



**TC06812**

**Appeal number: TC/2014/06397**

*VALUE ADDED TAX – alleged fraud involving purchase and sale of 19 second hand “qualifying cars” and other vehicles – whether fraudulent tax loss in chain of deals – yes in case of one seller, no in case of the other – whether appellant knew or should have known of connection with fraudulent tax loss – yes in case of 5 vehicles – appeal allowed in part.*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**ALAN McCORD**

**Appellant**

**- and -**

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

**Respondents**

**TRIBUNAL: JUDGE RICHARD THOMAS  
CELINE CORRIGAN**

**Sitting in public at Royal Courts of Justice, Chichester St, Belfast on 9 and 10  
April 2018**

**Neil Manley of McNamee McDonnell Duffy, Solicitors, for the appellant**

**Lucy Wilson-Barnes, instructed by the General Counsel and Solicitor and, HM  
Revenue and Customs, for the Respondents**

## DECISION

1. This was an appeal by Mr Alan McCord (trading as Hi-Octane Imports) (“the appellant” or “AM”) against decisions of the respondent Commissioners (“HMRC”) to deny credit for input tax of £39,141.68 in respect of the period 9/12 (September 2012) and £23,054.16 in respect of the period 10/12 (October 2012).

2. The decisions were made on the basis that the appellant knew, or should have known, that the transactions in relation to which the input tax arose were connected with fraudulent evasion of VAT.

3. The hearing was set down for two days. Shortly before the time when the hearing was due to start we were informed that while Ms Wilson-Barnes had successfully flown from Manchester to Belfast in time for the hearing, her luggage, including her court dress and her papers, had not.

4. We were then asked by Ms Wilson-Barnes for an adjournment of the case until the next day. She and Mr Manley both considered that, in the light of the “Fairford” directions which had been made, the case could be heard in one day, especially if the Tribunal was willing to spend time in pre-reading. We agreed to do that, and to start a little earlier than normal the next day, and we spent the rest of the morning reading those documents which the parties suggested to us.

5. In the event Ms Wilson-Barnes’ luggage turned up and the case was heard in one day and we are grateful to Ms Wilson-Barnes and Mr Manley for their assistance in helping to achieve that.

### Law

6. Denial of input tax on the basis of a connection with fraudulent evasion of VAT is something this tribunal has dealt with in many cases involving so-called “Missing Trader Intra-Community” (“MTIC”) fraud and other simpler, “acquisition” frauds. What follows is an exposition of the relevant European and domestic case law.

7. Although the joined cases in the European Court of Justice (“ECJ” - as it then was) C-439/04 *Axel Kittel v État Belge* and C-440/04 *État Belge v Recolta Recycling SPRL* (“*Kittel*”) are often taken as the starting point in any consideration of the European and domestic jurisprudence on the issue with which we are faced, we think it is helpful to consider two earlier judgments of the ECJ.

8. *Optigen Ltd and others v Commissioners of Customs and Excise* (Cases C-354/03, C-355/03 and C-384/03) (“*Optigen*”) involved MTIC fraud in CPUs. The Commissioners of Customs and Excise had sought to say ([14] of the judgment) of two of the appellant companies, none of which were said to have committed VAT fraud, that:

“the amounts of VAT purportedly paid in respect of those purchases were not input tax within the meaning of the Value Added Tax Act

1994. Further, for the purposes of VAT, the relevant sales were not supplies made in the course of a business and do not therefore give any entitlement to a refund. Finally, the purchases and the sales, judged objectively, were devoid of economic substance and were not part of any economic activity. Accordingly, the purchases were not supplies used or to be used for the purposes of any economic activity and the sales were not supplies made in the course of an economic activity for the purposes of VAT.”

and in relation to the third company at [18] that:

“the fact that the chains of supply at issue in the main proceedings had a fraudulent objective means that all the transactions which make it up, including those of Bond House, were devoid of economic substance. Accordingly, as the illegal transactions did not fall within the scope of VAT, the amounts which Bond House paid as input VAT to its suppliers under the guise of VAT were not VAT, and therefore did not give that company an entitlement to a refund of those amounts.”

9. The Court in its *dispositif* held:

“Transactions such as those at issue in the main proceedings, which are not themselves vitiated by value added tax fraud, constitute supplies of goods or services effected by a taxable person acting as such and an economic activity within the meaning of Articles 2(1), 4 and 5(1) of Sixth Council Directive 77/388/EEC of 17 May 1977 on the harmonisation of the laws of the Member States relating to turnover taxes — Common system of value added tax: uniform basis of assessment, as amended by Council Directive 95/7/EC of 10 April 1995, where they fulfil the objective criteria on which the definitions of those terms are based, regardless of the intention of a trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another transaction in the chain, prior or subsequent to the transaction carried out by that taxable person, of which that taxable person had no knowledge and no means of knowledge. The right to deduct input value added tax of a taxable person who carries out such transactions cannot be affected by the fact that in the chain of supply of which those transactions form part another prior or subsequent transaction is vitiated by value added tax fraud, without that taxable person knowing or having any means of knowing.”

10. This decision was given on 12 January 2006. On 16 February 2005 Advocate-General Poiares Maduro had given his opinion to the effect that the Commissioners’ arguments about “economic activity” should not be accepted as a method of tackling MTIC fraud. He said at Part E under the heading “Ways of tackling carousel fraud”:

“42. The United Kingdom seems to envisage combating carousel fraud — or at least dispensing with the problems it poses — by limiting the scope of the VAT system. To my mind, the Court should not consent to this approach. It would drastically shift the burden of the problem from the tax authorities to the private sector, at the expense of legitimate trade and the proper functioning of the VAT system.

5 Moreover, it would deter Member States from taking appropriate measures against carousel fraud. In this regard it is particularly worthy of note that where an activity falls within the scope of the Sixth Directive, that does not mean that Member States lose their power to take action against it.

10 43. In fact Article 21 of the Sixth Directive gives Member States the opportunity to introduce joint and several fiscal liability. A taxable person can accordingly be held accountable for the payment of VAT due by his co-contractor, if he knew or should have known of his co-contractor's fraudulent activities. Several Member States have adopted measures of that kind against carousel fraud".

11. Rather oddly the United Kingdom had in fact introduced such a measure in the Finance Act ("FA") 2003, s 18 of which inserted s 77A into the Value Added Tax Act 1994 (which as amended by FA 2007) reads:

15 **"77A Joint and several liability of traders in supply chain where tax unpaid**

(1) This section applies to goods which fall within any one or more of the following descriptions—

20 (a) any equipment made or adapted for use as a telephone and any other equipment made or adapted for use in connection with telephones or telecommunication;

25 (b) any equipment made or adapted for use as a computer and any other equipment made or adapted for use in connection with computers or computer systems (including, in particular, positional determination devices for use with satellite navigation systems);

(c) any other electronic equipment made or adapted for use by individuals for the purposes of leisure, amusement or entertainment and any other equipment made or adapted for use in connection with any such electronic equipment;

30 and in this subsection "other equipment" includes parts, accessories and software.

(2) Where—

35 (a) a taxable supply of goods to which this section applies has been made to a taxable person, and

(b) at the time of the supply the person knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or on any previous or subsequent supply of those goods, would go unpaid,

40 the Commissioners may serve on him a notice specifying the amount of the VAT so payable that is unpaid, and stating the effect of the notice.

(3) The effect of a notice under this section is that—

(a) the person served with the notice, and

(b) the person liable, apart from this section, for the amount specified in the notice,

are jointly and severally liable to the Commissioners for that amount.

5 (4) For the purposes of subsection (2) above the amount of VAT that is payable in respect of a supply is the lesser of—

(a) the amount chargeable on the supply, and

10 (b) the amount shown as due on the supplier's return for the prescribed accounting period in question (if he has made one) together with any amount assessed as due from him for that period (subject to any appeal by him).

(5) The reference in subsection (4)(b) above to assessing an amount as due from a person includes a reference to the case where, because it is impracticable to do so, the amount is not notified to him.

...

15 (10) For the purposes of this section—

(a) "goods" includes services;

(b) an amount of VAT counts as unpaid only to the extent that it exceeds the amount of any refund due."

20 12. The compatibility of this enactment with EC law was put in question by the Federation of Technological Industries Ltd and others who sought judicial review of the legislation in 2004. The Administrative Court (Lightman J) referred the question to the ECJ which on 11 May 2006 gave its judgment in Case C-384-04 *Commissioners of Customs and Excise and anor v Federation of Technological Industries Ltd and others*, ("*FTI*") the dispositif of which said:

25 "The 6<sup>th</sup> Directive] is to be interpreted as allowing a Member State to enact legislation, such as that in issue in the main proceedings, which provides that a taxable person, to whom a supply of goods or services has been made and who knew, or had reasonable grounds to suspect, that some or all of the value added tax payable in respect of that  
30 supply, or of any previous or subsequent supply, would go unpaid, may be made jointly and severally liable, with the person who is liable, for payment of that tax."

35 13. On 6 July 2006, two months after the judgment in *FTI*, the ECJ gave its judgment in *Kittel*. One case involved a company in a chain in which computer components moved from Belgium to Luxembourg and back again to the supplier to the company in Belgium of which Mr Kittel was the liquidator. The other involved cars, as in this case. In both cases Belgium denied a deduction for input tax. The questions asked by the Belgian Courts were:

"In Case C-439/04

40 '(1) Where the recipient of a supply of goods is a taxable person who has entered into a contract in good faith without knowledge of a fraud committed by the seller, does the principle of fiscal neutrality in respect of [VAT] mean that the fact that the contract of sale is void—

by reason of a rule of domestic civil law which renders the contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller—cannot cause that taxable person to lose the right to deduct that tax?

5 (2) Is the answer different where the contract is incurably void for fraudulent evasion of [VAT] itself?

(3) Is the answer different where the unlawful basis of the contract of sale which renders it incurably void under domestic law is a fraudulent evasion of [VAT] known to both parties to the contract?’

10 In Case C-440/04

‘(1) Where the recipient of a supply of goods is a taxable person who has entered into a contract in good faith without knowledge of a fraud committed by the seller, does the principle of fiscal neutrality in respect of [VAT] mean that the fact that the contract of sale is void—  
15 by reason of a rule of domestic civil law which renders the contract incurably void as contrary to public policy for unlawful basis of the contract attributable to the seller—cannot cause that taxable person to lose the right to deduct that tax?

20 (2) Is the answer different where the contract is incurably void for fraudulent evasion of [VAT] itself?’”

14. These questions were reformulated by the ECJ:

“THE QUESTIONS

27. By its questions, which must be considered together, the referring court asks essentially whether, where a recipient of a supply of goods  
25 is a taxable person who did not and could not know that the transaction concerned was part of a fraud committed by the seller, art 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void, by reason of a civil law provision which renders the contract incurably  
30 void as contrary to public policy for unlawful basis of the contract attributable to the seller, causes that taxable person to lose his right to deduct that tax. That court asks whether the answer to that question is different where the contract is incurably void for fraudulent evasion of VAT.

28. The referring court also asks whether the answer to that question is different where the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with  
35 fraudulent evasion of VAT.

