversations". The first telephone number used by Mr O'Kelly was self-populated on the Appellant's admin system and did not change when Mr O'Kelly called from a different number. Mr Mason was adamant that it was Mr O'Kelly he had dealt with as he had spoken to him directly, obtained proof of identification and sent DHL packages containing items such as spare keys and handbooks to him at his registered business address. Furthermore, security at the Dublin port required identification to release the vehicles. Mr Mason had never heard of Mr Cullen or Mr Byrne.

225. Mr Mason claimed that he had discovered that Mr O'Kelly was de-registered prior to HMRC's veto letter in January 2015 at which point he stopped trading with Mr O'Kelly. He stated that having told Mr O'Kelly there was no valid VAT number, Mr O'Kelly had not contacted him again. He stated he informed Mr Rylands, sometime after September 2014 but before January 2015, which as we noted above is at odds with Mr Rylands evidence. When Mr O'Kelly ceased contact, he knew something was wrong but did not expect it to be fraud as Mr O'Kelly had seemed plausible in their many phone calls and did not have any thoughts about it.

226. Mr Mason stated that the Appellant did not employ or engage Mr Griffiths to drive; he was a driver based in the UK who collected cars for Mr O'Kelly. A copy of Mr Griffiths'

driving licence was obtained as proof of identity. Mr Griffiths name was used on many occasions on the ferry booking reference as he often collected the Appellant's vehicles on behalf of Mr O'Kelly and regularly took vehicles supplied by others to Dublin. Mr Mason stated that he had no knowledge of Mr Griffiths' business, the Appellant did not sell vehicles to him, nor did it receive any services from him. The Appellant had made payments to him to reimburse him for ferry bookings, but Mr Mason was not aware of any payments made by Mr Griffiths to the Appellant which Mr Rylands had claimed were balances of payments from Mr O'Kelly.

227. In relation to bank statements showing Mr Capper's name in relation to transactions with Mr O'Kelly, Mr Mason stated he did not have access to the bank statements or app, he was just told when and if payments were made. Mr Rylands evidence was that a 3rd party name such as "JP Capper" which appear on some bank statement entries, that this would only be shown on the paper statements. The Appellant uses the banking app on a daily basis to check when funds have reached its accounts however the paper statements show more information but are not checked as payment is confirmed by the banking app:

> "Q. So you get the car out, but you obviously need proper accounts systems for all sorts of reasons?
> A. Our system is a system called Clickdealer which our admin system download each month with all the bank ins and outs which then goes into the system, which then goes into Sage. Again if I got the full -- if I was to get the full sort of breakdown of that on the bank statement, it will be probably about that long and it will have O'Kelly and a registration number. Like I say, in there it did say JP Capper which at the moment I can't explain. All I will say is it was missed because I have not checked the paper bank statement, because it is not common practice for me to do it.
> JUDGE DEAN: Did anybody check?
>
> A. I mean, I would need to ask my administration team but I wouldn't have thought so, no."
>
> Transcript 13 May 2022 page 106

Findings of fact in relation to Mr O'Kelly

228. The Appellant carried out a number of transactions with Mr O'Kelly prior to the first VIES check and the due diligence documents obtained were limited. Whilst Mr O'Kelly had a valid VRN for the transactions, we found that the Appellant's willingness to trade without carrying out any due diligence of substance was indicative of its knowledge that the transactions formed part of a scheme to defraud. The documents obtained told the Appellant very little of substance beyond a name and registration. The fact that Mr O'Kelly had bought from British Car Auctions did not tell the Appellant how many cars he had purchased, when he had done so or for what purpose. Again, we took the view that there was no assessment by the Appellant such that it could have satisfied itself that it was trading with Mr O'Kelly in legitimate transactions.

229. We noted Mr Rylands' claim that it was important to the Appellant to check its customer as they had not met Mr O'Kelly and that the Appellant was aware of the importance that VAT was correctly accounted for. However, we found that the limited due diligence upon which Mr Rylands claimed reliance "all painted the picture that what he was doing was not only above board but also in high demand."

230. Mr Mason's evidence was unconvincing; having claimed it was important to ensure the customer was above board, he stated that there was "only so much information I can get", later accepting that there was no difference in the information which could be obtained between a

trader in the UK or the ROI. Having also claimed that a trading history was important in assessing the credibility of a trader, Mr Mason subsequently conceded that it did not matter.

231. Only two of the documents obtained indicated that Mr O'Kelly was in the car trade and despite the Appellant claiming there were no concerns that Mr O'Kelly traded from a residential address, there was no evidence to indicate that this information had even been considered or that any analysis of the information obtained had been carried out. In our view this supports the finding that the Appellant did not carry out an assessment of Mr O'Kelly because it knew that the transactions were contrived.

232. The Appellant claimed to have been unaware that a payment appeared on its bank statements from JB Capper which related to a transaction with Mr O'Kelly. We found the evidence that no one at the company checks the bank statements unpersuasive, particularly given that the Appellant had no trading history with its customers. We also concluded that this was inconsistent with the Appellant's evidence that cash flow was a concern, particularly in the company's early days, in which circumstances we would expect any reasonable and prudent businessman to monitor payments in and out of the business. We concluded that either the Appellant's claim that it was unaware of the payment reference was untrue or it was content not to make any checks on payments because it knew that the transactions were contrived and it would receive payment.

233. We found the evidence relating to Mr Griffiths was unclear and unconvincing. Mr Mason claimed that Mr Griffiths was not engaged by the Appellant, yet he was described by Mr Rylands as a "driver logistics guy who moves cars up and down the country for us". The letter from The VAT People dated 3 August 2017 which stated that Mr Griffiths only ever collected vehicles for Mr O'Kelly at the Port of Dublin was inconsistent with the evidence of Mr Rylands that Mr Griffiths was booked onto numerous ferries indicating he accompanied the Appellant's vehicles to Dublin for delivery to Mr O'Kelly. Furthermore, the claim that Mr Griffiths did not accompany the vehicles is at odds with Mr Rylands' statement that payments made to Mr Griffiths were to reimburse him for ferry bookings to move vehicles from the UK to the ROI.

234. No due diligence was carried out on Mr Griffiths to whom the Appellant was content to hand over high value vehicles. We formed the view that the Appellant downplayed the responsibilities of Mr Griffiths who, on the material before us, was actively involved in the Appellant's transactions with Mr O'Kelly and we concluded that the Appellant knew that the transactions were part of a fraudulent scheme. In the alternative we were satisfied that the features of these transactions, when viewed against the totality of the evidence, supported a finding that the Appellant should have known that the only reasonable explanation for them was that they were connected to fraud.

Mr Wright

235. The due diligence produced included:

- 3 VIES checks (all valid)
- Certificate of registration
- Copy of driving licence

236. Mr D'Rozario highlighted that the first VIES check predated the first three sales in a timely manner however the subsequent checks took place in January and February 2015 after the deals were carried out in November and December 2014.

237. The evidence indicated that Mr Wright was still resident in the UK one month before the Appellant made its first supply and there was no permanent place of business in the ROI. No ID verification was undertaken by the Appellant and Mr Wright's address on a document

supplied to the Irish Tax Authority as evidence of funding when he applied for his Irish VRN was local to both Mr Hibbert's and Mr Rylands' home addresses. Mr D'Rozario queried whether Mr Wright would have been known to them given they worked in the same industry and were local to each other. The PPOB was a residential address and the business address was a virtual office.

238. Mr Rylands stated that he had only briefly spoken with Mr Wright and although he now understands that Mr Wright lived in Warrington, he did not know him or have any involvement with him prior to his first visit to the Appellant to discuss the relevant deal. He accepted it may have concerned him if he had known that information at the time, but added "it wasn't a client that I looked after personally" (13 May 2022 page 95). Mr Rylands stated that he had not given thought to the ROI Certificate of Registration dated 12 August 2014 which indicated Mr Wright had not been in business long but stated that Mr Mason would have dealt with more of these issues.

