TC05693

Appeal number: TC/2014/06310

VALUE ADDED TAX - Car dealers in Northern Ireland

First Issue - Denial of input tax - Was there a tax loss? - Yes - Did that loss result from fraudulent evasion? - Yes - Were the transactions subject to the appeal connected with that evasion? - Yes - Did the Appellants know or should they have known that the transactions were connected with fraud? - Yes - Appeal on the First Issue dismissed

Second Issue - Denial of input tax on basis of alleged non-compliant invoice - Did invoice comply with Regulation 14 of the VAT Regulations? - No - Did HMRC unreasonably refuse to consider alternative evidence of the charge to VAT? - No - Appeal on the Second Issue dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

(1) MR ANTHONY MULLEN **Appellants**
(2) MRS ZOE MULLEN (formerly FELL)
(A Partnership, trading as 'GRANGE ROAD CAR SALES')

- and -

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

TRIBUNAL: JUDGE CHRISTOPHER MCNALL
MISS PATRICIA GORDON

Sitting in public at the Tribunal Hearing Centre, 2nd Floor, Royal Courts of Justice, Chichester Street, Belfast BT1 3JF on 18, 19, 20, 21, 22 April 2016 and 25 July 2016, with further written submissions received on 8 July 2016 and 1 September 2016

Mr Danny McNamee of McNamee McDonnell Solicitors, for the Appellants

Ms Joanna Vicary (18-22 April 2016), Counsel, and Mr Joseph Millington (25 July 2016 only), Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

The First Issue

1. By an undated Notice of Appeal the Appellants challenge HMRC's decision dated 19 September 2014 (upheld on review on 22 October 2014) to deny the following amounts of input tax claimed and to amend the appellants' VAT returns accordingly:

(1)	09/12	£56,336.67
(2)	10/12	£28,659.50
(3)	2/13	£6,750

2. The denied claim for input tax related to 18 individually identified transactions ('**the Transactions**').

3. The reason given by HMRC for its decision was that HMRC, having conducted an extended verification of the Transactions, had concluded that the Transactions were connected with a scheme to defraud HMRC and that the Appellants knew or ought reasonably to have known that this was so.

The Second Issue

4. In addition to the above, HMRC also decided to deny input tax on one particular purchase of a vehicle during the period 09/12, in the sum of £1,433.33, on the basis that the invoice relied upon, dated 20 September 2012, was invalid. That decision is also challenged.

The hearing of the Appeal

5. At one stage, it was contemplated that the present Appeal might be heard at the same time as another Appeal by the same Appellants (TC/2015/00501). However, that course of action was not adopted, principally due to reasons of available time. It suffices to note that TC/2015/00501 was heard by a different composition of the same Tribunal, albeit presided over by the same Judge. But for the avoidance of doubt, the present Appeal has been treated entirely on its own merits. The Tribunal's findings in the other Appeal have not played any part in this one; and vice versa.

6. This appeal was listed to be heard over five sitting days. Although the Appellants had expressed the view that the appeal could be heard 'relatively quickly' and indeed perhaps in as little time as a single day, the appeal was in fact heard over six sitting days. The first five days were occupied with opening submissions and the taking of evidence. The sixth sitting day, which took place some time later, due to listing difficulties, was for the hearing of final oral submissions, principally at the (proper) insistence of Mr McNamee.

7. However, when those oral submissions came to be heard (at a hearing which the present Judge ordered must go ahead notwithstanding the unavailability, due to

absence on annual leave, of Ms Vicary, Counsel for HMRC who had appeared at the trial) the Appellants, through Mr McNamee, sought to argue that certain concessions said by HMRC to have been made on the Appellants' behalf during the course of the hearing had not in fact been made. Given (i) that HMRC's written closing had been composed on the basis that concessions had been made and that the issues had thereby fallen away, and (ii) Ms Vicary (as Mr McNamee knew) was not going to be present to speak to her written closing, further written submissions were invited.

8. The proceedings were subject to daily transcription, organised by HMRC. Complete copies of those transcriptions were provided to the Tribunal, to assist in its deliberations, and were also provided to the Appellants' representatives.

9. We were also assisted by a file of 'Illustrative Documents' which had been prepared by Ms Vicary. Those documents were largely graphical representations of the Transactions - in the nature of deal sheets - and also summaries of the documents which were otherwise located, not always in entirely sensible order, through the voluminous files. We were urged by Mr McNamee not to treat the 'Illustrative Documents' as evidence and we have not done so. We have simply treated them as documents of a conventional kind: as signposts and summaries produced to assist not only the Tribunal but also the Appellants to navigate the factual complexities of this appeal.

The Relevant Law on the First Issue

10. The right to deduct input tax is derived from Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 which has been implemented into UK domestic law by sections 24-26 *Value Added Tax Act 1994* and Regulation 29 of *The VAT Regulations 1995* (SI 1995/2518).

11. In brief terms, if a trader has incurred input tax which is properly allowable, he is entitled to set it against his output tax liability (or to receive a repayment if the input tax credit due to him exceeds that liability). Evidence is required in support of a claim: see Article 18 of the Sixth Directive and Regulation 29(2) of the 1995 Regulations. Traders are required, amongst other things, to hold or provide any document required by Regulation 13 of the 1995 Regulations or such other evidence to support the claim as HMRC may direct.

12. An exception to the above entitlement was identified by the European Court of Justice in the joined cases *Axel Kittel v Belgium; Belgium v Recolta Recycling SPRL* (C-439/04 and C-440/04) [2006] ECR I-6161. In a judgment on references for a preliminary ruling, the ECJ articulated the legal basis and circumstances in which the right to deduct may be lawfully denied by the taxation authorities:

> "51 […] it is apparent that traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing the right to deduct the input VAT [...]

52. It follows that, where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, Article 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.

53. By contrast, the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity' are not met where tax is evaded by the taxable person himself [...]

54. As the Court has already observed, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive...Community law cannot be relied on for abusive or fraudulent ends [...]

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 … 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 [...]

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’.

[...]

61 …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."

13. These principles - often referred to, in shorthand, as the 'Kittel' principles - were amplified and clarified, in a domestic context, by the Court of Appeal in *Mobilx Ltd (in administration) v HMRC [2010] EWCA Civ 517*. Moses LJ (with whom Carnwath LJ, as he then was, and Sir John Chadwick agreed) remarked:

"[30] ... the Court made clear that the reason why fraud vitiates a transaction is not because it makes the transaction unlawful but rather because where a person commits fraud he will not be able to establish that the objective criteria which determine the scope of VAT and the right to deduct have been met...

[...]

[41] ...*Kittel* did represent a development of the law because it enlarged the category of participants to those who themselves had no intention of committing fraud, but who, by virtue of the fact that they knew or should have known that the transaction was connected with fraud, were to be treated as participants. Once such traders were treated as participants their transactions did not meet the objective criteria determining the scope of the right to deduct."

14. On the issue of knowledge, the Court of Appeal gave the following guidance:

"MEANING OF *'SHOULD HAVE KNOWN'*

[52] If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met. It profits nothing to contend that, in domestic law, complicity in fraud denotes a more culpable state of mind than carelessness, in the light of the principle in Kittel. A trader who fails to deploy means of knowledge available to him does not satisfy the objective criteria which must be met before his right to deduct arises.

[...]

EXTENT OF KNOWLEDGE

[56] It must be remembered that the approach of the court in *Kittel* was to enlarge the category of participants. A trader who should have known that he was running the risk that by his purchase he might be taking part in a

transaction connected with fraudulent evasion of VAT, cannot be regarded as a participant in that fraud. The highest it could be put is that he was running the risk that he might be a participant. That is not the approach of the Court in *Kittel*, nor is it the language it used. In those circumstances, I am of the view that it must be established that the trader knew or should have known that by his purchase he was taking part in such a transaction, as the Chancellor concluded in his judgment in *Blue Sphere Global*:-

> "The relevant knowledge is that Blue Sphere Global ought to have known by its purchases it was participating in transactions which were connected with a fraudulent evasion of VAT; that such transactions might be so connected is not enough." (Para 5).

