



Neutral Citation: [2024] UKFTT 00495 (TC)

Case Number: TC09193

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

By remote video hearing

Appeal reference: TC/2021/03164

*VAT – Company officer’s liability penalty – Value Added Tax Act 1994, section 69D – scrap metal trading - whether input tax was correctly denied to the company on Kittel grounds – yes – whether the company knew that its deals were connected with the fraudulent evasion of VAT – yes – whether or not the company should have known that its deals were connected with the fraudulent evasion of VAT – yes – whether the company’s conduct was attributable to the appellant – yes – appeal dismissed.*

**Heard on:** 27 to 30 November 2023

**Judgment date:** 06 June 2024

**Before**

**TRIBUNAL JUDGE RICHARD CHAPMAN KC  
MR JULIAN SIMS**

**Between**

**GARY TURNER**

**Appellant**

**and**

**THE COMMISSIONERS FOR HIS MAJESTY’S REVENUE AND CUSTOMS**

**Respondents**

**Representation:**

For the Appellant: Mr Glen Henry, Solicitor.

For the Respondents: Ms Charlotte Brown of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs.

## DECISION

### INTRODUCTION

1. This appeal is in respect of a decision dated 3 December 2020 to impose a company officer's liability penalty upon the appellant, Mr Gary Turner, in the sum of £110,127.60, subsequently reduced to £107,306.55 ("the Penalty"). The Penalty related to the denial of input tax claimed by (and resultant penalties imposed upon) Loy Commodities Limited ("Loy") (a company of which Mr Turner was, at all material times, the sole director) in the VAT periods 03/18 to 03/19 inclusive. The majority of the input tax denied (and the whole of the denial that forms the basis of the Penalty) was upon *Kittel* grounds; namely, that HMRC alleged that Loy knew or should have known that its transactions were connected with the fraudulent evasion of VAT.

2. Loy went into a creditors' voluntary liquidation on 8 December 2020 and was dissolved on 13 August 2022. Loy has itself played no part in this appeal and (prior to its dissolution) did not appeal against any decision or penalty in its own right. However, the parties are agreed that HMRC must still establish within the present appeal that Loy was liable to the penalty imposed upon it (and so, in turn, that the relevant input tax was correctly denied) and that Loy's actions giving rise to its liability to a penalty were attributable to Mr Turner.

### BACKGROUND

3. The following background was not in dispute or set out the parties' respective allegations.

4. Loy was incorporated on 3 March 2008 and duly commenced trading in the purchase and sale of scrap metal. All suppliers and customers were businesses rather than general members of the public. The business was initially located in a scrap metal yard in Sheffield, shared with another company. Loy then moved to the premises of one of its trading partners, CTL Seal Limited ("CTLSL"). In about 2015, Loy returned to its original scrap metal yard.

5. Mr Turner was appointed as a director of Loy on 3 March 2008. The only other directors were a formation agent which was appointed on 3 March 2008 and resigned on the same day, and Mrs Dawn Wombell who was appointed on 22 November 2010 and resigned on 23 November 2010. Mr Turner was responsible for all Loy's business activities. Two part time employees were employed at various times to assist Mr Turner (one of whom, Ms Ellen Askew, carried out the bookkeeping), although there was no suggestion that they ever did anything that Mr Turner did not know about or did not have ultimate responsibility for.

6. Mr Turner has since 11 April 2006 been a director of Loy Transport Limited ("LTL"), which carries on business providing freight transport by road. Loy and LTL held a group VAT registration from 1 October 2014 until HMRC cancelled Loy's registration on 5 March 2020.

7. HMRC visited Loy on 30 January 2018 ("the January 2018 Visit"). The officers (Mr Ian Nolan and Mr Ben Caines) met with Mr Turner and provided him with general information about the risks of fraudulent traders in the sector. This included the provision of Public Notice 726 entitled, "Joint and several liability for unpaid VAT."

8. On 18 September 2018, HMRC again visited Loy and informed Mr Turner that it had been included on a project known as the Supply Chain Investigation Project, which monitored traders who (in HMRC's view) posed a particular risk ("the September 2018 Visit"). The officers (Ms Diane Warren and Mr Martin) also questioned Mr Turner about Loy's due diligence procedures and, in particular, about Loy's dealings with Agar Brown Bawtry Limited ("Agar").

9. A further visit took place on 16 October 2018 (“the October 2018 Visit”) attended by Ms Warren and Ms Emma Martin.

10. A further visit took place on 14 June 2019 (“the June 2019 Visit”). The officers (Ms Warren and Mr Mehmood) discussed with Mr Turner the fact that tax losses had been found which had resulted from Loy’s transactions with various traders.

11. On 18 December 2019, HMRC (by its officers Ms Warren and Mr Tattersall), interviewed Mr Turner about Loy’s transactions (“the December 2019 Visit”).

12. HMRC also informed Loy of tax losses within its supply chains during the relevant periods. By a letter dated 20 November 2018, HMRC notified Loy of tax losses in the 03/18 and 06/18 periods relating to its transactions with Agar, Ashwell Metals Limited (“Ashwell”) and Roman Traders Ltd (“Roman”). By a letter dated 18 December 2018, HMRC notified Loy of tax losses in the 09/18 period relating to its transactions with Metal Room Ltd (“Metal Room”). By letters dated 30 May 2019, HMRC notified Loy of tax losses in the 12/18, 09/18, and 03/19 periods relating to its transactions with Ashwell. By letters dated 25 July 2019, HMRC notified Loy of tax losses in the 03/19 and 06/19 periods, again relating to its transactions with Ashwell. By a letter dated 18 October 2019, HMRC notified Loy of tax losses in the 12/19 and 03/19 periods again relating to its transactions with Ashwell.

13. By a decision dated 5 March 2020, HMRC disallowed Loy’s input tax claim for the periods 03/18 to 03/19 in the sum of £367,095.73 (as calculated from the decision letter, correcting obvious arithmetical mistakes) and raised assessments for the same sum. All but £9,407.16 (again, as calculated from the decision letter, correcting obvious arithmetical mistakes) of this was upon the basis that, on HMRC’s case, Loy knew or should have known that the transactions which formed the input tax claim were connected with the fraudulent evasion of VAT. The remainder was denied upon the basis of insufficient invoices to support the claims.

14. By a further decision dated 5 March 2020, HMRC cancelled Loy’s VAT registration upon the basis that, HMRC alleged, the principle aim of the registration was in order to abuse the VAT system by facilitating fraud.

15. Following requests for a review, both of these decisions were upheld by a letter dated 16 July 2020.

16. The details of Loy’s suppliers, the alleged defaulters, and the amount denied on a *Kittel* basis for the relevant periods are set out below.

<i>Period:</i>	<i>Suppliers:</i>	<i>Alleged defaulters:</i>	<i>VAT denied on a Kittel basis:</i>
03/18	Agar Ashwell	Agar Chesterfield Services Ltd (“CSL”) DS Wholesaling and Recycling Ltd (“DSW”)	£105,101.00
06/18	Agar Ashwell	LSS International Ltd (LSS)	£112,604.16

	Roman Metal Room	Metal Room DSW	
09/18	Ashwell Roman Metal Room RJ Metals Ltd ("RJM")	Ashwell DSW Firth Logistics Ltd ("Firth") RJM	£84,114.62
12/18	Ashwell RJM	Ashwell DSW Firth RJM	£33,291.21
03/19	Ashwell	Ashwell McCamey Ltd ("McCamey") Firth City Alloys Group Ltd ("CAG")	£22,577.58
TOTAL:			£357,688.57

17. By a letter dated 16 July 2020, HMRC issued a penalty assessment against Loy in the sum of £110,127.60, being 30% of the input tax denied.

18. On 3 December 2020, HMRC issued an assessment against Loy for the Penalty in the same sum of £110,127.60, upon the basis that (HMRC alleged) Loy's actions are to be wholly attributed to Mr Turner.

19. Following a request for a review, the decision was upheld by a letter dated 3 May 2021.

20. The notice of appeal is dated 31 August 2021. Although this was out of time, HMRC agrees to an extension of time for the bringing of an appeal which (insofar as is necessary) we hereby grant.

21. By a letter dated 28 July 2022, the Penalty was reduced to £107,306.55 to take into account the fact that the Penalty could only be based upon the denial of input tax upon *Kittel* grounds rather than in respect of the element of the original assessment which related to the insufficiency of invoices. The Penalty comprised £31,530.30 for 03/18, £33,781.24 for 06/18, £25,234.38 for 09/18, £9,987.36 for 12/18, and £6,773.21 for 03/19.

#### THE ISSUES

22. The parties agree that there was a tax loss in the transactions set out in the table above. Further, Mr Turner does not contest the evidence set out in the witness statements served on behalf of HMRC and so did not cross-examine any of HMRC's witnesses, although he does not accept that this evidence is sufficient for HMRC to meet the necessary burden of proof.

23. The parties agree that the following issues arise for determination:

- (1) The legal framework.

- (2) The proper approach to unchallenged evidence.
- (3) Whether the tax loss is due to the fraudulent evasion of VAT.
- (4) Whether Loy's transactions which are the subject of this appeal were connected with any such fraudulent evasion.
- (5) Whether Loy knew or should have known that each of such transactions were connected to the fraudulent evasion of VAT.
- (6) If so, whether the actions of Loy which give rise to the penalty are attributable to Mr Turner.

24. As is evident from these issues, Mr Turner accepts the existence of a tax loss at the start of each of the transaction chains. Mr Turner's response dated 29 March 2023 to the *Fairford* directions ("the *Fairford* Directions Response") included the following:

"b. Whether the Appellant accepts that there is a tax loss at the start of each of the Transaction Chains. If the Appellant does not accept that there is a tax loss at the start of each of the Transaction Chains, the Appellant should specify in which of the Transaction Chains it disputes there was a tax loss and the reasons why.

It is accepted that there was a tax loss however the Appellant cannot confirm when the tax loss occurred nor can he confirm or accept the reason for the tax loss."

25. Mr Henry's skeleton argument relied upon Article 6 of the European Convention of Human Rights. However, Mr Henry withdrew this argument in opening and did not thereafter pursue or rely upon it.

26. Similarly, Mr Henry's skeleton argument referred to the Commissioners for Revenue and Customs Act 2005 ("the 2005 Act"). He used this for the purposes of arguing that HMRC were not entitled to rely upon the 2005 Act to refuse to provide disclosure. However, HMRC did not rely upon the 2005 Act for this purpose or at all. As such, Mr Henry did not pursue any submissions based upon the 2005 Act (although, as set out and considered below, he did argue that HMRC had not provided sufficient documentary or other evidence to prove their case).