239. Mr Mason explained that Mr Wright initially telephoned the Appellant to enquire about a Range Rover advertised on Autotrader. He visited in December 2014 and told the Appellant he had a car business in Dublin and was looking to export Range Rovers. Due diligence checks were carried out and confirmed with HMRC following which Mr Wright paid deposits for two vehicles by debit card. Although Mr Mason understands that Mr Wright lives in Warrington, he had no contact with him prior to the transactions under appeal. Mr Wright regularly visited the Appellant's showroom and paid with a debit card. Negotiations were carried out in person and there was communication by email.

240. Mr Mason explained that he had been told by Mr Wright that he had been living in Ireland since 2008/2009 and had an import/export business which he was seeking to expand to importing Range Rovers into the ROI. He was not a car dealer but this caused Mr Mason no concern as "he came across as very, very businesslike, very reputable, and he provided me with all checks that we asked for" (18 May 2022 page 51).

241. One of the due diligence documents for Mr Wright was a statement of particulars for the business registered on 12 August 2014. Mr Mason explained that this was consistent with Mr Wright's claim that he was setting up a business to import the new Range Rover into the ROI. Mr Mason could not explain why this required a new business when Mr Wright was already in the import/export business nor did he give the matter any thought. Mr Mason did not check whether Mr Wright had premises for the import/export of plant and machinery nor was he aware that Mr Wright was not living at the address given for the business at or around the time that he was trading with the Appellant. Mr Mason stated it was not commercially viable both financially and timewise to visit Dublin to make checks and he had no reason to disbelieve what he was told. Mr Mason did not think to ask for a copy of the VAT certificate as he had been provided with the number.

Findings of fact in relation to Mr Wright

242. Although Mr Mason claimed a number of times that it was not industry practice to visit premises and certainly not something that the Appellant would do, we noted that he had done so for another trader in the Midlands (Mirza t/a Heritage Cars) which had left him with a positive impression due to the "very, very nice showroom". We queried why, if he found this a relevant factor in assessing one trader, he would take an inconsistent approach to Mr Wright and others.

243. The due diligence was minimal and no consideration had been given to the ROI Certificate of Registration dated 12 August 2014 which indicated Mr Wright had not been in business long. There was no basis upon which we could find that any reasonable trader would have been satisfied from the checks undertaken that Mr Wright was trading legitimately and

we found Mr Mason's claim that "he came across as very, very businesslike" could not be a view formed by consideration of the due diligence.

244. Mr Mason had given no thought as to why Mr Wright required a new business when he was already in the import/export business nor did he check whether Mr Wright had premises for plant and machinery.

245. The absence of any meaningful due diligence led us to conclude that the Appellant was content to trade with Mr Wright because it knew that the transactions were contrived and there was no need to carry out any checks.

Mr McNulty

246. The Appellant's due diligence included:

- Six VIES checks (all valid)

247. Mr D'Rozario noted that no other due diligence was provided. There was also no due diligence provided in respect of Mr Stephen Murphy T/A Meridian Motors who, the Appellant stated, introduced Mr McNulty as a trade buyer for Meridian.

248. Mr Rylands had limited contact with Mr McNulty as Mr Mason dealt with that side of the business:

> "Q. Mr McNulty, did you meet him when he visited? It is at 22 of your witness statement, just one paragraph.
> A. Again I think very briefly, because again there's certain sections of the business that get looked after by certain people. I look after generally the high end vehicles, sports and supercars. Glen looked after the export vehicles and now looks after the deals that we do to the fleet business that we deal with. So whether I opened the door and said "Hello", which is probably something that I will have done. Aside from that, it would be very limited.
> Q. All right. You mention there that he -- you were aware he was sourcing cars for and selling cars on to an established car dealer in Ireland. Did that come from Mr Mason?
> A. Yes, it did, yes.
> Q. I will deal with it with him then."
>
> Transcript 13 May 2022 page 96

249. Mr Mason met Mr McNulty and his wife at the Appellant's showroom which, he clarified in oral evidence, was about three months after the Appellant had started trading with him. A VIES check was carried out in or around November 2013 when the Appellant held one of the first new shape brand new Range Rovers which it advertised on Autotrader. Mr Mason received a call from Mr Stephen Murphy about exporting to the ROI. It was clear to Mr Mason that Mr Murphy of Meridian Motors was an established business with a large showroom and website which he had seen on photographs of Google maps.

250. Mr Mason provided details about the car and agreed he could export it once the VAT number was checked. A price was agreed and Mr Murphy stated his trade buyer would contact the Appellant to arrange paperwork and payment. Mr McNulty of SFP Car & Commercial then telephoned and introduced himself as a trade buyer, one of his customers being Mr Murphy.

251. Mr Mason explained that he checked the VAT numbers of both Mr Murphy and Mr McNulty and he was happy to proceed as it was clear that Mr McNulty acted as a trade buyer for Mr Murphy in the UK. Mr Mason stated that Mr McNulty will have made a margin which would have increased the price payable by Mr Murphy. This did not concern Mr Mason as "this arrangement ensured that Mr Murphy did not have the hassle of negotiating and arranging UK sales himself."

252. Mr Mason was not surprised that Mr McNulty, who indicated he was acting on Mr Murphy's instructions, asked the Appellant to invoice him directly:

> "Obviously he has to get paid for his work that he does as a middle man. I wasn't aware of what the relationship they had regarding money for the car. So no, it didn't worry me
> …
> Q. He is asking you to invoice him himself?
> A. Yes
> Q. Rather than the person you have actually done the deal with already?
> A. Yes
> Q. So what was the price agreed then with Mr McNulty?
> A. It was the same price
> Q. So Mr McNulty was going to be invoiced for the price that Mr Murphy had negotiated. It followed presumably in your head that Mr McNulty was going to sell on at cost?
> A. Well, he might receive a commission from Stephen Murphy. I wasn't aware of that, but he did say to me Colm McNulty that I do a lot of buying and selling for Stephen Murphy.
> …
> Q. was this something you come across a lot?
> A. It is, yes. It happens a lot in the UK"
>
> Transcript 18 May 2022 page 6 - 7

253. Mr Mason agreed that his witness statement had explained that Mr Murphy had already carried out the negotiations on price for the relevant transactions and he anticipated that Mr Murphy would pay more to Mr McNulty than he had negotiated as he:

> "…would not have done that transaction for no commission…I wasn't privy to their relationship, so I can't comment on it."
>
> Transcript 18 May 2022 page 9

> "A. Eventually when we bought them, we paid JRS, which was the original suppliers. So that's like having a proxy invoice, a separate invoice. So we never paid McNulty for them vehicles.
> Q. Right. So for to the ones that you did pay, did you pay a deposit to him?
> A. No.
> Q. So where did the money go? To Meridian?
> A. The deposits that we paid to Meridian – to McNulty for the three Range Rover Sports we paid to Colm McNulty. That would have been his profit on the deal, his brokerage fee. When the cars eventually arrived, we were invoiced by JRS. So in essence McNulty has had his £3,000 profit. Whatever JRS assigned to McNulty is what I paid to JRS. Do you follow that?
> JUDGE DEAN: Just so I am clear, Murphy has offered the cars.
> A. Offered the cars
> JUDGE DEAN: McNulty.
> A. Asks for the deposit.
> JUDGE DEAN: Asks for the deposit. He is paid the deposit.
> A. We pay the deposit.
> JUDGE DEAN: You pay the deposit to McNulty.
> A. Which was 3 times 3.
> …
> JUDGE DEAN: But not to Mr Murphy.
> A. No, we paid McNulty.