[57] HMRC object that the principle should not be restricted to those cases were a trader has deliberately refrained from asking questions lest his suspicions should be confirmed. This has been described as a category of case which is so close to actual knowledge that the person is treated as having received the information which he deliberately sought to avoid...

[58] As I have endeavoured to emphasise, the essence of the approach of the court in *Kittel* was to provide a means of depriving those who participate in a transaction connected with fraudulent evasion of VAT by extending the category of participants and, thus, of those whose transactions do not meet the objective criteria which determine the scope of the right to deduct. The court preserved the principle of legal certainty; it did not trump it.

[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.*

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

15. The Court of Appeal referred with approval to the judgment of the then Chancellor, Sir Andrew Morritt, in *Blue Sphere Global Ltd v HMRC* [2009] EWHC 1150 (Ch) where, in relation to the issue of 'connection' with fraud, the judge remarked (see Paras. [42]-[45]):

> "…The nature of any particular necessary connection depends on its context, for example electrical, familial, physical or logical. The relevant context in this case is the scheme for charging and recovering VAT in the member states of the EU. The process of off-setting inputs against outputs in a particular period and accounting for the difference to the relevant revenue authority can connect two or more transactions or chains of transaction in which there is one common party whether or not the commodity sold is the same. If there is a connection in that sense it matters not which transaction or chain came first. Such a connection is entirely consistent with the dicta in *Optigen* and *Kittel* because such connection does not alter the nature of the individual transactions. Nor does it offend against any principle of legal certainty, fiscal neutrality, proportionality or freedom of movement because, by itself, it has no effect.
>
> Given that the clean and dirty chains can be regarded as connected with one another, by the same token the clean chain is connected with any fraudulent evasion of VAT in the dirty chain because, in a case of contra-trading, the right to reclaim enjoyed by C ... in the dirty chain, which is the counterpart of the obligation of A to account for input tax paid by B, is transferred to E .. in the clean chain. Such a transfer is apt…to conceal the fraud committed by A in the dirty chain in its failure to account for the input tax received from B."

16. We also have regard to the remarks of Christopher Clarke J (as he then was) in *Red12 v HMRC* [2009] EWHC 2563 at [109]-[111] which were also approved by the Court of Appeal in *Mobilx:*

> "[109] Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.
>
> [110] To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain

of transactions all of which have identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.

[111] Further in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them."

17. In *Megtian Limited (in administration) v HMRC* [2010] EWHC 18 (Ch) Briggs J (as he then was) stated at [34], and [37]-[38]:

"In my judgment, there are likely to be many cases in which a participant in a sophisticated fraud is shown to have actual or blind-eye knowledge that the transaction in which he is participating is connected with that fraud, without knowing, for example, whether his chain is a clean or dirty chain, whether contra-trading is necessarily involved at all, or whether the fraud has at its heart merely a dishonest intention to abscond without paying tax, or that intention plus one or more multifarious means of achieving a cover-up while the absconding takes place.

Similarly, I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be, demonstrated precisely which aspects of a sophisticated multifaceted fraud he would have discovered, had he made reasonable inquiries. In my judgment, sophisticated frauds in the real world are not invariably susceptible, as a matter of law, to being carved up into self-contained boxes even though, on the facts of particular cases, including Livewire, that may be an appropriate basis for analysis."

18. The burden of proof in this type of case rests with HMRC. Moses LJ made this clear in *Mobilx*:

"[81] ...it is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase is outwith the scope of the right to deduct it must prove that assertion.

[82] But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant....tribunals should not unduly focus on the question whether a

trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a tribunal from asking the essential question posed in Kittel, namely whether the trader should have known by his purchase that he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was.

[85] ....A trader who chooses to ignore circumstances which can only reasonably be explained by virtue of the connection between his transactions and fraudulent evasion of VAT, participates in that fraud, and, by his own choice, deprives himself of the right to deduct."

19. We agree with HMRC that the test in *Kittel* is simple and should not be over-refined. We note the observations made by Proudman J, sitting as a Judge of the Upper Tribunal, in *GSM Export (UK) Limited v HMRC [2014] UKUT 0529* (TCC) that *Mobilx* does not change the test in *Kittel*, and that the expression 'only reasonable explanation' (which was characterised by Mr McNamee as an impossible hurdle for HMRC to overcome in the present appeal) does not alter the requirement that the taxpayer's state of mind squarely remains *'knew or should have known'*, and is merely a way in which HMRC can demonstrate the extent of the taxpayer's knowledge: that is to say, that the taxpayer knew, or should have known, that the transaction was connected with fraud, as opposed to merely knowingly running some risk that there might be such a connection.

20. The standard of proof in this case is the ordinary civil standard, namely, the balance of probabilities. In *Re B (Children) (Care Proceedings: Standard of Proof) [2008] UKHL 35*, the Supreme Court made it very clear that there is no enhanced burden even if the allegations - as in this case - are ones where the gravity of misconduct alleged is serious, with serious consequences.

21. Lord Hoffmann also made the following helpful remarks concerning the operation of the standard when it comes to fact finding:

"[2] If a legal rule requires a fact to be proved (a 'fact in issue') a judge or jury must decide whether or not it happened. There is no room for a finding that it might not have happened. The law operates a binary system in which the only values are zero and one. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of zero is returned and the fact is treated as not having happened. If he does discharge it, a value of one is returned and the fact is treated as having happened.

[...]

[13] ... I think that the time has come to say, once and for all, that there is only one civil standard of proof and that if proof that the fact in issue more probably occurred than not."

The Appellants' identity

22. We reject the Appellants' argument, made in closing, that the Appeal must be allowed since (as we understood it) the assessments had been made against the wrong persons. This argument did not appear in the Notice of Appeal. Nor was it even hinted at in the Appellants' Skeleton Argument, which was undated but which was made in response to HMRC's Skeleton Argument dated 1 April 2016. If this indeed a knock-out point, then it was notable that no application to strike-out HMRC's Statement of Case had ever been made and the point dealt with at an interlocutory stage rather than following five days of evidence and submissions.

23. But, in any event, the point is not well conceived. Ms Fell originally registered for VAT on 21.6.08. Pursuant to that application, on 24.6.08 she was registered as the sole proprietor of Grange Road Car Sales ('**GRCS**'). Latterly, on 25.4.12 - and, hence, before the periods in issue in this dispute - an application was made to register GRCS as a partnership between Ms Fell and Mr Mullan. The 'Partnership Details' are given on the VAT2 which is in evidence before us. We find that Mr Mullan (irrespective of VAT registration) in fact became a partner somewhat earlier - by no later than October 2011.

24. Therefore GRCS was at all material times a partnership consisting of Mr Mullan and Ms Fell. In relation to HMRC, the partners were jointly and severally responsible for the VAT affairs of the business.

25. Section 45 of the *VAT Act 1994* relates to the VAT treatment of partnerships. The registration of persons carrying on a business in partnership may be in the name of the partnership: section 45(1)(a). Section 45(4) provides that any notice, whether of assessment or otherwise, which is addressed to a partnership by the name in which it is registered under section 45(1) shall be treated as served on the partnership.

26. This disposes of the issue. But, even if that were not the case, the issue of identity is transparently a poor point for the Appellants to seek to take given that Box 1 of the Notice of Appeal gives the 'Appellant's details' as 'Grange Road Car Sales' and the VAT number- 969 9945 59 - is the VAT number of 'Grange Road Car Sales'.

27. 'Grange Road Car Sales' means Mr Mullan and Ms Fell, trading in partnership as Grange Road Car Sales. The correspondence denying the input tax is directed to GRCS as its business address. That correspondence was wholly sufficient. 'The Appellants' in this decision is used simply in the conventional sense of referring to Mr Mullan and Ms Fell.

The scope of the Appeal

28. The Grounds of Appeal are extremely brief and unrevealing. They say, in full:

"The decision to deduct input tax in this matter is entirely misconceived, all of the transactions involved in the assessed periods have been fully and properly accounted for in compliance with the regulations. There are no grounds in (sic) which this input tax should be refused"

29. On 22 June 2015 the Tribunal's Registrar, of the Tribunal's own initiative, gave directions for the management of this appeal. These directions were in conventional form. Paragraph 9 reminded the parties that they were each at liberty to apply, at any time, for those directions to be amended, suspended, or set-aside, or for further directions. Neither party made any such application.

