[2018] UKFTT 487 (TC)

TC06665

Appeal number: TC/2014/06652

VAT – MTIC – VAT qualifying second hand cars - denial of input tax in the sum of £116,582.36 – the appellant did not dispute that there was a tax loss, that the tax loss resulted from fraudulent evasion of VAT and that the transactions were connected with fraudulent evasion of VAT– whether or not the appellant knew that the transactions were connected with fraudulent evasion of VAT – no – whether or not the appellant should have known that the transactions were connected with the fraudulent evasion of VAT – yes – appeal in respect of £116,582.36 dismissed – denial of input tax in the sum of £2,833.33 – HMRC accepted that this was properly claimed – appeal in respect of £2,833.33 allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ROY WILSON **Appellant**
(trading as ROY WILSON CAR SALES)

- and -

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

TRIBUNAL: JUDGE RICHARD CHAPMAN
MRS CELINE CORRIGAN

Sitting in public at the Royal Courts of Justice, Chichester Street, Belfast, BT1 3JF on 26-29 June 2017 and 5 April 2018.

Mr Tom Penman, Chartered Accountant, for the Appellant

Mr Paul Taylor, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. Mr Wilson sells cars. In the quarter ending 09/12, his business transactions included the purchase of 29 VAT qualifying cars ("the Disputed Deals") from a trader in the United Kingdom named Quinn Autos Limited ("QAL"). 13 of these cars were sold in the Republic of Ireland and so were zero-rated. The remaining 16 were sold in the United Kingdom and so attracted VAT.

2. Mr Wilson's 09/12 VAT return included a claim for input tax credit in the sum of £119,415.69 in respect of the Disputed Deals. HMRC denied this claim as they concluded that the transactions forming the claim for input tax were connected with the fraudulent evasion of VAT by virtue of Missing Trader Intra-Community ("MTIC") fraud and that Mr Wilson knew or should have known that his transactions were so connected. The decision was upheld by a review notified to Mr Wilson in a letter dated 12 November 2014 and subsequently amended by a letter dated 27 November 2014. Mr Wilson appeals against the decision by virtue of a notice of appeal dated 9 December 2014.

3. The hearing of this appeal took place in Belfast from 26 to 29 June 2017. We then received written submissions. The parties and the Tribunal all agreed that it would be appropriate for there also to be an opportunity for oral submissions. It is unfortunate that the logistics of ensuring mutual availability and a hearing room in Belfast meant that this could not take place until 5 April 2018.

4. We have been greatly helped by the approach taken by Mr Penman and Mr Taylor in limiting the issues which we must decide to whether or not Mr Wilson knew or should have known that his transactions were connected with the fraudulent evasion of VAT. For the purposes of this appeal, Mr Wilson (through Mr Penman) does not dispute that HMRC have proved that there was a tax loss, that the tax loss resulted from fraudulent evasion, and that Mr Wilson's transactions were connected with that evasion. Mr Penman said at various points during the hearing and submissions that Mr Wilson was unable to say that the tax loss was fraudulent. In order to be clear about what was in dispute, we asked Mr Penman what he meant by this; on each occasion he clarified the position by saying that Mr Wilson did not put HMRC to proof of the fraud or connection to fraud and so we treat this as an acceptance that these matters are made out.

Relevant Legal Principles

5. There was no dispute between the parties as to the relevant legal framework and principles. The right to deduct input tax is provided for by what is now Articles 167 and 168 of Council Directive 2006/112/EC. This right has been implemented into UK law by sections 24, 25 and 26 of the Value Added Tax Act 1994 and regulation 29 of the Value Added Tax Regulations 1995. A trader must show that that the goods or services which are the subject of the input tax were used or to be used for the purpose of any business carried on or to be carried on by him. The trader must also hold the VAT invoice (or, in certain circumstances, other evidence) for his input tax credit. In each

accounting period, the trader is allowed to deduct so much of his input tax as is allowable from any output tax liability that is due from him or to receive a repayment if his input tax exceeds his output tax liability.

6. In *Axel Kittel v Belgium; Belgium v Recolta Recycling SPRL* (Case C-439/04 and Case C-440/04) [2006] ECR I-6161, [2008] STC 1537, the European Court of Justice set out the circumstances in which the taxation authorities can deny a taxpayer the right to deduct input tax where the transactions in question are connected to fraud. The ECJ stated as follows at [53] to [61]:

> "[53] By contrast, the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity' are not met where tax is evaded by the taxable person himself (see Case C-255/02 *Halifax and Others* [2006] ECR I-1609, paragraph 59).
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> [54] As the Court has already observed, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see Joined Cases C-487/01 and C- 7/02 *Gemeente Leusden and Holin Groep* [2004] ECR I-5337, paragraph 76). Community law cannot be relied on for abusive or fraudulent ends (see, *inter alia,* Case C-367/96 *Kefalas and Others* [1998] ECR I-2843, paragraph 20; Case C-373/97 *Diamantis* [2000] ECR I-1705, paragraph 33; and Case C-32/03 *Fini H* [2005] ECR I-1599, paragraph 32).
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> [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*, Case 268/83 *Rompelman* [1985] ECR 655, paragraph 24; Case C-110/94 *INZO* [1996] ECR I-857, paragraph 24; and *Gabalfrisa*, paragraph 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*, paragraph 34).
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> [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.
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> [57] That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
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> [58] In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.
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> [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."

7. The *Kittel* principle was examined by the Court of Appeal in *Mobilx Ltd and others v HMRC* [2010] EWCA Civ 517, [2010] STC 1436 ("*Mobilx*"). The following points of relevance to the present appeal arise from the judgment of Moses LJ.

8. First, Moses LJ defined "should have known" and the extent of knowledge required as being where the only reasonable explanation for the circumstances in which the purchase took place was that it was a transaction connected with fraudulent evasion. He stated as follows at [50] to [60]:

"Meaning of "should have known"

[50] The traders contend that mere failure to take reasonable care should not lead to the conclusion that a trader is a participant in the fraud. In particular, counsel on behalf of Mobilx contends that Floyd J and the Tribunal misconstrue paragraph 5 of *Kittel*. Whilst traders who take every precaution reasonably required of them to ensure that their transactions are not connected with fraud cannot be deprived of their right to deduct input tax, it is contended that the converse does not follow. It does not follow, they argue, that a trader who does not take every reasonable precaution must be regarded as a participant in the fraud.

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

the phrase "knew or should have known" which it employs in paragraphs 59 and 61 in *Kittel* to have the same meaning as the phrase "knowing or having any means of knowing" which it used in *Optigen* (paragraph 55).

[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

[53] Perhaps of greater weight is the challenge based, in Mobilx and BSG, on HMRC's denial of the right to deduct on the grounds that the trader knew or should have known that it was more likely than not that transactions were connected to fraud. The question arises in those appeals as to whether that is sufficient or whether, as the Chancellor concluded in BSG, the right to deduct input tax may only be denied where the trader knows or should have known that the transaction *was* connected to fraud (see judgment, § 52). In short, does a trader lose his entitlement to deduct if he knew or should have known of a risk that his transaction was connected to fraudulent evasion of VAT? HMRC contends that the right to deduct may be denied if the trader merely knew or should have known that it was more likely than not that by his purchase he was participating in such a transaction. It contends that if it was necessary to show more than appreciation of a risk then the Court's decision in *Kittel* would not represent a development of the law and would fail to achieve the objective, recognised in the Sixth Directive, to which the Court referred at § 54.