15. The ECJ concluded:

40 “43. ... [R]equiring the tax authorities, in order to determine whether a given transaction constitutes a supply by a taxable person acting as such and an economic activity, to take account of the intention of a trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another  
45 transaction in the chain, prior or subsequent to the transaction carried

out by that taxable person, of which that taxable person had no knowledge and no means of knowledge, would be contrary to those objectives (*Optigen* para 46).

5 44. The court drew the conclusion, at para 51 of *Optigen*, that transactions which are not themselves vitiated by VAT fraud constitute supplies of goods effected by a taxable person acting as such and an economic activity within the meaning of arts 2(1), 4 and 5(1) of the Sixth Directive where they fulfil the objective criteria on which the definitions of those terms are based, regardless of the intention of a  
10 trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another transaction in the chain, prior or subsequent to the transaction carried out by that taxable person, of which that taxable person had no knowledge and no means of knowledge.

15 45. The court observed that the right to deduct input VAT of a taxable person who carries out such transactions likewise cannot be affected by the fact that, in the chain of supply of which those transactions form part, another prior or subsequent transaction is vitiated by VAT fraud, without that taxable person knowing or having any means of knowing  
20 (*Optigen* para 52).

46. The same conclusion applies where such transactions, without that taxable person knowing or having any means of knowing, are carried out in connection with fraud committed by the seller.

...

25 51. In the light of the foregoing, it is apparent that traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing their right to deduct the  
30 input VAT (see, to that effect, Case C-384/04 *Federation of Technological Industries and Others* [2006] ECR I-0000, paragraph 33).

35 52. It follows that, where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, art 17 of the Sixth Directive must be interpreted as meaning that it precludes a rule of national law under which the fact that the contract of sale is void, by reason of a civil law provision which renders that contract incurably  
40 void as contrary to public policy for unlawful basis of the contract attributable to the seller, causes that taxable person to lose the right to deduct the VAT he has paid. It is irrelevant in this respect whether the fact that the contract is void is due to fraudulent evasion of VAT or to other fraud.

45 53. By contrast, 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’ are not met where tax is evaded by the taxable person himself (see Case C-255/02 *Halifax and Others* [2006] ECR I-0000, paragraph 59).

5 55. Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively (see, inter alia, [certain other cases]. It is 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 ends (see *Fini H* (para 34)).

10 56. In the same way, 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.

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

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

20 59. Therefore, 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’.”

25 16. What emerges from *Kittel*, in which *Optigen* and *FTI* are closely considered, is that the only person in a chain of transactions who can be regarded as not carrying on an economic activity is the person who fraudulently evades VAT. That person is usually called a “missing trader” in the UK cases because more often than not the person is a cypher with no assets, where the directors disappear or had hijacked the valid VAT number of another innocent person. The VAT due on the transactions is not paid and  
30 so is evaded.

35 17. A person in the chain who is not the fraudulent evader, the “missing trader”, cannot be said not to be carrying on an economic activity and cannot be denied the right to deduct input VAT, as to do so would contravene fiscal neutrality, a bedrock of the VAT system. But that right is qualified and can be denied where the “taxable person” (taxable” because they do carry on an economic activity) while not being a fraudulent evader themselves nonetheless knew of the fraudulent evasion or should have known of it from objective factors.

40 18. It is noteworthy that while actual knowledge is always characterised as simply a case where the person “knew”, there are a number of ways in which the requirement short of actual knowledge is stated. In *Kittel* itself while [56], [59], [61] and the *dispositif* (1<sup>st</sup> para) say “should have known”, in [43], [44], [45] and [46] the ECJ refers to “means of knowledge” (which derives from *Optigen*) and in [27], [52], [60] and the *dispositif* (2<sup>nd</sup> para) “could not know”.



19. In the ECJ’s judgment in *Optigen* the only one of those phrases used is “means of knowledge/knowing”. It is the A-G who uses “should have known” in [42] of his opinion. It seems it was from this that the Court in *Kittel* decided to use that phrase.

20. The leading domestic decision on the meaning of *Kittel* is *Mobilx Ltd (in administration) v HMRC; Blue Sphere Global Ltd v HMRC; Calltel Telecom Ltd and another v HMRC (No 2)* [2010] EWCA Civ 517 (“*Mobilx*”)

21. In *Mobilx* Moses LJ, giving the only reasoned judgment, said at [5]:

10 “Two essential questions arise: firstly, what the ECJ meant by “should have known” and secondly, as to the extent of the knowledge which it must be established that the taxpayer had or ought to have had: is it sufficient that the taxpayer knew or should have known that it was more likely than not that his purchase was connected to fraud or must it be established that he knew or should have known that the transactions in which he was involved *were* connected to fraud?”

15 22. The answer to the second question is that it was not sufficient that the appellant knew or should have known that it was more likely than not that the purchase was connected to fraud. As to the first Moses LJ said:

“*Meaning of “should have known”*”

20 50. The traders contend that mere failure to take reasonable care should not lead to the conclusion that a trader is a participant in the fraud. In particular, counsel on behalf of Mobilx contends that Floyd J and the Tribunal misconstrue §51 of *Kittel*. Whilst traders who take every precaution reasonably required of them to ensure that their transactions are not connected with fraud cannot be deprived of their right to deduct input tax, it is contended that the converse does not follow. It does not follow, they argue, that a trader who does not take every reasonable precaution must be regarded as a participant in fraud.

30 51. Once it is appreciated how closely *Kittel* follows the approach the court had taken six months before in *Optigen*, it is not difficult to understand what it meant when it said that a taxable person “knew or should have known” that by his purchase he was participating in a transaction connected with fraudulent evasion of VAT. In *Optigen* the Court ruled that despite the fact that another prior or subsequent transaction was vitiated by VAT fraud in the chain of supply, of which the impugned transaction formed part, the objective criteria, which determined the scope of VAT and of the right to deduct, were met. But they limited that principle to circumstances where the taxable person had “no knowledge and no means of knowledge” (§55). The Court must have intended *Kittel* to be a development of the principle in *Optigen*. *Kittel* is the obverse of *Optigen*. The Court must have intended the phrase “knew or should have known” which it employs in §§9 and 61 in *Kittel* to have the same meaning as the phrase “knowing or having any means of knowing” which it used in *Optigen* (§55).

45 52. If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent

5 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.

***Extent of Knowledge***

10 53. Perhaps of greater weight is the challenge based, in *Mobilx* and *BSG*, on HMRC's denial of the right to deduct on the grounds that the trader knew or should have known that it was more likely than not that transactions were connected to fraud. The question arises in those appeals as to whether that is sufficient or whether, as the Chancellor concluded in *BSG*, the right to deduct input tax may only be denied where the trader knows or should have known that the transaction was connected to fraud (see judgment, §2). In short, does a trader lose his entitlement to deduct if he knew or should have known of a risk that his transaction was connected to fraudulent evasion of VAT? HMRC contends that the right to deduct may be denied if the trader merely knew or should have known that it was more likely than not that by his purchase he was participating in such a transaction. It contends that if it was necessary to show more than appreciation of a risk then the Court's decision in *Kittel* would not represent a development of the law and would fail to achieve the objective, recognised in the Sixth Directive, to which the Court referred at §54.

25 54. As I have already indicated, the mere existence of that objective and the principle that Community law cannot be relied upon for fraudulent ends (e.g., *Fini H* §32) does not provide any justification for a general principle that any transaction connected with fraud is vitiated. Such an approach was rejected in *Optigen*.

30 54. If HMRC was right and it was sufficient to show that the trader should have known that he was running a risk that his purchase was connected with fraud, the principle of legal certainty would, in my view, be infringed. A trader who knows or could have known no more than that there was a risk of fraud will find it difficult to gauge the extent of the risk; nor will he be able to foresee whether the circumstances are such that it will be asserted against him that the risk of fraud was so great that he should not have entered into the transaction. In short, he will not be in a position to know before he enters into the transaction that, if he does so, he will not be entitled to deduct input VAT. The principle of legal certainty will be infringed.

35 55. It must be remembered that the approach of the court in *Kittel* was to enlarge the category of participants. A trader who should have known that he was running the risk that by his purchase he *might* be taking part in a transaction connected with fraudulent evasion of VAT, cannot be regarded as a participant in that fraud. The highest it could be put is that he was running the risk that he might be a participant. That is not the approach of the Court in *Kittel*, nor is it the language it used. In those circumstances, I am of the view that it must be established that the trader

knew or should have known that by his purchase he *was* taking part in such a transaction, as the Chancellor concluded in his judgment in *BSG*:-

5           “The relevant knowledge is that *BSG* ought to have known by its purchases it was participating in transactions which were connected with a fraudulent evasion of VAT; that such transactions might be so connected is not enough.” (§52)

...

10           58. 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 fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*.

15           59. The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion.”

20           23. Many people, including HMRC in this case, seem to have assumed, understandably perhaps, that Moses LJ was laying down the “only reasonable explanation” test as a necessary requirement for it to be shown that the person should have known etc. Subsequently cases in this Tribunal (see for example *Taylor’s Service Centres Ltd v HMRC* at [58] to [61] [2018] UKFTT 474 (TC) (Judge Thomas Scott and Rebecca Newns) say that while it is a sufficient test, it is not necessary to go so far. In particular they say it is not necessary for HMRC to show that any other explanation is unreasonable. The test remains that of the balance of probabilities.

25           24. It could we think be argued that the bar is set somewhat lower. Section 77A VATA gives as its test for the “should have known” or “has the means of knowledge” leg of *Kittel* and *Optigen*:

30           “... at the time of the supply the person ... had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or on any previous or subsequent supply of those goods, would go unpaid ...”

35           25. In *FTI* the ECJ did not quarrel with this wording as equating to the equivalent wording in *Optigen*. “Reasonable grounds to suspect” is used in UK law mostly in relation to the police and in tax law to the National Crime Agency when seeking to exercise their powers in Part 6 Proceeds of Crime Act 2002 (“POCA”). It is a relatively low threshold to cross (see eg *O’Hara v Chief Constable of the Royal Ulster Constabulary* [1997] AC 286 (HL), *Parker (aka Michael Barrymore) v the Chief*

*Constable of Essex Police* [2017] EWHC 2140 (QB) and in tax/POCA cases *Khan v Director of the Assets Recovery Agency* [2006] UKSPC SpC 523 and *Chadwick (as trustee in bankruptcy of Oduneye-Braniff) v National Crime Agency* [2017] UKFTT 656 (TC)).

5 26. When applied to a person not involved in law enforcement it may be that a higher  
threshold is required, or that a person such as the appellant in this case might not have  
the investigative “nose” of a police officer or officer of HMRC seconded to the NCA.  
In this case then we have stuck to the balance of probabilities, and have been mindful  
10 the means of knowing that there was fraud and knowing or having the means of  
knowing that it is more likely than not that there was fraud in a chain of transactions.  
This distinction is it seems to us reflected in what Moses LJ says at [50] in *Mobilx*:

15 “... traders who take every precaution reasonably required of them to  
ensure that their transactions are not connected with fraud cannot be  
deprived of their right to deduct input tax”

27. Most reported MTIC cases involve electronic goods, especially mobile phones  
and computer parts. This case involves cars (as did *État Belge v Recolta SPRL*, the case  
joined with *Axel Kittel v État Belge*) and other vehicles which are traded across the land  
border with the Irish Republic (which we call simply the “Republic” to avoid confusion  
20 with Northern Ireland). The treatment of cars which are transferred to another member  
state (“MS”) is more complicated than that for mobile phones because of the existence  
of the input tax recovery block and of margin schemes. Broadly it is this.