30. Direction 5 provided that the parties were each to provide the Tribunal and each other with an *'Outline of the case that they will put to the Tribunal'*.

31. In a case of this nature, four issues conventionally arise:

(1) Was there a tax loss? (**Point 1**)

(2) If so, did this loss result from a fraudulent evasion? (**Point 2**)

(3) If so, were the transactions which are the subject of this appeal connected with that evasion? (**Point 3**)

(4) If so, did or should the Appellants have known that the transactions were so connected? (**Point 4)**

32. The Grounds of Appeal do not self-evidently engage with any of those Points.

33. Neither party seems to have considered (or, if they did, wished to implement) the case-management guidance given by the Upper Tribunal (Simon J and Judge Bishopp) in *Revenue and Customs Commissioners v Fairford Group plc (in liquidation) and another* [2015] STC 156, namely that the Appellants should notify HMRC and the Tribunal of the issues in dispute in this appeal and in particular should confirm:

"Whether the Appellant accepts the transaction chains as set out in the deal sheets produced by HMRC in relation to the Appellant's purchases on which HMRC have denied input tax recovery accurately reflect the trading history of the goods bought and sold by the Appellant. If the Appellant does not accept the accuracy of the deal sheets, the Appellant should specify which chains it considers incorrect and why;

Whether the Appellant accepts (without making any admission of knowledge or means of knowledge) that the Appellant's transactions were part of an orchestrated fraud;

Whether, in respect of chains alleged to be directly connected with a defaulter, the Appellant accepts that there has been a fraudulent VAT default at the start of the chain;

Whether the Appellant accepts its transactions were connected to fraudulent tax loss."

34. In *Fairford*, the Upper Tribunal went on to say (at [48]):

"In our view the appellant should additionally be required to provide reasons if the answer to any of the second, third and fourth of those questions is No. An appellant who advances a positive case will be required, by virtue of other customary directions, to set it out in witness statements or, if that is not practicable, in a response or a letter, or in some similar way. Accordingly, an appellant putting a positive case must disclose his hand in advance; we see no reason why one merely putting HMRC to proof should be in a better position. If there is a real challenge to HMRC's evidence it should be identified; if there is not, the evidence should be accepted. We see no reason why an appellant who does not advance a positive case should be entitled to require HMRC to produce witnesses for cross-examination when their evidence is not seriously disputed. Such a course is wasteful not only of HMRC's resources but also of the resources of the FTT, since it increases the length of hearings and adds to the delays experienced by other tribunal users."

35. In *C F Booth Ltd v HMRC [2016] UKFTT 261 (TC)* Judge Berner considered those observations (not uncritically) and remarked (at Para. [13]):

"Two aims can be discerned in the approach adopted by the Upper Tribunal. The first is that the appellant, as well as HMRC, should set out its case whether it advances a positive case or is merely putting HMRC to proof. HMRC is entitled to know which of the issues is in dispute, and the basis on which the relevant issues are disputed. The second is that if the appellant makes no positive case with respect to the issues specified in the directions, serves no evidence which challenges the evidence of HMRC's witnesses in those respects and does not identify the areas of dispute in that evidence, then the appellant will not be entitled to cross-examine those witnesses, whose witness statements will be accepted by the tribunal".

36. There was no evidence at all from Ms Fell. Neither the Grounds of Appeal nor the relatively brief witness statement filed by Mr Mullan generated any efforts by HMRC to establish, before the hearing, the issues which were being genuinely put in issue by the Appellants; whether any of Points 1, 2 or 3 were in dispute; and, if they were, whether the Appellants were advancing a positive case or putting HMRC to proof.

37. HMRC's Skeleton Argument was dated 1 April 2016. It identified the 4 points but focussed on Point 4. It seems to us that was probably on the basis that HMRC, rightly or wrongly, had formed the impression that Points 1, 2 and 3 were not genuinely in dispute. If there was any attempt to bottom that out before the hearing came on before us, we were not made aware of it.

38. The Appellants' Skeleton Argument, which responded to it, did not clarify matters. It was of a general, discursive and even somewhat polemical character.

39. Thus, and even on the basis of the Skeleton Arguments, which were intended to stand as 'Outlines of the Case', it was not easy to ascertain whether all 4 Points were genuinely in dispute between the parties. That said, the principal focus of the Appellants' Skeleton was on Paragraph 21 of HMRC's Skeleton, which deals with HMRC's submissions as to the 'matters' which it alleges are 'illustrative of the Appellants' knowledge, or means of knowledge, of the connection with fraud': i.e., Point 4.

40. These circumstances suggest a failure by the parties to engage co-operatively with each other. In turn, this meant that this Appeal consumed a more considerable proportion of the Tribunal's resources than otherwise might have been the case. The position, as it eventually emerged, in relation to each of Points 1, 2 and 3 is discussed at more length below.

The Transactions

41. These are the Transactions which are the subject matter of the First Issue:

Deal	**Period**	**Tax Loss**	**Car Reg**	**Ostensible Seller / Supplier to GRCS**	**GRCS Ostensible Payee**	**Ostensible Buyer / Customer from GRCS**	**Payment received by GCRS ostensibly from**
T1	09/12	4930	VE61 FJY	Lafferty Moore	Mullagh Motors	David McMahon	NI bankers draft
T2	09/12	3800	FT11 0ZD	Patrick McGourty	RMC Autos	Neil Finnegan	NI bankers draft
T3	09/12	3200 4500 2200	HG61 XOZ MK62 FZV MV12 ZLY	Patrick McGourty	Altmore Motors	Neil Finnegan	Roy Wilson Car Sales Carhill Car Sales Smash Recovery
T4	09/12	5000	YB12 ZHV	Patrick McGourty	Mullagh Motors	Keith Cocorran	NI bankers draft
T5	09/12	4560	YK61 SXZ	Patrick McGourty	Altmore Motors	HSS Leasing	NI bankers draft
T6	09/12	3066.67	FY61 YKD	Q Autos	JMC Wholesaling	Neil Finnegan	Alan McCord t/a High Octane

T7	09/12	2980	FT11 OZM	Patrick McGourty	O'Kaines	Neil Finnegan	NI bankers draft
T8	09/12	5600	YB12 YBE	Lafferty Moore	LTS	Neil Finnegan	NI bankers draft
T9	09/12	3400 8300	HJ12 GLK RF12 NUX	Patrick McGourty	Auric & Altmore Motors	Neil Finnegan	NI bankers draft
T10	09/12	1600 1600 1600	EX11 DDU FP11 TKE HV11 OHW	Patrick McGourty	Altmore Motors	Neil Finnegan	Benjamin Nugent t/a Altmore Motors
T11	09/12	1000	S18 ANL	Patrick McGourty	nk	Neil Finnegan	nk
T12	10/12	3300	DXZ 4611	JRS	JRS	Neil Finnegan	nk
T13	10/12	5041	MV60 YNP	Patrick McGourty	MR Truck Services	Neil Finnegan	nk
T14	10/12	2094.50	W158 GWV	Patrick McGourty	nk	Neil Finnegan	nk
T15	10/12	1700 1700	SF11 NWD SF11 NZP	Lafferty Moore	Altmore Motors	Neil Finnegan	nk
T16	10/12	2960	FY61 YLK	Hughes Car and Van	Hughes Car and Van	Neil Finnegan	nk
T17	10/12	1983.33	DXZ 5454	Patrick McGourty	MR Truck Services	Unknown customer in NI	nk
T18	02/13	3375 3375	FR12 WUU FY12 VHO	Q Autos	nk	James McCarville	nk

42. On the basis of the authorities cited above, we consider that the correct approach to be adopted in this appeal is to recognise that, whilst we must consider the Transactions individually, the Transactions should not be viewed in isolation from each other.

The Respondent's case

43. HMRC's case is that there was a tax loss, which resulted from a fraudulent evasion, that the Transactions which are the subject matter of this appeal were connected with that evasion, and that the Appellants either knew or ought to have known that the Transactions were so connected.