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

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

[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 *BSG* :− "The relevant knowledge is that *BSG* ought to have known by its purchases it was participating in transactions which were connected with a fraudulent evasion of VAT; that such transactions might be so connected is not enough." (§ 52).
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> [57] HMRC object that the principle should not be restricted to those cases where 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 (see Lord Scott in *Manifest Shipping Co Limited v Uni−Polaris Insurance Co Limited and Others* [2001] UKHL 1 and *White v White* [2001] 1 WLR 481 paragraphs 16 and 17, 486 E−G). HMRC seeks to rely upon the views of Lewison J in *Livewire and Olympia* [2009] EWHC 15 (Ch) (§ 85) and Burton J in *R (Just Fabulous) v HMRC* [2008] STC 2123 (§ 45) that:- "The principle of legal certainty must be trumped by the 'objective recognised and encouraged by the Sixth Directive'."
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> [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.
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> [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*.
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> [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."

9. Secondly, the burden of proof as to the state of the trader's knowledge is upon HMRC. Moses LJ stated as follows at [81]:

> "[81] HMRC raised in writing the question as to where the burden of proof lies. 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. No sensible argument was advanced to the contrary."

10. Thirdly, the Tribunal is entitled to take into account evidence of the surrounding circumstances when considering the trader's state of knowledge. In *Mobilx*, Moses LJ stated as follows at [82] to [85]:

> "[82] But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant. As I indicated in relation to the BSG appeal, 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 that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was.
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> [83] The questions posed in BSG (quoted here at § 72) by the Tribunal were important questions which may often need to be asked in relation to the issue of the trader's state of knowledge. I can do no better than repeat the words of Christopher Clarke J in *Red12 v HMRC* [2009] EWHC 2563:−
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> > '[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.
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> > [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.
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> [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.'
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> [84] Such circumstantial evidence, of a type which compels me to reach a more definite conclusion than that which was reached by the Tribunal in Mobilx, will often indicate that a trader has chosen to ignore the obvious explanation as to why he was presented with the opportunity to reap a large and predictable reward over a short space of time. In *Mobilx*, Floyd J concluded that it was not open to the Tribunal to rely upon such large rewards because the issue had not been properly put to the witnesses. It is to be hoped that no such failure on the part of HMRC will occur in the future.
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> [85] In so saying, I am doing no more than echoing the warning given in HMRC's Public Notice 726 in relation to the introduction of joint and several liability. In that Notice traders were warned that the imposition of joint and several liability was aimed at businesses who "know who is carrying out the frauds, or choose to turn a blind eye" (3.3). They were warned to take heed of any indications that VAT may go unpaid (4.9). 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 input tax."

11. The "should have known" test was explained further by *AC (Wholesale) Limited v HMRC* [2017] UKUT 191 (TCC). The Upper Tribunal (Proudman J and Upper Tribunal Judge Sinfield) held that HMRC was not required to eliminate all other reasonable explanations for the circumstances in which the transactions took place in order to prove that a connection with fraud is the only reasonable explanation for the transactions. The Upper Tribunal stated as follows at [29] and [30]:

> "[29] In our view, Mr Brown's submissions place a weight on the words used by Moses LJ in *Mobilx* that they cannot bear. Moses LJ was clear that the test in *Kittel* was a simple one that should not be over refined. It is, to us, inconceivable that Moses LJ's example of an application of part of that test, the 'no other reasonable explanation', would lead to the test becoming more complicated and more difficult to apply in practice. That, in our view, would be the consequence of applying the interpretation urged upon us by Mr Brown. In effect, HMRC would be required to devote time and resources to considering what possible

> reasonable explanations, other than a connection with fraud, might be put forward by an appellant and then adduce evidence and argument to counter them even where the appellant has not sought to rely on such explanations. That would be an unreasonable and unjustified evidential burden on HMRC. Accordingly, we do not consider that HMRC are required to eliminate all possible reasonable explanations other than fraud before the FTT is entitled to conclude that the appellant should have known that the transactions were connected to fraud.
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> [30] Of course, we accept (as, we understand, does HMRC) that where the appellant asserts that there is an explanation (or several explanations) for the circumstances of a transaction other than a connection with fraud then it may be necessary for HMRC to show that the only reasonable explanation was fraud. As is clear from *Davis & Dann*, the FTT's task in such a case is to have regard to all the circumstances, both individually and cumulatively, and then decide whether HMRC have proved that the appellant should have known of the connection with fraud. In assessing the overall picture, the FTT may consider whether the only reasonable conclusion was that the purchases were connected with fraud. Whether the circumstances of the transactions can reasonably be regarded as having an explanation other than a connection with fraud or the existence of such a connection is the only reasonable explanation is a question of fact and evaluation that must be decided on the evidence in the particular case. It does not make the elimination of all possible explanations the test which remains, simply, did the person claiming the right to deduct input tax know that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT or should he have known of such a connection."

12. It is clear from the decision of Barling J in the Upper Tribunal in *Excel RTI Solutions Ltd v HMRC* [2015] UKUT 552 (TCC) that the standard of proof in cases such as the present is the civil standard of the balance of probabilities.

13. For completeness, we note that we were also referred to the following authorities, which we have considered in giving this decision: *Blue Sphere Global Ltd v Revenue and Customs Commissioners* [2009] EWHC 1150 (Ch), *Bond House Systems v The Commissions of Customs and Excise* [2003] V&DR 210, *Calltel Telecom Ltd and another v Revenue and Customs Commissioners (No 2)* [2009] EWHC 1081 (Ch), *In re B (Children)(Care Proceedings: Standard of Proof (CAFCASS intervening)* [2008] UKHL 35, *S-B Children* [2009] UKSC 17, *Megtian Ltd & Others v HMRC* [2010] EWCA Civ 517, *Optigen Ltd v Revenue and Customs Commissioners* [2006] Ch 218, *Red 12 Trading Ltd v Revenue and Customs Commissioners* [2009] EWHC 2563 (Ch), *Ross Pharmacy* [2008] Lexis Citation 617, *Softwarecore Ltd v Pathon* [2005] EWHC 1845 (Ch) and *Teleos and Others* (Case C-409/04).

Factual Background

14. We treat the following factual background as not being in dispute, as it is a commentary upon the documents or alternatively formed the basis of both sides' cases or alternatively was not challenged.

15. Mr Wilson began dealing in second hand cars in 1995. He initially traded from home, purchasing from trade dealers and quickly selling on to other dealers. Over time, Mr Wilson's business model changed so that he could hold cars for longer and also sell to retail customers. This now involves purchasing the vehicles, carrying out any necessary mechanical checks and preparing them for sale. These preparations include valeting the vehicles, servicing them and if necessary carrying out repairs. In order to do this, Mr Wilson opened his premises in County Antrim, Northern Ireland, in 1999. He still trades from the same premises. He employs 16 staff. The business has a substantial turnover; Mr Wilson's unaudited accounts for the period ending 30 September 2014 records annual sales of £4,680,602. Mr Wilson retains professionally qualified accountants to handle his tax and VAT affairs.