28. Supplies of goods which are removed from the UK to another MS are zero-rated  
if certain conditions are met and appropriate evidence is kept. Zero-rating is a form of  
25 exemption from VAT, but one where, despite no VAT being charged, input tax is prima  
facie deductible. But in general it is not possible to obtain full input tax deduction for  
a car, and where a margin scheme is used for second hand vehicles zero-rating is not  
allowed. A motor dealer in Northern Ireland wishing to zero-rate a supply of a car to a  
taxable person in the Republic and who wishes to claim a deduction for input tax must  
30 therefore ensure that the car is a “qualifying motor car” (one where credit for input tax  
has never been blocked), is not in a margin scheme and is removed in accordance with  
VAT law and those parts of relevant VAT Notices that have the force of law. They  
would also be well advised to follow the suggestions and requirements in VAT Notices  
which do not have the force of law if they wish to avoid problems and disputes with  
35 HMRC.

29. The question of due diligence always arises in MTIC and similar cases. VAT  
Notice 726 was created especially to warn traders about the possibility of being landed  
with joint and several liability for VAT where the trader “knew” or “had reasonable  
40 grounds to suspect” that the VAT on the supply, or any previous or subsequent supply,  
of those goods would go unpaid to HMRC. But VAT Notice 726 does not apply to  
cars.

30. But there is also a VAT Notice, number 725, which deals with supplies to a taxable person in another MS. The relevant provisions of this notice (February 2011 version) are:

**“4.3 When can a supply of goods be zero-rated?”**

5

**The text in this box has the force of law**

A supply from the UK to a customer in another EC Member State is liable to the zero rate where:

10

- you obtain and show on your VAT sales invoice your customer’s EC VAT registration number, including the 2-letter country prefix code, and
- the goods are sent or transported out of the UK to a destination in another EC Member State, and
- you obtain and keep valid commercial evidence that the goods have been removed from the UK within the time limits set out at paragraph 4.4.

15

You must not zero-rate a sale, even if the goods are subsequently removed to another Member State, if you:

20

- supply the goods to a UK VAT registered customer (unless that customer is also registered for VAT in another Member State. In such cases they must provide their EC VAT registration number and the goods must be removed to another EC Member State)
- deliver to, or allow the goods to be collected by, a UK customer at a UK address, or
- allow the goods to be used in the UK in the period between supply and removal, except where specifically authorised to do so

25

Paragraph 4.9 covers the checks that you must undertake to ensure that your customer’s EC VAT number is valid.

30

**4.6 What should I do if I cannot meet all the conditions in paragraph[ ] 4.3 ...**

If you cannot obtain and show a valid EC VAT registration number on your sales invoice you must charge and account for tax in the UK at the appropriate UK rate.

35

If the goods are not removed or you do not have the evidence of removal within the time limits you must account for VAT as described in paragraph 16.10. No VAT is due on goods which would normally be zero-rated when supplied in the UK. You may wish to consider taking a deposit for the VAT (see paragraph 5.5) if you have reason to doubt that the goods will be removed. *Extra caution may be advisable if your customer:*

40

- *is not previously known to you*

- *arranges to collect and transport the goods, or their transport arrives without advance correspondence or notice*
- *pays in cash, or*
- *purchases types or quantities of goods inconsistent with their normal commercial practice”*

[We have emphasised this text for reasons which will become apparent later in the decision – see §§88, 102(2) and 107(1)]

#### **“4.7 How can I obtain my EC customer’s VAT registration number?”**

You will probably have carried out the usual commercial checks such as bank and trade credit worthiness references when you agreed to sell goods to your EC customer. We also strongly recommend that you write to them to ask for their EC VAT registration number, as one of the conditions for zero-rating your supply is that you hold a valid EC VAT number for your customer. After placing the number in your accounting records, you should retain the letter or advice which you have received.

#### **4.8 How can I ensure my EC customers give me their VAT registration numbers?**

When writing to your customers ask them to provide you with the number which has been allocated to them for intra-EC trade. This will ensure they do not provide you with an internal tax or fiscal number used only in their own Member State.

#### **4.9 Checking the validity of an EC customer’s VAT registration number**

If you are uncertain whether the number you have been given is valid you can do a preliminary check by making sure it follows the format at paragraph 16.19. Further checks on the validity of a customer’s number including name and address, can be made using the [Europa website](#).

All Member States share these arrangements and businesses in other Member States can verify a UK VAT registration number in the same way.

If when making an enquiry you identify yourself by entering your own VAT registration number, you will be able to print out a validation record of the date and time that the enquiry was made and confirmed. If it later turns out that the customer’s number was invalid, e.g. the tax authorities database was not up to date, you will be able to rely on the validation record as one element to demonstrate your good faith as a compliant business and, in the UK, to justify why you should not be held jointly and severally liable for any VAT fraud and revenue losses which occur.

We also recommend that you consider regularly checking your EC customer’s VAT registration number to ensure that the details are still valid and the number has not been deregistered.

Alternatively you can contact the VAT Helpline on 0845 010 9000 to validate your customer’s VAT registration number and verify that the name and address is correct.

**4.10 Will I have to account for VAT if my customer's VAT number turns out to be invalid?**

No. But only if you:

- 5           • have taken all reasonable steps to ensure that your customer is registered for VAT in the EC
- have obtained and shown your customer's EC VAT number on your VAT sales invoice, and
- hold valid documentary evidence that the goods have left the UK

10           **4.11 What is meant by 'reasonable steps'?**

We will not regard you as having taken reasonable steps, as mentioned at paragraph 4.10, to ensure your customer is VAT registered in the EC if, for example:

- 15           • the VAT number you quote does not conform to the published format for your customer's Member State as shown at paragraphs 16.19, or
- you use a VAT number which we have informed you is invalid, or
- 20           • you use a VAT number which you know does not belong to your customer

**4.12 Will VAT be chargeable if reasonable steps are not considered to have been taken?**

Yes. You will have to account for VAT at the appropriate rate on the goods in the UK.

25           ...

**5. Zero-rating of supplies to VAT registered customers in another Member State – evidence of removal**

**5.1 Evidence of removal**

30           A combination of these documents must be used to provide clear evidence that a supply has taken place, and the goods have been removed from the UK:

- the customer's order (including customer's name, VAT number and delivery address for the goods)
- inter-company correspondence
- 35           • copy sales invoice (including a description of the goods, an invoice number and customer's EC VAT number etc)
- advice note
- packing list
- 40           • commercial transport document(s) from the carrier responsible for removing the goods from the UK, for example an

International Consignment Note (CMR) fully completed by the consignor, the haulier and signed by receiving consignee

- details of insurance or freight charges
- bank statements as evidence of payment
- receipted copy of the consignment note as evidence of receipt of goods abroad
- any other documents relevant to the removal of the goods in question which you would normally obtain in the course of your intra-EC business

5

10

Photocopy certificates of shipment or other transport documents are not normally acceptable as evidence of removal unless authenticated with an original stamp and dated by an authorised official of the issuing office.

### 5.2 What must be shown on documents used as proof of removal?

15

<p><b>The text in this box has the force of law</b></p> <p>The documents you use as proof of removal must clearly identify the following:</p> <ul style="list-style-type: none"><li>• the supplier</li><li>• the consignor (where different from the supplier)</li><li>• the customer</li><li>• the goods</li><li>• an accurate value</li><li>• the mode of transport and route of movement of the goods, and</li><li>• the EC destination</li></ul>
--

20

25

Vague descriptions of goods, quantities or values are not acceptable. For instance, 'various electrical goods' must not be used when the correct description is '2000 mobile phones (Make ABC and Model Number XYZ2000)'. An accurate value, for example, £50,000 must be shown and not excluded or replaced by a lower or higher amount.

30

If the evidence is found to be unsatisfactory you as the supplier could become liable for the VAT due.

### 5.3 Evidence of removal of goods to the Republic of Ireland across the Irish Land Boundary

35

The evidence you obtain must clearly show that the goods have left the UK. The types of documentary evidence required are explained in paragraphs 5.1 and 5.2. See also paragraph 5.5 for advice when goods are collected by your customer. Depending on the circumstances of the removal, we recommend that you obtain the following types of evidence to meet the conditions for zero-rating:

<b>If the goods are...</b>	
----------------------------	--



	<b>then commercial evidence should include...</b>
...	... copy of the consignment note).
collected by your customer or their authorised representative,	a written order completed by your customer, which shows their name, address, EC VAT number, the name of the authorised representative collecting the goods, the address in the Republic of Ireland where the goods are to be delivered, the vehicle registration number of the transport used, and a signature of your customer, or their authorised representative, confirming receipt of the goods.

5 Where you sell a motor vehicle, (*sic*) which is collected by your customer or their representative, it may be difficult to obtain satisfactory evidence of removal from the UK. In these circumstances, a copy of the vehicle registration document issued by the authorities in the Republic of Ireland will normally provide satisfactory evidence of removal if supported by other evidence described above and in paragraph 5.1.

#### 5.6 How long must I retain evidence of removal?

You must ensure that the proof of removal is:

- retained for six years, and
- 10 • made readily available so that any VAT assurance officer is able to substantiate the zero-rating of your removals.”

31. We mention this notice in particular because it was clear to us that the appellant and HMRC were somewhat at cross purposes about due diligence, as will be seen later.

#### Evidence

15 32. As we have mentioned there were *Fairford* directions<sup>1</sup> made in this case. There has also been an earlier decision on interlocutory matters, cited as [2017] UKFTT 620 (TC), where Judge Christopher McNall opened his decision by saying:

20 “This Appeal has a lengthy procedural history which, having given rise to the present application (2 December 2016) to set aside a direction made by Judge Bishopp on 1 December 2016, I must set out in some detail.”

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<sup>1</sup> They are called *Fairford* directions because they were first suggested as an appropriate way of shortening MTIC cases by the Upper Tribunal in the case of *HMRC v Fairford Group plc (in liquidation) and another* [2014] UKUT 329 (TCC) (Simon J and Judge Bishopp)

33. The direction made by Judge Bishopp was the *Fairford* direction and it said:

“The appellant having failed to comply with paragraph 1 of the directions herein which became effective in the absence of objection by the appellant delivered on or before 7 October 2016 **IT IS FURTHER DIRECTED** that:

1. It shall be assumed at the hearing of this appeal that the deal sheets prepared by the Respondents and annexed to the Statement of Case are accurate in every respect and that the tax losses on which the Respondents rely occurred as stated by them, and no challenge by the Appellant to such matters shall be entertained;

2. The Respondents may rely at the hearing of this appeal upon the witness statements of Garth Armstrong, Bernadette O’Neill, Lisa Wilkinson, and Paul Goodman served in this appeal and on the exhibits to those statements without calling the witnesses to give oral evidence and without tendering them for cross-examination, and no challenge to the accuracy of what is set out in the witnesses’ statements shall be entertained.”