44. In broad summary, HMRC relies on the following features:

(1) All 18 Transactions can be traced back to 4 defaulting traders;

(2) 16 of the Transactions were made directly from defaulters;

(3) 15 of the transactions were 'back to back': that is, with ostensibly purchases and ostensible onward sales being on the same day;

(4) All but 1 of the transactions involve dispatch to the Republic of Ireland;

(5) Payments were made to third parties, meaning that, in most of the transactions, the vehicles were paid for by way of cheque to or from a third party not otherwise connected with the same. GRCS either gave cheques to their suppliers leaving the payee details blank to be completed at a later stage, or received payment from seemingly unconnected third parties.

The Appellants' case

45. In summary, the Appellants' case, derived from Mr Mullan's Witness Statement, the Skeleton Argument, and Mr McNamee's opening remarks is this:

(1) All the Transactions to the best of his (that is, Mr Mullan's) knowledge were carried out in the 'proper lawful tax compliant matter';

(2) Back-to-back sales are the most common form of transaction in the vehicle trade;

(3) Written contracts are not normal practice in the car trade;

(4) Purchase orders are 'an unnecessary duplication' of sales orders and were not kept. However, the failure to record purchase orders did not detract from the reliability of GRCS' business records;

(5) The leaving of payee blank on cheques is common, especially where goods are being released on sale or return basis;

(6) No cheques were issued without GRCS obtaining possession of the vehicle;

(7) There was nothing in any of the financial arrangements which would give rise to any concern for anyone involved in the motor trade.

46. Mr Mullan's key point was that he was 'an extremely innocent party' and a legitimate businessman. In opening, Mr McNamee agreed with the characterisation of this position as 'an innocent dupe'.

47. In the Skeleton Argument, Mr McNamee also raised the point that Mr Mullen 'is illiterate and relies heavily on [Mrs Mullan] and his professional advisers in relation to the documentary aspects of the business'.

48. Neither Mrs Mullen nor any of the (unnamed) professional advisers gave any evidence. We discuss what inferences can be drawn from this below.

The Respondent's evidence

49. The Tribunal was supplied with 6 lever-arch files of documents, containing mainly witness statements and exhibits to them.

50. HMRC's evidence was provided by witness statements from Heather Arnold (two statements); Lisa Wilkinson; Paul Goodman; and Bernadette O'Neill (two statements).

51. None of those statements were agreed. All the witnesses were therefore made available for cross-examination. The cross-examination of Wilkinson, Goodman and O'Neill was extremely brief and took place on the afternoon of Day 2.

52. We make some preliminary comments about their evidence.

53. Heather Arnold gave evidence from 2.45 to 4.15 on Day 1 (1.5hrs) and from 10.00 to 12.45 (2.75 hrs) on Day 2. She is a higher officer. She had been investigating GRCS for about 18 months. One of her witness statements was in relation to the denial of input tax to GRCS. The other witness statement was in her role as the defaulting officer for Lafferty Moore, one of the other traders involved with GRCS.

54. She was a steady and credible witness. She had identified a small number of minor errors in her witness statement, and these were drawn immediately to the Tribunal's attention. She was conversant with the documents, and had an impressive grasp of the details of the Transactions. She was vigorously cross-examined at some length. She was conscious of the limits of her personal knowledge, and was careful not to stray beyond that. She made sensible concessions where the meaning of her statement or documents relied upon were not entirely clear. She agreed without hesitation when (for example) it was put to her that none of the VAT numbers seemed to have been 'hi-jacked'.

55. Lisa Wilkinson gave evidence in relation to Q Autos on the afternoon of Day 2. She was very briefly cross-examined in relation to Q-Autos and confirmed that Q-Autos, given the size of its un-met assessment, would have been dealing with other auto traders as well. Her evidence was not otherwise challenged.

56. Paul Goodman gave evidence on the afternoon of Day 2. He was very briefly cross-examined by Mr McNamee (3 questions, all relating to M & R Motors). His evidence was not otherwise challenged.

57. Bernadette O'Neill gave evidence on the afternoon of Day 2. She was cross-examined by Mr McNamee. She made sensible concessions when called upon to do so, and answered the questions put to her (both by Mr McNamee and the Tribunal) without hesitation and with clarity.

The Appellants' evidence

58. Direction 2 (made on 22 June 2015) was to the effect that each party was to send to the other parties 'witness statements from all witnesses on whose evidence they intend to rely at the hearing setting out what that evidence will be...': emphasis supplied

59. The Appellants' only evidence was from Mr Mullan. There was no evidence from his wife / co-partner. His witness statement did not comply in substance with the

Direction. It was extremely brief. It consisted entirely of general observations. It did not deal at all (let alone in any detail) with any of the Transactions, the alleged sellers, the alleged buyers, or any of the other serious allegations made against GRCS.

60. We treated a passing suggestion by Mr McNamee, in the course of his opening submissions, that the partnership's accountant could be called to give evidence as an application, and we refused it. No notice of the application had been given to HMRC and there was no draft witness statement.

61. We refused an application in the face of the Tribunal by Mr McNamee to extensively examine Mr Mullan by way of supplementary questions in chief. The Direction in this regard was clear, and no application had been made to vary it. There had to be a level playing field, and the overriding objective (set out in Rule 2 of the Tribunal's Rules) that the case be dealt with fairly and justly meant that HMRC was entitled to know, in advance of the hearing, what the Appellants' case really was. That was supposed to be set out in witness statements. It would neither have been fair nor just for HMRC to discover what Mr Mullan's evidence was only in the course of examination-in-chief, moments before cross-examination.

62. Mr Mullan also sought to rely on a single side of A4, annexed to Mr McNamee's Skeleton Argument, which purported to show that GRCS's 'own researches' had identified ROI registration numbers for three of the impugned vehicles. That document is slightly baffling since none of the UK registration numbers match the impugned numbers. In any event, there was no evidence given as to the ROI registration numbers.

63. These are our findings about the Appellants' evidence in general.

64. The brevity (11 paragraphs, over 2 pages) and almost entirely unrevealing nature of Mr Mullan's witness statement made necessary a lengthy and painstaking cross-examination. Mr Mullan gave evidence for a total of 16 hours over 3 sitting days. As such, we had a very good opportunity to observe and assess him.

65. Mr Mullan struck us as an individual of courtesy and charm. His evidence was given calmly and with obvious respect to the Tribunal. Whatever his difficulties with reading and writing, he is obviously a highly intelligent and skilled businessman, who has succeeded in expanding the turnover of GRCS considerably.

66. But, whilst making all due allowances for (i) Mr Mullan's alleged difficulties with reading and writing; (ii) his unfamiliarity with the forensic process in general, and the rigours of cross-examination in particular; (iii) the strain imposed by such lengthy cross-examination; and (iv) inevitable lapses of concentration or memory, we nonetheless found Mr Mullan to be a very unsatisfactory witness and his evidence to be unconvincing.

67. We were struck by his extremely relaxed - even nonchalant - attitude. To our eyes, he betrayed little anxiety that he had, on his case, as an entirely innocent 'dupe', been tricked and deceived by persons with whom he had done business. He betrayed little anxiety that the result of this was that (i) he was the one having to mount a

lengthy and time-consuming appeal to the Tribunal, in which his own honesty and integrity were being called into question and (ii) his own business was facing a loss - in terms of its inability to recover input tax - to the tune of about £90,000.

68. Of course, demeanour is not conclusive. But we cannot properly ignore it. Moreover, demeanour aside, Mr Mullan's evidence, in almost all material respects, was hopelessly vague, to the point where we have concluded that none of it can safely be relied upon.

69. His evidence was also sometimes evasive. We did not accept the general impression which he endeavoured to convey that he knew nothing and could not tell the Tribunal much at all about any of the other participants in the Transactions, or the Transactions themselves.

70. We were unconvinced by this stance. We considered that Mr Mullan's apparent and pervasive ignorance as to the paperwork which was actually kept or produced by GRCS, or which was required to be kept by a business seeking to comply with its tax obligations, was not genuine ignorance but was artificial and designed to mislead us.

71. We are satisfied to the requisite civil standard of proof that Mr Mullan displayed a lack of candour and honesty both in his dealings with HMRC and in his evidence to us. In relation to these Transactions, we cannot treat him as a witness of truth.