27. We note that Mr Henry did not submit (and in any event Mr Turner did not plead in his grounds for appeal or assert in his evidence) that the Penalty should be mitigated pursuant to section 70 of the Value Added Tax Act 1994 ("VATA").

#### **THE LEGAL FRAMEWORK**

28. There was no dispute between the parties as to the following legal framework.

29. The penalties against Loy and Mr Turner were issued pursuant to sections 69C and 69D respectively of VATA respectively, which provide as follows:

"69C Transactions connected with VAT fraud.

(1) A person (T) is liable to a penalty where—

(a) T has entered into a transaction involving the making of a supply by or to T ("the transaction"), and

(b) conditions A to C are satisfied.

(2) Condition A is that the transaction was connected with the fraudulent evasion of VAT by another person (whether occurring before or after T entered into the transaction).

(3) Condition B is that T knew or should have known that the transaction was connected with the fraudulent evasion of VAT by another person.

(4) Condition C is that HMRC have issued a decision (“the denial decision”) in relation to the supply which—

(a) prevents T from exercising or relying on a VAT right in relation to the supply,

(b) is based on the facts which satisfy conditions A and B in relation to the transaction, and

(c) applies a relevant principle of EU case law (whether or not in circumstances that are the same as the circumstances in which any relevant case was decided by the European Court of Justice).

(5) In this section “VAT right” includes the right to deduct input tax, the right to apply a zero rate to international supplies and any other right connected with VAT in relation to a supply.

(6) The relevant principles of EU case law for the purposes of this section are the principles established by the European Court of Justice in the following cases—

(a) joined Cases C-439/04 and C-440/04 *Axel Kittel v. Belgian State; Belgium v. Recolta Recycling* (denial of right to deduct input tax), and

(b) Case C-273/11 *Mecsek-Gabona Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága* (denial of right to zero rate),

as developed or extended by that Court in any other cases relating to the denial or refusal of a VAT right in order to prevent abuses of the VAT system which were decided before the coming into force of section 42 of TCTA 2018.

(7) The penalty payable under this section is 30% of the potential lost VAT.

(8) The potential lost VAT is—

(a) the additional VAT which becomes payable by T as a result of the denial decision,

(b) the VAT which is not repaid to T as a result of that decision, or

(c) in a case where as a result of that decision VAT is not repaid to T and additional VAT becomes payable by T, the aggregate of the VAT that is not repaid and the additional VAT.

(9) Where T is liable to a penalty under this section the Commissioners may assess the amount of the penalty and notify it to T accordingly.

(10) No assessment of a penalty under this section may be made more than two years after the denial decision is issued.

(11) The assessment of a penalty under this section may be made immediately after the denial decision is made (and notice of the assessment may be given to T in the same document as the notice of the decision).

(12) Where by reason of actions involved in making a claim to exercise or rely on a VAT right in relation to a supply T—

(a) is liable to a penalty for an inaccuracy under paragraph 1 of Schedule 24 to the Finance Act 2007 for which T has been assessed (and the assessment has not been successfully appealed against by T or withdrawn), or

(b) is convicted of an offence (whether under this Act or otherwise), those actions do not give rise to liability to a penalty under this section.

#### 69D Penalties under section 69C: officers' liability

(1) Where—

(a) a company is liable to a penalty under section 69C, and

(b) the actions of the company which give rise to that liability were attributable to an officer of the company (“the officer”), the officer is liable to pay such portion of the penalty (which may be equal to or less than 100%) as HMRC may specify in a notice given to the officer (a “decision notice”).

(2) Before giving the officer a decision notice HMRC must—

(a) inform the officer that they are considering doing so, and

(b) afford the officer the opportunity to make representations about whether a decision notice should be given or the portion that should be specified.

(3) A decision notice—

(a) may not be given before the amount of the penalty due from the company has been assessed (but it may be given immediately after that has happened), and

(b) may not be given more than two years after the denial decision relevant to that penalty was issued.

(4) Where the Commissioners have specified a portion of the penalty in a decision notice given to the officer—

(a) section 70 applies to the specified portion as to a penalty under section 69C,

(b) the officer must pay the specified portion before the end of the period of 30 days beginning with the day on which the notice is given,

(c) section 76(9) applies as if the decision notice were an assessment notified under section 76, and

(d) a further decision notice may be given in respect of a portion of any additional amount assessed in an additional assessment.

(5) HMRC may not recover more than 100% of the penalty through issuing decision notices in relation to two or more persons.

(6) A person is not liable to pay an amount by virtue of this section if the actions of the company concerned are attributable to the person by reference to conduct for which the person has been convicted of an offence. In this subsection “conduct” includes omissions.

(7) In this section “company” means a body corporate or unincorporated association but does not include a partnership, a local authority or a local authority association.

(8) In its application to a body corporate other than a limited liability partnership “officer” means—

(a) a director (including a shadow director within the meaning of section 251 of the Companies Act 2006),

(b) a manager, or

(c) a secretary.

(9) In its application to a limited liability partnership “officer” means a member.

(10) In its application in any other case, “officer” means—

(a) a director,

(b) a manager,

(c) a secretary, or

(d) any other person managing or purporting to manage any of the company's affairs.”

30. The right to deduct input tax referred to in section 69C arises from sections 24 to 26 of VATA, which implement Articles 167 and 168 of Council Directive 2006/112/EC (itself replacing Article 17 of the Sixth Council Directive).

31. For the purposes of the present case, the relevant principle of EU case law referred to in section 69C of VATA is that, where a taxable person knew or should have known that by his purchase he was taking part in a transaction which was connected with fraudulent evasion of VAT, that person is regarded as a participant in that fraud irrespective of whether or not he profited from the resale of the goods. The CJEU in *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (Joined cases C-439/04 and C-440/04) [2008] STC 1537 (“*Kittel*”) stated as follows at [54] to [61]:

“[54] As the court has already observed, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see *Gemeente Leusden v Staatssecretaris van Financien* (Cases C-487/01 and C-7/02) [2007] STC 776, [2004] ECR I-5337, para 76). Community law cannot be relied on for abusive or fraudulent ends (see, *inter alia*, *Kefalas v Greece and OAE* (Case C-367/96) [1998] ECR I-2843, para 20; *Case Diamantis v Greece* (Case C-373/97) [2000] ECR I-1705, para 33; and *IIS Fini H v Skatteministeriet* (Case C-32/03) [2005] STC 903, [2005] ECR I-1599, para 32).

[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*, *Rompelman v Minister van Financien* (Case 268/83) [1985] ECR 655, para 24; *Intercornmunale voor Zeewaterontziltting (in liquidation) v Belgium* (Case C-110/94) [1996] STC 569, [1996] ECR I-857, para 24; and *Gabalfrisa* (para 46)). 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)).

[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.

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

[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'.

[60] It follows from the foregoing that the answer to the questions must be 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 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.

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

32. In *Blue Sphere Global Ltd v HMRC* [2009] STC 2239 (“*Blue Sphere*”) at [29] Sir Andrew Morritt C identified the following issues which arise when considering whether the right to deduct input tax has been lost pursuant to *Kittel*.

“[29] The tribunal started by setting out the four questions they considered that they must answer. It is common ground that they were the correct questions. They were:

- (1) Was there a VAT loss?
- (2) If so, did this loss result from a fraudulent evasion?
- (3) If there was a fraudulent evasion, were the BSG transactions the subject of this appeal connected with that evasion?
- (4) If such a connection was established, should BSG have known that its purchases were connected with a fraudulent evasion of VAT?”

33. The burden of proof in respect of each of these issues is upon HMRC. The standard of proof is that of the balance of probabilities (see *The Commissioners for Her Majesty’s Revenue and Customs v Citibank NA, E Buyer UK Limited* [2017] EWCA 1416 (Civ), [2018] 1 WLR 1524 (“*Citybank*”) at [97] and [98]).

34. The elements which must be proved to establish knowledge or means of knowledge were well summarised in *Tower Bridge GP Ltd v HMRC* [2019] UKFTT 176 (TC) (Judge Rupert Jones) (“*Tower Bridge*”). *Tower Bridge* was a case heavily relied upon by Mr Henry, which, although it is not binding upon us, we find accurately reflects the law. We note that *Tower Bridge* was appealed to the Upper Tribunal (see [2021] UKUT 0030 (TC) (Fancourt J and Judge Timothy Herrington)), the appeal was dismissed, and in any event only dealt with matters relating to the denial of input tax claims based on invalid invoices rather than the *Kittel* appeal. The First-tier Tribunal stated as follows at [1236] and [1237]:

“[1236] As noted, the burden of proving knowledge or means of knowledge rests upon HMRC: *Mobilx Ltd (in admin) v HMRC* [2010] STC 1436, at [81].

[1237] In terms of what HMRC must prove:

(1) The threshold they must cross is high - *Davis & Dann Ltd and another v HMRC* [2016] STC 1236, at [4].

(2) They must demonstrate either:

(a) that the taxpayer actually knew that he was participating in a transaction connected with fraudulent evasion of VAT; or

(b) that the taxpayer had the means at his disposal of knowing that he was participating in such a transaction: see *Mobilx*, at [52]. It is now accepted that this requires HMRC to show that the taxpayer ought to have known that the only reasonable explanation for the transactions was that they were connected to a VAT fraud: see *Mobilx*, at [59] and [75]; and *Davis & Dann Ltd*, at [4].

(3) It is thus not sufficient for HMRC to show that the taxpayer knew or 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: *Mobilx*, at [56].

(4) Nor is it sufficient for HMRC to show that a taxpayer knew or should have known that such transactions might be connected with fraudulent evasion, or even that it was more likely than not (i.e. probable) that his transaction was so connected: see *Mobilx*, at [56] and [60].

(5) It follows from the nature of what HMRC must prove that the focus is on only what the taxpayer actually knew at the time of the relevant transaction and/or the means of knowledge he had at his disposal at that time. Whilst that can include obvious inferences from the facts and circumstances in which he has been trading (*Mobilx*, at [61]), it cannot, by definition, include information not known to him if he had no means at his disposal of knowing during the relevant period or matters known only with the benefit of hindsight: see *Aria Technology Ltd v HMRC* [2016] UKFTT 98 (TC), at [13].

(6) Nor is it sufficient for HMRC to show that a reasonable explanation for the relevant transaction was that it was connected with fraudulent evasion of VAT. It must be the only reasonable explanation.”