16. Mr Wilson sources cars to purchase from his contacts. He also advertises in a trade only website called Autotrade-mail, stating the make and model of car which he is seeking either to purchase or to sell. His sales have predominantly been in the United Kingdom. Mr Wilson also seeks out VAT qualifying cars. Further, throughout Mr Wilson's career his transactions have included cross-border sales in that he would either purchase cars in Northern Ireland and sell them in the Republic of Ireland or alternatively purchase cars in the Republic of Ireland and sell them in Northern Ireland.

17. HMRC have carried out a number of routine visits to Mr Wilson over the years. These include visits on 1 July 2002, 1 July 2004, 6 October 2005, 20 December 2005 and 23 August 2009. Mr Wilson was provided with information about MTIC frauds in the course of various of these visits.

18. In June 2012, Mr Wilson advertised in Autotrade-mail seeking to purchase an Audi A4 2.0 TDI SE. Mr James Quinn of QAL contacted Mr Wilson and this ultimately resulted in Mr Wilson purchasing a car from him. Mr Wilson then advertised this car for sale in Autotrade-mail. Mr Wilson received a response to this advert from Mr Adrian Cromie, who presented as a trader from the Republic of Ireland and purchased the car. Mr Wilson claimed (and received) a repayment of his input tax in respect of this vehicle in his 06/12 VAT return.

19. Mr Wilson went on to purchase the 29 cars comprising the Disputed Deals from QAL. 11 of these were sold to Mr Cromie and at least one was sold to another Republic of Ireland trader, RMC Autos.

20. It is worth noting at this stage that Mr Wilson received a visit from Officer Lisa Wilkinson and Officer Harold Kennaway on 21 September 2012 as a result of his request for a change to monthly returns. The visit report was of significance during the hearing and so we set out its most relevant contents as follows:

> "Suppliers
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> I obtained a list of suppliers/customers for the last three months.
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> The main supplier in this period was Q Autos VRN 132 1706 53, they supplied 13 out of the 15 vehicles purchased from 11/7/12-07/09/12. After checking on EF I discussed this trader with local officer Paul Goodman who had a user interest. Paul explained he had visited the

PPOB which is a half finished bungalow and noone has ever lived there. Paul left a deregistration letter last week and gave the trader two weeks before dreg action would proceed. I asked Mr Wilson who his contact was at Q Autos and was told the two sales guys are John and Sean Wilkins but James Quinn owned the business, Mr Wilson has not dealt directly with Mr Quinn. Mr Wilson said they buy qualifying cars in England specifically to sell onto him.

Customers

The two customers in this period were RMC Autos VRN IE4087633P and Adrian Cromie VRN IE0950937N. Mr Wilson said he had visited the premises of both of these customers. RMC Autos has been deregistered wef 01/01/12 however this was backdated and the actual action took place on the 16/08/12. I have checked EF and Mr Wilson was issued with a veto letter for RMC on the 26th September 2012. Mr Wilson last dealt with RMC Autos on the 07/08/12.

Mr Wilson said he would normally ring round his contacts in the ROI with details of the vehicles (always sells to the trade), a price would be agreed and payment would be made by bank transfer prior to the vehicle being despatched to the customer. Mr Wilson has a small transporter which holds two cars and he would arrange to transport the vehicle to an agreed point in the ROI. The customer would meet him there and take possession of the vehicle.

…

Conclusion/Credibility

I am satisfied with Mr Wilson at the present time in relation to MTIC activity, however, I would hope that now he has been given the knowledge he would make more stringent checks on suppliers/customers. I would recommend that a general 329 inhibit for LVO 007 is put on so that the next repayment return is verified especially in light of the potential dereg action on Q Autos. I see no reason why the monthly returns should be disallowed at this time, the repayments have gradually become more frequent but this position could change as the sales all hinch [sic] on a good exchange rate between the Euro and the pound, therefore I would recommend that the monthly returns are reviewed in six months."

21. Mr Wilson does not dispute that QAL, Mr Cromie and RMS are missing traders.

22. HMRC's uncontested evidence as regards QAL is as follows:

(1) QAL was incorporated on 24 January 2012 with a registered address in County Down, Northern Ireland. The sole registered director and shareholder was Mr James Quinn.

(2) No annual returns or accounts were filed. This resulted in a strike-off warning notice being issued by Companies House on 24 May 2013. No objections were received and QAL was struck off the register and dissolved on 13 September 2013.

(3) QAL was registered for VAT on 4 April 2012 and was required to file VAT returns on a quarterly basis.

(4) QAL filed two VAT returns. The 06/12 return declared tax due of £1,192.73. The 09/12 return claimed a repayment of £38,413.00.

(5) HMRC visited QAL's trading address. There was nobody present, no signs of trading activity or car sales, and the property was a partially built house.

(6) HMRC issued correspondence to QAL in respect of the 09/12 return but this was not replied to.

(7) QAL's output tax was recorded on its 09/12 return as £98,234. However, sales invoices have been obtained by HMRC showing output tax of £524,145.70.

(8) QAL was de-registered for VAT with effect from 21 February 2013.

(9) HMRC then received email correspondence from Mr Quinn stating that physical premises were not required as he sold cars to order. However, there was no telephone contact, no visits or meetings were arranged and no records were provided.

23. HMRC's uncontested evidence as regards Mr Cromie is as follows:

(1) A mutual assistance request was made to the Republic of Ireland in order to check the address and business activities of Mr Cromie.

(2) The Republic of Ireland authorities visited Mr Cromie's premises on 14 December 2012 and found a residential unit of three separate flats. There was no trace of Mr Cromie, or the signwriting business which was registered to him at his address.

(3) The Republic of Ireland authorities visited Mr Cromie's accountant, who provided identification details for Mr Cromie. These stated that his address was in Newry.

(4) Mr Cromie was registered for VAT on 1 April 2012 as an individual with a trade classification of advertising agencies.

(5) Mr Cromie was compulsorily deregistered for VAT by the Republic of Ireland authorities on 14 December 2012.

24. HMRC's uncontested evidence as regards RMC Autos is as follows:

(1) RMC Autos (also referred to by HMRC as RMC Motors) was the trading name of Mr Ruairi McNulty.

(2) The value of EC sales to RMC Autos was £29,000 in the quarter to 08/11, £51,200 in the quarter to 03/12 and £88,450 in the quarter to 06/12.

(3) RMC Autos was registered for VAT as an individual with a trade classification of the sale of cars and light motor vehicles.

(4) RMC Autos was compulsorily de-registered for VAT by the Republic of Ireland authorities from 31 December 2012.

25. It is also HMRC's uncontested evidence that parallel deals took place in respect of the cars which are the subjects of the Disputed Deals. For example, as regards Deal 2, British Car Auctions Limited sold the car to Mr Cromie on 18 June 2012, notwithstanding that QAL sold it to Mr Wilson on 11 July 2012, who then sold it to Mr Cromie. As regards Deal 4, Tynan Supplies sold the car to Moy Auto Services, who sold it to Mr Cromie on 27 June 2012, notwithstanding that QAL sold it to Mr Wilson on 24 July 2012, who then sold it to Mr Cromie. As regards Deal 9, Mid Ulster Cars Ltd sold the car to JRS Commercial & Cars, who sold it to RMC Autos on 20 July 2012, notwithstanding that QAL sold it to Mr Wilson on 6 August 2012, who then sold it to Mr Cromie. HMRC's evidence is that there were parallel deals in 21 of the 29 Disputed Deals.