72. It is sufficient for us to identify the following over-arching matters that have led us to our conclusion about Mr Mullan's knowing involvement in VAT fraud.

73. In the context of this case, the question whether Mr Mullan had known of the connection to VAT fraud turned almost entirely on whether we accepted his case and evidence that he was an 'innocent dupe'.

74. There was a large quantity of compelling and wide-ranging circumstantial evidence suggesting that GRCS and Mr Mullan had been culpable and knowing participants in fraud. Documents were put, fairly and squarely, to Mr Mullan in cross-examination. He was consistently unable to provide satisfactory explanations.

75. We do not consider him to be an innocent, a dupe, guileless, or naive. We have to judge him in the light of his proven experience in the motor trade. He had been very successful with GRCS. We note that he told HMRC in October 2011 that he was already a partner, and he formally became a partner for VAT purposes in April 2012. Following his formal introduction to the business, GRCS's turnover increased massively: from £791,109 in year ending 06/11 to £2,892,963 in year ending 06/12. That increase in turnover was largely attributable to increased cross-border trade: from £27,450 in year ending 06/11 to £2,156,828 in year ending 06/12. This increase corresponded with Mr Mullan's formal involvement with GRCS. We do not consider this to have been coincidence. We are convinced that Mr Mullan (in common with many other car dealers) spotted the legitimate financial opportunities that cross-border trading could bring, and was able to compete successfully in that market.

76. It is not in dispute that GRCS is a successful business, nor that Mr Mullan is a successful businessman. Nor is it in dispute that the Transactions in dispute in this case only amount, on any view, to a very modest proportion of GRCS's business or turnover.

77. But that does not detract from the essentially fraudulent character of these Transactions. We note and have regard to the fact that the legitimacy of a large majority of GRCS's business is not challenged. We also note and have regard to the fact that verification of two other periods - 11/12 and 01/13 - was undertaken by HMRC but apparently without any denial of input tax.

78. We accept that it was necessary to have in mind what was actually known to Mr Mullan, and also what he should have known - subject of course to the usual safeguards against hindsight. But the Tribunal was entitled to draw inferences from Mr Mullan's evidence and the nature of his dealings.

79. His case did not amount to more than a flat denial that he knew that the Transactions had been connected with fraud, coupled with an assertion that he was honest. He had called no other evidence. He had not called a single fellow trader. He had not obtained evidence from his accountant, or any other professional adviser. Even his wife / co-partner did not give evidence (a matter which we shall consider further below).

80. The evidence in relation to the Transactions disclosed obvious uncommercial features, many of which features were present across more than one transaction. There was a myriad of inconsistencies and anomalies in the documents. Mr Mullan appeared unable to explain any of them. The impression from many of the documents - both those coming from GRCS, and those from other traders - was that they had not been generated as part of genuine commercial dealings, but had been generated so as to try to create a paper trail.

81. We also find that Mr Mullan's evidence was contradictory in one fundamental regard which goes to the manner of the Transactions. Our understanding had been that his evidence, and the Appellants' case, going to explain why many of the transactions were 'back to back', and should not be treated as suspicious, was that his business model was to source a particular vehicle for a particular customer. That is, the inquiry from the customer preceded the acquisition of the vehicle. This is set out in Mr Mullan's witness statement, and it is the way in which the Appellants' case was opened. However, Mr Mullan's oral evidence was completely the opposite. He was asked this directly in relation to one of the vehicles by the Tribunal. It had been bought by GRCS thinking that GRCS could find a buyer for it. Mr Mullan acknowledged 'yes, just like any vehicle'.

82. The two are not the same thing at all. Not only is this a different business model, but the inconsistency is highly material since the former scenario - finding a vehicle in response to an existing inquiry - does (at least, potentially) explain back-to-back sales and (at least, potentially) alleviates suspicion that might otherwise attach to a quick onward sale. But the same does not self-evidently hold true in relation to the

latter scenario. A vehicle could be bought, without any potential buyer, and GRCS would be stuck with that vehicle unless and until it could find a buyer.

83. It is appropriate to express a conclusion at this juncture in relation to Point 4. We find, for those overarching reasons, and for the reasons set out in more detail below, that Mr Mullan, as a partner of GRCS, knew or (which amounts to the same thing) wilfully shut his eyes to the fact that all the Transactions were connected with the fraudulent evasion of VAT. We are satisfied that Mr Mullan knew, or wilfully shut his eyes to the fact that the supply chains were tainted and that VAT fraud had occurred or would occur at some point. We are entirely satisfied that Point 4 is made out against Mr Mullan, and accordingly is made out against GRCS.

The non-attendance of the Second Appellant

84. Ms Fell (latterly, Mrs Mullan) did not file a witness statement. She did not attend the hearing. Mr McNamee argued that her attendance was not necessary. In broad terms, he argued that her absence was completely irrelevant, and argued that the Tribunal could not draw any inferences at all from her absence.

85. We disagree. Inferences can properly be drawn from her absence. In *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 the Court of Appeal (Brooke LJ, with whom Aldous and Roch LJJ agreed) articulated the following principles governing the failure of a witness to attend a trial.

86. We consider that the same principles apply with no less force - and, perhaps, with even greater force - in the case of *a party* who does not attend a trial.

> "(1) In certain circumstances, a court may be able to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

87. These principles are especially applicable in cases which raise serious allegations of wrongdoing against a party: see the discussion by Proudman J in *HMRC v Sunico A/S and others* [2013] EWHC 941 (Ch) at Paras. [92] and following.

88. It is plain that Mrs Mullan would have had useful evidence to give about the manner in which GRCS conducted its business, especially in terms of its book-keeping and administrative procedures. It is plain that she would have had useful evidence to give in relation to some of the Transactions which are the subject matter of this appeal.

89. HMRC has shown, for the reasons set out below, a prima facie case to answer that she knew or ought reasonably to have known that the Transactions were connected to fraud.

90. Therefore, and insofar as we need to do so, we draw the inference, which is adverse to her, and accordingly to GRCS, that Mrs Mullan did not give any evidence since she was reluctant to associate herself with this appeal, did not wish to subscribe to any Statement of Truth, and did not wish to come to the Tribunal to be exposed to cross-examination.

Point 1 - Was there a tax loss?

91. HMRC bears the burden on this issue, and we are satisfied that it has discharged that burden. The answer to this Point is 'yes'.

92. Mr McNamee's position on Day 1 had been that the burden was on HMRC (which is correct) but that the Appellants 'do not have to specifically raise it as an issue'. Insofar as that is inconsistent with the case-management guidance already set out, it is not correct: Day 1 p 157. Miss Vicary objected that it was a waste of the Tribunal's time to entertain cross-examination on the basis that a tax loss is challenged, *'when it simply cannot be on a proper analysis of the documentation that is put before you'*: Day 1 p 165.

93. We are bound to say that we had derived the clear impression that the matter of the tax losses - Point 1 - even if originally in dispute, then became undisputed.

94. That impression came from Mr McNamee's apparent acceptance, at the commencement of Day 2 (Day 2 page 2) and having had the opportunity to reflect on the matter overnight, that HMRC's position that the tax losses were proved by HMRC through the raising of assessments (we understood this to mean the assessments against missing traders) and that accordingly Mr McNamee did not intend (as he put it) 'to probe the witness' (which was Officer Arnold) 'any more in that regard': Day 2 p 2.

95. Moreover, that impression is entirely consistent with, and borne out by, the manner in which the other officers were cross-examined. The substance of the evidence of Wilkinson, Goodman and O'Neill was not seriously challenged. It was not challenged in relation to the tax loss.

96. That position having been adopted by Mr McNamee, this was the footing upon which HMRC subsequently ran its case, and it was the footing which led Ms Vicary to omit any mention of Point 1 from her closing submissions.

97. Latterly, but only at the hearing of final submissions, Mr McNamee sought to argue that no such concession had been made.

98. It is disappointing that such a stance was adopted by Mr McNamee in closing, especially in circumstances when it was known that HMRC's trial counsel was not going to be present. It has a scent of opportunism. In our view, in this case, and from the beginning of Day 2 of the hearing onwards, the matter of tax loss in relation to the defaulting traders had been conceded, with the effect that it was no longer open to or indeed proper for Mr McNamee to seek to challenge the point.