35. It is not necessary for HMRC to establish dishonesty in order to establish that an appellant knew or should have known that he was participating in a transaction connected with fraudulent evasion of VAT. In *Citybank*, the Chancellor stated as follows at [85] and [90]:

“[85] The key point, in my judgment, is that, whilst HMRC can, of course, allege that a taxpayer has acted dishonestly and fraudulently in relation to the transactions to which it was a party, they do not need to do so in order to deny that taxpayer the right to reclaim input tax under the test. The exercise upon which Judge Mosedale was engaged was, therefore, inappropriate. It was simply irrelevant for the F-tT to ask whether the allegations in the statement of case, if all proved, would necessarily lead to the conclusion that the taxpayer had been dishonest or fraudulent. It was even more inappropriate for Judge Mosedale to direct HMRC to plead dishonesty when it had expressly informed her that it did not wish to make any such allegation. It might be, of course, that if some or all of the allegations made in the statement of case were proved, that might (in theory, though not, of course, in practice) have allowed a tribunal to go on to make a finding that the taxpayer had been dishonest. But if HMRC does not seek such a finding,

and if such a finding is not needed to support the conclusion that the taxpayer cannot recover its input tax, there is neither any need nor any utility in asking the F-tT to undertake that exercise.”

...

[90] Finally, if a summary of the applicable law is required along the lines of paragraphs 86 and 87 of the UT’s decision, I would simply summarise the principles as follows:-

i) The test promulgated by the CJEU in *Kittel* was whether the taxpayer knew or should have known that he was taking part in a transaction connected with fraudulent evasion of VAT.

ii) Ultimately the question in every *Kittel* case is whether HMRC has established that the test has been met. The test is to be applied in accordance with the guidance given by the Court of Appeal in *Mobilx* and *Fonecomp*.

iii) It is not relevant for the FTT to determine whether the conduct alleged by HMRC might amount to dishonesty or fraud by the taxpayer, unless dishonesty or fraud is expressly alleged by HMRC against the taxpayer. If it is, then that dishonesty or fraud must be pleaded, particularised and proved in the same way as it would have to be in civil proceedings in the High Court.

iv) In all *Kittel* cases, HMRC must give properly informative particulars of the actual and constructive knowledge by the taxpayer.”

36. Where it is alleged that there is an overall scheme to defraud HMRC, knowledge or means of knowledge can still be established if an appellant did not know or could not have known of the facts underpinning that scheme. In *Tower Bridge*, the First-tier Tribunal summarised the position as follows at [1266] to [1269]:

“[1266] HMRC allege that the denied transactions were part of an orchestrated scheme to the Revenue and that, in consequence, the Appellant knew that the transactions were connected with fraud.

[1267] Newey, J. (as he then was) addressed just such an issue in *Regent Commodities Limited v HMRC* [2011] UKUT 259 (TCC) at [46], stating:

‘I should have thought, moreover, that, in the circumstances of the present case, the evidence given by Mr Humphries [overall contra-trading scheme] and Mr Mendes [FCIB circularity] (as to which, see paragraphs 17-31 above) would of itself have sufficed to entitle the Tribunal to make a finding of actual knowledge. As already mentioned, the Tribunal considered (with justification, in my judgment) that that evidence indicated that Regent knew to whom it was supposed to sell.’

[1268] Thus, an objective factor may be that a series of transactions took place as part of an overall scheme to defraud the Revenue. Inferences may then be drawn from the existence of the overall scheme to defraud the Revenue. Those inferences are not precluded simply because the Appellant did not know the facts that underpinned that scheme.

[1269] The Court of Appeal addressed this issue in *Fonecomp Ltd v Revenue & Customs Commissioners* [2015] STC 2254 at [51] where Arden, LJ. (as she then was) stated:

‘[51] However, in my judgment, the holding of Moses LJ does not mean that the trader has to have the means of knowing how the fraud that actually took place occurred. He has simply to know, or have the

means of knowing, that fraud has occurred, or will occur, at some point in some transaction to which his transaction is connected. The participant does not need to know how the fraud was carried out in order to have this knowledge. This is apparent from paras 56 and 61 of *Kittel* cited above. Paragraph 61 of *Kittel* formulates the requirement of knowledge as knowledge on the part of the trader that ‘by his purchase he was participating in a transaction connected with fraudulent evasion of VAT’. It follows that the trader does not need to know the specific details of the fraud.”

37. The parties diverge as to whether the factors relied upon by HMRC were objective or subjective. Mr Henry appeared to argue in his skeleton argument that objective indicators of fraud were necessary even to the extent that HMRC’s case was that Mr Turner actually knew about Loy’s participation in fraud. However, in the course of oral submissions, he accepted that this was only relevant to HMRC’s alternative argument that Loy and Mr Turner should have known that Loy was participating in fraud.

38. Mr Henry submitted that HMRC must prove through objective factors that Loy (and, given the need for attribution in the context of the present appeal, Mr Turner) actually knew that they were participating in a transaction connected with the actual existence of a fraudulent evasion of VAT. Mr Henry relied in this regard upon *Mobilx v HMRC* [2010] EWCA Civ 517 at [59], in which Moses LJ stated as follows:

“[59] 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*.”

39. Mr Henry also relied upon *Ronald Hull Junior Ltd v HMRC* [2020] UKFTT 76 (TC) (Judge Sarah Allatt and Mr Mohammed Farooq) at [164] which sets out the same issues as in *Blue Sphere* recited above.

40. Mr Henry submitted that the indicators relied upon by HMRC were subjective rather than objective because HMRC had said in their review letter and in the course of the appeal that HMRC considered them to be indicators of fraud and because they were unsupported by evidence.

41. Ms Brown submitted that the matters relied upon as indicators of fraud are objective factors for the purposes of determining whether input tax should be denied on a *Kittel* basis insofar as they would have caused a reasonable person to conclude that it was more likely than not that the transactions were connected to fraud. Ms Brown referred us, in particular, to *S & I Electronics plc v HMRC* [2015] UKUT 162 (TCC) (Asplin J and Judge John Walters) (“*S&I*”) at [46], in which the Upper Tribunal stated as follows:

“[46] We consider that such objective factors (summarised by the FTT in the “five indicia” – see [10] above) amply justify a conclusion that the only reasonable explanation for the 79 transactions which were found to have been connected to fraud was that they were so connected and that S&I ought to have known of that fact. It is no bar to such a conclusion that there were other transactions in which fraud was not proved or that it is acknowledged that there were in the grey

mobile phone market generally some legitimate trades. Evidence in relation to them would in all likelihood have exhibited different objective factors to those exhibited by the 90 transactions of S&I which were in issue, for example, in relation to the first four of the “five indicia”: short chains, variable margins, UK specification phones, fully detailed invoices. But this is by the way. It is not required of HMRC in cases such as this that they should lead evidence of the way legitimate trade in the grey market is conducted for the purpose only of showing by comparison that the deals in issue in an appeal display different objective factors. What is required is that the Tribunal should be satisfied by reference to objective factors established by the evidence (1) that, at the time the transactions took place, S&I should have known that the only reasonable explanation for them was a connection with fraud, and (2) that they were so connected. The FTT was so satisfied and we consider that no error of law is discernible in their decision on this point. We therefore reject S&I’s first ground of appeal.”

42. The submissions of both parties correctly agree with the need for objective factors. The fact that HMRC considers that indicators of fraud are present does not render the indicators themselves subjective; it is nothing more than HMRC’s position in respect of those objective factors. The key question is (transposing the test set out in *S&I*) satisfied by reference to objective factors established by the evidence (1) that, at the time the transactions took place, Loy should have known that the only reasonable explanation for them was a connection with fraud, and (2) that they were so connected. We deal with whether or not there is sufficient evidence in this regard below.

#### **THE EVIDENCE**

43. The only oral evidence from either party was from Mr Turner, as Mr Turner did not require HMRC’s witness to attend for cross-examination. Mr Henry explained that Mr Turner did not challenge the facts set out in HMRC’s witness statements, but did not accept that those facts were sufficient for HMRC to resist the appeal. The *Fairford* Directions Response included the following in this regard:

“e. And in respect of the Respondents’ witness statements which deal only with the issues set out at (a) to (d) above, the passages in those statements which the Appellant does not accept.

The Respondent does not accept paragraphs 6 to 69 of the Statement Richard Hudson which concerns investigations into Ashwell Metals. Ashwell Metals have an ongoing Appeal concerning the issues raised in HMRC Officer Hudson’s Statement.

The Appellant accepts the contents of the remaining witness statement concerning factual matters of investigation and documentary exhibits but without making any admission of knowledge or means of knowledge that each of the Transaction Chains in issue and participant companies (eg Agar Brown) were part of an orchestrated overall scheme to defraud HMRC.”

44. By the time of this appeal, Ashwell’s appeal was no longer being pursued. As such, Mr Henry explained that Mr Hudson’s evidence was to be treated in the same way as that of HMRC’s other witnesses.

45. Mr Henry submitted that HMRC ought to have obtained witness evidence from Ms Warren rather than relying upon a statement from Mr Tattersall as her replacement. Ms Brown submitted that it was standard practice for replacement officers to provide witness

statements where the original officer is unavailable and referred us to *Tradestar International Ltd v HMRC* [2022] UKFTT (TC) at [146] as follows (see also [144] to [147]):

“[146] It is standard practice in accordance with this legislation for the evidence of one officer to be replaced by that of another when the first is no longer with HMRC. In this context it is usually the case that the replacement evidence is essentially the same as that which it replaces.”

46. We find that it is a matter for HMRC to decide who they wish to adduce evidence from; the real question is whether the evidence which they have adduced is sufficient for HMRC successfully to resist the appeal.

47. We note that in the course of cross-examination Mr Turner took issue with the accuracy of the file notes which were exhibited to Mr Tattersall’s witness statement. Ms Brown submitted that Mr Turner cannot challenge the accuracy of these notes without Mr Henry cross-examining Mr Tattersall. Ms Brown relied upon *Brown v Dunn* (1893) 6 R 67 HL and *Markem Corporation v Zipher Ltd* [2005] EWCA Civ 267 in this regard. In the course of his closing submissions, Mr Henry submitted that he (on behalf of Mr Turner) accepts the accuracy of the meeting notes with the sole exception of Mr Turner’s evidence as to what was said in the meeting about Ashworth.

48. In order to rely upon a version of events that contradicts a witness’ evidence, that version of events must be put to that witness. As such, Mr Henry cannot say that Mr Tattersall’s *own* evidence is incorrect without cross-examining him upon it. This therefore includes any allegation that the file note of a meeting attended by him was incorrect. However, it is open to Mr Henry to submit that a document is incorrect if no witness is giving direct evidence of what was said at the meeting. As such, the visit report of the December 2019 Visit cannot be challenged given that Mr Tattersall was at the meeting and the file note is adduced by him as an accurate record. However, Mr Tattersall was not at the other meetings and so is not able to give direct evidence of his own as to the accuracy of the visit reports. Given that the only issue as to the accuracy of the meeting notes relates to Ashworth, we make our findings of fact in this regard below.