34. Judge McNall refused the appellant’s application to set aside those directions, and so the directions stood. Accordingly we had the written evidence of Mr Armstrong, Ms O’Neill, Ms Wilkinson and Mr Goodman, but, in accordance with the directions, they were not cross-examined. The exhibits to their evidence (particularly that of Mr Armstrong) were extensive and contained in a number of ring binders.

35. We had a witness statement with exhibits and oral evidence from the appellant who was cross-examined by Ms Wilson-Barnes.

36. We have explained in the discussion section the extent to which we accepted the appellant’s evidence. We merely add here that the appellant became noticeably more confident in his demeanour as his cross-examination progressed, making some sarcastic remarks about Ms Wilson-Barnes’ knowledge of the second hand motor trade.

### **Facts - background**

37. We set out here facts which are undisputed (or even if disputed are unchallengeable by the appellant) and which we derive from the oral and written evidence (often from both parties).

38. The appellant was registered for VAT with effect from 24 June 2005. He is a sole trader dealing in mainly second hand cars. The place of business as given to HMRC is his parent’s address in Cookstown, Co Tyrone, which has a yard and garage adjoining.

39. He is also the sole director and shareholder of Smash Recovery & Claims Ltd, a company which is also registered for VAT and trades from the same address as the appellant. The two business are separate.

40. His application for registration said that the intended business activity was importing second hand Japanese cars<sup>2</sup> and selling them. By the time of HMRC's decision he had broadened his trade to a wider range of cars some of which were sourced within the EU and some of which were "qualifying cars" (see §28).

5 41. The appellant applied to make monthly rather than quarterly returns on 25 October 2011 as there was a rise in repayments of input VAT because of zero-rated EU sales and his application to do so was approved on 1 November 2011.

42. The accounts of the appellant for the 5 years ended 5 April 2013 show:

- (1) sales of £285k, £428k, £580k, £1,378k and £1,821k,  
10 (2) gross profits of £30k (10.7% of sales), £18k (4.11%), £39k (6.76%), £76k (5.57%) and £24k (1.34%),  
(3) net profits of £2k, £-16k, £4k, £36k and £-11k,  
(4) closing stock at each 5 April was £109k, £50k, £44k, £54k and £47k.

43. Yearly VAT figures were:

	1/10/2009 to 30/9/2010	1/10/2010 to 30/9/2011	1/10/2011 to 30/9/2012
VAT Sales	£61,180	£544,109	£1,559,883
Zero rated sales	£6,000	£464,050	£1,425,015
VAT repayments	£220	£81,160	£283,209

15 44. These results were achieved without significant introduction of capital and without capital expenditure on business premises.

#### **Facts – HMRC interaction with the appellant**

45. Before the submission of the 09/12 and 10/12 returns, there had been a compliance check on 17 June 2011. The result of this check was an assessment to VAT  
20 for 03/11 in the amount of £1,025. A desk based check was carried out on 15 November 2011. By two letters dated 16 November 2011 and 7 February 2012 the appellant was informed that some of his deals had been traced back to an "identified tax loss", but no amendments to VAT returns were made as a result of this check.

25 46. On 30 October 2012 Mr Garth Armstrong, an officer of Revenue and Customs, began extended verification of the VAT returns for 09/12 and 10/12 which showed

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<sup>2</sup> His logo on his stationery includes a rising sun, the name "HiOctane Imports" in a typescript that looks like Japanese character strokes and an outline of what we think is a Subaru Impreza or similar high performance Japanese car.

repayments due of £52,919.05 (with input tax of £61,258.72) and £27,074.84 (with input tax of £34,959.83) respectively. The repayments were withheld.

47. Mr Armstrong had meetings with the appellant and with his advisers (with and without the appellant). He also caused enquiries to be made into the two major suppliers of vehicles to the appellant in these two months. VAT Notice 726 was first given to the appellant after the deals in question.

48. On 12 September 2014 Mr Armstrong sent the appellant three letters.

49. Two notified the appellant of a change to the amount of his VAT return for each month because of inaccuracies in the returns. The inaccuracies were not identified in the letters but the letters showed a reduction in the VAT input tax credit, leaving in each month a lower net credit. These letters then stated that penalties may be charged where there are inaccuracies but no decision on that question had been taken.

50. The third letter of 12 September 2014 was headed “Notification of a decision to refuse entitlement to the right to deduct input tax”. In this notice Mr Armstrong set out in an Annex (though in the body of the decision letter he called it an Appendix) a list of the purchases of cars (“the impugned purchases”) which he said were, to the satisfaction of the Commissioners, connected with fraud where the appellant knew or should have known of that connection.

51. 10 purchases in 09/12 (covering 11 vehicles) were listed in the Annex for each of which the supplier was either Quinn Autos Ltd (“QA”) or Patrick McGourty trading as McGourty Trading (“PM”), and the disallowed VAT on those was £39,141.68.

52. 6 purchases in 10/12 (covering 8 vehicles) were listed for each of which the supplier was either QA or PM, and the disallowed VAT on those was £23,054.18.

53. In the 09/12 period there were 8 purchases from other suppliers where the VAT (£19,190.00) was not impugned, and in 10/12 3 such purchases (VAT £11,266.66).

54. The impugned purchases and the others in those months had some customers in common where the vehicle was sold on, but none of the other purchases were from QA or PM.

55. The appellant sought a review of the decisions, the conclusion of which was to uphold the decisions. Following that review he appealed to the Tribunal on 28 November 2014.

#### **Facts about the suppliers – Quinn Autos Ltd**

56. The unchallengeable evidence of Ms Wilkinson related to her researches into QA. She showed evidence that:

(1) QA was incorporated in the United Kingdom on 23 January 2012 as Quinn Autos Ltd with a registered office in Cullyhanna, Newry, Co Armagh.

(2) QA applied to be registered for UK VAT in relation to a business of the sale of used cars and light motor vehicles, with an estimated annual turnover of £500,000, buying and selling from the EU. EU acquisitions and dispatches were both estimated at £100,000.

5 (3) It was registered with effect from 4 April 2012. Its first return for the quarter ended 30 June 2012 (06/12) showed VAT due of £1,192. Its second, for the quarter 09/12 (that is including one of the months in the appeal), showed a repayment of £38,413, based on net purchases of £788,976 and net sales of  
10 £523,566 and dispatches (to another MS) £87,500 and acquisitions from another MS £0. QA did not provide documentary evidence for the repayment claim and did not pursue it.

(4) In the 12/12 quarter (which includes one month in this appeal) known sales by QA total £1,157,425 with VAT of £231,485. It is not known whether there were purchases from other MSs so the amount of input tax that would be due was  
15 not known.

(5) The total turnover for its 11 month trading life was £797,541 (compared with its annual estimate of £500,000 on the application for registration).

(6) No accounts were filed and the company was struck off on 13 September 2013.

20 (7) The sole director was James Quinn, for whom HMRC had no records.

57. The unchallengeable evidence of Mr Goodman related to his assurance visits about QA in October 2012. He showed evidence that:

(1) He phoned the trader in October 2012 and although the phone was operational it was never answered.

25 (2) On 26 October 2012 he wrote to QA at its registered address to say that he would be visiting the premises on 23 November 2012.

(3) When he got to the registered address in Cullyhanna, Co Antrim it was a residential building under development in a rural area, and was not habitable. A neighbour said the house, which was not accessible from the road, belonged to  
30 Mr Quinn.

(4) On 18 January 2013 he made another announced visit to the premises to which there had been no change. Mr Quinn did not appear.

(5) During an enquiry into M & M Trucks Ltd ("M & M") on 14 March 2013 Mr Goodman noticed sales invoices from QA and four hotel bills issued by (*sic*)  
35 M & M, on each of which the guest shown was Quinn, Mr J Quinn or James Quinn.

(6) Mark McNally, a director of M & M, told Mr Goodman that Mr Quinn was not an employee of his but that he was doing haulage work for M & M. McNally had no contact number for Mr Quinn but would get him to call Mr Goodman.

40 (7) After that meeting Mr Goodman receive an email from James Quinn confirming the transactions between QA and M & M.

(8) Further email traffic between Mr Quinn and Mr Goodman revealed that QA's records were with his bookkeeper and Mr Quinn wished to know why his VAT registration had been cancelled. He received no further contact from Mr Quinn.

5 (9) In an email of 19 April 2013 (which Ms Wilkinson describes as "purporting" to come from Mr Quinn), Mr Quinn stated that he worked by phone only and did not stock vehicles. He bought to order and didn't therefore need premises.

10 58. Mr Armstrong's witness statement says that the appellant was informed of QA's deregistration on 22 February 2013.

15 59. Ms Wilkinson's statement also says that QA sold vehicle FY61YKD to the appellant on 20 September 2012 (which is in accordance with other evidence) but that QA also sold it to Grange Road Car Sales ("GRCS") on 25 September 2012. On the second sale QA charged £1,666.66 more. [We assume this should be £2,000 including the VAT].

### **Facts about the suppliers – Patrick McGourty**

60. The unchallengeable evidence of Ms O'Neill related to her researches into PM. She showed evidence that:

20 (1) PM applied on 25 July 2012 to be registered for UK VAT in relation to a business of "specialised construction activities (other than scaffold erection)" and the main activity was "plasterer", with an estimated annual turnover of £90,000, with no EU trade. His accounting periods ended on September, December, March and June.

25 (2) PM confirmed his business as a plasterer on 8 August 2012 and was registered.

(3) No returns were filed and the business was compulsorily deregistered from 12 December 2012.

(4) In the quarter 09/12 invoices from PM to UK purchasers of vehicles show output VAT of £66,698 and in 12/12 £40,462.

30 (5) An invoice received from the Commissioners in the Republic under procedures for exchange of information shows that on 12 October 2012 A1 Tyres Ltd sold tyres with a total net amount of £210,722 to PM. These were zero-rated.

35 (6) An "officer's" assessment was made in the sum of £196,104 total undeclared output VAT<sup>3</sup> for 12/12 and 99/99 (final period to include January 2013 sales) and notice issued to PM but it had not been appealed against or paid.

(7) PM is also a director of McGourty Trading Ltd incorporated on 20 September 2012. HMRC had no records of VAT registration for this company.

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<sup>3</sup> This figure includes output VAT for the tyres mentioned in §60(5). But these were a purchase from the Republic. PM would be liable for VAT under the reverse charge for acquisitions, but would be entitled to deduct input tax of the same amount.

61. Ms O'Neill's witness statement also shows that another officer, Claire Scullion, issued "HMRC Dereg VETO" letters to the appellant and two others on 5 February 2013. These warned that "any input tax in relation to transactions involving this company (*sic*) which purport to have taken place after that date may fail (*sic* - fall?) to be verified". The appellant's evidence shows that another such letter was issued on 26 July 2013 by HMRC Special Investigations in Glasgow.

### **The appellant's dealings with QA and PM**

62. From Mr Armstrong's witness statement and the exhibits attached to that statement we have constructed the tables of deals set out in the Appendix. References to dates of transactions are to the dates on the relevant invoices exhibited by Mr Armstrong.

### **The appellant's dealings with QA**

63. Mr Armstrong relates in his witness statement that the appellant told him:

(1) He was contacted by James Quinn of QA directly and had no prior knowledge of him before 18 June 2012.

(2) He had never visited the address in Cullyhanna, Co Armagh.

(3) He was not aware of any website for QA

(4) The only check made by him of QA's credentials was to check the VAT number on the VIES Europa validation website.