JUDGE DEAN: That was just what you considered to be his broker's fee but then you were invoiced by JRS?
A. We were invoiced by JRS for the cars.
JUDGE DEAN: Did that surprise you?
A. No.
JUDGE DEAN: You knew at that point?
A. We knew before we purchased the cars that we were going to buy them from JRS. Everybody was having a few shillings out of that in Ireland, but the £3,000, I take it that that was their commission for arranging the sale to me."

(Transcript 18 May 2022 page 30)

254. In respect of one vehicle Mr Mason sourced from JRS (Jason Stinson) in Northern Ireland, the VAT number of JRS was checked and the car purchased. JRS arranged to transport the car to Mr McNulty. Mr Mason was not concerned that JRS, who arranged the transportation, were given his customer's details as the Appellant had already paid for the car by that point and Mr McNulty did not know where the car came from until he paid the Appellant:

"I don't think he was bothered. He advertised the car on the Autotrade Mail at a price. We paid that price, invoiced Mr McNulty and then arranged delivery of the car. He would only have known when the car arrived.

…

It actually turns out Mr McNulty did business with Mr Stinson anyway."

(Transcript 18 May 2022 page 17)

255. Mr Mason could not explain why the invoice of a shipping company used in one transactions with Mr O'Kelly was addressed to Vanrooyen C/O Colin McNulty or how the transport company had information that Mr McNulty was involved in the transaction.

Findings of fact in relation to Mr McNulty

256. There was no credible explanation as to why Jason Stinson of JRS shipped a vehicle purchased from the Appellant directly to Mr O'Kelly but the invoice from the transport company was addressed to Vanrooyen C/O Colm McNulty. Mr Mason could not explain this or how it was that the transport company had information that Mr McNulty was involved in the transaction. Had the Appellant considered this information it would have been alerted to the connection between purportedly separate parties with which it was carrying out transactions.

257. On the issue of connections between parties, we note that Jason Stinson is the brother of Ryan Gordon Stinson who traded as Country Sales, a direct supplier to the Appellant. On one occasion Jason Stinson requested the Appellant to amend its invoice to Country Sales and we agreed with the submissions for HMRC that this demonstrated a fluidity in use of different entities which is a clear factor which would raise concern. In our view the Appellant either knew of the connection or turned a blind eye to it in circumstances which should have raised concern and we considered this lends support to the Appellant's knowledge that the transactions were connected to fraud.

258. Furthermore, the arrangement described between Mr McNulty and Mr Murphy/Meridian was nonsensical. Whilst buying agents may be used in the industry, the evidence was that the deals had already been negotiated and agreed rendering Mr McNulty's involvement redundant. We found Mr Mason's evidence regarding the role of Mr McNulty, what he added to the transaction or what he was likely to gain was vague and unclear.

259. The Appellant carried out no due diligence of Mr Murphy or Meridian and the due diligence on Mr McNulty was limited to VIES checks. In our view, there was no material upon which the Appellant could have carried out any assessment such as to satisfy itself that the transactions were genuine nor any basis upon which it could have formed that view. There was also nothing in the due diligence and material before the Appellant to support Mr Mason's evidence:

> "Q. I think you said he and Stephen offered the cars to you. Just so we are clear again, were Meridian involved but the money was going to McNulty. What was the position?
>
> A. It was Meridian who initially offered the cars. Obviously Stephen Murphy and Colm McNulty were working together."

(Transcript 18 May 2022 page 29)

260. The lack of due diligence contradicted the Appellant's assertion that the questionnaire was based on the due diligence processes it was already carrying out:

> "Q. Just going back to the list that you say you gave Mr Lee, which reflected, in fact, the more formalised document that was shown to Customs in January 2015, we are missing quite a lot of documents, aren't we, Mr Mason, according to your own list?
> A. For McNulty?...The new process.
> Q. Yes.
> A. We didn't do that for McNulty.
> Q. No, but what you told us yesterday was that this, apart from the preamble, which talks about why you are doing it, this reflected what you were doing already and the list that you gave to Mr Lee. Yes.
> A. Did I say that?
> Q. Yes, you did. You didn't do a lot of these checks, apart from the questionnaire itself?
> A. Not on the early customers, ie, O'Kelly and McNulty was the first two people we dealt with.
> Q. All right. So, in fact, at that stage you were not doing checks that you showed to Mr Lee…"

(Transcript 18 May 2022 page 42 – 43)

261. On the material before us we concluded that the only explanation for the Appellant's willingness to trade with Mr McNulty in the circumstances described above was that it was aware that the deals were contrived. The same factors, in our view, would also have put a reasonable trader on notice that the only explanation for the circumstances of the transactions, was that they were connected to fraud.

Mr Lynch

262. The due diligence provided was as follows:

- Seven VIES checks (all valid)
- HMRC confirmation of validation
- Letterhead showing "Paul imports Ireland" which stated "Hi Glen Here is letterhead as requested. I import cars to Ireland."
- Copy of driving licence
- Letter issued by Donegal revenue relating to tax returns and payments
- Copy of enhanced due diligence questionnaire.

263. Mr D'Rozario noted that the address on the Appellant's sales invoices was Mr Lynch's residential address where he had not lived for approximately 16 years and highlighted that had utility bills or similar been requested, they would have been unlikely to show this address.

264. In February 2015 Mr Mason stated he received a call from Mr Lynch in the ROI regarding supplying and exporting cars to him. The Appellant obtained his driving licence, IE Tax Return letter, completed due diligence, IE Bank account details, completed VIES check and company letterhead notepaper. HMRC confirmed the validity of Mr Lynch's VAT number.

265. Following Mr D'Rozario's visit in February 2015, he highlighted in a letter dated 10 March 2015 that the recent validation of Mr Lynch by the Appellant was a "partial validation only (as indicated within their last paragraph of their letter dated 10 March 2015 where they state that their checks have been limited to verifying only the VAT number) as you have not provided to them all the requested documentation". Mr D'Rozario advised the Appellant that the trade classification shown on VIES ('Manufacturer of household and sanitary goods') was at variance with that which Mr Rylands had described and that he may wish to make further enquiries as to the nature of Mr Lynch's business activities. Mr D'Rozario also advised that "the scope and extent of due diligence checks is a matter for your company but if carried out properly should enable you to make a judgement on the integrity of your supply chain."

266. Mr D'Rozario noted that the Appellant went on to supply Mr Lynch with seven vehicles worth £389,300 between 12 March 2015 and 5 June 2015.

267. Mr Rylands claimed to have no recollection of HMRC advising "that a variance existed regarding his trading activity". However, Mr D'Rozario highlighted that he had made such an indication in a telephone call on 3 March 2015 and suggested he may wish to make further enquiries.

268. Mr Mason claimed he was not made aware that HMRC had informed Mr Rylands that there was an issue regarding Mr Lynch's trade classification, stating:

> "It was just my job to obtain the information, hand it across to Mr Rylands and he would deal with this side of it."
>
> Transcript 17 May 2022 page 102

Findings of fact in relation to Mr Lynch

269. It was clear to us that the Appellant's due diligence was another example of simply collating paperwork without giving any consideration to the contents. The documents obtained could do little to satisfy the Appellant as to Mr Lynch's trading history and experience in the industry and registration was recent. Had the Appellant made enquiries of any substance they would have been aware that the there was a discrepancy between the trade classification and Mr Lynch's claim that he imported vehicles. Furthermore, when this anomaly was highlighted by Mr D'Rozario, no further checks were made and the Appellant continued to trade regardless. In our view, a reasonable and prudent trader would not have traded in such circumstances and Mr Mason's response that he simply handed due diligence documents to Mr Rylands without any consideration was reflective of the Appellant's cavalier attitude to trading with the ROI customers generally and which we were satisfied a finding of knowledge by the Appellant that the transactions formed part of a scheme to defraud the Revenue.