49. We note at this point that Mr Turner generally (save as set out to the contrary below) gave his evidence in a clear and helpful way. We set out below the extent to which we do or do not find his evidence to be credible when seen in the light of the documents and facts as a whole.

## **FRAUDULENT EVASION OF VAT**

### **Introductory points**

50. HMRC’s submission in respect of each allegedly defaulting trader (“the Defaulters”) was that the undisputed evidence was sufficient to establish that each of the Defaulters was acting fraudulently, and so that the tax losses were all fraudulent.

51. Mr Henry’s only submission in respect of the Defaulters being involved in the fraudulent evasion of VAT is that it is for HMRC to prove this in respect of each of the Defaulters. He did not pursue any positive case on behalf of Mr Turner.

52. In respect of each alleged Defaulter in turn, we set out below our findings of fact and then our analysis as to whether HMRC have discharged their burden of proof in establishing a tax loss and in establishing that that tax loss was fraudulent. We note that the first four of the Defaulters set out below were also Loy’s direct suppliers (Agar, Ashwell, Metal Room, and RJM).

## **Agar**

### ***Findings of fact***

53. The evidence relating to Agar is set out in the witness statement of Mr Danel Porritt and the accompanying exhibits. The facts contained in the witness statement are unchallenged as set out above. We make the following findings of fact:

- (1) Agar was incorporated on 3 September 2015.
- (2) Agar's main business activity as shown on its VAT1 was a property Developer. Its principal place of business as registered with HMRC was an office space above a shop.
- (3) Agar repeatedly submitted overdue VAT returns. No returns at all were submitted for the VAT periods 02/18, 05/18 and 08/18.
- (4) Agar claimed in its 08/17 return that it traded in headphones and electrical goods. However, there was no evidence of this.
- (5) Agar commenced metal trades in the 11/17 period but these involved a defaulting trader and third parties.
- (6) Agar was denied input tax and assessed for output VAT for the periods from 05/17 to 05/18. This was not paid.
- (7) Agar submitted nil VAT returns for the periods 02/18 to 05/18. However, Agar was trading during this period as invoices have been obtained.
- (8) One of Agar's directors from 19 December 2016 to April 2018 was Mr Stewart Groves. Mr Groves was disqualified as a director pursuant to a notice dated 27 March 2018 by virtue of his conduct as a director of another company. He was convicted of fraud, albeit in matters unconnected to Agar.
- (9) Agar went into voluntary liquidation on 8 June 2018.
- (10) HMRC has assessed Agar in the sum of £1,376,344, which remains unpaid.
- (11) 40 of Loy's transactions in 03/18 were with Agar, for which the input tax denied is in the sum of £58,345.99.

### ***Discussion***

54. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. In doing so, we take into account all the findings of fact set out above. We find it to be of particular significance that Agar submitted nil VAT returns despite in fact trading. Indeed, Agar's direct transactions with Loy were in 03/08 and so were during the period in which Agar had represented to HMRC that it was not trading.

## **Ashwell**

### ***Findings of fact***

55. The evidence relating to Ashwell is set out in the witness statement of Mr Richard Hudson and the accompanying exhibits. The facts contained in the witness statement are unchallenged as set out above. We make the following findings of fact:

- (1) Ashwell was incorporated on 2 April 2007.
- (2) The directors of Ashwell are Mr Brendan Needham and Mr Darren Manning.
- (3) Mr David Needham is Mr Brendan Needham's father and was a previous director of Ashwell from 24 February 2015 to 27 November 2015, but during the relevant time was still a site manager of Ashwell. Mr David Needham appears to have been the main

point of contact with HMRC during their visits, appears to have been heavily involved in its transactions, and is the controlling mind of Ashwell.

(4) Mr David Needham had been a director of Star Communications Limited (“Star”). Star had traded in mobile phones and had had input tax denied in the sum of over £23,000,000 upon *Kittel* grounds. Star appealed but the appeal was struck out. Mr David Needham was disqualified as a director for 12 years from 8 February 2016 as a result of his involvement in Star.

(5) Mr Manning was also a director of Man Metals Limited (“MML”), which was a scrap metal business in Sheffield and which had had £341,176 denied for invalid VAT invoices. MML appealed but was compulsorily deregistered and wound up before the appeal was heard.

(6) As at the date of Mr Hudson’s witness statement, 785 of Ashwell’s purchase invoices have been linked to a tax loss.

(7) By a letter dated 17 July 2020, Ashwell was de-registered for VAT upon the basis that the business had been registered with the sole or principal purpose of facilitating VAT fraud. As set out in this letter, Mr Hudson relied upon Ashwell’s continued purchases from supply chains connected to fraud despite warnings, the absence of any formal written contracts with suppliers despite the amounts involved, and the fact that Ashwell had no real purpose for being within the supply chains.

(8) Many of Ashwell’s immediate suppliers are defaulting traders.

(9) HMRC reached the view from its investigations that the directors of Ashwell were aware that the trading that it had been involved in was suspect and was for the purposes of facilitating VAT fraud.

(10) On 18 September 2020, HMRC issued assessments against Ashwell in the sum of £1,185,091.00. £15,987 related to 09/18, £104,727 related to 12/18 and £212,819 related to 03/19.

(11) Ashwell appealed against the decisions, but the appeal has since been withdrawn.

(12) Ashwell traded with Loy for each of the periods in dispute. Upon the evidence presented by HMRC, Ashwell was itself a defaulting trader for the periods ending 09/18, 12/18 and 03/19.

## ***Discussion***

56. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. In doing so, we take into account all the findings of fact set out above. We find it to be of particular significance that Mr David Needham had been disqualified for his conduct in relation to Star where input tax had been denied on *Kittel* grounds and yet continued to play a significant role in Ashwell in circumstances in which a very large number of Ashwell’s transactions were traced to tax losses. Further, the evidence contained in Mr Hudson’s witness statement and exhibits justified HMRC’s view that Ashwell had been registered with the principal purpose of facilitating VAT fraud.

## **Metal Room**

### ***Findings of fact***

57. The evidence relating to Metal Room is set out in the witness statement of Ms Louise McKnight and the accompanying exhibits. The facts contained in the witness statement are unchallenged as set out above. We make the following findings of fact:

(1) Metal Room was incorporated on 20 July 2017.



- (2) Metal Room's main business activity as shown on its VAT1 was wholesale of precious metals on an order basis.
- (3) Metal Room applied to be registered for VAT on 5 September 2017 and was registered with effect from 6 September 2017. On 6 August 2018, Mr Ayub, Metal Room's director, applied to de-register for VAT with effect from 6 September 2017, saying that Metal Room had ceased to trade on 6 September 2017.
- (4) Metal Room has never filed any returns and has never declared any trading. However, invoices held by HMRC showed that Metal Room had net trade of £209,770.30 in a period of six weeks after VAT registration. This was despite Mr Ayub having no experience of the trade sector.
- (5) HMRC visited Metal Room's premise and found that it was a shop in the jewellery quarter of Birmingham. The shop's signs read "Bullion Chest", the due diligence on Metal Room's trading partners was poor, the business model as explained to HMRC was uncommercial, and Mr Ayub could not answer questions about his business.
- (6) HMRC issued assessments against Metal Room in the sum of £50,236 for the period 07/18. The assessment letters were returned to HMRC and have not been challenged.
- (7) Nine of Loy's transactions in the period 06/18 were with Loy, for which the input tax denied was in the sum of £32,270.64.

### ***Discussion***

58. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. In doing so, we take into account all the findings of fact set out above. We find it to be of particular significance that Metal Room did not declare its trading or file any VAT returns, that Mr Ayub applied to de-register for VAT upon the basis of ceasing trading immediately upon registration despite this being untrue, and that Metal Room was immediately successful despite not having any history in metal trading.

### **RJM**

#### ***Findings of fact***

59. The evidence relating to RJM is set out in the witness statement of Mr Shahzad Ali and accompanying exhibits. The facts contained in the witness statement are unchallenged as set out above. We make the following findings of fact:

- (1) RJM was incorporated on 16 January 2018.
- (2) RJM's main business activity as shown on its VAT1 was scrap metal dealer.
- (3) RJM was registered for VAT from 1 February 2018 but failed to file any returns at all.
- (4) RJM did not file any company accounts since incorporation and was dissolved on 15 June 2021.
- (5) HMRC investigated RJM's activities but was unable to make contact.
- (6) HMRC issued assessments against RJM in the sum of £38,543, which all related to RJM's transactions with Loy as set out below. By a letter dated 26 April 2019, Mr Ali informed RJM that its VAT number was to be cancelled with effect from 26 April 2019 because there was no evidence that they had been making taxable supplies. There has been no contact, challenge or appeal to these decisions.

(7) Eight of Loy's transactions in the periods 09/18 and 12/18 were with RJM, for which the input tax denied was in the sum of £39,743.

### ***Discussion***

60. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. In doing so, we take into account all the findings of fact set out above. We find it to be of particular significance that RJM did not declare its sales with Loy (or indeed any trading activity) and is a missing trader.

### **McCamey**

#### ***Findings of fact***

61. The evidence relating to McCamey is set out in the witness statement of Mr Porritt and the accompanying exhibits. The facts contained in the witness statement are unchallenged as set out above. We make the following findings of fact:

- (1) McCamey was incorporated on 29 June 2017.
- (2) McCamey's main business activity as shown on its VAT1 was management consultancy activities (other than financial management).
- (3) McCamey was registered for VAT with effect from 28 June 2017. McCamey filed a nil return for the period 10/17 and did not submit any returns thereafter.
- (4) HMRC visited the principal place of business on 16 May 2019. Mr Porritt met the named director, Mr Roy Tetley and spoke to him through an open window. Mr Tetley said that he was unsure about discussing his business and said that he wanted to make a telephone call to someone called Mr David Frost. When he returned, Mr Tetley said that he had been unable to speak to Mr Frost but that whilst away he had received a telephone call from his mother relating to the ill health of his grandfather. He asked for the visit to be rearranged. Mr Tetley said that he wanted the visit to be at the address where the business activity took place, which he said was a yard in the next village, but he was unsure of the exact address.
- (5) Mr Tetley telephoned Mr Ali on 22 May 2019 to arrange the visit. Correspondence followed, resulting in the arrangement of a meeting on 10 June 2019 at a farm named Stonegate Farm, Everton, DN10 5BP. When Mr Ali and his colleague arrived at the postcode address, Mr Tetley was not there, the property was residential rather than a farm and there was no evidence of a yard belonging to a metal trader. As he had seen another property named Stonegate Farm on the way, Mr Ali attended at Stonegate Farm. Mr Tetley was not there and the occupant said that there was no business called McCamey there. Mr Ali tried to contact Mr Tetley by telephone on two occasions but the phone did not ring and went to voicemail.
- (6) Mr Ali wrote to McCamey de-registering its VAT registration. There was no response.
- (7) Upon finding that McCamey had traded without declaring any VAT, HMRC issued assessments against McCamey in the sum of £227,926.81 for the periods 03/19, 06/19 and 09/19. McCamey has not appealed or challenged any of the decisions.
- (8) McCamey was involved in one of Loy's transactions in 03/19 (although not as a direct supplier), for which the input tax denied is in the sum of £2,811.90.