(5) The cars were brought to Cookstown by Quinn.

(6) No order forms or written contracts were used.

(7) Prices were not negotiated

(8) All cars were VAT qualifying cars.

(9) At the beginning the appellant paid by cheque, but at Quinn's request the payee details were left blank. Mr Armstrong noted from the copy cheques that the payees were Auric, Altmore Motors ("Altmore") and James McCarville. The appellant was informed that QA owed money to suppliers and could not afford to wait 7 days for the cheque to clear.

(10) Later payment was made by bank transfer and CHAPS, referenced QA on the appellant's bank statements.

### **The appellant's dealings with PM**

64. Mr Armstrong relates in his witness statement that the appellant told him:

(1) He had been approached by PM at a car auction in Castledawson and was offered cars.

(2) He got a business card from PM but did not ask him where he got the cars from.

(3) He was not aware of any website for PM.

- (4) His first purchase was on 7 September 2012 (see Appendix deal 2).
- (5) PM came to Cookstown to show the cars.
- (6) Prices were not generally negotiated if they seemed reasonable.
- (7) No order forms or written contracts were used.
- 5 (8) Cars were delivered to the appellant's business premises in Cookstown.
- (9) All cars were VAT qualifying cars.
- (10) The appellant paid by cheque, but at PM's request the payee details for deals 2, 3, 4, 5 and 13 were left blank. Mr Armstrong noted from the copy cheques that the payees were RMC Autos, JRS, Moy Auto Services, (Moy"), and
- 10 GRCS.

**The appellant's dealings with customers in the Republic**

*Neil Finnegan (NF) (Deals 2 & 7)*

65. Mr Armstrong relates that:

- 15 (1) NF was registered for VAT in the Republic as a trader in oils on 7 May 2011.
- (2) NF is from Northern Ireland and holds a UK Passport, a copy of which was held by the appellant as ID for proof of an EU sale.
- (3) NF was compulsorily deregistered on 15 November 2012 with an effective date of 29 February 2012. Notice of NF's deregistration was given to the
- 20 appellant on 4 December 2012.

66. Mr Armstrong relates in his witness statement that the appellant told him or accepted that:

- (1) NF contacted AM at a time when he had no previous contact or knowledge.
- (2) AM did not know how NF got his details.
- 25 (3) All cars sold to NF were VAT qualifying cars and were zero-rated.
- (4) Payment was by bankers draft.
- (5) Cars were collected from Cookstown.
- (6) No due diligence or background checks were carried out save for a copy of the passport.
- 30 (7) Sales involved did not contain terms and conditions and there were no order forms.
- (8) AM had no proof the cars were registered in Ireland, and never supplied any.

*Michael Robinson (MR) (Deals 3, 5, 8 & 14)*

35 67. Mr Armstrong relates that:



(1) MR was registered for VAT in the Republic on 1 May 2012. No information about his business is given save that he traded as MR Trucks.

(2) VAT officers in the Republic were unable to trace MR at the VAT registered address.

5 (3) MR was compulsorily deregistered with an effective date of 31 August 2012 (but this had been backdated from a date not given). Notice of MR's deregistration was given to the appellant on 4 December 2012.

68. Mr Armstrong relates in his witness statement that the appellant told him or accepted that:

10 (1) AM knew MR as he was from Cookstown and had imported Japanese cars like AM.

(2) Due diligence/background checks were that AM obtained a copy of MR's driving licence, a copy of correspondence with the Irish Revenue Commissioners and a Europa VIES validation. The driving licence photo shows an address in  
15 Cookstown.

(3) AM thought MR lived in Kildare (in the Republic) but he had never visited him there.

(4) MR would ring AM regularly looking for cars, but only qualifying cars.

(5) Sales involved did not contain terms and conditions and there were no order  
20 forms.

(6) AM had received no proof the cars were registered in Ireland

*James McCarville (JM) (Deals 4 & 16)*

69. Mr Armstrong relates that:

(1) JM was registered for VAT in the Republic as a trader in wholesale food  
25 and beverage from 1 August 2012, under the name JMC Wholesaling.

(2) JM was compulsorily deregistered on 15 November 2012 with an effective date of 1 August 2012. Notice of deregistration was given to the appellant on 4 December 2012.

(3) JM first contacted AM when he arrived at the Cookstown premises with no  
30 previous appointment. AM had no previous contact with or knowledge of JM.

70. Mr Armstrong relates in his witness statement that the appellant told him or accepted that:

(1) AM did not know, and did not ask, how JM got his details.

(2) All cars sold to JM were VAT qualifying cars and were zero-rated by AM.

35 (3) Payment was by bankers draft.

(4) Cars were collected from Cookstown.

(5) Due diligence/background checks were<sup>4</sup> that AM obtained a copy of JM's passport photo and driving licence, a copy of correspondence with the Irish Revenue Commissioners, a blank trading invoice and a Europa VIES validation.

5 (6) Sales involved did not contain terms and conditions and there were no order forms.

(7) AM had no proof the cars were registered in Ireland.

### **The UK VAT registered customers in the deals**

71. Euro Auto Salvage Ltd ("Euro") (deal 1) is UK VAT registered and are a local car dealer in Coagh, Co Tyrone near Cookstown. Purchase records of the appellant  
10 show a vehicle bought by him from Euro Auto Salvage Ltd on 5 April 2012.

72. McGrath Motors (deals 6, 10 and 15) is UK VAT registered and are a local car dealer in Cookstown.

73. R & M Greenkeepers (deal 11) is UK VAT registered and are a local greenkeeping and skip hire business in Cookstown. Deal 11 relates to a tractor.

15 74. KL Autos Ltd (Deals 9 and 13) is UK VAT registered and is a car dealer in Peterlee, Co Durham.

### **Other UK suppliers to the appellant before 09/12**

75. Mr Armstrong's witness statement gives details of other UK sellers to the appellant. In one case (Sava) AM gave similar information to Mr Armstrong to that  
20 about his purchases from QA and PM. In others bare details only of their VAT history are given, save in the case of Hughes Car and Van ("Hughes") from whom AM bought 29 vehicles between April 2011 and August 2012. Hughes are said to be part of a "duplicate chain with McCord reference deal 2", with Hughes selling to JM, and part of a "duplicate chain with McCord reference deal 7" with Hughes purchasing from  
25 Altmore and selling to Gregory Brady.

76. The appellant admitted to Mr Armstrong that Altmore, Moy and GRCS are near him, and that Moy and GRCS are known to him.

### **Other customers from the Republic of the appellant before 09/12 and after 10/12**

77. Lee Adams was a customer of AM between 01/11 and 12/11 for cars to the value  
30 of £376,100 (all zero-rated). Lee Adams was deregistered in the Republic as from 14 November 2011 and AM was informed of this by HMRC on 16 November.

78. Ruairi McNulty was a customer of AM between 10/11 and 07/12 for cars to the value of £497,765 (all zero-rated). He was deregistered in the Republic as from 31 December 2012. AM gave details of his contacts with McNulty to Mr Armstrong which

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<sup>4</sup> We find it unsatisfactory that Mr Armstrong said in his witness statement that "No due diligence or background checks were carried out" and then proceeded to list five exceptions to this categorical statement. He did not say what else was supposed to have been done by the appellant in this regard. The same comment applies to the information about MR where there were three exceptions.

followed the pattern of his dealings with QA and PM. He had been informed of the deregistration of McNulty on 26 September 2012 by HMRC.

79. Bloodstone Developments Ltd (“BDL”) was a customer of AM between 01/13 and 12/13 for cars to the value of £61,100. BDL was deregistered in the Republic as  
5 from 19 March 2013. Nothing is said about whether AM was informed of this by HMRC.

80. Gavin Murphy was a customer of AM between 07/13 and 12/13 for cars to the value of £200,800 (all zero-rated). Gavin Murphy was deregistered in the Republic as  
10 from 11 November 2013. Nothing is said about whether AM was informed of this by HMRC.

### **Other aspects of the “chains” including duplication.**

81. In the course of his witness statement, and in particular in the parts relating to the 16 deals in detail, Mr Armstrong has supplied information about some predecessor transactions (ie sales to QA and PM) and some successor transactions (sales by the  
15 appellant’s customers in those deals) and some other transactions in the same vehicle which appeared to HMRC to be simultaneous. These details are set out in the appendix after the tables relating to the relevant deal.

### **The appellant’s evidence**

82. In his witness statement the appellant sets out details of all his transactions  
20 involving QA and PM and to his statement he attached the documents he had relating to each deal. He also attached:

- (1) documentation (passport photos and correspondence from the Irish Revenue Commissioners) relating to four Irish purchasers from him (Neil Finnegan, James McCarville, Michael Robinson and Gavin Murphy).
- 25 (2) correspondence from HMRC about the deregistration of PM.
- (3) correspondence from HMRC about the deregistration of QA.
- (4) VIES validation checks for QA (18 June, 7 and 24 September, 17 and 29 October 2012 and dates into 2013).
- (5) VIES validation checks for PM (11 and 17 September and 17 October  
30 2012).
- (6) A business card for QA.
- (7) The *Kittel* refusal of deduction letter of 12 September 2014 with the appellant’s annotations on the schedule of deals.

83. The witness statement itself states that:  
35 (1) all the impugned deals were “valid commercial transactions” carried out by him trading as HiOctane Imports “in a highly diligent manner”.

(2) He did not and still does not have any reason to believe that any of the transactions formed part of a chain of transactions that involved wrongdoing by any party.

5 (3) He took extreme caution to ensure that all necessary paperwork was supplied by customers and full “proofs” as set out in HMRC Guidelines were obtained.

84. In his examination in chief the appellant was asked what advice he had received from HMRC. He said that he was told by them in 2011 to obtain the registration numbers of the purchasers of the cars.

10 85. Asked when he was first aware that QA and PM might be involved in fraud he said that it was when Mr Armstrong told him.

86. He explained that his mother (at whose address he lived) did the books of the business and that he kept a book in which his deals were recorded.

15 87. The appellant was cross-examined on his statement and evidence. We group his responses to Ms Wilson-Barnes’ questions and his other evidence into a number of themes.

#### *Due diligence*

20 88. Asked by Ms Wilson-Barnes why he said he needed to take “extreme caution” in the paperwork, the appellant said that he had had 4 letters about traders being deregistered: it was not because he was aware of fraud in the type of business he was doing. He agreed the only documentation he got from QA was a business card and that his only check on QA was a VIES one on the date of the deal. He would have had a Companies House check but had not retained it.

25 89. He accepted that in Deal 1 the purchase date was 6 September but the VIES check was dated 7 September. He suggested that his mother may have done it in advance but not put it in the file.

30 90. He had obtained photocopies of the passport or driving licence and Irish VAT details from each of the purchasers of cars from him in the Republic, and he had done VAT validations on all deals, taken registration details of purchasers arriving from the Republic and notified the DVA<sup>5</sup> of all sales and copied the V5.

91. He had not received the VAT 726 until Mr Armstrong gave him one in January 2013.

92. He did not know that PM was registered as a plasterer. “How could I know?” He agreed he didn’t ask. He had met him at an auction and followed up with phone calls.

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<sup>5</sup> In Northern Ireland the relevant agency is the DVA, rather than the DVLA in Great Britain.