Mr Burke

270. The due diligence produced was:

- Four VIES checks (all valid)
- HMRC validation confirmation

- Certificate of registration
- Revenue Commissioners' vehicle registration tax (VTR) approval
- VTR authorisation notification
- Bank account details
- Enhanced due diligence questionnaire (undated and partially completed)
- Copy passport

271. In October 2014 Mr Mason stated he received a telephone call from Mr Burke enquiring about a vehicle and that due diligence was carried out before the deal. Mr Burke had been introduced by Mr McNulty and Mr Mason was aware that they did business together. On one occasion when Mr Burke had not paid in full, Mr McNulty agreed to collect the vehicle in question and look after it until payment was made. Mr Mason claimed that the reason Mr McNulty was used as a reference on the Appellant's system for sales to Mr Burke was because the former had introduced the latter.

272. Mr Mason was not concerned that Mr Burke was registered from 3 February 2014 and was a recent business because the information he obtained was sent to HMRC Special Investigations "which we were led to believe that they would do their due diligence checks…we thought by giving this to Special Investigations they would come back to us and say "You can deal with this person" or "You can't" which is what he understood from Mr Rylands. (18 May 2022 page 69).

273. Although the due diligence questionnaire had not been fully completed, Mr Mason did not give it any thought as he handed the information to Mr Rylands who sent it to HMRC.

274. In relation to the purchase of vehicle FT14 DBY which was dispatched to Mr Burke but in respect of which payment was received from Mr McNulty, Mr Rylands explained in a letter dated 30 July 2015 that:

> "This vehicle was sold to Martin Burke. Unfortunately, as MB Motors was the reference displayed on our online banking system when the credit appeared, the actual source of payment did not become clear to us until the printed bank statements arrived to our business…"

275. Mr Rylands advised HMRC that the vehicle was driven directly from the supplier to the customer by a representative of the Appellant. The correspondence also stated that "photographic evidence of the vehicle was taken" and copies enclosed. In oral evidence he stated that the transaction was arranged by Mr Mason who had provided him with the information passed to HMRC.

276. In relation to the transaction with Mr Burke where Mr McNulty was named on the payment, Mr Mason stated he had not been aware of this until HMRC checked the company's records. He agreed that one of the transactions with Mr Burke was carried out before HMRC's Special Investigations Unit provided confirmation, explaining that it often took a long time to receive information from HMRC and that the deal in question involved Mr Burke supplying the vehicle to Meridian. Not only did Mr Burke and Mr McNulty know each other, Mr Mason also stated that Mr Burke was working on behalf of Meridian.

277. An email chain between Mr Mason and Mr Murphy set out correspondence whereby the Appellant had invoiced Mr Burke of MB Motors but requested the invoice from MB Motors to Meridian for confirmation of purchase as payment was received from Meridian, not Mr Burke.

“Q. "The VAT are asking why you paid a bank transfer to Vanrooyen for the car but it was
ordered in invoice to Martin Burke. (see payment details attached.) The VAT is saying we can only receive payment from the person who is on the invoice. What I will need from you is a copy of the invoice from MB Motors to you for that car and confirmation that you did purchase it." So this is a situation where it wasn't simply that the agent or buyer for Meridian was inserting themselves in the deal chain or the supply chain, but they were -- payment was being made direct from Meridian?
A. It did on that occasion, yes…We knew the car was destined to go off to Meridian when we were selling it. Meridian had a customer for it. We sourced it in the UK via Martin Burke. We didn't want to supply the vehicle, because we hadn't had Martin Burke's confirmation of his VAT back from DVLA -- from the HMRC. To speed things up we said "If you pay theVAT, we will ship the car". We didn't realise at the time the money came from Meridian and this is one of Mr D'Rosario's questions. So I sent this e-mail back to Stephen Murphy. He sent me all the correct paperwork with invoices.
Q. Now is this the one that the VAT was paid for?
A. Yes. He paid the VAT, which then we deducted off the next vehicle.
Q. So Meridian are paying the VAT to you?
A. They did on that occasion, yes.
Q. But you asked for the VAT to be paid by Mr Burke?
A. Yes.
Q. So this rather just demonstrates the complete irrelevance of Mr Burke in this transaction, it's going to Meridian, and yet you have this extra link in the chain…It is just unnecessary…?
A. That would not have happened if HMRC would have replied to us in a matter of weeks rather than months…Because we wouldn't deal with him until HMRC said it was okay.
Q. But what about Meridian? Why were they okay?
A. They paid me the full VAT. So it didn't matter that the car was going out there. They paid the full price of the vehicle including the VAT. So dealing with them with that, there was no VAT risk on that vehicle.
Q. But there wouldn't have been if Mr Burke had
A. But we hadn't had clarification, which is the new due diligence we had put in, from Special Investigations of HMRC that he was okay.
Q. But you hadn't had clarification that Meridian was okay either?
A. You are not listening. My answer was Meridian -- we never checked Meridian out. We never did any business with Meridian where he did not pay us the VAT upfront and that was that one vehicle. So he paid the full price of the vehicle including VAT.
Q. Yes, I understand that, Mr Mason. Forgive me. You are saying that it is no surprise that Meridian paid on this occasion, because you couldn't take money from Mr Burke, because you were awaiting confirmation from HMRC, but you were awaiting confirmation from HMRC on Mr Burke. You hadn't even given any details about Meridian to HMRC for them to check them out, had you?
A. We never did any VAT exempt business with Meridian.
Q. But you had asked Mr Burke for the VAT upfront in this one. So there would have been no issue with Mr Burke paying the VAT upfront, whether he had been checked out or not at that stage?
A. Well, we asked Mr Burke upfront. The payment eventually came from Meridian, which again with the way our banking system works we didn't know it was from Meridian until Mr D'Rosario went through his work. As far as we were concerned -- that's why I sent that e-mail to Stephen Murphy for him to explain it.
Q. Mr Burke was completely unnecessary in all these transactions, wasn't he? You were dealing with Meridian?
A. No, I was not.
Q. You knew it was going to Meridian. They paid you.

A. We knew they were going to Meridian, but he has his team of traders buying cars for him. You know, he has -- he sells a lot of cars. He's a busy man."

(Transcript 18 May 2022 pages 81 – 84)

278. Mr Mason stated it was a query from Mr D'Rozario which alerted him to the fact that Meridian had made the payment directly which led to the request to Mr Murphy. Mr Mason had also requested that the VAT be paid by Mr Burke, with the intention of paying it back when the transaction was cleared, but it was in fact paid by Meridian. As to why Mr Burke appeared to be an unnecessary link in the chain, Mr Mason stated that it would not have happened if HMRC had responded more quickly. He did not carry out any checks on Meridian as he never did any business with them where the VAT was not paid upfront. Mr Mason did not agree that in this deal he was dealing with Meridian and Mr Burke's involvement was entirely unnecessary.

279. Mr Mason explained that Mr Rylands was incorrect in his claim that the vehicle FT14 DBY was sent directly from Country Sales to Mr Burke. He explained that the car was shipped from County Tyrone to the Appellant and then shipped to Dublin. He believed Mr Rylands had made an assumption as the information had not been given by him.

Findings of fact in relation to Mr Burke

280. This was another instance in which Mr Rylands stated he obtained information from others, and we inferred that the information must have come from Mr Mason who was responsible for the deal. However, Mr Rylands' evidence was at odds with that of Mr Mason which we found undermined the credibility of the Appellant's evidence.

281. Mr Mason accepted that he gave no consideration to the fact that Mr Burke was recently registered. We rejected his claim that he believed HMRC would advise the Appellant whether it could or should trade with Mr Burke; HMRC had made it clear that it could only provide verification and that the onus rested with the Appellant to satisfy itself as to the credibility of its trading partners. In any event, one deal went ahead before a response was received from HMRC.