### ***Discussion***

62. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. In doing so, we take into account all the findings of fact set

out above. We find it to be of particular significance that McCamey did not declare its trading, did not file any VAT returns, and despite being eager to rearrange the meeting, gave a misleading address, did not attend and was not contactable.

## **CSL**

### ***Findings of fact***

63. The evidence relating to CSL is set out in the witness statement of Mr Stefan Tosta and the accompanying exhibits. The facts contained in the witness statement are unchallenged as set out above. We make the following findings of fact:

- (1) CSL was incorporated on 11 November 2014 with the name PK House (UK) Ltd. The name was changed to CSL on 1 August 2017.
- (2) CSL's main business activity as shown on its VAT1 was kitchen and bathroom sales. By the time of a visit in 2017, the main activity was said to be electrical testing and installation.
- (3) Mr Tosta tried to contact CSL on 28 April 2018 using CSL's contact details but was told that CSL had nothing to do with the company that had been contacted, which was called PK Electrical Limited.
- (4) Mr Tosta tried to contact CSL's director, Mr Martin Wood, but was unable to do so despite numerous letters and visits to various addresses.
- (5) CSL's history shows various changes of personnel and registered address in 2017.
- (6) CSL has not filed any accounts since the period ending 31 December 2016 and has not filed any corporation tax returns.
- (7) CSL's first scrap metal trade was on 21 November 2017, which coincides with Mr Martin Wood being appointed as director on 13 November 2017.
- (8) CSL had unpaid VAT liabilities for 09/17 to 12/17. The return for 12/17 also under-declared sales. CSL did not file a VAT return after 12/17 despite sales allegedly having been made.
- (9) HMRC de-registered CSL with effect from 4 May 2018 as a missing trader.
- (10) HMRC has assessed CSL in the sum of £357,697.29, which remains unpaid and the assessments have not even been acknowledged.
- (11) CSL was involved in one of Loy's transactions in 03/18 (although not as a direct supplier), for which the input tax denied is in the sum of £14,965.97.

### ***Discussion***

64. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. In doing so, we take into account all the findings of fact set out above. We find it to be of particular significance that the metal trading coincided with Mr Wood's appointment as a director, the failure to declare all sales in 12/17 or to file any VAT returns thereafter despite trading in metal, and the inability to contact Mr Wood.

## **DSW**

### ***Findings of fact***

65. The evidence relating to DSW is set out in the witness statement of Ms Ceris Jones and the accompanying exhibits. The facts contained in the witness statement are unchallenged as set out above. We make the following findings of fact:

- (1) DSW was incorporated on 11 January 2018.

- (2) DSW's main business activity as shown on its VAT1 was wholesaling.
- (3) DWS did not declare any trading other than the periods ending 31 July 2018 and 31 October 2018. DSW's VAT liabilities as shown on these two returns were not paid. There were undeclared sales after 31 October 2018, including to Ashwell.
- (4) HMRC have been unable to make contact with DSW other than calls with the director, Mr Smith, who said on each occasion that he was unavailable to speak. The business premises were visited and showed a sign for DWS but also a sign for "J's Used Car Spares" together with various scrap cars. However, nobody from DSW was present and the person who was present said that he did not know of DSW.
- (5) DSW was dissolved on 18 June 2019.
- (6) HMRC has assessed DSW in the sum of £476,789.22, which remains unpaid. HMRC also deregistered DSW for VAT. These decisions have not been challenged or appealed.
- (7) DSW was involved in 32 of Loy's transactions in the periods 03/18 to 12/18 (although not as a direct supplier), for which the input tax denied is in the sum of £54,033.88.

### ***Discussion***

66. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. In doing so, we take into account all the findings of fact set out above. We find it to be of particular significance that DWS did not declare all its trading, that it was not known at its registered address, and that it has not been possible to make meaningful contact with its director.

### **LSS**

#### ***Findings of fact***

67. The evidence relating to LSS is set out in the witness statement of Ms Rosalie Baines and the accompanying exhibits. The facts contained in the witness statement are unchallenged as set out above. We make the following findings of fact:

- (1) LSS was incorporated on 3 October 2016.
- (2) LSS' main business activity was declared as management consultancy activities other than financial management.
- (3) LSS filed a nil VAT return for 11/17. A return was filed for 02/18 but information was missing and so it could not be processed. HMRC wrote to LSS in respect of this but received no response.
- (4) HMRC visited LSS' declared principal place of business on 18 May 2018. However, this was a serviced front office in London. The receptionist did not know of LSS.
- (5) LSS was compulsorily de-registered for VAT from 1 March 2018.
- (6) LSS was dissolved on 4 June 2019.
- (7) HMRC has assessed LSS in the sum of £465,991.89, which remains unpaid. There has been no contact, challenge or appeal from LSS.
- (8) LSS was involved in eight of Loy's transactions in 06/18 (although not as a direct supplier to Loy), for which the input tax denied is in the sum of £10,318.61.

### ***Discussion***

68. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. In doing so, we take into account all the findings of fact set out above. We find it to be of particular significance that LSS' business activity was inconsistent with metal trades, LSS were not known at their principal place of business, there has been no declaration of trade or VAT returns filed, and LSS is a missing trader.

### **Firth**

#### ***Findings of fact***

69. The evidence relating to Firth is set out in the witness statement of Mr David Lewis and the accompanying exhibits. The facts contained in the witness statement are unchallenged as set out above. We make the following findings of fact:

- (1) Firth was incorporated on 31 January 2018.
- (2) Firth's main business activity shown on its VAT1 is construction of other civil engineering projects not elsewhere classified.
- (3) No annual accounts have been submitted to Companies House.
- (4) Firth submitted nil returns for 06/18 and 09/18, claimed a credit of £1,722.95 for the 12/18 return and did not file a return for 03/19.
- (5) HMRC established that the address given by Firth was a residential address and not fit for the purposes of carrying out a scrap metal trading business.
- (6) Firth provided HMRC with invoices but did not declare these sales in any VAT return.
- (7) Mr Christopher Swaine is registered as a director of Firth and is stated to be its sole shareholder. In the course of investigations by HMRC and the Insolvency Service, Mr Swaine stated that he was not in fact a director of Firth and that his identity had been hijacked by Mr Brough. Mr Brough is currently in prison in respect of another matter and is disqualified from acting as a director for ten years.
- (8) HMRC has assessed Firth in the sum of £628,808 which remains unpaid. There has been no contact, challenge or appeal from Firth.
- (9) Firth was involved in 11 of Loy's transactions in 09/18, 12/18 and 03/19 (although not as a direct supplier to Loy), for which the input tax denied is in the sum of £20,919.00.

### ***Discussion***

70. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. In doing so, we take into account all the findings of fact set out above. We find it to be of particular significance that Firth did not declare its sales and that Mr Swaine says that he was not a director and that his identity has been hijacked notwithstanding that he is registered as a director and shown as the sole shareholder.

### **CAG**

#### ***Findings of fact***

71. The evidence relating to CAG is set out in the witness statement of Ms Jones and the accompanying exhibits. The facts contained in the witness statement are unchallenged as set out above. We make the following findings of fact:

- (1) CAG was incorporated on 18 October 2018.

- (2) CAG declared trades in its first return for the period ending 01/19, with a VAT liability in the sum of £3,090.44 which was paid. Trade was also declared for the 04/19 period and a return filed. However, the VAT liability of £4,078.23 was not paid.
- (3) CAG's principal place of business was a mail forwarding address in London. HMRC visited the premises which were on a sales invoice to Ashwell. However, these premises were unsuitable for use in scrap metal trading as it only comprised office space.
- (4) CAG's director, Mr Lee Shelton, contacted HMRC to arrange a further visit at different premises, which were shared with another scrap metal trader. However, Mr Shelton was unable to provide HMRC with a lease. No metal was seen at the yard area.
- (5) In the course of investigations, Mr Shelton explained to HMRC that he did not carry out due diligence on CAG's trading partners. However, Mr Shelton had been involved in the metal trade previously and had a general awareness of fraud in the sector.
- (6) On 2 September 2019, Mr Shelton explained to HMRC that his co-director, Mr Mir, had sold the company but that he did not know who to. He also said that he was just the operations director and that all paperwork was dealt with by Mr Mir. However, he was vague about exactly what his role in CAG was. Mr Shelton said that he did not know where the books and records were, he wanted to resign as a director, the business had broken up on bad terms due to bad business decisions being made and that he "wanted out", and that he no longer wanted to be involved in the metals trade. Mr Shelton was not a shareholder of CAG.
- (7) HMRC has assessed CAG in the sum of £389,132 for 04/18, 07/19, and 99/99, which remain unpaid. These assessments have not been challenged or appealed.
- (8) CAG was dissolved on 15 June 2021.
- (9) CAG was involved in one of Loy's transactions in 03/19 (although not as a direct supplier to Loy), for which the input tax denied is in the sum of £1,366.90.

### ***Discussion***

72. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. In doing so, we take into account all the findings of fact set out above. We find it to be of particular significance that Mr Shelton was vague as to what his role in CAG was, no due diligence was undertaken on trading partners, no books or records were available, and Mr Shelton did not know any detail about the purported sale of the company by his co-director Mr Mir.

### **CONNECTION TO FRAUD**

73. Mr Turner does not advance any positive case as to the tracing of the supply chains, instead simply putting HMRC to proof of the same. We have been provided by HMRC with transaction summaries in respect of each of Loy's transactions. Upon considering those supply chains, we find that each of the supplies to Loy for which input tax had been denied have been traced through (and so are connected) to one of the Defaulters set out above (whether through a supply directly from a Defaulter or with the Defaulter being in the supply chain prior to the supply to Loy). In the absence of any contrary evidence, we accept HMRC's evidence in this regard.