### *The cars*

93. Ms Wilson-Barnes asked him why there was no service history or MOT details in his records. He said that in the kind of business he was in they were irrelevant - “no one would ask for a service history”. The vehicles were not MOT-able (one was a lorry). He said that he always took possession of the cars he bought.

### *Negotiations*

94. Ms Wilson-Barnes asked what negotiations on price he did in the deals. He said generally none – “the price is the price”.

### *Third party cheques*

95. The appellant was asked whether he thought it suspicious that he was asked to give blank cheques to QA and PM. He said it was no cause for concern to him, and if it indicated that the purchasers had financial problems that was not his problem.

### *Purchases and sales*

96. In deal 1 Ms Wilson-Barnes said that he had sold the car and received payments on 7 September but did not pay QA until the 12 September according to the bank statements. She asked him whether it was correct that QA were prepared to let him sell the car before they had been paid and was this not contrived and showing a connection to VAT fraud? He replied no to both questions. He also said that it was well known in the trade that he never bounced cheques.

97. Ms Wilson-Barnes also asked about the apparent parallel trades as set out in Mr Armstrong’s witness statement about Deal 1. He agreed that the statements about his dealings were correct. Was it not strange, Ms Wilson-Barnes asked him, that they were all buying and selling the same vehicle? He did not think so. Wasn’t it true that he knew full well that this was tied up with VAT fraud? He denied it saying he paid VAT and he charged VAT.

98. In relation to Deal 2 the appellant was asked about the blank cheque he gave and the fact that he was able to sell the same day to Neil Finnegan who he had not dealt with before. Was it not too good to be true? He disagreed. He added sarcastically that it was “easy” and suggested Ms Wilson-Barnes try it: “she would make as much money as him”. He mentioned here, for the first time HMRC said, that he put the cars on his website which said “Export enquiries welcome”.

99. In relation to Deal 7 where HMRC say there were parallel sales the appellant said he had never seen that happen. At this point he revealed that he had not previously seen Mr Armstrong’s witness statement.

100. In relation to Deal 11 Ms Wilson-Barnes queried why it was done on a Sunday. The appellant replied “So what? You’re picking at straws.”

101. Other responses were to the effect that his “focus is on cars, not on people”, that he carried out checks that were required by HMRC Guidelines that he was aware of from eg his accountant.

### **Grounds of appeal**

102. In his grounds of appeal set out in the notice of appeal the appellant said:

- 5 (1) He had properly carried out all of the “refused” transactions and had paid input tax in relation to each vehicle and kept meticulous records in relation to them.
- (2) He had complied with all guidelines in relation to zero rated sales and had no knowledge or reason to believe the sales transactions were other than bona fide.
- 10 (3) He had retained sufficient data in relation to each transaction and customer to satisfy the requirements of the statutory guidelines.

### **Submissions by HMRC**

103. In relation to the appellant’s evidence Ms Wilson-Barnes commented that:

- 15 (1) It was disturbing that the appellant had not seen Mr Armstrong’s witness statement until the day of the hearing
- (2) There was a paucity of due diligence, and VIES checks were done on the date of the deal
- (3) There was no evidence of the appellant being given advice by HMRC that a registration number check was sufficient
- 20 (4) It was incredible that the appellant had no inkling of any fraud. But why then did he get passports and validation of purchasers if he had no suspicion of fraud?
- (5) It was equally incredible that all the sellers and buyers approached him and that it was all done by phone so quickly.
- (6) There was no explanation of how the deals came about until the day of the hearing.
- 25 (7) The deregistration details he was given must have been of concern to him.
- (8) There were obvious risks to him as in Deal 4.
- (9) It was odd he was not aware of the parallel trades, and that they don’t bother him.
- 30 (10) He turned a blind eye to the obvious problems with QA and PM.
- (11) QA was putting a “huge degree of trust” in him when he sold a vehicle before paying them for it – was this likely if he was not in the loop?
- (12) It is all simply not credible, neither his witness statements nor his account today.

35 104. Ms Wilson-Barnes said that, applying the usual tests in MTIC cases, the first question is whether there was a tax loss which involve fraudulent evasion. The unchallenged witness evidence of the HMRC witnesses shows there was. Both QA and PM were registered for short periods and failed to declare substantial sums of VAT

without any explanation. Those losses were part of an orchestrated scheme to defraud the Revenue.

105. The second question is whether the appellant's transaction were connected to tax losses. They clearly were as he purchased direct from the defaulting traders.

5 106. The third question is whether the appellant either knew or alternatively should have known that his transactions were connected with the fraud.

107. In support of their submission that the appellant was an aware participant in the frauds ("knew") or that the only reasonable explanation ("should have known") for the lack of commercial reality in the trades was that they were connected to fraud means  
10 that he should have known of that connection, HMRC rely on:

(1) The appellant's awareness by early September 2012 of the incidence and characteristics of VAT fraud such that he knew he had to take extreme caution and exhibited the due diligence checks he carried out.

15 (2) His due diligence however on QA and PM was not meaningful and was wholly inadequate.

(3) The fact that he never queried or investigated the recent VAT registration of QA and PM, and his first VIES check was on the day of the first deal.

(4) The blank cheques. Even if he was told it was because QA needed money, that in itself should have been a concern given QA's newness.

20 (5) Vehicles were exchanged and collected before the cheque had cleared, which was casual and uncommercial.

(6) The underlying lack of paperwork and general lack of commercial reality (no written contracts and no order forms) showed that the deals were uncommercial and lacking every facet of legitimate arm's length trading.

25 (7) The customers in Ireland were ones he had never dealt with before or did not know well. McCarville was registered to deal in wholesale food and beverage but the appellant chose to deal with him.

30 (8) It was unrealistic that the appellant was able to make a quick profit by there being a supplier and customer both previously unknown to him, particularly in a place like Cookstown where dealers would be known to each other. The deals were obviously contrived.

(9) There was no due diligence on customers, and in the sales to the Republic no order forms or terms and conditions.

(10) The parallel deals where prices were inconsistent (eg Deals 2 and 10).

35 (11) There was a large increase in turnover from 2009 to 2012 though no capital was introduced nor were there any economic reasons for this increase.

108. In summary HMRC say that, looked at in context, the transactions on which input tax is claimed were inherently suspicious given the lack of any previous history (except for QA from June 2012); the knowledge of blank cheques and the inconsistency

regarding PM’s registration. Those features point to the transactions being contrived and orchestrated as part of an MTIC fraud and the appellant knew or must have known of that fact, or should have known that the only reasonable explanation was such fraud.

### **Submissions by the appellant**

5 109. In his skeleton Mr Manley argued that:

(1) The appellant does not dissent from the statement that QA and PM are defaulting traders and that the tax losses stated by HMRC occurred. Nor do they contest that the appellant’s transactions were connected with those losses.

10 (2) The appellant carried out due diligence not only on QA and PM but as part of his regular statutory checks on all purchasers and vendors of vehicles. It was done in compliance with HMRC guidelines.

(3) The appellant did not make significant financial gains from the fraudulent scheme.

110. In his closing submissions Mr Manley made some further points.

15 (1) There were a number of transactions in the period with non-defaulting traders

(2) The appellant could only have access to publicly available documents.

20 (3) There was no official guidance on MTIC fraud given to the appellant at the time of the deals. Education by HMRC should have taken place earlier if fraud was rife in the trade.

(4) There is nothing illegal or untoward about third party cheques: they looked bona fide at the time.

25 (5) In essence the appellant had done his best, had kept a paper trail for all the transactions. He did not know, nor could he have known of the fraud in the transactions.

### **Discussion**

111. In her skeleton Ms Wilson-Barnes says, under the heading “Connection with fraud” that the question whether the transactions were “connected” to a tax loss can be broken down into the following issues:

30 (1) Is there a tax loss? <sup>[1]</sup><sub>[SEP]</sub>

(2) If so, does that tax loss result from fraudulent evasion? <sup>[1]</sup><sub>[SEP]</sub>

(3) If there is fraudulent evasion, were the Appellant’s transactions connected with that <sup>[1]</sup><sub>[SEP]</sub> evasion? <sup>[1]</sup><sub>[SEP]</sub>

35 (4) If they were connected, did the Appellant know or should the Appellant have known <sup>[1]</sup><sub>[SEP]</sub> that its transactions were connected with the fraudulent evasion of VAT? <sup>[1]</sup><sub>[SEP]</sub> <sup>[1]</sup><sub>[SEP]</sub>

112. As HMRC point out these questions have been approved by superior courts, eg in *Blue Sphere Global Ltd v HMRC* [2009] EWHC 1150 (Ch) (Sir Andrew Morritt C)



*Was there a fraudulent tax loss?*

113. We think it is sensible to take the first two questions together, so that the first question for our decision is whether there was a tax loss brought about fraudulently by either QA or PM.

5 114. We are of course mindful of the *Fairford* directions given in this case. To repeat, they say:

“1. It shall be assumed at the hearing of this appeal that ... the tax losses on which the Respondents rely occurred as stated by them, and no challenge by the Appellant to such matters shall be entertained;

10 2. The Respondents may rely at the hearing of this appeal upon the witness statements of Garth Armstrong, Bernadette O’Neill, Lisa Wilkinson, and Paul Goodman served in this appeal and on the exhibits to those statements without calling the witnesses to give oral evidence and without tendering them for cross-examination, and no challenge to  
15 the accuracy of what is set out in the witnesses’ statements shall be entertained.”

115. We do not read these directions as saying that it must necessarily be held by the Tribunal that there are tax losses arising from the fraudulent behaviour of QA and PM, and that we are not able to make a decision on this issue ourselves. What we take it to  
20 mean is that the evidence that HMRC put forward to substantiate their claim that there were tax losses cannot be challenged by the appellant, and that we must accept as fact and only consider the evidence so put forward.

116. What then does the evidence show? The evidence in relation to QA we have is in Ms Wilkinson’s witness statement and is summarised at §56. In that statement Ms  
25 Wilkinson sets out her conclusions from the evidence which are:

(1) At least 140 vehicles were sold by QA in 09/12, with up to 7 being bought and sold the same day on some occasions, so it was impossible to see how one man, Mr Quinn, could have collected and delivered all the vehicles as he had, on his own account, no premises.

30 (2) Mr Quinn was employed on a casual basis for another motor trader for whom he carried out delivery of trucks and haulage and vehicle recovery.

(3) Some cars appeared to have been traded twice in a short space of time.

(4) There is no obvious explanation for the purchases so substantially exceeding sales given that QA said it bought to order and did not hold stock, nor  
35 for the funding of that position.

(5) No evidence to support the zero-rating of the dispatches has been supplied, so £14,583 VAT that should have been charged is due. No EC Sales Lists were produced to HMRC.

40 (6) Dispatches to QA of at least £236,369 have been declared by other MS traders in 09/12, nearly all from the Republic, but which have not been declared by QA, which casts doubt on the accuracy of the return.

(7) No trades after 09/12 were declared by QA, but output tax of £231,458 would have arisen on known sales in the UK.

(8) In a previous business registered for VAT in 2007 Mr Quinn had gone missing owing over £140k in central (estimated) assessments.

5 and accordingly it was her opinion that QA had dishonestly failed to “remit” (ie pay) VAT.