26. Mr Wilson filed his VAT return for the period 09/12 on or about 19 October 2012. His box 3 (total VAT due) was £101,488.11, his box 4 (VAT reclaimed on purchases and other inputs) was £184,610.02 and his box 5 (net VAT) was a repayment of £83,121.91.

27. By a decision dated 24 September 2012, HMRC (through Higher Officer Davis) denied £119,415.69 of the £184,610.02 claim for credit for input tax. Mr Wilson's 09/12 return was therefore adjusted to the effect that his box 3 (total VAT due) remained £101,488.11 but his box 4 (VAT reclaimed on purchases and other inputs) became £65,194.33 and his box 5 (net VAT) became a liability of £36,293.78. HMRC therefore made an assessment pursuant to section 73 of the Value Added Tax Act 1994 for the VAT due in the sum of £36,293.78.

28. Mr Wilson requested a review of the decision. This review was undertaken and the decision upheld by a letter dated 12 November 2014 from Officer Siobhan Brown. This was amended by a letter dated 27 November 2014. Although the decision itself referred only to inaccuracies on the return, the review decision explained that the basis for this was pursuant to the *Kittel* principle. Officer Brown said that there was evidence of fraudulent evasion of VAT and that Mr Wilson knew or should have known that the transactions which he was engaged in were connected with this fraudulent evasion of VAT. In summary, she found that: the 29 Disputed Deals were traced to fraudulent evasion of VAT; the transactions commenced with a defaulting trader (QAL); Mr Wilson had a general knowledge of fraud at the time of the transactions; Mr Wilson was an experienced car dealer; the majority of the cars were sold to two defaulting traders in the Republic of Ireland; delivery of vehicles was to a hotel car park in Dundalk; and insufficient due diligence was undertaken.

29. The Disputed Deals are set out in the table below. There is no reason to doubt the good faith of the purchasers other than Mr Cromie and RMC and so, whilst we identify whether those purchasers were resident in the United Kingdom or the Republic of Ireland, we do not name them. Similarly, in the remainder of this decision we will identify the vehicles by deal numbers rather than by their registration plates as no criticisms have been made about their current ownership. A spreadsheet provided by Mr Wilson shows that Deal 5 was sold to RMC Autos and that Deal 6 was sold to a Republic of Ireland trader referred to as "? Autos". For the purposes of this appeal, the parties have treated both of these cars as having been sold to RMC Autos.

Deal:	*Date:*	*Net:*	*VAT:*	*Purchaser (UK/ROI):*
1	11/07/12	£14,791.66	£2,958.34	(UK)
2	11/07/12	£14,791.66	£2,958.34	Adrian Cromie (ROI)
3	24/07/12	£40,000.00	£8,000.00	(UK)
4	24/07/12	£35,000.00	£7,000.00	Adrian Cromie (ROI)
5	24/07/12	£15,625.00	£3,125.00	RMC (ROI)
6	26/07/12	£14,583.33	£2,916.67	RMC (Disputed) (ROI)
7	26/07/12	£14,582.33	£2,916.67	(UK)
8	03/08/12	£38,451.00	£7,709.00	(UK)
9	06/08/12	£50,000.00	£10,000.00	Adrian Cromie (ROI)
10	06/08/12	£14,583.33	£2,916.67	(UK)
11	07/08/12	£10,417.00	£2,083.00	Adrian Cromie (ROI)
12	16/08/12	£11,250.00	£2,250.00	Adrian Cromie (ROI)
13	21/08/12	£7,333.36	£1,466.64	Adrian Cromie (ROI)
14	21/08/12	£32,083.34	£6,416.66	Adrian Cromie (ROI)
15	22/08/12	£14,583.33	£2,916.67	Adrian Cromie (ROI)
16	22/08/12	£14,583.33	£2.916.67	(UK)
17	31/08/12	£13,083.33	£2,616.67	(UK)
18	31/08/12	£14,583.33	£2,916.67	Adrian Cromie (ROI)
19	07/09/12	£23,334.00	£4,666.00	Adrian Cromie (ROI)
20	07/09/12	£31,250.00	£6,250.00	Adrian Cromie (ROI)
21	07/09/12	£8,959.00	£1,791.00	(UK)
22	11/09/12	£14,791.66	£2,958.34	(UK)
23	18/09/12	£14,166.67	£2,833.33	(UK)
24	18/09/12	£13,333.33	£2,666.67	(UK)
25	18/09/12	£14,791.66	£2,958.34	(UK)
26	21/09/12	£7,708.33	£1,541.67	(UK)
27	21/09/12	£14,583.33	£2,916.67	(UK)
28	21/09/12	£48,333.33	£9,666.67	(UK)
29	27/09/12	£21,250.00	£4,250.00	(UK)
			£116,582.36	

30. It is of note that the total input tax denied in respect of the Disputed Deals as shown in the table is £116,582.36 whereas the decision denied input tax in the sum of £119,415.69. The reason for the discrepancy is that a thirtieth deal was included within the decision, being the purchase of a car with a net price of £14,166.67 and VAT of £2,833.33. It subsequently emerged that that thirtieth car was returned and so a credit note ought to have been issued and an adjustment made in the following period. Mr Taylor accepted that the denial of the £2,833.33 for the thirtieth deal depended upon whether or not there had been a later adjustment by Mr Wilson; if there had been then the total denied would be £116,582.36 whereas if it had not been adjusted then the total denied would be £119,415.69. Mr Taylor fairly submitted that if there was no evidence

as to whether or not there had been an adjustment the safer course is for the Tribunal to adopt the lower figure. In the event, no evidence was provided either way as to this. On any view, HMRC originally denied this thirtieth deal upon the basis of connection to fraud but do not now argue that it was connected to fraud and so have not provided any evidence in that regard. As such, we follow Mr Taylor's invitation to treat the £2,833.33 as properly claimed.

31. Mr Wilson's notice of appeal is dated 9 December 2014. The grounds for appeal are as follows:

> "HMRC have denied the claim to input tax relating to the VAT period to September 2012 on the basis that we knew or should have known transactions in this VAT period were connected with the fraudulent evasion of VAT.
>
> We do not deny that there was fraudulent evasion of VAT or that the transactions were linked to a fraudulent supply chain as HMRC [sic].
>
> We wish to appeal this decision on the basis that due diligence and risk assessment checks were sufficient and that after taking into account all actual knowledge and having made all proportionate enquiries, the better view is that there is probably no fraud connected with the transaction, then we have met the required standard and VAT claimed in respect of the transactions tainted by fraud should be allowed.
>
> HMRC's denial of input tax was summarised in their review letter dated 12th November 2014 (this letter was subsequently amended on 27th November 2014 to remove incorrect content). My representative responded to this letter on 2nd December 2014 to provide further information and to specifically provide information on due diligence and risk assessment processes. HMRC appear to have denied our claim for input tax on the basis of inadequate due diligence, however they have at no point asked us to clarify or confirm our due diligence & risk assessment processes or provide confirmation of the checks or processes that we should/could have made.
>
> It is therefore our opinion that HMRC have denied the VAT claim without first investigating or verifying the due diligence and risk assessment processes which we believe to be more than adequate and in order.
>
> We believe that the input tax claim should be allowed on the basis that we acted in good faith and took reasonable measures to check both supplier and customer integrity.
>
> A full list of our reasons for appeal can be found on the last page of our representative's letter to HMRC dated 2nd December 2014 (copy attached)."