74. We note that HMRC has only calculated the Penalties by reference to those transactions which are traced to a tax loss. As set out above, the existence of a tax loss for each of these

transactions is not disputed by Mr Turner. For the reasons set out above, we find that those tax losses are fraudulent.

75. It follows that HMRC has established the connection between Loy's purchases from its suppliers and the fraudulent evasion of VAT.

#### **WHETHER LOY KNEW OR OUGHT TO HAVE KNOWN THAT ITS TRANSACTIONS WERE CONNECTED WITH THE FRAUDULENT EVASION OF VAT**

##### **Introductory points**

76. We deal with the question of knowledge in the following manner. First, we consider (and make our findings of fact upon) various recurring features referred to by the parties. Secondly, we make any further specific findings of fact in respect of Loy's dealings with its suppliers. Thirdly, we make findings as to whether Loy and Mr Turner knew that Loy's transactions with its suppliers were connected with the fraudulent evasion of VAT. Finally, we make findings as to whether Loy should have known that its transactions with its suppliers were connected with the fraudulent evasion of VAT.

##### **Recurring features**

###### ***General awareness of fraud***

77. We make the following findings of fact in respect of Loy's general awareness of the risk fraud in the sector.

78. Mr Turner accepted during cross-examination that he was already aware of the risks of fraud in the metal trading industry prior to the relevant periods. Mr Turner explained that Loy stopped trading with PPX and with Agar when he became aware of concerns about them. As regards PPX, this was before HMRC informed him of tax losses involving PPX. He had heard that PPX's director had retained a VAT lawyer on a monthly retainer, which he treated as a sign that he should stop trading with them. As regards Agar, Mr Turner had heard that Agar's director was involved in litigation in which fraud had been alleged against him by a footballer and that the same director had been involved in fire insurance claims which Mr Turner had concerns about. Mr Turner stopped Loy's trading with Agar because, as he put it, "something was not right".

79. We therefore find that Mr Turner (and so also Loy) had a general awareness of the risk of fraud in the sector.

###### ***Commercial checks and due diligence***

80. We make the following findings of fact in respect of Loy's commercial checks and due diligence.

81. Mr Turner treated commercial checks and due diligence as being focused upon whether or not the people and companies that Loy was dealing with in fact existed, were who they said they were, and were located where they said they were. This included checking that they had the relevant licences (including scrap licences), VAT registration (through VIES VAT number validations) and company registration. He said that he would do these checks before trading with a supplier.

82. We accept that Mr Turner satisfied himself that his suppliers had a yard capable of dealing with metals. As he put it, he would not deal with someone on a regular basis that was working from a kitchen when it is obvious that they cannot be what and who they say they are. Although Mr Turner did not take photographs of his suppliers' premises, we accept that he did carry out these visits. We also accept that Mr Turner checked the identity of his contacts at the suppliers, as the hearing bundle included various copies of such individuals' passports.

83. We make specific findings as to the checks and due diligence made in respect of each of Loy's relevant suppliers below. At this stage, however, we find that Mr Turner's due diligence on behalf of Loy did not include any analysis as to the commercial background or commercial standing of his suppliers save as set out above and was in substance limited to ensuring their identity, appropriate registration and licensing, and that they had the use of a yard. There is no evidence of Mr Turner conducting any credit checks upon Loy's suppliers.

84. We also note that Mr Turner said that he satisfied himself that a VAT number was live before trading and then did a VIES VAT number validation check every four to six weeks later. He said in respect of Ashwell and the disparity between the date of the VIES check and the start of trading, "I have satisfied myself that it is live and the VISE is afterwards. I will have gone online and checked that it was live. I am not stupid. There is no way I am going to deal with someone I don't know." We do not accept Mr Turner's evidence with regard to checking that the VAT number was live before trading. He did not include this in his witness statement, there is no documentary evidence of this, there is no explanation as to where he checked the VAT number, he said "will have gone online" rather than saying that he did or providing any detail as to when and where he made these checks, and there is no explanation as to why he did not carry out a VIES VAT number validation check before trading. We find that the first time that Mr Turner checked that the VAT number of his supplier was live was when requesting a VIES VAT number validation check where these appear in the documentation provided by Mr Turner.

85. We note that Mr Turner says in his witness statement that he minimises his commercial risk. However, we find that Mr Turner's due diligence and checks upon the suppliers at issue within this appeal were not sufficient to enable him to take a view upon commercial risk as they did not involve any analysis of his suppliers' commercial background or commercial standing save for identity, location and VAT registration.

### ***Price negotiations***

86. Mr Turner has given a number of explanations as to his (and so Loy's) approach to price negotiations with suppliers and customers.

87. Paragraph 14 of Mr Turner's witness statement provides as follows as regards price negotiations:

"HMRC allege that the transactions I have been involved with are contrived. I vehemently deny this and refer to my accounts in support. Prices would be negotiated on a day to day basis. HMRC will accept that I stated that I obtained different starting prices from different suppliers. In the majority of cases, he would ring CF Booth who would provide a starting price. In the case of stainless steel, I would for example would telephone Cronimet to gain an understanding of process on a particular day. I made a profit every year but the profit margins are such that it cannot be said that I was involved in a VAT fraud (or should have known). Prices in non ferrous metals were subject to change and subject to Global events. As an example [of] this in 2008 aluminium was being traded at £1000 per tonne. However, following the banking crash in 2002 that price reduced to just £80 per tonne. Non ferrous metals pricing could change up to 3 or 4 times [a day]. The London Metal Exchange would publish prices once a day and usually twice a day. None of these factors have been taken into account by HMRC in their broad and unfounded assertions that the transactions were contrived and not negotiated."



88. We note that the reference to “he would ring” is odd given that Mr Turner is talking about himself. It is also confusing that Mr Turner initially appears to be referring to CF Booth and Cronimet as suppliers when they are in fact customers.

89. In the course of cross-examination, Mr Turner was asked if a customer would call to say they wanted a certain volume of steel and he said yes, if a company are looking for a particular type of metal they would telephone around everybody, they might ring him and he might have some of what was required and then he would ring around suppliers to fulfil the rest.

90. Later in the cross-examination, Mr Turner provided a different chain of events. He said that if somebody offers him a supply, for example three tonnes of brass, he would ask what price the supplier wants. He would then ring around people who he is selling into and ask what price they are paying for brass. Of the people he contacts, he would go for the best price. When he finds out if he can make a profit, he then goes back to the supplier to say he can pay what they are looking or alternatively would give them the best price he can offer and it is up to the supplier whether they choose to sell or not at that price.

91. Mr Turner then said that he would not actively seek any material. The only material he would be looking to sell would be material that he had already been offered. He said that 99.9% of the time when he was looking for a price it is because he was sourcing a customer as he had been offered a material and he was looking for a profit.

92. Mr Turner said that Cronimet and CF Booth were his customers. He knew that Cronimet would give the best price for stainless steel but that they do not deal with anything else. CF Booth deal across the board. Sometimes other companies would give the best price because they were looking for something in particular or because he would be able to provide haulage as well.

93. Ms Brown asked Mr Turner about the paragraph 14 of his witness statement (as set out in paragraph 87 above). He did not accept that there was any inconsistency between his witness statement and his oral evidence. Ms Brown asked Mr Turner what he meant by “the majority of cases” in paragraph 14 (which said that in the majority of cases he would ring CF Booth for a starting price). Mr Turner did not answer this directly, instead saying that he pays the supplier and the customer pays him.

94. Ms Brown asked about price negotiations. Mr Turner said that he would ask the supplier what price that supplier wants, and he would then ring around several customers to get a price that a customer would purchase at which would give him the best price and a profit. He would then ring back the supplier. The negotiation would therefore happen at both ends. On speaking to a customer, he would on occasion say, to use Mr Turner’s words, “I can’t get the material for that” and would say whatever figure he could get to, which the customer would say yes or no to. He would say to that supplier, again to use Mr Turner’s words, “can’t you get any better than that as I can only get to “X” amount?” and the supplier says yes or no.

95. On being asked by Ms Brown about the absence of anything in writing to evidence these negotiations, Mr Turner said that the negotiations were verbal. He said the only time that it would be in writing is if it takes place over a few days and “they” (Mr Turner did not specify whether this was the customer or supplier) wanted to hold the price until Thursday, then he would want verification – usually by email - that that is what was said. This was for his own purposes so that they cannot go back on it. However, he said he did not have any examples of emails because they are not needed unless the negotiation takes place over a few days. Usually, he does not keep hold of the material and just moves it out as soon as it comes in.

96. HMRC's report of the October 2018 Visit ("the October 2018 Report") includes the following (with "GT" being Mr Turner and "DW" being Ms Warren):

"GT stated that the company had been trading for 10 years. DW then referred to the visit that was carried out in January 2018, at which GT had stated that profit was negotiated on a deal by deal basis, DW asked where he got his start price from to negotiate with, he stated that he would ring CF Booths and ask for the price that day. Stainless steel he would ring Cronimet for the best price. He will then go back to his supplier with a price that he will buy at."

97. We note that, as set out above, Mr Henry (on behalf of Mr Turner) did not challenge the veracity or accuracy of this element of the October 2018 Report.

98. Having carefully considered the evidence, we find that there is no credible evidence of any price negotiations with suppliers at all in respect of the transactions in dispute within this appeal. This is for the following reasons.

99. First, Mr Turner is inconsistent in his approach to whether the starting price would come from the supplier or the customer. According to the October 2018 Report, Mr Turner would get a starting price for the day from his customer. This is reinforced by paragraph 14 of his witness statement, which gives the impression that Mr Turner would start with an understanding from his customers such as Cronimet what their price and process was for the day. His references to "starting price" suggest that the negotiations start with him knowing what price he can sell to a customer at. Mr Turner's oral evidence, however, was that he would only be contacting a purchaser if he already had material and a price from a supplier and that 99.9% of the time he would be contacted by a supplier first (although this itself contrasted with the early stages of cross-examination in which Mr Turner seemed to accept that customers would telephone him).

100. Secondly, Mr Turner is inconsistent as to the number of customers he would speak to before reverting back to the supplier. The October 2018 Report and Mr Turner's witness statement suggest that a specific customer would be approached (or at the very least does not say that a number of customers are approached). However, Mr Turner's oral evidence is that several customers would be approached. However, he did not explain who these would be and how they would be chosen.

101. Thirdly, Mr Turner accepted that there would sometimes be emails relating to the negotiations but has not provided any such emails and did not provide any satisfactory explanation for not doing so.