282. As with Mr Lynch, the information provided was, in our view, minimal and the Appellant had given no consideration to it; Mr Mason accepted he had simply handed the documents to Mr Rylands and Mr Rylands stated he obtained his information from others. It was clear from the evidence that either no consideration was given to the documents in an attempt to assess the integrity of the Appellant's customer or the Appellant simply turned a blind eye to features such as the apparent involvement of Mr McNulty and Meridian which, we consider, would have led any reasonable trader to make further enquiries to verify its trading counterparties.

283. Looking at the evidence overall, we found the fact that the payment was received from Mr McNulty despite being sold to Mr Burke was a matter about which the Appellant either should have been aware or was aware and turned a blind eye to. We concluded that it did not matter to the Appellant from whom payment was made; it knew it would receive payment because the transactions were contrived. Our conclusion was, in our view, supported by the fact that in relation to the transaction in which Meridian paid for the vehicle sold to Mr Burke, Mr Burke was entirely unnecessary in the transaction chain and no credible explanation could be provided for this. This feature again demonstrates the links between entitles purported to be separate and indicates overall contrivance of which the Appellant must have been aware, having requested to be paid by Mr Burke but having in fact received payment from Meridian.

A4W

284. The only checks undertaken on A4W comprised a VIES check after the first deal. Mr The three supplier invoices were headed "FLEXIBLE" and then showed the company name "Adapt 4 Work Ltd. t/a Flexible"

285. Mr Mason met Mr Harrison in 2002 when he had a business called U2Drive, a daily rental and contract hire/leasing business in Lancashire. Mr Harrison supplied new cars to this type of company and also supplied used car supermarkets. The pair did business for approximately 3 years; when Mr Mason left the business in 2005 he lost contact with Mr Harrison. When Mr Harrison first rang the Appellant to enquire about a car, he was not aware that it was Mr Mason who was selling it. Mr Harrison told Mr Mason that he was still in the same business and Mr Mason suggested that they meet to discuss business.

286. Mr Mason ordered a car from Mr Harrison which he had agreed to sell to Mr O'Kelly. The invoice was received from Adapt4Work Ltd T/A Flexible. The VAT number was found to be invalid and Mr Mason was told by Mr Harrison that it was an error and that a new invoice with the correct VAT number would be sent. This was received and a VIES check showed the number as valid for Adapt 4 Work Ltd. As the company name matched that on the invoice, Mr Mason stated "we did not question this any further and paid for the car".

287. The Appellant's representatives provided an email from Mr Harrison to Mr Mason dated 3 August 2016 which it relied on in support of the claim that:

> "…At the time the vehicles were sold to Vanrooyen, Adapt 4 Work Limited and Flexible Vehicles Limited were acting under an Agency Agreement (with Adapt 4 Work being the principal and Flexible the agent). The vehicles were bought and sold under the terms of the Agreement…The payments made by Vanrooyen were received into one of the trading bank accounts of Adapt 4 Work (and) Adapt 4 Work had accounted for input VAT and output VAT in relation to the relevant transactions)."

288. Mr Mason's evidence was that when he queried the relationship between A4W and Flexible he received the agency agreement referred to above together with an email from Mr Kenwright the accountant stating that two vehicles were supplied through A4W and that VAT was properly recorded in respect of the sales to the Appellant and a further email from Mr Harrison confirming the agency agreement was in place.

289. Mr Mason did not know why Mr Harrison needed another's VRN but stated there were no red flags with the paperwork except for the VAT numbers which he queried. He did not think to do any checks on Mr Harrison personally and it did not strike him as odd that Mr Harrison was not a director but his partner was.

290. At a meeting with HMRC, Mr McEvoy, director of A4W, and his accountant Mr Kenwright, Mr McEvoy confirmed he did not recognise the Agency Agreement which was supplied to HMRC by The VAT People (the Appellant's representative at the relevant time) and confirmed he had only agreed that Mr Harrison could buy and sell two vehicles in order to help him make money to e used to support Mr McEvoy's daughter (Mr Harrison's partner) and grandson who were living with Mr Harrison at the time. Mr McEvoy stated he did not receive payment for the transactions and confirmed that it was not his signature on the Agreement and produced evidence of his signature in support. The accountant also claimed to have no knowledge of the Agreement and confirmed that the transactions had not been declared in the business records of A4W which, Mr D'Rozario noted, contradicted the indication by the Appellant's representative that the transactions had been accounted for.

Findings of fact

291. The due diligence carried out by the Appellant was minimal and took place after the first deal. We agreed with HMRC's submissions that the invoices were an attempt to make the

business appear as, or similar to, Mr Harrison's previous business which was compulsorily de-registered. A Companies House check would have revealed that Mr Harrison was not a director of A4W and that the SIC Code showing the nature of business was "other education not elsewhere classified". We were satisfied that at the time of trading with A4W there was no information obtained by the Appellant which could have provided any assurance about the bona fides of its supplier.

292. If, as claimed, Mr Mason known Mr Harrison for 15 – 20 years, it was unclear why he would describe A4W as a "training school type thing". If the pair had lost touch to the extent that there was no working relationship, we consider that there was even more reason for the Appellant to carry out due diligence and that in those circumstances any prudent trader would have done so. If, on the other hand, Mr Mason still believed he had a working relationship with Mr Harrison, there was no credible explanation why he was unaware that Mr Harrison had been declared bankrupt or why he was no longer trading under his previous company.

> "Q. So you have got a supplier you have known from a long time ago, who is now using -- piggy-backing on his father-in-law's company to do his business, having apparently lost his own VAT number. Yes?
> A. Yes.
> Q. You have got him selling you cars that you are sourcing for somebody who you then learn, in fact, knows him already?
> A. I later found that out, yes.
> Q. This is exactly the sort of red flag that a reasonable trader in your position would be alive to, isn't it? This is another example of --
> A. No, I disagree with that.
> Q. -- things not adding up?
> A. Well, when we got the second invoice, as you can see by my due diligence, I make lots of e-mails, and they are all in there, to Ian Harrison stating I want more confirmation. He said, "There is an agreement he will allow me to use his VAT number". "I need the agreement". The agreement came and there is an e-mail there from the law company who did the agreement.
> Q. A reasonable trader, I suggest, would have said by way of example to Mr Harrison, "Why are you doing business on the back of your father's company, which trades in something else?"
> A. I didn't ask that question when he produced the contract and he said -- and Brian at Kenwright, he stated that that was what they were allowed to do.
> Q. Whether they were allowed to do it or not, if you had asked Mr Harrison that question, he would have had to have given you an answer, wouldn't he?
> A. Well, I did ask the question and the answer that I got was they have an agreement that he can use his VAT number to do business.
> …
>
> Q. Mr Mason, that wasn't the question. It is my fault, not yours. The question is asking Mr Harrison, "Why do you need to go through all this malarkey?" Forgive my slang again. "Why do you need to go through all this agreement to use someone else's VAT number when you're a successful car dealer who used to have his own VAT number?" and he would have had to have given you a sensible answer I suggest?
> A. I didn't ask the question in that context, but I asked the question that I wanted more information and he gave it me.
> Q. Because the answer was that he was a bankrupt and he couldn't run his own company and have his own VAT number in those circumstances?
> A. That I was not aware of. I didn't do the checks."
>
> Transcript 17 May 2022 page 187

293. We found it significant that the Appellant had failed to make basic enquiries regarding Mr Harrison's involvement in A4W and we concluded that the Appellant's ignorance as to the fact that Mr Harrison was not listed as a director indicated that either the Appellant had not been aware of this or his role in the company because it failed to undertake checks, or that it did not care. Had checks been undertaken the Appellant would have been put on notice as to the many obvious features that the transactions were not genuinely commercial, and it therefore should have known of the connection to fraud. We concluded, when we considered the features below together with the evidence as a whole, that the Appellant failed to make checks because it knew the transactions were fraudulent.