32. As set out above, any uncertainty as to whether or not Mr Wilson disputes fraud and connection to fraud was dispelled by Mr Penman clarifying during both opening and closing submissions that these matters are not in dispute.

Evidence

33. We read witness statements and heard oral evidence on behalf of HMRC from Higher Officer Caron Davis and Officer Lisa Wilkinson. A witness statement from Officer Paul Goodman was adduced but he was not called to give oral evidence. We read witness statements and heard oral evidence on behalf of Mr Wilson from Mr Wilson himself, Mr Raymond Stewart and Mr Mark Walsh.

Higher Officer Davis

34. Higher Officer Caron Davis gave evidence on behalf of HMRC in respect of the denial of Mr Wilson's claim for input tax. Officer Davis took over HMRC's verification of Mr Wilson's claim on 21 November 2012 from Officer Maxine Allen and made the decision to deny the claim.

35. We read Officer Davis' two witness statements. These were largely a commentary upon the documents available to Officer Davis, the research undertaken in verifying Mr Wilson's return and an explanation for the decision to deny the claim. Officer Davis explains the deal chains and shows in her witness statement that each of the Disputed Deals leads back to QAL. These are not convoluted deal chains; Officer Davis makes the obvious point that the connection is shown by the fact that Mr Wilson purchased the cars directly from QAL and that QAL did not pay any output tax on those cars.

36. Officer Davis found that a cheque had been issued by Mr Wilson for £16,000 in respect of Deal 24. Although the car had been purchased from QAL and the cheque stub stated QAL, a copy of the cheque has been obtained and bears the name "Grange Motors". Officer Davis wrote to Mr Wilson's then representatives to ask why a third party cheque had been issued and was not satisfied with the response. Officer Davis' colleague, Officer Arnold, wrote to Grange Road Car Sales who advised that they did not know Mr Wilson (although we do note that the name on the cheque was Grange Motors and not Grange Road Car Sales).

37. Mr Penman cross-examined Officer Davis at length. He began by questioning her experience in cases of this type. Officer Davis frankly accepted that she had very little experience of MTIC investigations, that her knowledge of the car trade was limited to the framework of VAT records and that she was not aware of how a car broker or trade to trade dealer would work. This last point seemed to be directed at whether or not trade premises would be expected; Officer Davis said that she would expect premises to exist for a bona fide business. Mr Penman asked Officer Davis about the difference between Europa checks and Redhill or Wigan checks. Officer Davis said that the main difference was that Redhill checks would show whether or not a trader had been de-registered. Mr Penman put to Officer Davis that Mr Wilson had obtained Mr Quinn's driving licence and that that obviated the need for Mr Wilson to visit Mr Quinn's business premises. Officer Davis said that the licence may establish where the business address is but as a matter of due diligence she would still expect Mr Wilson to have gone there. Mr Penman asked Officer Davis about the third party cheque and the steps which HMRC had taken to verify who had written the name of the payee. Officer Davis said that HMRC had not carried out any such checks. In the course of cross-examination, Mr

Penman suggested that Mr Wilson had been duped by QAL and that HMRC had failed to acknowledge this. Officer Davis' response was that Mr Wilson had not done enough by way of due diligence to check that his trades were legitimate.

Officer Wilkinson

38. We read Officer Lisa Wilkinson's witness statement. She is a specialist MTIC officer. Her evidence focused upon her investigation into QAL as set out above. She also gave evidence about her visit to Mr Wilson on 21 September 2012 and commented upon her visit report as follows:

> "[59] In the section headed "Suppliers" I describe a conversation with Paul Goodman and a discussion with Mr Wilson regarding his contacts at QAL. I should clarify that these conversations took place after the visit. I rang Mr Wilson three days later on the 24th September 2012 to discuss QAL and it was during this conversation that he gave me details of his contacts at QAL.
>
> [60] In the section headed "Customers" I mention a trader called RMC Autos. I only discovered RMC Autos was de-registered for VAT after 21st September 2012 when I became aware of a subsequent visit by another officer. Mr Wilson stated that he had visited the premises of both RMC Autos and Adrian Cromie and he was satisfied that they were bona fide businesses.
>
> [61] In the section headed "Conclusion" I state that, "I am satisfied with Mr Wilson at the present time in relation to MTIC activity". By way of clarification, I only established that QAL was supplying Roy Wilson after the visit and the fact that QAL was a missing trader and the extent of their involvement in MTIC trading had yet to be established by HMRC (as the investigations had not been completed by the date of the visit). QAL had in fact rendered their 09/12 VAT return. My role in relation to this visit was to establish why Mr Wilson wanted to go onto monthly returns and to gather information – I was not there to trace deals at that stage."

39. Mr Penman cross-examined Officer Wilkinson about her visit and her visit report. He asked whether the conclusion on the visit report was written before speaking to Officer Goodman. Officer Wilkinson stated that:

> "I may well have started the notes and then made a phone call to Mr Goodman and added to it, made the phone call to Mr Goodman and added to it, made the phone call to Mr Wilson and added to it, but it all happened around the sort of two or three days after the visit."

40. The Tribunal asked Officer Wilkinson how it could be said that Mr Wilson should not have been prepared to deal with QAL when she had been satisfied with Mr Wilson's transactions during the visit. Officer Wilkinson replied as follows:

> "Because Mr Wilson was the one that was dealing, he was dealing with Mr Quinn. He was the one that was carrying out these high value transactions. He was the one that was claiming the VAT back, he was

> the one that was doing the onward sale and zero-rating those sales. So ultimately there was a lot of responsibility on him within his business to make sure that he people that he was dealing with were *bona fide*. I would say that from his point of view, from a businessman's point of view, you would want to make sure that the people you were dealing with are correct"

41. On being asked about whether or not QAL's prolific involvement in Mr Wilson's transactions registered any alarm bells, Officer Wilkinson expressed regret about the wording of her report. She stated as follows:

> "It did register that there were, that first line of my conclusion is unfortunate. It's there now in black and white and there's nothing I can do about it. Yes, there were lots of triggers but the thing, the bottom line, was a compliance officer was already dealing with Q Autos. At that stage I was not in the mix as such to take it for I knew that other people were taking it further. This was the end of September. By the time we got to January of 2013, the middle of January, I took over the investigation into Q Autos and that was in relation to another visit that we had received but at that time, yes, there were lots of triggers, I totally agree with you, and I am sorry that I have written that first line but it's there now. By saying at the present time I think I've thought to myself that sort of, you know, will, and then I qualified it by saying, you know, although I am not carrying this forward I knew other people were. It wasn't something that I was ignoring, and I put the 329 inhibit on to look at future repayments. So I knew that investigations were going on, just not with me."

42. Mr Penman asked Officer Wilkinson about whether or not it was her experience that trade car dealers had their own premises. She replied that she would expect traders to have premises.

43. Officer Wilkinson also explained that she had carried out a search on Google for QAL's premises and had found a field.