102. Fourthly, Mr Turner refused to accept that there was any inconsistency between his oral evidence and his witness statement and did not give any explanation for it. Similarly, the inconsistency between his evidence and the October 2018 Report was not explained.

103. Fifthly, Mr Turner's oral evidence of the negotiations does not make commercial sense. There appear to be occasions when he would tell a supplier that he would accept the price offered and occasions when he would try to reduce the supplier's price, but there was no explanation as to why he would not always try to get the lowest price from the supplier.

104. Sixthly, there is no evidence as to when the contracts are concluded. His oral evidence was that the supplier contacts Mr Turner with a price, Mr Turner contacts various customers for the best price, and Mr Turner then reverts back to the supplier either to say yes to its offer price or to seek a lower price. However, it is not clear whether Mr Turner has already agreed a sale to a customer before reaching agreement with the supplier or, if not, when this takes place.

***Contract terms (including as to payment)***

105. We make the following findings of fact in respect of the terms of Loy's trading, including payment terms. These findings are upon the basis of Mr Turner's oral evidence and the documents relied upon by the parties as Mr Turner's witness statement did not address these matters other than to say that the lack of formal written contracts should not be criticised.

106. There were no written contracts between Loy and its suppliers as Loy (and various other suppliers and customers) relied upon trust and reputation. This carried the risk of not being paid by customers.

107. The suppliers relevant to the disputed transactions did not require payment until after Loy had been paid by its customer. As such, the majority of the time the customer pays Loy before Loy pays its supplier.

108. Loy would raise invoices to customers for goods which Loy's suppliers had not yet invoiced Loy and for which Loy had not yet paid. Mr Turner was clear that Loy would generally not be at risk of having to pay for goods before it had been paid. Sometimes, there would be a difference in time between the invoice to the customer and the invoice from the supplier; for example, a transaction involving Agar involved an invoice from Loy to its customer (DAC Steels Ltd) on 9 January 2018 and an invoice from Agar to Loy on 19 January 2018. Similarly, we were shown an invoice from Loy to its customer (European Metal Recycling Ltd) dated 17 January 2019 which related to metal which Loy purchased from Ashwell pursuant to an invoice dated 18 January 2019.

109. Mr Turner did not give any satisfactory explanation as to why Loy's suppliers were prepared to wait for payment (and even in some cases to wait before providing an invoice) until after Loy had been paid by its customer. He said that legally the ownership of all materials is with the supplier until the invoice is paid in full. However, he could not identify any invoices with retention of title clauses in respect of the suppliers involved in the transactions for which input tax was denied. Even if this was Mr Turner's understanding, this would mean that he was selling metal to customers to which he did not yet have title. In the light of these unsatisfactory explanations, we find that the basis of the disputed supplies was that there were no formal contract terms and the basis of the payment structure was that Loy would not be under any obligation to pay suppliers until he had been paid by customers and that Loy would never be at any risk of having to pay suppliers if he had not been paid by customers.

110. We note that there was a marked difference between the absence of contract terms and the payment obligations in respect of the suppliers in transactions for which input tax had been denied and those for which it had not been denied. CTLSL includes a retention of title clause on its invoices and is an invoice at the end of the month for all supplies during that month (these supplies being metal off cuts from CTLSL's manufacturing process). Mr Turner's evidence was that it was agreed that the payment terms were that Loy was required to pay CTLSL's invoices within thirty days. It follows that as a matter of fact Loy may well have been paid by its customer before CTLSL's monthly invoice, but this was pursuant to an agreed timetable and process rather than payment to CTLSL being dependent upon payment by Loy's customer.

***Weighing and inspecting the metal***

111. We make the following findings of fact in respect of weighing and the inspection of metal.

112. All material sold by Loy was weighed and inspected using a weighbridge. Weighbridge tickets were retained for the material which Loy sold to its customers. There would also be an outturn email which would break down the type and weight of the material and would be a precursor to the invoice to the customer.

113. When material arrived at Loy's premises, the supplier would tell Mr Turner what the weight was. The material would then be weighed and paperwork provided stating what had been received. There might be some paper with the weight written on it, but this was not in the form of a weighbridge ticket and there is no documentation available evidencing the weight of the goods sold to Loy.

114. Mr Turner's evidence (which, in the absence of any contrary evidence, we accept), was that the weight of the material when weighed at Loy's premises did not matter as it was only the weight on the invoice to the customer which was important to him, his customer and his supplier.

#### ***First contact from suppliers***

115. Mr Turner did not give any detailed explanation as to when his first contact with each of his suppliers came about. For each of the five suppliers involved in the transactions for which input tax has been denied, the supplier arrived at Loy's yard, said that they had work in the area, and wanted to deal with Loy.

#### ***Loy's role***

116. Mr Turner accepted during cross-examination that Loy did not add any value to the supply chain as he was not processing the goods and was a middleman sending out all the materials that came to him. He said the only value was in the price, which we take to mean that successive traders added value by adding a mark up to the purchase price to give a profit. However, Mr Turner was unable to give a satisfactory answer as to why his supplier and customer could not have dealt with each other without paying Loy's mark up. Mr Turner said that this was because some businesses did not get on with each other whereas Mr Turner tried to get on with everybody. However, Mr Turner did not suggest that this was the case for the suppliers and customers involved in the disputed transactions.

#### **The suppliers**

##### ***Ashwell***

117. Each of the factors set out above are applicable to Loy's dealings with Ashwell. We also make the following additional findings of fact.

118. On 20 November 2018, Mr Turner was informed about tax losses relating to his earlier supplies by Ashwell. However, Mr Turner continued to deal with Ashwell after this tax loss letter. Ms Brown put to Mr Turner that he ignored this tax loss letter by continuing to trade with Ashwell, to which Mr Turner said, "Yes," (although we note that his reasoning for continuing to trade was because of his evidence as to his discussions with Ms Warren).

119. We accept Mr Turner's evidence that he asked Ms Warren whether Ashwell was the company causing the tax loss. However, we do not accept Mr Turner's evidence that Ms Warren said that there was no problem with Ashwell. This is for the followings reason. First, this is inconsistent with HMRC's report of the visit on 14 June 2019 (which said, "GT wanted to know which company was causing the tax loss. DW advised she could not discuss this information with him."). Although Mr Turner disputes the report he does not say which elements were wrong or precisely what it should say. Indeed, he was unclear as to which visit he says Ms Warren said that there was no problem with Ashwell. Secondly, this is inconsistent with the fact that tax loss letters relating to Ashwell's supplies had been sent to

Loy. In any event, we note that Mr Henry stated in his closing oral submissions that Ms Warren had not gone so far as to say that Loy could continue to trade with Ashwell.

120. We accept that Mr Turner was aware of, and visited, Ashwell's yard because he passed it every day to get to work.

121. Mr Turner began dealing with Ashwell before any due diligence checks. Mr Turner's first due diligence checks on Ashwell were on 22 January 2018. However, Loy's first transaction with Ashwell was on 9 January 2018.

122. In any event, Mr Turner's due diligence in respect of Ashwell was limited. He obtained a VAT number validation, a certificate of VAT registration, a council tax bill, a certificate of incorporation, a driving licence and bank account details. Although these established Ashwell's and its director's identities it did not involve any checks into Ashwell's financial or commercial standing or credibility. In the course of a visit on 14 June 2019, Mr Turner said that he was in the process of receiving a scrap metal licence from Ashwell (as evidenced by HMRC's report, which was unchallenged on this point). This was notwithstanding that Mr Turner usually asked for a scrap licence (albeit not a legal requirement to do so), had already been trading with Ashwell since at least the 03/18 period and had already received a tax loss letter involving Ashwell on 20 November 2018.

123. Further, Mr Turner was not concerned that the description of Ashwell's business activity in the due diligence was that of repair of fabricated metal products notwithstanding that he was dealing in scrap metal with them and knew that they had a scrap metal yard.

#### ***Agar***

124. Each of the factors set out above are applicable to Loy's dealings with Agar. We also make the following additional findings of fact.

125. The unchallenged visit report for 18 September 2018 reveals that Mr Turner was unable to remember the full name of his contact at Agar, other than that his first name was Stuart.

126. Mr Turner's due diligence in respect of Agar comprised VAT number validation, a certificate of VAT registration, a council tax bill, a certificate of incorporation, a driving licence and bank account details.

127. Loy's first transaction with Agar predates the verification of Agar's VAT number. The VIES VAT number validation states on its face that it was requested on 22 May 2018, which (according to the deal log for deal 5 in the quarter to 03/18, as annexed to HMRC's statement of case) was after Loy's first trade with Agar on 19 January 2018.

#### ***Metal Room***

128. Each of the factors set out above are applicable to Loy's dealings with Metal Room. We also make the following additional findings of fact.

129. Loy's first transaction with Metal Room predates the verification of Metal Room's VAT number. The VIES VAT number validation states on its face that it was requested on 12 July 2018, which (according to the deal log for deal 5 in the quarter to 09/18, as annexed to HMRC's statement of case) was after Loy's first trade with Metal Room on 9 July 2018. Although Mr Turner said in oral evidence that this was because he could not check this until he had a supplier's VAT certificate, this does not explain why he was prepared to start dealing with Metal Room (or any other supplier) before carrying out one of the checks which he regards as important.

130. Metal Room's registered office is a shop in the jewellery quarter of Birmingham and is itself unsuitable for metal trading. Mr Turner accepted that he did not visit Metal Room's

registered office. Mr Turner said that he visited Metal Room's yard, which we accept. However, he does not appear to have treated it as significant that Metal Room had a different registered office or principal place of business to its trading premises or questioned Metal Room about the same.

### ***RJM***

131. Each of the factors set out above are applicable to Loy's dealings with RJM. We also make the following additional findings of fact.

132. Mr Turner's due diligence in respect of RJM comprised VAT number validation, a letter of introduction, certificate of VAT registration, a certificate of incorporation, a passport, and a driving licence.

133. Loy's first transaction with RJM predates the verification of RJM's VAT number. The VIES VAT number validation states on its face that it was requested on 8 October 2018, which (according to the deal log for deal 48 in the quarter to 09/18, as annexed to HMRC's statement of case) was after Loy's first trade with RJM on 14 September 2018.

### ***Roman***

134. Each of the factors set out above are applicable to Loy's dealings with Roman. We also make the following additional findings of fact.

135. Mr Turner's due diligence in respect of Roman comprised VAT number validation, a certificate of VAT registration, a certificate of incorporation, a passport, bank account details, a document entitled "Business Information" and a welcome letter.

136. The business information document refers to Roman being wholesale traders and the welcome letter states that, "Our product range is vast and we can offer wholesale stock of everything from TV and Media to Fabrics for manufacture and much more."