99. The Tribunal and all parties are entitled to be able to rely on concessions which are made by legal representatives. Without being able to safely rely on what is said by a legal representative (especially one as experienced in this Tribunal as Mr McNamee) then the interests of justice and the overriding objective are both affected. If concessions are made, or if a case is advanced in a particular way, then resiled from, the consequences are serious in terms of additional time and cost.

100. It is not for the Tribunal to seek to tease out what a legal representative is or is not conceding. If there are qualifications to a concession, those have to be set out fairly and squarely. A dispute of a semantic nature where a representative then seeks to gloss or qualify what is on the record is wholly invidious.

101. However, and in case it should subsequently be said that we are mistaken on that point, we need to decide whether there was a tax loss. We are so satisfied.

102. Mr McNamee's position (Day 1 p 159) was that there has to be a tax loss 'relating to (each particular) transaction'. That is not correct. It is not necessary for HMRC to identify and 'allocate' tax losses so as to (in effect) marry the tax loss relied upon to the individual transaction in dispute. In *Mobilx* the Court was clear that the *Kittel* principles may engage even when there is no correlation between the amount of output tax of which a fraudulent trader has defrauded HMRC and the amount of input tax which another trader - in this case, the Appellants - has been denied: see Para [65].

103. The Tribunal (Judge Brannan and Mr Perrin) took a similar approach in *Digi-Trade Limited v HMRC [2011] UKFTT 566 (TC).* They did not believe that any such apportionment was necessary under the *Mobilx* test, and neither do we. The decision in *Calltech Telecon Ltd [2009] EWHC 1081 (Ch)* emphasises that the objective of not recognising the right to repayment is not simply to ensure that the Exchequer is not harmed by fraud, but also extends to combating fraud and discouraging taxpayers from entering into transactions which they knew or ought to have known were connected with fraud. In that context, considerations of fiscal neutrality (which is the catalyst for Mr McNamee's submission) are besides the point.

104. Lafferty Moore (a partnership, and the apparent seller to GRCS in T1, T8 and T15) submitted nil returns from 04/10. It was made subject to an assessment for

£131,115 which has not been met or appealed. The tax loss is established. For the sake of completeness, Mr McNamee's argument, even if correct, would not have held good in relation to Lafferty Moore since the assessment referred to included supplies to GRCS which are at issue in this present appeal.

105. Q-Autos (the apparent seller to GRCS in T6 and T18) was made subject to an assessment of £702,406, which has not been met or appealed. A repayment return was submitted for input tax in relation to the period 09/12 for £38,143 which was denied. In relation to T18, a nil declaration was made for 03/13 in relation to output tax. The tax loss is established. Indeed, Mr McNamee was asked to confirm whether the fact of the assessment was disputed, and he said that it was not: Day 2 p 129

106. Patrick McGourty (the apparent seller to GRCS in T2, T3, T4, T5, T7, T9, T10, T11, T13, T14 and T17) was made subject to an assessment of £196,104, which has not been met or appealed. He never submitted any VAT returns. The tax loss is established.

107. We should say that this conclusion is not affected by the fact that T17 was a vehicle sold by GRCS to a neighbour, W Major, upon which sale which GRCS accounted for VAT. HMRC always accepted that VAT had been accounted for on that sale. But it was not a 'concession' (as described by Mr McNamee) that 'there was no loss to the Revenue' and therefore that the entire appeal should succeed, which seemed to us an ambitious and wholly unrealistic submission. We agree with HMRC that the submission ignores the point, wrongly, that there had already been a tax loss in relation to this deal since the vehicle was supplied by Patrick McGourty who had failed to file a return. Therefore, there had been a simple acquisition fraud of the kind described by Jacob LJ in *R (exp Federation of Technological Industries) v Customs and Excise Commissioners* [2004] EWCA Civ 1020 at Para [17]: namely, a business in the UK acquires goods from an EU supplier VAT free and sells them on into the UK market directly or indirectly. When it sells those goods to its UK customers, it charges VAT but it fails to account to HMRC for the VAT it collects. Before HMRC catches up with it, the trader simply disappears.

108. T12 can be traced back at one remove to Patrick McGourty. The vehicle - said to have been a 2011 Mercedes E250 Sport - was apparently sold by McGourty Trading to JRS Commercials for £19,800. The undated invoice carries a VAT number but no VAT is charged. The invoice is numbered 2947. At some point that same invoice has been doctored (i) to add the date 'October 12' (or possibly '13', but in either event, without a day) (ii) to add 'This is a VAT qualifying invoice PMG' and (iii) to break down the £19,800 into sub totals of £16,500 plus £3,300 VAT. At the time of this transaction, this vehicle was owned by one Stephen Hughes in Armagh. It was not JRS's to sell. Stephen Hughes was not VAT registered so the car cannot have been a 'qualifying car' - namely, a car which had not been subject to the full input tax block: see VAT Notice 700/64. It was a margin scheme car. We are satisfied that there was a tax loss.

109. In T16 the apparent buyer from GRCS was Altmore. Altmore Motors is the trading name of Benjamin Nugent. He was made subject to several assessments, the

last of which was £1,750,961 which has not been met or appealed. The car was not a qualifying car since it had been bought under the margin scheme. We are satisfied that there was a tax loss.

Point 2 - Did this loss result from a fraudulent evasion?

110. HMRC bears the burden on this issue, and we are satisfied that it has discharged that burden. Having found that there are tax losses, we are satisfied that these arose from fraudulent evasion. The answer to this Point is 'yes'.

111. The tax losses arose by virtue of missing traders failing to account for the output tax by either failing to submit returns at all (Lafferty Moore from 04/10; Patrick McGourty - no VAT returns ever submitted); rendering nil returns or submitting an unsubstantiated repayment return (Q-Autos).

112. We accept HMRC's evidence about the dishonest trading of the partnership known as Lafferty Moore. It was registered with its business activity being 'fishing of freshwater prawns'. Consistently with this, during a visit in early 2010, HMRC was indeed told that the partners operated a trawler with a crew of 6, and had taken on a unit at the Harbour in Kilkeel. Following inquiries, and unsuccessful attempts to contact the partners, Lafferty Moore was deregistered on 31 May 2013. Latterly, in 2015, HMRC received two letters saying that the business had in fact ceased in 2009.

113. We accept HMRC's evidence about the dishonest trading of Q-Autos. We accept that Q-Autos Limited was registered for VAT for 11 months but in that time declared a total turnover of £797,541 which was £297,541 higher than the estimated turnover on the VAT 1. Q Autos Limited had a sole director, James Quinn. It was struck off and dissolved through failure to file accounts with Companies House. James Quinn was declared bankrupt in February 2014 and we agree that the lack of contact between him and HMRC was indicative of a trader acting to deliberately frustrate HMRC's investigations.

114. An email ostensibly from Mr Quinn said that *'I don't stock vehicles for the reason I think that would be foolish in this day and age. I only buy to order, for that reason I don't need a premises at the moment'*. The writer of the email was not more forthcoming. But Q-Autos apparently sold 140 vehicles in the single period 09/12, without business premises or employees. It is inherently implausible that Q-Autos collected and delivered 140 vehicles in that period. We also accept that Q-Autos return for 09/12 showing an excess of £265,410 in a single month of inputs (£788,976) over outputs (£523,566) would normally be attributed to a build-up of stock which is inconsistent with the apparent business model of buying and selling only to order.

115. We accept HMRC's evidence about the dishonest trading of Patrick McGourty. We accept that Patrick McGourty described himself as a plasterer, and gave a residential address in Belfast as his business address. We accept that any evidence of trading related to car and tyre sales and not plastering. We are satisfied that there were undeclared amounts by McGourty apparently flowing from sales invoices in 04/12

and 10/12. The latter was for 210,000 Euros worth of tyres - a significant shipment, both in terms of volume and value. He was deregistered in 12.12 as a missing trader and there had been no contact with him despite several visits and letters.