Officer Goodman

44. HMRC relied upon a witness statement from Officer Paul Goodman which related solely to his investigations of QAL. Given that it is accepted that QAL was a missing trader, Officer Goodman was not called to give oral evidence.

Mr Wilson

45. The primary evidence on behalf of Mr Wilson was from Mr Wilson himself. We read two witness statements from Mr Wilson, further evidence was given in chief and he was cross-examined. Given the necessarily wide scope of Mr Wilson's evidence, we deal with it in an issue-based manner.

QAL

46. Mr Wilson said in his witness statement that his first contact with QAL was when Mr Quinn responded to an advert which Mr Wilson had placed in Autotrade-mail. The advert had been a request for an Audi A4. Mr Wilson asked Mr Quinn to bring the vehicle to his premises. This was partly in order to consider the vehicle but also in order to meet him personally and, as Mr Wilson put it in his witness statement, "to obtain details from him as to the nature of his business, the extent of his business and his *bona fides*." Mr Wilson carried out checks on QAL by logging on to a "Company Checker" website and checking how long the company had been in operation, the company accounts, the company address and the director and shareholder details. This was because, Mr Wilson said, "The issue of dealing with fraudulent traders is one which I am acutely aware." Mr Wilson went on to say as follows:

> "The conclusion drawn was that the company had only been in existence for a relatively short period of time and so I had some cause for some suspicion. In an attempt to allay any suspicion whenever I met JQ, therefore, I sought copies of his driving licence, a copy of his headed paper (to confirm that he was VAT registered) and details of the bank account to be used. JQ in turn provided the following information: a copy of his licence, a copy of his headed paper, details of the bank account."

47. Mr Wilson did not check QAL's VAT number with Redhill or Wigan as he maintained that he was not aware that he could do so. Instead, Mr Wilson said that he telephoned HMRC's contact centre.

48. Mr Wilson met Mr Quinn the day after the telephone conversation. This was the only time they met. Mr Quinn provided Mr Wilson with the information and documents he had requested. Mr Wilson also asked Mr Quinn various questions. Mr Wilson stated as follows in his witness statement:

> "When I met JQ I asked him a number of questions about his business, i.e. how long he had been in operation, when he had started, how many vehicles he was selling etc etc. The answers were consistent with what I would have expected from an experienced and established motor trader. It should also be said that I was aware of JQ from other motor auctions. I had seen him at the various auctions where he had bid on vehicles and whilst I had never been introduced to him or spoke to him directly prior to the transaction referred to below I was reassured by the fact that I had physically seen him at auctions buying vehicles."

49. Mr Wilson said that he fully understood the risks involved in dealing with a new supplier and how a new supplier can be involved in VAT fraud but he was satisfied by his checks and there were in his mind no indicators to confirm otherwise.

50. Mr Wilson explained that he was satisfied that Mr Quinn was a genuine motor trader because of what he termed "chitchat" and "that connection with somebody where they know what the general motor trade is." This, he said, was not just a question of knowing the prices of cars but also the workings of the motor trade. He said that Mr

Quinn came across as the complete package. He used the analogy of one lawyer knowing whether or not another person was also a lawyer.

51. During cross-examination, Mr Taylor asked Mr Wilson for further detail as to his discussions with Mr Quinn at their meeting. Mr Wilson's oral evidence was as follows:

> "Q. Did you ask him what he had done before QAL was incorporated?
>
> A. Yes, he said he was always dealing in cars. He had formed his limited company on the advice of his accountant … Before that he was sole trader …
>
> Q. All right. Did you ask him what his VAT registration was as sole trader?
>
> A. No.
>
> Q. Because that would have helped, wouldn't it, because if he had been VAT registered as a sole trader, that would be an indicator he really was a motor trader, wouldn't it?
>
> A. (No reply).
>
> Q. Did you ask him whether he was VAT registered as a sole trader?
>
> A. No.
>
> Q. You used the word "for ages" so when did he tell you he started working as a motor trader?
>
> A. He just said he had just recently formed a limited company and before that he was sole trader.
>
> Q. Yes. Did you ask him for how long he'd been a sole trader?
>
> A. No.
>
> Q. Did you ask him about what sort of vehicles he'd started off selling when he'd started being a sole trader?
>
> A. No.
>
> Q. So you used the expression "chitchat"?
>
> A. Yes.
>
> Q. Is that really all it was?
>
> A. Terminology – no, when you asked me the question, is it not possible that within five minutes you could learn the price of cars, I was trying to put forward to you that the answer to that question was, "no, it would not be possible to learn the motor trade in five minutes," and whenever I said general chitchat, what I'm basically trying to say is you would pick it up on general conversation. I mean, I would know somebody coming in with a Parker's Guide, which is the amateur's guide, trying to pretend they're in the motor trade. I would trigger on to them like that. Certainly, Mr Quinn did not come across as an amateur or somebody that was just in for this for the MTIC kill and out again.
>
> Q. But you didn't ask any of the sort of questions which would have produced factual answers as in, "I used to trade in the motor trade under

> the name of James Quinn. I was registered for VAT in 1995. I've worked in the trade for 20 odd years. I deal in such and such motor cars." For example, did you ask him about any of the contacts he had in the motor trade?
>
> A. No, well he's not going to tell me."

52. Mr Wilson had arrived in a BMW which he said was for sale. Mr Wilson entered into a negotiation for the car, carried out checks on it and ultimately purchased it. Two of QAL's sales representatives brought the Audi which had been the subject of the original advert and telephone conversation. After a negotiation and checks, Mr Wilson purchased the Audi.

53. Thereafter, Mr Wilson's main contact with QAL was the two main delivery drivers. Mr Wilson maintained that he did not recall saying to Officer Wilkinson that he had not dealt with Mr Quinn directly. Mr Wilson said that he started off buying one car but eventually he had confidence in QAL and this led to a good supply of good cars. Mr Wilson's understanding was that Mr Quinn was what is known as an "auction lodger" whereby he would spend a long time in auctions and would know which from fleet companies.

54. It was put to Mr Wilson that if he had carried out an internet search into QAL's address, he would have found that it was a half-built bungalow in a field. Mr Wilson said that he did not need to check on the address as Mr Quinn had a driving licence with the same address and made the point that it could not have been posted to him if the address did not exist. Mr Wilson also said that whether or not QAL's premises were suitable for storing cars was not relevant to him as Mr Quinn was trading the vehicles rather than retaining them for any period of time and did not need to store them. Mr Wilson said that this did not strike him as unusual as this was precisely what he did when he was starting out. Mr Wilson said that, "he was like myself in my trading life where he dealing from the auctions and selling to me."

55. Mr Wilson was keen to note that all the vehicles purchased from QAL were genuine, were checked for outstanding finance and checked for signs of having been in an accident.