137. Loy's first transaction with Roman predates the verification of Roman's VAT number. The VIES VAT number validation states on its face that it was requested on 8 October 2018, which (according to the deal log for deal 2 in the quarter to 09/18, as annexed to HMRC's statement of case) was after Loy's first trade with Roman on 5 July 2018.

## **Whether Loy knew that its transactions were connected with the fraudulent evasion of VAT**

### ***Submissions***

138. Ms Brown submitted that the basket of evidence looked at in the round establishes actual knowledge of involvement in fraud. Mr Turner had prior knowledge of fraud in the industry. There was no legitimate reason for ignoring red flags in the due diligence. There was no commerciality in the transactions. Loy did not add any value. There were no records of weight in respect of the incoming purchase. The site visits were unsatisfactory and were not recorded. Ms Brown also relies upon the tax loss letter of 20 November 2018 which informed Loy that Ashwell had been involved in fraudulent tax losses and yet Loy continued to trade with Ashwell. Ms Brown noted that although this only directly relates to supplies from Ashwell after 20 November 2018, it casts light upon what Mr Turner knew all along. Ms Brown also said that the large number of tax losses suggests that Loy's whole trading was contrived.

139. Mr Henry submitted that Mr Turner's evidence was consistent. He did not accept that there was an inconsistency in respect of pricing policies, as Mr Turner would only reach the stage of contacting customers once he had a supplier. Mr Turner was not ignoring due diligence and tax loss letters and instead was following the usual approach taken in the metal trading industry. It is normal not to have formal contracts as there is no need for a contract.

He submitted that there would be an implied term as to retention of title which would also avoid the need for a contract. There was no lack of commerciality as Loy would always be under a business risk and so should not be criticised for seeking to reduce it. Mr Henry said that Mr Turner did not just ignore the tax loss letters in respect of Ashwell as HMRC had said that it was a matter for Loy as to whether they continued to trade with Ashwell, he raised them Ashwell, and he satisfied himself that there was no problem.

### *Discussion*

140. We find that Mr Turner (acting on behalf of Loy) knew that the disputed transactions were connected with the fraudulent evasion of VAT. In reaching this finding, we take into account all of the evidence set out above (especially as set out in paragraphs 76 to 137) and, in particular, the following features.

141. First, Mr Turner was well aware of VAT fraud in the industry and gave examples of suppliers that he stopped working with because of concerns about their commercial propriety (namely, PPX and Agar). However, Mr Turner did not give any satisfactory explanation as to why he continued to trade with Ashwell after the tax loss letter of 20 November 2018. We note that Mr Tattersall's unchallenged evidence was that, at the visit on 14 June 2019, Mr Turner said that he had continued to trade with Ashwell because he had shown the tax loss letters to Ashwell who had denied knowing anything about them. We also note that Mr Henry included this in his closing submissions. However, Mr Turner did not give this explanation either in his witness statement or his oral evidence. His only explanation was that he had asked Ms Warren if Ashwell had caused the loss but, as set out above, our finding is that Ms Warren did not give him any reassurance that Loy could trade with Ashwell. Mr Turner's continued trade with Ashwell in such circumstances was particularly stark given his insistence that he would not trade with suppliers where any concern about the supplier had been brought to his attention, such as PPX or Agar. Here, HMRC was telling Mr Turner that supplies from Ashwell were involved in tax losses and yet he continued regardless.

142. Of course, this feature relates most directly to Loy's transactions with Ashwell after 20 November 2018. However, this does cast light upon what Mr Turner already knew about Ashwell. This is because Mr Turner did not give any evidence of learning anything new about Ashwell which would satisfy him that Ashwell was a legitimate trading partner after 20 November 2018 that he did not already know before then. As such, we infer that his state of knowledge about Ashwell was the same throughout.

143. Secondly, Mr Turner did not investigate the commercial backgrounds or commercial standing of his suppliers. Loy's only interest was in verifying identity, location, and the continued validity of the suppliers' VAT registration, which would not provide comfort as to commerciality or minimising the risk of fraud. This is particularly stark given that Mr Turner did not give any detail in his witness evidence as to how and when he first came into contact with any of his suppliers other than that they attended at Loy's yard.

144. Mr Turner accepted during cross-examination that he began trading with Ashwell before carrying out due diligence checks. He did not explain why he was comfortable in doing this and reveals that he was wrong to say that he did not trade before being satisfied as to due diligence. As set out above, for Agar, Metal Room, MJM and Roman, supplies commenced before Mr Turner had carried out a VIES VAT registration check, notwithstanding that he treated this as an important part of his due diligence.

145. Further, Mr Turner did not react to red flags within his checks upon suppliers. As set out above, we accept that Mr Turner did visit his suppliers' yards. However, he did not question why various of the suppliers had different registered offices to their yards and, in the case of Metal Room, why there was a discrepancy between their main jewellery business and

metal trading. We also note that Loy began trading with Ashwell before carrying out any due diligence at all and that Ashwell's trading description was not that of scrap metal trading. Similarly, there was a disparity between Roman's trading description as a wholesale and Roman's metal trading which was not questioned by Mr Turner.

146. Taken the evidence on due diligence as a whole, we find that he was only paying lip service to his investigations into his suppliers and was not interested in assessing the commercial risk involved in dealing with them. We infer from this that the inadequacies in the due diligence were because he knew there was no need for due diligence as he knew that the transactions were connected with the fraudulent evasion of VAT.

147. Thirdly, there were no price negotiations with the suppliers involved in the disputed transactions. One would expect price negotiations to take place in commercial deals. This is reinforced by Mr Turner's inconsistencies in his attempts to explain how his pricing processes took place in the course of meetings with HMRC, his witness statement and his oral evidence.

148. Fourthly, in respect of all of the suppliers involved in the disputed transactions, Loy was not under any obligation to pay its suppliers until Loy had been paid by its customers notwithstanding (and, indeed, despite) the absence of any contract terms. This meant that Loy was not taking any commercial risk at all and contrasts with the more commercial approach employed by suppliers for transactions which were not the subject of denials of input tax (such as CTLSL). We do not accept Mr Henry's submission (raised for the first time in his closing submissions) that this is resolved by a purported implied term as to retention of title as he did not explain how this would arise as a matter of law. In any event, a retention of title clause on the part of Loy's suppliers would create even greater difficulty for Loy, as it would mean that Loy was selling metal to its customers which Loy did not yet have title to.

149. Fifthly, Mr Turner's insistence that the weight of the material when delivered to (or collected by) Loy did not matter as it was the weight on the invoice to the customer which was important does not make commercial sense. It is as important to know how much a supplier provides as it is to know how much a customer obtains. Whilst Mr Turner appears to have treated the customer's weight as determinative (and would expect it to be the same anyway) this does not explain why Loy's suppliers would accept this in the absence of a retained document recording the weight of the metal provided to Loy.

150. Sixthly, the absence of commerciality is reinforced by the fact that Loy did not add any value to any of the transactions.

151. Seventhly, taking all the evidence together, we infer that the disputed transactions were contrived. The obvious absence of commerciality, the absence of any risk and the absence of any price negotiation means that, on the balance of probabilities, they were orchestrated. We find that Mr Turner knew this because he knew about that absence of commerciality, absence of risk and absence of price negotiation.

### **Whether Loy should have known that its transactions were connected with the fraudulent evasion of VAT**

#### ***Submissions***

152. Ms Brown submitted that Loy should have known that its transactions were connected with fraudulent evasion of VAT for the same reasons that she relied upon in respect of actual knowledge.

153. Mr Henry also relied upon his earlier submissions in respect of actual knowledge. In addition, he submitted that it could not be said that the only reasonable explanation for the transactions with Loy's suppliers was that they were connected to fraud.



### ***Discussion***

154. If, contrary to our findings above, Mr Turner did not know that Loy's transactions with Ashwell were connected with the fraudulent evasion of VAT, we find that he should have known that this was the case. This is for the same reasons as set out in paragraphs 140 to 151 above, which we repeat in this regard.

155. When taking these factors in combination, we find on the balance of probabilities that the only reasonable explanation for the transactions with Loy's suppliers was that they were connected to fraud. Again, this is for the same reasons as set out in paragraphs 140 to 151 above, which we again repeat in this regard.

### **WHETHER LOY'S ACTIONS ARE ATTRIBUTABLE TO MR TURNER**

#### **Submissions**

156. Ms Brown submitted that Mr Turner was a director of Loy at the material times, that he was the controlling mind of Loy, that he was responsible for Loy entering into the disputed transactions, and that Mr Turner accepted that he conducted all Loy's deals. She also submitted that Mr Turner had the requisite actual knowledge or means of knowledge for the reasons set out in her earlier submissions as to the *Kittel* denials.

157. Mr Henry submitted that in order for Mr Turner to be liable for the Penalty, HMRC must establish that he knew or should have known that Loy's disputed transactions were connected with the fraudulent evasion of VAT and that HMRC have not disclosed any evidence of matters concerning Mr Turner's conduct to this effect. He notes that Mr Turner is a man of good character without any criminal convictions, he has carried out his business activities lawfully, and he has co-operated with HMRC. He also notes that there has been no criminal investigation into Mr Turner's conduct.

#### **Discussion**

158. We find that Loy's actions are attributable to Mr Turner. This is for the following reasons.

159. First, there was no dispute that Mr Turner was the director and controlling mind of Loy at all material times. He was responsible for, and conducted, all the transactions which are relevant to this appeal. Mr Turner did not suggest that any employee or other person had any other meaningful input into Loy's affairs that would detract from this.

160. Secondly, for the reasons set out above, we have found that Mr Turner knew or should have known that Loy's transactions were connected with the fraudulent evasion of VAT. That is his own knowledge or means of knowledge, albeit in his capacity as a director of Loy.

161. Thirdly, we have no reason to doubt that Mr Turner is a man of good character. However, that is not the test and has no bearing upon the question of attribution. Similarly, the lack of criminal investigation has no bearing upon the question of attribution either. Our findings relate to Mr Turner's knowledge or means of knowledge that Loy's transactions were connected with the fraudulent evasion of VAT. We make no findings – and do not need to make any findings – as to whether Mr Turner was acting dishonestly or as to whether he committed a criminal offence.

#### **DISPOSITION**

162. It follows that, for the reasons set out above, we dismiss Mr Turner's appeal.

#### **RIGHT TO APPLY FOR PERMISSION TO APPEAL**

163. 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 CHAPMAN KC  
TRIBUNAL JUDGE**

**Release date: 06<sup>th</sup> JUNE 2024**