116. We accept HMRC's evidence about the dishonest trading of Benjamin Nugent. We accept that Nugent was identified as a missing trader. Several assessments issued to Nugent remained unpaid. He described his trade as a linesman, but his principal place of business was residential and did not have any evidence of car or tyre trading. Despite repeated requests, he did not reply to any letters to make himself personally available for interview. He issued invoices without declaring them and did not pay or otherwise attempt to pay sums of VAT due.

Point 3 - Were the transactions which are the subject of this appeal connected with that evasion?

117. HMRC bears the burden on this issue, and we are satisfied that it has discharged that burden. The answer to this Point is 'yes'.

118. All the Transactions involve a missing trader, whether as apparent seller to GRCS or apparent buyer from GRCS.

119. All the Transactions except for T5, T12 and T16 involve missing traders both as GRCS's immediate sellers and immediate buyers. That is, all the Transactions except for T5 (ostensible purchaser from GRCS = HSS Leasing), T12 (ostensible seller to GRCS = JRS) and T16 (ostensible seller to GRCS = Hughes Car and Van) had missing traders on both sides of the deal with GRCS buying from someone who HMRC cannot trace or who has been assessed to tax which has not been paid and GRCS selling to someone who cannot be traced.

120. The other Transactions, even though they do not have missing traders on both sides of the deal, do have on one side of the deal: whether immediately, or at one remove.

121. We accept HMRC's evidence, largely put forward by Officer Arnold, that its extended verification revealed that many of the vehicles were being sold in parallel chains and/or in a 'carousel' formation (that is, being dispatched to the Republic of Ireland only to be returned to Northern Ireland a short while later). For example:

(1) In T1, one David Mahon bought the same car (VE61 FJY) twice: on 27 July 2012 and then (from GRCS) on 13 September 2012;

(2) In T3, one Neil Finnegan bought the same car (MK62 FZV) twice: on 11 September 2012 and then (from GRCS) on 19 September 2012 - a mere 8 days later;

(3) In T4, the same vehicle (YB12 ZHV) was sold by 4 traders in the UK to 4 different customers in the Republic of Ireland. Moreover, on 21 September 2012 it was sold twice - once by GRCS and once by Q-Autos.

Point 4 - Did or should the Appellants have known that the transactions were so connected?

122. Having found that GRCS' transactions were connected to this fraudulent evasion it is necessary to determine whether it, through Mr Mullan, knew or should have known that this was the case. We remind ourselves that this has to be proved by HMRC to the civil standard - namely, whether HMRC is able to show that it is likelier than not that GRCS (through its partners, Mr and Mrs Mullan) either knew or ought to have known that the transactions were connected to fraud.

123. In doing so, it is clear from *Mobile Export 365 v HMRC* that we are entitled to rely on inferences drawn from the primary facts. It is also clear, from the approach taken by Christopher Clarke J in *Red12 v HMRC*, and approved by the Court of Appeal in *Mobilx*, that we should not unduly focus on whether a trader has acted with 'due diligence' but should consider the totality of the evidence.

124. We have already set out above our general observations as to Mr Mullan's evidence. We are driven to reject his oral evidence as reliable except where it is clearly supported and corroborated by authentic, reliable, contemporary, documentation.

125. We reject Mr McNamee's argument that HMRC is obliged, when there is documentation emanating from either GRCS, or ostensibly emanating from the other traders involved, including the missing traders, to state definitively which of a suite of inconsistent documents it seeks to rely on. It does not seem to us as if the proposition is well-founded. The proposition is counter-intuitive, since the documents emanate from persons who are missing traders, and who have caused tax losses.

126. Moreover, if correct, it is productive of obviously absurd outcomes. For example, in relation to the vehicle in T1 (VE61 FJY) its recorded mileage fluctuates for no apparent reason: 24 July 2012 (19,367); 25 July 2012 (19,000 = minus 367); 31 July 2012 (5,000 = minus 14,000: a sale by Altmore - a missing trader to Hughes); and 13 September 2012 (7,000 = plus 2,000: a sale by GRCS to Mahon). HMRC relied on the fluctuations as one factor, amongst others, which was suggestive that there was a fraud. We do not consider that HMRC was obliged to prove, for example, that the mileage on 31 July 2012 was anything other than 5,000.

127. We do not agree that where the documentation contradicts itself - as it does at many points in this appeal - that it is incumbent on HMRC to assert that one or other version is correct. The documents, if emanating from persons involved in fraudulent behaviour, may well all be incorrect. HMRC is simply required to discharge the burden in relation to Points 1, 2 and 3, and it has done so in this appeal.

128. There are other features which lead us to conclude that GRCS either knew or ought to have known that the transactions were connected to fraud.

129. GRCS was immediately proximate to missing traders in 16 transactions, and at one remove in the remaining two. Even accepting that proximity, in and of itself, is

not conclusive of knowledge or means of knowledge, we are bound to note that GRCS and Mr Mullan seemed, at best, to be completely indifferent to the bona fides of the persons with whom GRCS was actually, or ostensibly, dealing. This is particularly important given that the dealing was not of 'dematerialised' assets, with counter-parties known only through e-mail or online, but was ostensibly with physical assets, namely vehicles, which were being physically moved from place to place, through GRCS's hands, and by persons with whom Mr Mullan was coming into contact.

130. Mr Mullan was an experienced businessman, and used to trading in second hand cars. One would have expected a reasonable businessperson in his position, and irrespective of any alleged difficulties with reading or writing, to have been far more circumspect and demanding of information and documents when the transactions in question involved people he did not know very well, and large sums of money - often in the tens of thousands of pounds - was changing hands. If, as he said, he was heavily reliant on Mrs Mullan and his advisers to deal with paperwork, then that was all the more reason for GRCS to have led evidence from her or them at the hearing.

131. When pressed on individual sales, Mr Mullan frequently retreated into apparent want of recollection, even when he had earlier been able to give HMRC information. An example of this was Alan Simpson (who was at the relevant time a deregistered trader and who was made subject to an assessment for £4.4m). His knowledge of Alan Simpson was relevant since T4 involved a vehicle YB12 ZHV ostensibly sold by GRCS on 20 September 2012. But GRCS had a faxed copy of the V5 ('logbook') received on 6 September 2012. Once his memory had been prompted, Mr Mullan then advanced, in quick succession, different explanations as to why GRCS should have had a faxed log book before its own ostensible purchase of the vehicle. The impression was that Mr Mullan had been caught out in a lie, and was rapidly improvising to try to arrive at some plausible answer.

132. We agree that the situation in relation to T6, as explored in a carefully structured passage of cross-examination by Ms Vicary, set against the contemporary documents, is also extremely revealing as to Mr Mullan, and GRCS's, state of mind and approach.

133. T6 relates to an Audi FY61 YKD. This vehicle was apparently purchased by GRCS on 25 September 2012 (from Q-Autos) at Q-Autos' premises described by Officer Goodman as 'a residential building under development, situated in a rural area. The property was not habitable as it was still under construction'. That description was not seriously challenged. The vehicle was apparently sold by GRCS on the same day to Neil Finnegan. However, one Eamonn McGrath trading as McGrath Motors claims, in a letter dated 1 July 2015, to have had the vehicle in his possession since buying it on 20 September 2012, that it was on his premises on Derryloran Industrial Estate in Cookstown from that date, was not lent to any other trader, and was not stolen during his period of ownership, which was until a date in November 2012. McGrath was not a defaulter. Mr Mullan was not able to explain this situation.

134. In most of the deals, GRCS ostensibly buys the vehicle from one missing trader and ostensibly sells it to another missing trader. On each and every occasion that a missing trader sells or purchases a vehicle, they pay or are paid with a cheque in the name of an unconnected third party.

135. Officer Arnold accepted in cross-examination that she had not sought expert advice in relation to the use of open cheques in the motor trade. That was a proper concession, and added to our impression of her reliability as a witness. We do not consider that she needed to seek expert evidence. We disagree with Mr McNamee that it is incumbent on HMRC to establish (for example, through the introduction and reliance on some kind of expert evidence) that the use of cheques of which some parts are left blank for completion by the recipient is irregular. One reason for this is that it is prima facie irregular and suggestive of wrongdoing for cheques to be used in this way. Cheques are not banknotes. They are instruments which are ordinarily made out to a named person or entity. To handle, or part with, cheques which are not completed is - with respect to Mr McNamee's argument - inherently suspicious. A cheque is put into circulation, without the drawer knowing what will happen to it. This is surprising when, as in this case, GRCS was dealing with people they do not know, and have never met. Although cheques drawn by the Appellants were apparently eventually presented for payment, there was no evidence that the Appellants had ever sought to verify the identity of the payees.