Adrian Cromie

56. Mr Wilson advertised for sale the Audi which he had purchased from QAL on Autotrade-mail. Mr Cromie contacted Mr Wilson for the first time saying that he was responding to that advert. Mr Wilson said in his witness statement that Mr Cromie told him the address of his office in Dundalk but that he did not keep cars on his premises or have premises on which to display his vehicles. Mr Wilson did not visit Mr Cromie's premises. He said in his witness statement that he did not recall telling Officer Wilkinson that he had visited Mr Wilson's premises and that, "if indeed I made this statement then I can only conclude that I answered this way because I knew where Bridge Street was located and was familiar with the area. I knew the irrelevance of an independent trader's actual premises." In the course of cross-examination, Mr Wilson accepted that he had simply driven past Mr Cromie's premises and not stopped,

although on one occasion he had handed something to Mr Cromie on the same street. Cars would be delivered to Mr Cromie at a hotel halfway between them. This location was suggested by Mr Wilson. Mr Wilson said this was not unusual.

57. Mr Wilson explained in his witness statement his due diligence checks upon Mr Cromie. These comprised obtaining a copy of Mr Cromie's driving licence and verifying Mr Cromie's VAT number using the online VIES checker. Mr Wilson said that he was also reassured by the fact that Mr Cromie contacted him via Autotrade-mail which was only open to the trade and so Mr Cromie must have passed their due diligence to be a member. Further, Mr Wilson spoke to Mr Cromie on the telephone and was satisfied that he was a car dealer from the terminology and expressions which he used. Mr Wilson also explained in his witness statement that he asked one of his contacts, Mr Walsh, for information about Mr Cromie:

> "Prior to meeting with AC, I telephoned a reputable car dealer in Ireland – Mr Mark Walsh. I have previously worked with Mr Walsh and valued his opinion. I now refer to the witness statement of Mark Walsh confirming that I had contacted him to enquire about AC. Mark Walsh confirmed that AC was a known trader in ROI and as far as he was aware, AC was a reputable and trustworthy dealer."

58. However, in the course of cross-examination Mr Wilson accepted that his account in his witness statement of his conversation with Mr Walsh was inaccurate in that Mr Walsh had not said that Mr Cromie was reputable and trustworthy. Mr Walsh's witness statement said that he had confirmed that he had heard of Mr Cromie but that he had never had any dealings with him directly. The exchange between Mr Taylor and Mr Wilson was as follows:

> "Q. You were trying to make HMRC think that a trader with a good reputation would say that Adrian Cromie was reputable and trustworthy, and that was not true, was it?
>
> A. It does seem a bit exaggerated.
>
> Q. It is a lie, is it not?
>
> A. To say a lie, certainly that was not my intention. From his letter too I was speaking to my adviser at the time, but the impression that Mark Walsh had given me was certainly not a negative one, but yes, I may have exaggerated the truth.
>
> Q. So we are now into the realms of the Americanism of "I have misspoke" are we rather than simply admitting that you have told a lie?
>
> A. Whatever your interpretation is of at the time. Yes, I may have exaggerated the truth but you can see what Mark Walsh has said there, that he heard nothing negative about him and nothing bad about him and in turn there whenever I heard the bad news I said to Mark Walsh there was something bad about him but, yes, if it is exaggerated the truth to be a lie is the same thing, yes, it was a lie."

RMC Autos

59. Mr Wilson maintained that he had no reason to be concerned about RMC Autos. RMC Autos' de-registration was after the deals in question and he had no way of predicting any problems. Mr Taylor was not cross-examined in respect of RMC Autos.

Third party cheque

60. Mr Wilson maintained in his witness statement that he did not make the cheque payable to Grange Motors as the cheque stub referred to QAL as the payee. His assumption was that Mr Quinn or somebody else at QAL had fraudulently altered the name of the payee.

61. Mr Wilson accepted that he had signed blank cheques (and signed the cheque in question as a blank cheque) but maintained that this was for his employee, Mr Stewart, to fill in the name of the payee on the cheque and on the cheque stub. The company policy was not to give out blank cheques. Mr Wilson stated as follows:

> "Q. As I understand it, it is your case that when Mr Stewart wrote this cheque, he wrote on the top of it "Q Autos".
>
> A. Well, again, that's one of the options. What we do there is I would sign. If I was going to that auction or going away somewhere, they would ask me to sign five or six cheques or eight cheques or ten cheques or whatever it may be for somebody who was coming to collect a cheque. So it's either that. I would love to have seen the original cheque to see has it been changed or are all of them original cheques … It's certainly not practice for us to give out blank cheques. That's certainly not company policy, to give out blank cheques. So either, as I say, what I would do is I would sign – I sign cheques before I would leave the office."

Method of trading

62. Mr Wilson makes the point that it is not unusual for him to have purchased a large number of vehicles from one source as he had purchased multiple vehicles on one day from the same source in the past. Similarly, Mr Wilson's evidence was that it was not unusual to purchase and sell the same car on the same day.

63. Further, Mr Wilson maintained that he took comfort from the fact that he took possession of every car that he purchased and sold. Further, the majority of the cars were advertised to the general public and the deals with Mr Cromie and RMC Autos were not pre-arranged. He said that these were all genuine transactions.

64. Mr Taylor put to Mr Wilson that it was unusual that QAL had been unknown to Mr Wilson and yet in the course of 77 days Mr Wilson had purchased about half a million pounds worth of cars. Mr Wilson denied that this was unusual. Mr Wilson later made the point that he did not make any additional profit from these cars beyond his usual profit from cars sourced from other traders.

Cessation of trade

65. Mr Wilson said during his evidence-in-chief that he stopped dealing with QAL and Mr Cromie as soon as he found out there was a possibility that they were involved in MTIC fraud as a result of issues being raised by HMRC with his VAT return. However, Mr Taylor put to Mr Wilson that the 09/12 VAT return was received by HMRC on 19 October 2012 whereas the last trade with Mr Cromie was on 7 September 2012. Mr Wilson said that by that point he was having difficulties with cash flow. Mr Wilson then said that Mr Quinn disappeared after the last trade on 27 September 2012.

Knowledge of the fraud

66. Mr Taylor put to Mr Wilson that he had knowledge of the fraud and that he allowed himself to be drawn into a VAT fraud because he was under significant financial pressure. Mr Wilson denied this and said that he had, "been duped and duped badly." He was adamant that he was not knowingly involved and said as follows:

> "I was not involved in MTIC, should I say here and now. I mean, our job is all about selling cars, it is all about selling cars, and you take every individual deal as it comes along."

67. Mr Wilson also said that financial pressure is there in the everyday running of the business. His turnover did not change. He said that the decision to deal with QAL was not a matter of financial pressure; this was an opportunity to sell cars from the North to the South and was an opportunity to grow. He said that he was not making excessive profits and the gains were no more than buying cars in Northern Ireland, keeping them while they are cleaned and if necessary repaired and then selling them in Northern Ireland.

Mr Stewart

68. We read a witness statement from Mr Raymond Stewart and heard his oral evidence. Mr Stewart was responsible for the day to day management of the business at the material time. He confirmed that QAL's drivers brought an Audi to Mr Wilson's premises and, the following afternoon, Mr Quinn visited Mr Wilson to discuss the purchase of the vehicle. Mr Stewart was also present and this was the only time which he met Mr Quinn.

69. Mr Stewart and Mr Wilson met Mr Cromie on 2 July 2012, who had arrived to view the Audi purchased from QAL. Mr Cromie had responded to an advert placed by Mr Wilson in Autotrade-mail. Negotiations were made as to the purchase of an Audi and another vehicle. Mr Cromie visited on four other occasions. It was agreed that deliveries would be made when funds were cleared at a hotel. Mr Stewart said that this was a common delivery address for Mr Wilson when delivering stock to the Republic of Ireland because of its location and its large car park.