117. The evidence for the quarter 09/12 shows that QA did in fact make a VAT return and it shows a repayment due which has not been made. HMRC say (see §116(5)) that the return understates output tax by £14,583 because there is no evidence to support  
10 zero-rating of certain sales. It is not clear to us if HMRC are saying that QA was asked for and did not supply that evidence or if such evidence is required to be produced with a VAT return. Either way this is not evidence of a tax loss and cannot in any case relate to vehicles QA sold to the appellant which were not zero-rated.

118. Ms Wilkinson also points (see §116(4)) to an excess of purchases over sales in  
15 the return of £265,410 for which there is no obvious explanation, given James Quinn’s statement in 2013 that he buys to order and given the fact that QA does not have premises. We note that eliminating that excess (which does not take into account EU dispatches) and adding a small profit margin would not necessarily cause any VAT to become due for the period. But Ms Wilkinson does not suggest that there were  
20 unrecorded sales or that such sales are a more likely explanation than that QA had substantial stock on hand at the quarter end. Nor does Ms Wilkinson suggest that it is likely that QA’s sales to the appellant, on which he charged VAT, were not included in the reported outputs.

119. The statements also say that there are unrecorded EU acquisitions in the period  
25 of £228,426 (see §116(6)). But she admits that the acquisition tax paid would not affect the VAT return (because of the ability to claim it as input tax) but that onward sales of the cars so acquired would have yielded additional VAT of some £47,000. There is no evidence given that there were UK sales of the vehicles in that quarter. But we note that there is some evidence in Mr Armstrong’s witness statement (paragraph 209) that  
30 the vehicle in Deal 8 may have been an EU acquisition by QA because the defendant’s blank cheque was made out to JMC Wholesaling (James McCarville).

120. But in our view this evidence, even when considered with the totality of Ms Wilkinson’s statement, does not demonstrate that there was a tax loss for which QA was responsible in the quarter 09/12 nor that any tax loss results in relation to the  
35 vehicles sold to the appellant in that quarter.

121. For the quarter 12/12 (see §116(7)) there is no VAT return so the VAT on sales to the appellant has not been accounted for. HMRC rightly say that there is a large under-declaration of output tax, but they also go on to say, correctly in our opinion, that because it is not possible to know what input tax would have been deductible (and it  
40 might have been all incurred on taxable purchases) it is possible that QA was a “buffer”, and the inability of HMRC to have any meaningful contact with QA is indicative of a trader acting as a “blocker” and deliberately trying to frustrate HMRC’s investigations.

122. It seems to us that this admission undermines the case made by HMRC for a fraudulent tax loss in 12/12. A “buffer” is a trader which is inserted between a defaulting trader and a subsequent exporter who reclaims VAT, and who, at least in the classic mobile phone and computer CPU MTICs, buys and sells for a small profit leading to an equally small VAT bill, and this is consistent with what Ms Wilkinson says at §56(3) about QA’s 06/12 return. HMRC therefore do not seek to show for 10/12 that the appellant’s deals were ones where any VAT for which QA was liable was inevitably going to be both due and unpaid whether fraudulently or not.

123. It is of course equally likely that QA was a buffer in 09/12 which is another reason for our conclusion, and so in relation to both quarters covering the appellant’s impugned purchases from QA, we find that HMRC have not demonstrated that there was a tax loss incurred by QA with which the appellant was connected.

124. If there was no tax loss, there cannot have been a fraudulent tax loss, nor can the appellant be connected with such a loss, nor could he have known of, or had the means to obtain knowledge of such a loss. As a result we uphold the appellant’s appeal so far as it related to vehicles acquired from Quinn Autos Ltd.

125. We find a little support for our decision on this matter in relation to QA in the terms of s 77A VATA which imposes joint and several liability on persons in the appellant’s position if:

“at the time of the supply the person knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or on any previous or subsequent supply of those goods, would go unpaid.”

This is clearly intended as a rendering into the language of UK statutes the tests laid down by the ECJ for denying a deduction for input tax to those who are not themselves fraudulent traders. If this condition is met then what the person may be made liable for is:

“the VAT so payable that is unpaid”.

126. As for Patrick McGourty the evidence we have is in Ms O’Neill’s witness statements and is summarised at §60. In that statement Ms O’Neill sets out her conclusion from the evidence which are:

- (1) PM did not submit any VAT returns or provide any records to HMRC.
- (2) No VAT was declared on any sales made by PM to other traders including the appellant.
- (3) She prepared an assessment schedule from PM sales invoices and issued a VAT assessment for £196,014. The assessment was not appealed and the VAT is unpaid.
- (4) PM described his business as plasterer on his registration application.
- (5) He had no place of business other than a residential address.

and accordingly it was her opinion that PM had dishonestly failed to “remit” (ie pay) VAT and was, in effect, a missing trader.

127. We are satisfied from this evidence that Patrick McGourty did dishonestly fail to pay VAT it owed and is properly characterised as a “missing trader” and that the fraudulent loss of tax is one with which the appellant is connected because he bought vehicles from PM.

5 *Did the appellant know or have reason to know about PM’s fraud?*

128. In relation to the PM purchases we therefore have to go on and determine if the appellant knew or should have known that they were connected with fraud. In so doing we consider all the circumstances, not only of the deals involving purchases from PM, but also those with QA, and also of the transactions which were carried out by the  
10 appellant in the two months in issue which were not impugned and transactions carried out by the appellants in other periods so far as we have the evidence about them. In so doing we are following the guidance given in *Red 12 Trading Ltd v HMRC* [2009] EWHC 2563 (Ch) (Christopher Clarke J) at [111]:

15 “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.”

129. We consider the submissions of the parties under the same broad headings that  
20 we divided HMRC’s submissions into.

*Due diligence generally & customers*

130. We are very mindful that in *Mobilx Moses LJ* stressed that due diligence should not be over-emphasised. But it was an important part of HMRC’s submissions.

131. In our view those submissions were misdirected. First, the appellant had not been  
25 given VAT 726 or had its requirements explained to him. This is not surprising as Paragraphs 1.3 and 1.4 of the Notice confine its application to specific goods which do not include cars or other vehicles.

132. When the appellant referred to HMRC Guidelines by which he operated we find  
30 that what he had in mind was what he had been told by HMRC or his accountant and he may have had in mind VAT Notice 725, particularly as it contains specific requirements for deals across the border with Ireland. The passage in VAT 725 that we have emphasised refers to the “extra caution” that someone should take in circumstances very like those in the impugned deals. But VAT Notice 725 does not lay  
35 down requirements for second hand car dealers when they *purchase* from other UK suppliers. It does apply to the appellant’s sales to his customers in the Republic such as Michael Robinson and JMC. But HMRC made no suggestion that he had failed to comply with what are legal requirements in VAT 725, nor did they ever argue that the sales he made to the Republic should not have been zero rated.

133. It seems to us that what the appellant did by way of due diligence on his customers  
40 where zero rating was in issue was sensible and prudent and looked at on its own goes nowhere near showing that the appellant knew or should have known that his purchases and sales were connected with fraud. “Extreme caution” seems to us a phrase that was

5 planted into the appellant's mind, possibly as a slight miscomprehension of the wording "extra caution" in VAT 725: it certainly exaggerates what he actually did. And the appellant did admit he had received some deregistration notices before September 2012, though not in relation to those he was dealing with in 09/12 and 10/12. But none of this matters.

*Dealings with QA & PM*

10 134. HMRC say that the appellant should have been alerted to the fraudulent nature of the dealings with QA and PM because both were newly registered and PM's business as disclosed to HMRC was that of plasterer. The appellant says he did VIES checks repeatedly, obtained business cards and other forms of ID and did a Companies House search on QA. But his main response was that he focused on the cars, not the people. HMRC say that if one does focus on the cars there were no service records or MOTs obtained.

15 135. We agree with HMRC that the VIES checks on PM and QA were not made in advance of deals and were less than complete. But we agree with the appellant that service records are of little relevance in intra-trade deals and it was the appellant's evidence, which was not contradicted, that the vehicles did not need an MOT<sup>6</sup>.

*Third party cheques & other financing issues*

20 136. We do not place any great significance on the fact that in certain deals, but not all, the appellant signed a cheque leaving the payee, but nothing else, blank. There was no risk to him and we do not see why the position should be thought to be suspicious enough to suggest fraudulent evasion of VAT. The explanation given by QA that they owed money to creditors does not seem to us to carry any implication that the purchase might be connected to fraud. And in many deals it was not done, but HMRC do not say that those deals were not tainted.

25 137. Nor do we see what HMRC are implying when they point out that in one case the appellant sold a car before the cheque he gave the person he purchased it from had been debited to his bank account. That person (or the intended payee of the cheque) was taking a risk that the appellant was good for the cheque, but we accept his evidence that he had a reputation for never having a cheque bounce and so he was trusted.

30 138. The implication must be from HMRC that the seller to the appellant was not concerned because he was in league with the purchaser of the car from the appellant so knew he could reclaim the vehicle if the cheque bounced. That might be true, but it was not a regular feature of the deals and would not, in our view, alert the appellant to the possibility of there being a fraudulent and contrived transaction.

*Too good to be true?*

139. The appellant says that the fact that James Quinn of QA and Patrick McGourty, previously unknown to him, approached him and that three purchasers from the

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<sup>6</sup> For what it is worth it seems to us that where we can date a car's registration (ie Great Britain plates, not Northern Ireland) the vehicles that were within the scope of MOT testing were under the MOT threshold.

Republic, two of whom were unknown to him, also approached him within a very short period to purchase the cars was a coincidence. He told the Tribunal that he had offered the cars for sale on his website where he encouraged export enquiries, something he had never previously mentioned. Such an assertion made from the witness box could obviously not be checked by HMRC at the hearing, as they would have to do an “Internet Memory” search to find out the state of his website in September and October 2012. We give it no weight. In our opinion the arrival unannounced of UK sellers and purchasers from the Republic at such convenient times was too good to be true and was not a coincidence. We think it more likely than not that the purchasers and sellers were in league and that the deals were contrived. The deals here are numbers 2, 3, 4, 5, 7, 8, 14 and 16, of which 2, 3, 4 and 5 were purchases from PM and the rest from QA.

*Not too good to be true?*

140. What we say in §139 applies, as we have said, to the Irish sales. We can see no reason why the appellant should have been alerted even to the possibility of fraud where the purchaser was in the UK, known to the appellant and being charged VAT which the appellant accounted for. All the more is this the case in the transaction where the vehicle was taken into stock by the appellant for more than a year, or where the vehicle was a tractor sold to a local firm of greenkeepers. The only thing these deals have in common with the sales to the Republic is that the seller to the appellant was QA or PM. In these quarters there were other similar deals which HMRC do not challenge because they did not involve QA or PM.

**Overall conclusion**

141. From the matters we have set out here we consider that on the basis that the deals were obviously contrived and too good to be true, the appellant should have known that deals 2, 3, 4 and 5 were connected with the fraud of PM. But in the light of our findings about QA we do not need to consider this question in relation to deals 7, 8, 14 and 16.

142. Accordingly the input tax claimed for 09/12 falls to be reduced by £26,875 and the balance of the repayment claim falls to be made, and the whole repayment claim for 10/12 falls to be made.

143. 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.