294. The fact that Mr Mason claimed he visited the company's premises contradicted his other evidence in which he had stated this would something he would usually do. Moreover, having visited the premises Mr Mason found no evidence of trade and no information that could have assured him that Mr Harrison was trading legitimately.

295. We have already set out our findings about the Agency Agreement and our doubts as to its veracity given it was not provided until 2016, the relevant transactions having taken place in 2014, and the agreement was not mentioned to Ms Fazakerley at the time of her visit in January 2015. However, if Mr Mason had received it at or around the time of the transactions, we considered that any reasonable trader would have made further enquiries to establish why such an agreement was required. Had further enquiries been made, the Appellant would have been alerted to Mr Harrison's situation and the trade classification which on an objective view could have provided no assurance, but rather would have raised concerns, to the Appellant as to the legitimacy of its transactions with A4W.

A4W/O'Kelly offset/contra arrangement

296. Mr Mason explained that in relation to LG64 YJL and YR14 YCA the latter, which was in the Appellant's possession of in order to sell on behalf of Mr O'Kelly, was kept in part payment for LG64 YJL. Mr Mason was surprised having asked Mr O'Kelly for a sales invoice for YR14 YCA that it came from Adapt 4 Work T/A Ian Harrison. When he questioned this, he was told by Mr Harrison that he was doing "a bit of trading with O'Kelly and at this stage they were both unaware that I knew and was trading with both businesses." In cross-examination Mr Mason explained:

> "A. Yes. No, we were already holding the Mercedes and we probably had it six weeks. Mr O'Kelly bought another Range Rover off us, nothing to do with Ian Harrison. We agreed in the deal -- he said: "Do you want to take the part exchange of that Mercedes". We agreed, I think it was £34,000 for the Mercedes. Let's say it was 40,000, the new car, he paid us the difference, we kept the car. But I needed an invoice, the title for it. I asked for the invoice, and it came as an email. When it came it was exactly the same as Adapt 4 Work, which surprised us a little bit. When I queried it with Ian Harrison, he said "I do a little bit of business with Mr O'Kelly".
> Q. That was really the point. Forgive me. You have explained it much better than me. It is a bit of a coincidence, is it not?
> A. We thought that at the time, but in the circles that Ian Harrison mixes with, probably not. Colin O'Kelly did say later that he had bought a few cars from Ian Harrison.
> Q. If Colin O'Kelly is buying cars from Ian Harrison, you are buying cars from Ian Harrison to sell to Colin O'Kelly?
> A. Yes.
> Q. You are a bit of an unnecessary step in the chain, aren't you, if they know each other already?
> A. But at the time that I was buying cars from Ian Harrison to sell to Colin O'Kelly, Colin O'Kelly didn't know that I knew Ian Harrison. We only bought two cars off Ian Harrison in a short period."

Transcript 17 May 2022 page 184

Findings of fact on offset arrangement

297. In our view, there was no satisfactory evidence as to why the Appellant set off a payment to A4W. The vehicle against which payment was offset (LG64 YJL) was purchased from M&M (Cambridge) and sold to Mr O'Kelly and in those circumstances, it is unclear how the purportedly separate arrangements could lead to a set off. There were no terms in writing to document the arrangement and there were no other examples of such arrangements in the Appellant's course of trade to indicate that it was usual.

298. We concluded that this was another example of an unexplained connection between purportedly separate entities which the Appellant did not question and which we consider indicates knowledge of contrivance.

Title, terms and conditions, insurance

299. The Appellant's evidence was that vehicles were under Manufacturer Warranty and therefore any issues would be dealt with by Land Rover until the vehicle was 3 years old. It is not unusual in the industry to have no formal contracts with suppliers or customers. The Appellant's invoice contains standard industry business terms and that is the contract.

300. The Appellant controlled shipment of the vehicles to the ROI either by its employees physically driving the vehicles to the port or appointing a shipping company. After the vehicles are shipped to Ireland Mr Rylands explained the Appellant had no control over what happened to them:

> "Q. Can you just help us, and it may be this is more Mr Mason's area, but can you help us? How is it that you were able to control that? You sent these vehicles over by ferry?
> A. Yes.
> Q. Sometimes full payment hadn't been received at the point that you send them?
> A. Correct.
> Q. They are given to the custody of the ferry security people?
> A. Yes.
> Q. Who are experienced in this. There are lots of vehicles going over?
> A. Yes.
> Q. Then there is an instruction. You give an example I think of a note being left on the steering wheel?
> A. Yes.
> Q. Saying "Please don't release until you have our permission"?
> A. Yes.
> Q. But there's also reference to a reference number being given?
> A. Yes.
> Q. Can you just help us, because clearly these are very high value vehicles?
> A. Yes.
> Q. What is your safeguard? How do you know that they're not going to release the vehicle? What arrangement or contract do you have with either the security people or anyone else?
> A. So the cars are being sent as freight. So we've paid to send them over as freight, and when we've booked them, we've -- again this might be something more for Mr Mason, because he handled -- he dealt more with this side of the business, but there was a password that effectively needed to be given to the shippers at the other end. I wouldn't say it is unusual for people that ship other types of items, whatever they may be, the high value items, for the shipper to not release at the other end until they have had confirmation that all the payment and everything is in place."

Transcript 13 May 2022 pages 27 - 28

301. In relation to insurance, Mr Mason stated:

"Q. They were under your control -- and this is a big point that you make -- on the ferry?
A. Yes.
Q. Who insured them on the ferry?
A. I would imagine Vanrooyen would have stood on the insurance on that until it was collected on the other side. It was our responsibility until it was collected.
Q. You would imagine?
A. I think that was the case.
Q. Were you aware of the policy that the company had to insure on the ferry or not?
A. No, I'm not."

Transcript 17 May 2022 page 39 - 40

302. Mr Mason stated that there were no formal contracts; the invoice represents the contract and includes the Appellant's business terms which are standard throughout the industry. There are also no guarantees between traders; the vehicle is bought as seen.

Findings of fact on title, terms and conditions, insurance

303. We found it significant that Mr Mason who was responsible for the treansactions was wholly unaware of who insured the vehicles during transit; these were high value vehicles which could be damaged on the ferries and having highlighted that the Appellant was concerned with cash flow in its infancy, we consider that any prudent trader would have ensured that it was covered in the vent of damage. This feature, in our view, demonstrated the lack of commerciality and was indicative of knowledge of contrivance.

304. There was also a notable absence of evidence as to who held title to the vehicles or when title passed which we consider indicates the contrived nature of the transactions. In a genuine commercial transaction, we would have expected to see terms covering the reality of trade, such as title, payment and delivery terms, particularly in a new model of business, in a new business and with new overseas customers. The Appellant was left in a position whereby it had little to no protection or recourse in event something went wrong and we do not consider that this is consistent with the manner in which a reasonable trader would conduct business. When considered in totality with the remainder of the evidence we concluded that these features were another indication of knowledge; the Appellant did not need to protect itself as the transactions were contrived and the Appellant knew or should have known from the circumstances of its transactions that this was the case.

305. We rejected the Appellant's claim that it could rely on its terms and conditions contained within the 'Consumer Transaction' sales invoices which contained 12 requirements. Many of the terms were not applicable to the transactions under appeal and none were signed up to by the Appellant's wholesale customers.

306. We noted that in evidence Mr D'Rozario accepted that there was evidence in the form of call logs which the Appellant relied on to demonstrate that negotiations had taken place. We formed the view that Mr D'Rozario had initially misunderstood the Appellant's explanation that negotiations could take hours or days and we accepted that there may have been brief calls between parties in which negotiations took place. That said, we were surprised at the lack of records of agreements reached following negotiations given that the Appellant was dealing with people they did not know and this added to our overall impression of the manner in which the Appellant traded.