136. Given the inherently suspicious nature of this practice, the burden of establishing that the practice is a regular or conventional one in the second-hand motor trade moves to the Appellants. However, Mr Mullan, as a participant in that trade, was not able to give us any plausible reason why he should have been dealing with cheques in this way. Nor did he seek to advance any other evidence to establish that this mode of dealing with cheques is regular and conventional amongst reputable dealers in the second-hand motor trade. The only evidence before us was that this was a regular practice adopted by the missing traders with whom GRCS was dealing.

137. There is a further feature which we consider significant and suggestive that GRCS was deliberately operating a dishonest system. This is that the pattern of using a 'third party' cheque holds good only when the vehicle was bought by GRCS from a missing trader. When the vehicle is ostensibly bought by GRCS from a party who is *not* a missing trader, namely in transactions 12 and 16, GRCS makes out a cheque to the identified seller and not to someone else. It does not have the appearance of coincidence.

138. Mr Mullan was not able to explain why, when his immediate seller was a missing trader, a 'third-party' cheque was used; but when his immediate seller was not a missing trader, a conventionally completed cheque was used.

139. We agree with HMRC that the fact that GRCS was content to make payment to, and receive payment from, unconnected third parties (that is, third parties who were neither the ostensibly seller nor the buyer, as the case may be) generates the obvious inference that the funds would be paid to, or received from, someone other than the

supplier, and we agree that this is indicative that GRCS either knew, or ought to have known, that the transactions were contrived.

140. We remind ourselves that we should not focus narrowly on due diligence. But, when it comes to this aspect of the matter, there was no 'due' diligence in proper sense: that is, diligence appropriate in relation to transactions of this character, and value. Indeed, there seems to have been little diligence at all worthy of the name.

141. GRCS's record-keeping was in our view not only irregular, in the sense of departing from the ordinary norms of regular business behaviour, but was so irregular as to defy ready comprehension. The most striking instance of this is that no purchase orders were ever issued. Mr Mullan's explanation of this in his witness statement was this:

> "In relation to a purchase order this is simply a duplicate document showing exactly the same details as the sales invoice from my customers to me. Such a document would simply be an unnecessary duplication of detail and would not add anything further to the reliability of the business records'.

142. This is muddled and unsatisfactory. The integrity and reliability of the sales invoices can be tested and corroborated by matching purchase orders. The 'duplication' of detail is not simply to be shrugged off as red-tape or unnecessary paperwork. To treat is a such is especially surprising in a business, such as this one, with a turnover of several million pounds. It is an important means of forging the necessary links in a paper trail. Moreover, the absence of purchase orders means that the integrity of the sales invoices cannot be robustly tested. In our view, Mr Mullan's attitude went beyond cavalier. It seemed to us that it was a deliberate failure, in a business with a substantial turnover, and with the benefit of professional financial advice, done with the intent to frustrate inquiry.

143. We do not need to express any view as to whether any of these features, taken individually and in isolation from each other, would suffice for a finding that Mr Mullan, and, through him, GRCS knew or should have known that the transactions were connected with fraud. This is because we are sure that these features, taken together, in aggregation, clearly demonstrate the requisite knowledge or means of knowledge on the part of Mr Mullan, and, through him, GRCS.

144. We have had regard to the way in which 'the only reasonable explanation' was glossed by Proudman J in *GSM (Export) Ltd*, to which we have already referred. For the avoidance of any doubt, we are sure, and so find, that GRCSs actual or constructive knowledge went well beyond the 'merely knowingly running some risk that there might be' a connection to fraud.

Conclusion on the First Issue

145. Accordingly, the Appeal in relation to the First Issue is dismissed. The amendments to the VAT returns for the quarters 09/12, 10/12 and 2/13 stand.

The Second Issue

146. The Invoice in question is at File 3/160. It ostensibly emanates from Lafferty Moore and is addressed to Grange Motors Cookstown. It is ostensibly dated 20 April 2012 and relates to a 7500kg DAF recovery vehicle HX53 NZO. The total given is £8,600. No separate figure is inserted for VAT. Alongside the box for VAT is written (in the main body of the invoice and not in the money column) 'YES'.

Discussion on the Second Issue

147. The invoice did not comply with Regulation 14 of the 1995 Regulations in that it did not have a uniquely identifying sequential number (contrary to Regulation 14(1)(a)) and it did not set out the amount of VAT chargeable (contrary to Regulation 14(1)(b)).

148. HMRC has a discretion to allow input tax in the absence of a VAT invoice, but, where HMRC has refused to exercise that discretion in a taxpayer's favour, then our jurisdiction is supervisory only: see the decision of Schiemann J (as he then was) in *Kohanzad v Customs and Excise Commissioners [1994] STC 968*, more recently applied by this Tribunal in *McAndrew Utilities Ltd v HMRC [2012] UKFTT 749 (TC).*

149. We must consider whether there is alternative evidence of the charge to VAT in respect which HMRC has unreasonably failed to consider, under Regulation 29(2).

150. The burden on this issue in on the Appellants. GRCS has to satisfy us that HMRC's decision was incorrect.

151. We are not so satisfied.

152. The invoice was from Lafferty Moore but the cheque said to be in respect of the invoiced sum was in a different amount (£8,160) and was made out to 'Crown Promotions'. On 12 September 2013 (that is, about a year later) Mr Mullan said that he did not know who Crown Promotions were. The sole proprietor of Crown Promotions, a Mr Trevor Ferguson, denied that the cheque to Crown Promotions was to *his* business Crown Promotions, and Officer Arnold had not seen any lodgment for the amount of GRCS's cheque - £8,160 - through Crown Promotions' bank statements. There was also a chain of back-to-back sales leading through Q Autos.

153. Even though the invoice is ostensibly dated 20 September 2012, Mr Mullan's evidence was that the vehicle had been bought on 7 September 2012. It had apparently passed through 4 owners on that same day: from Hi Octane Imports to Euro Auto Salvage to Andy Mullen Cars to GRCS.

154. The value also escalated through a series of ostensible onward sales without any explanation why: £6,000 plus £1,200 VAT = £7,200 on 6 September 2012 from Q Autos to Hi Octane; £6,500 plus £1,300 VAT = £7,800 on 7 September 2012 from Hi Octane to Euro Auto Salvage; somehow to Lafferty Moore, and £8,600 on 20 September 2012.

155. There is no explanation for the discrepancy between purchase date and invoice date. The impression is that documents were being created to form a paper trail, and did not accurately reflect the deal (whatever it actually was) which had been done.

156. It does not seem to us that HMRC's decision in this regard was unreasonable in the conventional public law sense.

157. For the sake of completeness, and even if we are mistaken as to the scope of our jurisdiction, and can properly take account of material which was not before the reviewing officer, we nonetheless consider that the outcome would have been no different.

158. Part of that subsequent material is the evidence which Mr Mullan gave before us. In the course of re-examination, he asserted that he had given Officer Arnold a log book and tax disc. That was not correct. The letters dated 19 March 2014 and 22 May 2014 from Officer Arnold to Mr Mullan were obviously written on the footing that Officer Arnold had neither seen nor received the log book or the tax disc. Mr Mullan himself latterly wrote to Officer Arnold that he did not have the SORN and the tax had run out in July 2012. None of this exchange of correspondence makes sense if Mr Mullan's oral evidence is right. That evidence was wrong. He had not provided HMRC with any more information.

Conclusion on the Second Issue

159. That decision therefore stands, and the Appeal on the Second Issue is dismissed.

Decision

160. For the above reasons, the whole Appeal is dismissed.

161. 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.

DR CHRISTOPHER McNALL
TRIBUNAL JUDGE

RELEASE DATE: 21 FEBRUARY 2017