**RICHARD THOMAS  
TRIBUNAL JUDGE**

**RELEASE DATE: 12 November 2018**

## APPENDIX

144. The “deals” in the two monthly periods which HMRC have refused to allow the input tax on are set out below (all figures are £ and VAT is UK VAT). The names of customers in bold italics are those who are registered for VAT in the Republic.

### 5 Deal 1

*DAF 45 Lorry HX53NZO*

Date on invoice	Seller	Purchaser
6/9/12	Q Autos	The appellant
7/9/12	The appellant	Euro Auto Salvage

	net price	VAT
Purchase price to AM	6,000	1,200
Sale price from AM	6,500	1,300

145. In relation to the Deal 1 vehicle, HMRC say that NF bought the vehicle for £4,600 on 3 August 2012 for cash from James Black, a director of Lisburn Auto Salvage Ltd and had been “used in the business”.

146. The deal documentation shows that Euro acquired the vehicle from the appellant on 7 September 2012 for £6,500 plus VAT. It also shows a Euro invoice for the sale of the vehicle on 11 October 2012 to MR for £6,750 with no VAT.

147. HMRC made enquiries of Trevor Ferguson of Euro who said that he bought the vehicle from the appellant on 7 September 2012 but that Euro sold it to GRCS. Later he told HMRC that in fact he had been contacted by the appellant (who had retained custody of the vehicle) to say that he had found a buyer and offered to cut Ferguson in for £200-£300. That customer was, said Ferguson, MR and the sale to them was on 11 October 2012.

148. GRCS records show that they bought the same vehicle from Lafferty Moore on 20 September 2012 for £8,600 (no VAT). The “tax book” shows that GRCS acquired the vehicle on 7 September 2012.

149. DVLA records show the keepers as James Black, Lisburn Auto Salvage, HiOctane Imports (the appellant), Euro, Amy Mullen Cars and GRCS as last keeper from 7 September 2012.

### Deal 2

*Ford Focuses HK11BXE and EX11DDU*

<b>Date on invoice</b>	<b>Seller</b>	<b>Purchaser</b>
7/9/12	Patrick McGourty	The appellant
7/9/12	The appellant	<i>Neil Finnegan</i>

	<b>net price</b>	<b>VAT</b>
Purchase price to AM	17,500	8,750
Sale price from AM	18,500	0

150. In relation to the Deal 2 vehicle HMRC enquiries into GRCS' records show one of the 2 vehicles was purchased by them from PM for £8000 plus VAT invoice date 27 September 2012. GRCS sold to NF for £9,250 on 28 September 2012.

- 5 151. Information given to HMRC by the Irish Revenue Commissioners was that Hughes sold both vehicles to JM for £17,000 (on 20 and 21 September 2012) and that the vehicles were dispatched back to the UK to Chambers (NI) Ltd for £17,200 on 19 September 2012.

### **Deal 3**

- 10 *Mercedes C250 DN12VZB*

<b>Date on invoice</b>	<b>Seller</b>	<b>Purchaser</b>
13/9/12	Patrick McGourty	The appellant
17/9/12	The appellant	<i>M Robinson</i>

	<b>net price</b>	<b>VAT</b>
Purchase price to AM	24,375	4,875
Sale price from AM	25,700	0

### **Deal 4**

*Porsche Cayenne KFZ6451*

<b>Date on invoice</b>	<b>Seller</b>	<b>Purchaser</b>
17/9/12	Patrick McGourty	The appellant
21/9/12	The appellant	<i>James McCarville</i>



	<b>net price</b>	<b>VAT</b>
Purchase price to AM	53,000	10,600
Sale price from AM	55,000	0

152. HMRC enquiries showed that the vehicle was bought by Moy from Porsche Centre Belfast invoice dated 30 August 2012 for £51,520.62 plus VAT £10,304.12, and that Moy sold it to Athboy Bio Fuels invoice dated 11 September 2012 for £56,250.

- 5 153. Information given to HMRC by the Irish Revenue Commissioners was that JM dispatched the vehicle back to PM invoice dated 24 September 2012 for £55,750.

154. DVLA records show the keepers as Stuart McNiece (Moy), Roy Wilson cars and Johnny Stinson (of JRS) from 8 January 2013.

#### **Deal 5**

- 10 *Toyota Avensis MV12ZMK*

<b>Date on invoice</b>	<b>Seller</b>	<b>Purchaser</b>
19/9/12	Patrick McGourty	The appellant
19/9/12	The appellant	<b><i>M Robinson</i></b>

	<b>net price</b>	<b>VAT</b>
Purchase price to AM	13,250	2,650
Sale price from AM	14,000 <sup>7</sup>	0

#### **Deal 6**

*Toyota RAV4 No registration*

<b>Date on invoice</b>	<b>Seller</b>	<b>Purchaser</b>
21/9/12	Q Autos	The appellant
24/9/12	The appellant	McGrath Motors

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<sup>7</sup> £14,000 is the figure in the appellant's witness statement and in the exhibits to it. Paragraph 202 of Mr Armstrong's witness statement say £1,400, an obvious typo.

	<b>net price</b>	<b>VAT</b>
Purchase price to AM	14,583.33	2,916.67
Sale price from AM	15,000	3,000

**Deal 7**

*BMW 520 YB12ZHW*

<b>Date on invoice</b>	<b>Seller</b>	<b>Purchaser</b>
21/9/12	Q Autos	The appellant
24/9/12	The appellant	<i>Neil Finnegan</i>

	<b>net price</b>	<b>VAT</b>
Purchase price to AM	25,000	5,000
Sale price from AM	26,500	0

5 155. HMRC enquiries into Taylors Service Centre Ltd (“Taylors”) show the vehicle was purchased by them from Synter Sunningdale for £24,458.33 plus VAT £4891.67 invoice date 21 August 2012. Taylors sold to David MacMahon for £25,500 invoice date 31 August 2012.

10 156. HMRC enquiries into Hughes show the vehicle was purchased by them from Altmore Motors for £22,291.66 plus VAT £4458.3 invoice date 31 August 2012. Hughes sold to Gregory Brady for £23,125 plus VAT £4625 invoice date 22 August 2012.

157. HMRC enquiries into GRCS’ records show the vehicle was purchased by them from PM for £25,000 plus VAT invoice date 20 September 2012. GRCS sold to Keith Corcoran for £26,250 invoice date 21 September 2012.

15 **Deal 8**

*BMW 520 YK12ULS*

<b>Date on invoice</b>	<b>Seller</b>	<b>Purchaser</b>
20/9/12	Q Autos	The appellant
27/9/12	The appellant	<i>MR Trucks (M Robinson)</i>

	<b>net price</b>	<b>VAT</b>
Purchase price to AM	23,750	4,750
Sale price from AM	25,000	0

**Deal 9**

*Mitsubishi L200 TJZ9475*

<b>Date on invoice</b>	<b>Seller</b>	<b>Purchaser</b>
25/9/12	Q Autos	The appellant
26/9/12	The appellant	KL Autos Ltd

	<b>net price</b>	<b>VAT</b>
Purchase price to AM	4,583.33	916.67
Sale price from AM	5,000	0

5 158. DVLA Records show PM as a previous keeper as at 26 September 2012.

159. HMRC enquiries into GRCS' records show the vehicle was purchased by them from QA for £15,333.33 plus VAT £3,066.67. GRCS sold to NF for £16,400 invoice date 25 September 2012.

**Deal 10**

10 *Audi FY61YKD*

<b>Date on invoice</b>	<b>Seller</b>	<b>Purchaser</b>
20/9/12	Q Autos	The appellant
20/9/12	The appellant	McGrath Motors

	<b>net price</b>	<b>VAT</b>
Purchase price to AM	13,666.66	2,733.34
Sale price from AM	14,500	2,900

**Deal 11**

*Holland Tractor PL06MHA*

<b>Date on invoice</b>	<b>Seller</b>	<b>Purchaser</b>
1/10/12	Q Autos	The appellant
7/10/12	The appellant	R & M Greenkeepers

	<b>net price</b>	<b>VAT</b>
Purchase price to AM	19,250	3,850
Sale price from AM	19,800	3,960

**Deal 12**

*Mercedes E250 DXZ4611*

<b>Date on invoice</b>	<b>Seller</b>	<b>Purchaser</b>
15/10/12	Q Autos	The appellant
5/11/13 <sup>8</sup>	The appellant	Gavin Murphy

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	<b>net price</b>	<b>VAT</b>
Purchase price to AM	14,791.67	2,958.33
Sale price from AM	15,000	0

160. HMRC enquiries into Jason Stinson (JRS) show the vehicle was purchased by them invoice dated October 2012 (no day shown) from PM for £16,000 plus VAT £2,800. JRS sold to GRCS for £16,500 invoice date 8 October 2012.

161. GRCS sold to NF for £16,400 invoice date 20 October 2012 for £17,500.

10 **Deal 13**

*Mazda Double Cab Lorry CE53WZV*

<b>Date on invoice</b>	<b>Seller</b>	<b>Purchaser</b>
11/10/12	Patrick McGourty	The appellant

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<sup>8</sup> 13 (Thirteen) is correct

15/10/12	The appellant	KL Autos
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	net price	VAT
Purchase price to AM	1,104.17	220.83
Sale price from AM	1,500	0

#### Deal 14

*Toyota Yaris RNZ4057, Mercedes E350 RNZ7275 & BMW 520D LB10EPV*

Date on invoice	Seller	Purchaser
22/10/12	Q Autos	The appellant
23/10/12	The appellant	<b>MR Trucks</b> <i>(M Robinson)</i>

	net price	VAT
Purchase price to AM	41,208.33	8,241.67
Sale price from AM	44,450	0

5 **Deal 15**

*Audi A4 VA12CEX*

Date on invoice	Seller	Purchaser
30/10/12	Q Autos	The appellant
31/10/12	The appellant	McGrath Motors

	net price	VAT
Purchase price to AM	17,291.67	3,458.33
Sale price from AM	17,708.33	3,541.67

#### Deal 16

*Mercedes C63 MV60YNP*

<b>Date on invoice</b>	<b>Seller</b>	<b>Purchaser</b>
6/9/12	Q Autos	The appellant
31/10/12	The appellant	<b>James McCarville</b>

	<b>net price</b>	<b>VAT</b>
Purchase price to AM	21,625	4,325
Sale price from AM	24,750	0

162. HMRC enquiries into GRCS show the vehicle was purchased by them invoice dated October 2012 (no day shown) from PM for £25,208.33 plus VAT £5041.67. GRCS sold it to NF invoice dated 14 October 2012 for £25,700.

5 *Other information*

163. Of the purchasers from the appellant listed above, MR Trucks, N Finnegan and J McCarville appear as purchasers from the appellant in the other deals in these two months. Euro-Auto Salvage appears as a seller to the appellant on one of those deals where MR Trucks is the purchaser (see also Deal 1).

10 164. On the question of the appellant's first contact with QA Mr Armstrong says the first purchase the appellant made from QA was, according to the invoice, on 18 June 2012 and the vehicle was sold with invoice date of 19 June 2012. The second purchase was made with invoice date of 16 August 2012 and sold on by the appellant with invoice date 24 August, but the same vehicle was sold by QA to Moy Auto Services Ltd with  
15 invoice date 17 August.