Anomalies

307. There were various other anomalies within the documentations, by way of example incorrect description of a vehicle specification and in two deals with Mr McNulty the Appellant appeared to have received an overpayment for which there was no cogent explanation and no evidence to support the assertion that finder's fees were paid. These anomalies, in isolation, may have indicated no more than a haphazard and careless manner of trading. However, when viewed against the totality of the evidence we consider that they supported the finding that the Appellant did not concern itself with such details because it knew that it was part of a contrived scheme.

SUMMARY OF FINDINGS

308. We considered the evidence of the witnesses and the submissions of both parties carefully in reaching our conclusions. We have based our decision on the totality of the evidence, and we were careful not to assess the evidence in a piecemeal fashion or with the benefit of hindsight. We have set out certain compelling features of the extensive evidence which we regard as material to our decision, some of which was more relevant to actual knowledge and others to means of knowledge, or both, although we should make clear we took account of all of the evidence before us.

309. We considered the evidence in respect of the defaulting traders and transaction chains carefully and we were satisfied that HMRC had accurately traced the Appellant's transactions chains to fraudulent tax losses caused by defaulting traders whether directly or indirectly connected to the Appellant. In those circumstances we were satisfied that HMRC had proved that the Appellant's transactions were connected to fraudulent tax losses.

310. The live evidence we heard related mainly to the issue of knowledge/means of knowledge. We were satisfied that the evidence proves objective factors within the Appellant's knowledge at the time of the transactions which support our conclusion that the Appellant knew of the connection to the fraudulent evasion of VAT or should have known that the only reasonable explanation was that its transactions were connected to fraud.

311. For the reasons set out above, we found the Appellant's evidence contradictory and unpersuasive. We were satisfied that in relation to each trader and each transaction under appeal, the Appellant's due diligence was woefully inadequate and could have provided no assurance as to the integrity of its supplier or customer. It was clear from the evidence that the Appellant collated minimal documentation and gave no consideration to that information which, in our view, would have put a reasonable and prudent trader on notice that the transactions lacked commerciality.

312. In our view, any reasonable business seeking to protect itself from fraud would see due diligence and verification of the integrity of its deals as a commercial necessity. We concluded from the inferences we have drawn from the Appellant's minimal commercial checks that its lack of due diligence, together with the evidence as a whole, was indicative of knowledge on its part.

313. Having considered the totality of the evidence, from which we inferred the Appellant's actual knowledge, we consider that our conclusions also support a finding of means of knowledge. The deals at the time had clear features which were satisfied would have been obvious to the Appellant, for instance the casual way the business was conducted without contractual terms, the recent incorporation of a number of customers, the woefully inadequate due diligence which provided no assistance in assessing the integrity of the transactions and the connections between separate entities which raised obvious queries as to why they were in the transaction chain or referenced on payments in deals with other individuals. In our view a prudent and reasonable trader would have undoubtedly queried these features of the deals and

would not have reached the conclusion as asserted on behalf of the Appellant that the deals were simply an opportunity arising from supply and demand.

314. We considered the issue of who the individuals were whose knowledge of the connection to fraud could be attributed to the Appellant. We were satisfied that Mr Mason knew that the deals were connected to fraud. He presented as a shrewd businessman with a wealth of experience in the industry, he was responsible for each of the transactions under appeal and for carrying out due diligence. As with Mr Mason's claims that he was "just a salesman" and had no knowledge of HMRC's involvement or concerns of fraud, we rejected his assertion that he knew nothing of VAT fraud in the industry which we found wholly implausible for a man of such experience and entirely unpersuasive. Mr Rylands may not have known the minutiae of each transaction but his role as director combined with his lead role in dealing with HMRC and the fact that he was aware of the concerns yet did nothing to address them led us to conclude that he either knew that the transactions were contrived or turned a blind eye.

315. We concluded that there was no other reasonable explanation for the circumstances and features of the deals other than their connection to fraud. Accordingly, we found that if the Appellant did not know that the transactions in question were connected to the fraudulent evasion of VAT, it should have known that they were so connected.

APPELLANT'S NEW GROUND OF APPEAL/THE RESPONDENT'S ALTERNATIVE ARGUMENT

316. In light of our conclusions above, we do not need to address HMRC's alternative argument. However, in case our findings above should fall for reconsideration, we will summarily set out the submissions and our decision.

317. The Appellant submitted that if we rejected the Respondent's *Mescek* argument in relation to Mr O'Kelly and consider HMRC's alternative basis for denying zero rating, namely that the supplies were made to Mr Cullen and Mr Byrne who were unregistered EU individuals, the Appellant wished to amend its grounds of appeal to support its argument that the Appellant was entitled to supply non-taxable persons and claim zero rating for "new means of transport".

318. HMRC object to the amendment to the grounds of appeal on the basis it cannot succeed for the following reasons.

319. The proposed new ground of appeal is predicated upon Article 138(2) of the Principal VAT Directive ("PVD"), s95(3)(ii) *Value Added Tax Act 1994* ("VATA") and regulation 147(1)(b) Value Added Tax Regulations 1995 ("the Regulations").

320. However, HMRC contend, these provisions alone are not sufficient to dispose of the issue. Regulation 155 provides that:

> "The Commissioners may, on application by a person who is not taxable in another member State and who intends—
> (a) to purchase a new means of transport in the United Kingdom, and
> (b) to remove that new means of transport to another member State,
> permit that person to purchase a new means of transport without payment of VAT, for subsequent removal to another member State within 2 months of the date of supply and its supply, subject to such conditions as they may impose, shall be zero-rated."

321. HMRC are entitled to impose conditions under Regulation 155 pursuant to Article 2 of the PVD:

> "1. The following transactions shall be subject to VAT:
> …

(b) the intra-Community acquisition of goods for consideration within the territory of a Member State by:

…

(ii) in the case of new means of transport, a taxable person, or a non-taxable legal person, whose other acquisitions are not subject to VAT pursuant to Article 3(1), or any other non-taxable person;

2. …

(b) These means of transport shall be regarded as 'new' in the cases:

(i) of motorised land vehicles, where the supply takes place within six months of the date of first entry into service or where the vehicle has travelled for no more than 6 000 kilometres;

(c) Member States shall lay down the conditions under which the facts referred to in point (b) may be regarded as established."

322. PN 728 ("New means of transport") sets out the conditions that have been imposed and which, HMRC argued, has (to an extent) force of law. It states:

"6. Purchasing a NMT in the UK for removal to another member state

6.1 Buying a NMT in the UK for removal to another member state

This section has the force of law

If you buy a NMT in the UK to take to another member state, you will be liable for the VAT on the value of the NMT when you arrive there. To make sure that the purchase of the NMT is free of UK VAT, you must comply with certain conditions. These are:

• the means of transport must be 'new'
• you or your authorised chauffeur, pilot or skipper must personally take delivery of the new means of transport in the UK
• you must remove it from the UK to the member state of destination within 2 months of the date of supply to you
• you must complete and sign a declaration on a form VAT411, stating your intention to remove the NMT from the UK and pay any VAT due in the member state of destination, your supplier must complete their part of the form

…

6.3 Form VAT411

Form VAT411 is your declaration that you'll take the NMT to another member state within 2 months and pay the VAT there. It's also your supplier's declaration that they've supplied a NMT to you for removal from the UK.

6.4 Completion of form VAT411

The form is made up of an original (the top sheet) and 3 copies. When it has been properly completed, your supplier will send the original copy to us (see paragraph 9.5) and give the first copy to you. The supplier will keep the second copy of the form as part of their business records, and, if the NMT is a land vehicle, they'll use the third copy to register it for road use if you're going to drive it out of the UK.

6.5 Buying a NMT in the UK for removal if you're VAT-registered in another member state

If you're registered for VAT in another EU member state and you buy a NMT from a VAT-registered person in the UK for removal to that state your supplier may zero rate the supply under the normal rules (see Notice 725: the single market).

To benefit from zero rating you must remove the NMT from the UK within 2 months of the time of supply. You must account for any tax due on the acquisition in the member state of destination, under the laws of that state.

6.6 Using the land vehicle on UK roads before removal to another member state

You must not use your land vehicle on UK roads unless it's been licensed and registered, and is properly insured (see section 10).

6.7 Inability to remove the NMT due to circumstances beyond your control

If you purchase a NMT and then find that because of circumstances beyond your control, you're unable to remove it, you should inform us immediately by writing to the address given in paragraph 3.4 (see paragraph 6.8).

When we receive your letter we'll calculate the VAT due and send you a demand, which you must pay immediately.

6.8 Failure or inability to remove the NMT within the period allowed

If you fail or are unable to remove your NMT from the UK within the 2-month period allowed, you should inform HMRC and pay the VAT which is due. Failure to do so may make your NMT liable to forfeiture.

6.9 Exemption of NMT from 'type approval

You can find more information on 'type approval' and how it affects NMT that are land vehicles from paragraph 10.7 onwards.

6.10 Insuring the NMT that you purchase in the UK for removal to another member state

If you buy a NMT in the UK for removal to another member state you should consider insuring it for its full value including UK VAT. If for any reason (for example, an accident) it's not removed from the UK, you'll be liable for any UK VAT which was not charged at the time the NMT was supplied to you.

It's a legal requirement that you must be insured against third-party liabilities before you drive a land vehicle on UK roads. If your vehicle is registered in the UK, its use must be covered by a policy of insurance issued by an authorised insurer (a member of the Motor Insurers Bureau).

6.11 Next steps

When a NMT (that is a vehicle) is finally removed from the UK, the DVLA require the tear-off portion of the VX302. In the case of a temporary removal to another EU member state, say for a holiday, the VX302 is not required to be completed. If it is, then it can cause problems on return to the UK as the licence is cancelled."

(Emphasis added)

323. PN728 also states:

> "9. Supply of NMT by a VAT-registered person
>
> 9.3 Conditions you should meet if your customer is not VAT-registered in the member state of destination
>
> You must meet all the conditions in order to zero rate the supply to your customer who will be liable for any VAT in their member state:
>
> • the means of transport must qualify as 'new', see section 2
> • you and your customer must make a joint declaration about the transaction on form VAT411, if this form is not completed properly, you will not be entitled to zero rate the supply - see paragraph 6.2 and paragraph 6.7
>
> …
>
> 9.5 Where to send the completed form VAT411
>
> You must send all originals to:
> HMRC Customs Belfast PTU Erskine House 20-32 Chichester Street Belfast BT1 4GF
>
> 9.6 Deadline for submitting form VAT411
>
> You must submit this within 6 weeks of the end of the calendar quarter in which you've made the supply."

324. HMRC submitted that it follows from Reg 155 and PN728 that in order to be eligible to zero rate a new means of transport transaction, a Form 411 must have been prepared and signed by both the Appellant and its customer. As this has not been done, the force of law requirements have not been met and the Appellant cannot rely upon it. Moreover, on the Appellant's own case, it was unaware that the vehicles were dispatched to Mr Cullen and Mr Byrne and therefore it cannot take shelter under the new means of transport provisions.

325. In relation to HMRC's alternative assessment, the ITA provided information that Mr O'Kelly permitted his VRN to be used by Messrs Cullen and Byrne who were not VAT registered entities. HMRC submitted that as the economic reality of those supplies is that they were being made to those individuals, as opposed to Mr O'Kelly t/a Pyramid, the supplies were being made to unregistered EU individuals. Therefore, they must be treated as a domestic supply, and standard rate VAT must be charged and accounted for (as per paragraph 6.1 of Public Notice 725).

326. Mr Brown relied on the decision of the Court of Justice of the European Union in *Plokl v Finanzamt Schrobenhausen* (Case C-24/15 [2017] STC 379) for the principle a VAT number is not required where it can be shown that the person supplied is a taxable person. Applying Art 9 of the VAT Directive, the purchase of vehicles must be an economic activity and Mr Cullen and Mr Byrne were taxable persons:

> "39. Accordingly, the principle of fiscal neutrality requires that an exemption from VAT be allowed if the substantive conditions are satisfied, even if the taxable person has failed to comply with some of the formal requirements (see, by analogy, judgment of 27 September 2007, Collée, C-146/05, EU:C:2007:549, paragraph 31).
>
> 40 In that regard, the Court has held, in connection with an intra-Community supply, that an obligation to communicate the VAT identification number of the

person acquiring the goods constitutes a formal requirement with regard to the right to exemption from VAT (see, to that effect, judgment of 27 September 2012, VSTR, C-587/10, EU:C:2012:592, paragraph 51).

41 The same applies to an obligation to provide, in connection with an intra-Community transfer, the taxable person's VAT identification number issued by the Member State of destination. While the provision of that number is proof that such a transfer has been effected for the purposes of that taxable person's undertaking and, therefore, as is apparent from paragraph 31 of the present judgment, that that taxable person is acting as such in that Member State, proof of that capacity cannot, in every case, depend exclusively on the provision of that VAT identification number. Article 4(1) of the Sixth Directive, which defines 'taxable person', does not make that capacity subject to the possession by that person of a VAT identification number (see, to that effect, judgment of 27 September 2012, VSTR, C-587/10, EU:C:2012:592, paragraph 49). The provision of that number is not, therefore, a substantive condition for the exemption from VAT of an intra-Community transfer.

42 It follows from the foregoing that an authority of a Member State cannot, in principle, refuse to grant an exemption from VAT in respect of an intra-Community transfer on the sole ground that the taxable person has not provided the VAT identification number issued to him by the Member State of destination."

DECISION ON APPLICATION TO AMEND GROUNDS OF APPEAL

327. We agreed with the Respondent's submissions. Having considered the provisions carefully, we note that PN728 at 6.1 has the force of law and that the conditions are mandatory. There was no evidence upon which we could find that the declaration on VAT411 had been completed and signed by either the Appellant or Messrs Cullen and Byrne. The mandatory nature of this requirement is reiterated at paragraph 9.3 of PN728. In those circumstances, we rejected the Appellant's submission that it could rely on the "new vehicle" provisions as its entitlement to zero rate its transactions and it follows that, even if we were to grant permission to amend the grounds of appeal, the ground must fail.

DECISION ON ALTERNATIVE ASSESSMENT

328. We do not find that *Plokl* assists the Appellant. The decision was concerned with the absence of a VAT number where the substantive conditions for zero rating were met (see [39] and [40] of *Plokl* above). In this case there is no evidence that the substantive conditions for zero rating have been satisfied. We consider that the Appellant's argument requires us to look at the formality rather than the substance of the supply which we do not consider to be the correct approach.

329. We preferred the submissions of HMRC that, if the Appellant supplied Mr Cullen and Mr Byrne, the economic reality is that the supplies were made to those unregistered EU individuals and must be treated as a domestic supply.

CONCLUSION

330. We were satisfied HMRC had established fraudulent tax losses and that there was an orchestrated scheme for the fraudulent evasion of VAT connected with the transactions which form the subject of this appeal.

331. We concluded that in respect of the period under appeal that the Appellant knew that the transactions were connected with the fraudulent evasion of VAT or that the factors set out above would at the very least support a finding of means of knowledge and that the Appellant did not take every reasonable precaution within its power to prevent its own participation in that fraud.

332. The appeal is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

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

JENNIFER DEAN
TRIBUNAL JUDGE

Release date: 23rd MARCH 2023