70. During cross-examination, Mr Stewart accepted that due diligence was the province of Mr Wilson rather than him. Mr Stewart was asked about how a cheque for £16,000 came to be made out to Grange Motors. He was effectively unable to help other

than to say that he wrote the counterfoil and the body of the cheque but did not sign it (it had already been signed by Mr Wilson) and did not write the name of the payee. Mr Stewart accepted that the photocopy did not look as if the cheque had been tampered with but made the point that he would have to see the original in order to be sure.

Mr Walsh

71. We read a witness statement from Mr Mark Walsh and heard his oral evidence. His involvement was brief and focused upon his answer to Mr Wilson's request for information about Mr Cromie. Mr Walsh stated as follows in his witness statement:

> "I confirmed that I had heard of AC but never had any dealings with him directly. I did know of other ROI dealers that had purchased/sold vehicles from/to Ac and as far as I was aware there had never been any issues with these transactions.
>
> Roy then informed me that AC had contacted him with the intention of purchasing an Audi A4 and we had a brief discussion about the increased dangers of cross-border selling hence the reason for his telephone call. I again reiterated that from speaking with other traders there did not appear to have been any issues with AC and MTIC fraud. If I had known of any issues I would certainly have made RW aware of these."

72. In the course of cross-examination, Mr Walsh frankly accepted that he did not know Mr Cromie, had not connected Mr Cromie with the trade name AC and did not know anybody who had dealt with Mr Cromie.

Submissions

HMRC

73. Mr Taylor's submissions on behalf of HMRC can be summarised as follows:

(1) HMRC's primary case was that Mr Wilson did know that his transactions were connected to fraud. In essence, this was upon the basis that his assertion that he did not know was not credible.

(2) This lack of credibility was shown by:

(a) Deliberate dishonesty, particularly as regards Mr Wilson's account of what Mr Walsh had said in respect of Mr Cromie's trustworthiness.

(b) Contradictory accounts, particularly in respect of his "visit" to Mr Cromie's premises (which it later emerged was simply a case of having driven past Mr Cromie's flat) and whether or not Mr Wilson dealt directly with Mr Quinn.

(c) Evasive answers and an unwillingness to make appropriate concessions.

(d) The third party cheque and Mr Wilson's unsubstantiated assertion that it had been tampered with.

(e) Inadequate due diligence, particularly as regards the absence of proper checks upon QAL and Mr Cromie.

(f) The failure to visit QAL's premises or to discover that it was a field and a half-built bungalow.

(g) The failure to carry out Redhill or Wigan checks.

(h) Discrepancies as to Mr Wilson's evidence in respect of the cessation of trading with QAL and Mr Cromie.

(i) Financial benefits to Mr Wilson from sales which were all too easy to make.

(3) HMRC's secondary case was that Mr Wilson should have known that his transactions were connected to fraud. In essence, all the matters relied upon for the primary argument of actual knowledge were relied upon in respect of the submission that Mr Wilson should have known that his transactions were connected to fraud.

Mr Wilson

74. Mr Penman's submissions on behalf of Mr Wilson can be summarised as follows:

(1) Mr Wilson neither knew nor should have known that his transactions were connected to fraud.

(2) The due diligence checks undertaken were sufficient. There was no need to visit QAL's premises as Mr Quinn's driving licence had been provided and this could not have been issued to (or received by) Mr Quinn if post could not be collected from that address. In any event, it was not clear that the property was a half-built bungalow as Officer Arnold had interviewed a partner in Grange Road Car Sales who had said that he had visited QAL's premises, which was a newly built house in Newry.

(3) Higher Officer Davis and Officer Wilkinson accepted that not all traders required premises and not all traders hold or take possession of vehicles.

(4) Mr Wilson had also carried out a company check on QAL and VAT invoices.

(5) Mr Wilson met Mr Quinn and satisfied himself that he was genuine. Both Mr Quinn and Mr Cromie reflected how Mr Wilson had himself worked when he was first embarking on his car sales career. Mr Wilson had not had business premises capable of storing cars either.

(6) Mr Wilson did not know about Redhill or Wigan checks but did carry out Europa checks which, in the circumstances, were just as helpful.

(7) The Disputed Deals were genuine. Mr Wilson took possession of the cars and received payment. The cars were genuine and passed HPI checks and checks of the log books.

(8) Mr Wilson did visit Mr Cromie's premises.

(9) The fact that Mr Wilson only had two Republic of Ireland customers adds nothing as it is difficult to service retail customers in the Republic of Ireland.

(10) The third party cheque adds nothing because it was either altered or had been left blank and, contrary to company policy, had been given to QAL blank.

(11) It is common for some traders in Northern Ireland to make deliveries to car parks in the Republic of Ireland.

(12) The reason for Mr Wilson ceasing to trade with QAL and Mr Cromie was that Mr Wilson received a visit from HMRC on 21 September 2012 in which MTIC fraud was mentioned.

(13) Mr Wilson did not have financial problems and would not obtain substantial financial gain.

(14) Higher Officer Davis accepted that she was not experienced in MTIC fraud investigations.

(15) Officer Wilkinson had visited Mr Wilson and, as set out in her visit report, found no MTIC concerns.

(16) HMRC failed to make a recovery against QAL. Mr Penman stated in his written submissions that, "The clear implication is that HMRC cannot get the perpetrator of real fraud and so attack the victim instead to ensure that HMRC gets the VAT. One cannot help wondering whether the honest trader is simply a soft touch." Mr Penman went on to say that the impression given by HMRC is that a taxpayer can never do enough to satisfy themselves that a deal is genuine.

Discussion

Findings of fact

75. As set out in paragraph 30 above, HMRC accepted (through Mr Taylor) that the input tax of £2,833.33 on the cancelled thirtieth deal was properly claimed. We therefore find as a fact that this was not connected to fraud.

76. We find as a fact that there was fraudulent evasion of VAT and that the Disputed Deals were connected to that fraudulent evasion of VAT. We make this finding upon HMRC's uncontested evidence as set out above and upon the basis that Mr Wilson does not dispute these matters.

77. The dispute therefore turns upon the following questions of fact:

(1) Did Mr Wilson know that the Disputed Deals were connected with the fraudulent evasion of VAT?

(2) Should Mr Wilson have known that the Disputed Deals were connected with the fraudulent evasion of VAT?

78. We find as a fact that Mr Wilson did not know that the Disputed Deals were connected with the fraudulent evasion of VAT. This is for the following reasons, both individually and cumulatively.

79. First, HMRC did not adduce any evidence which established Mr Wilson's actual knowledge. No concession to that effect was elicited from Mr Wilson and there was no other witness evidence or documentary evidence which proved or inferred actual knowledge. This is of fundamental importance given that the burden of proof is upon HMRC in that regard.

80. Secondly, we accept Mr Wilson's evidence that he did not have actual knowledge of the fraud. It is correct that, as set out below, Mr Wilson's credibility is impaired by inconsistencies between his oral evidence and his witness statement. The most striking of these were the embellishment of what Mr Walsh had said about Mr Cromie and driving past (rather than visiting) Mr Cromie's flat. However, we find that in those instances it is Mr Cromie's oral evidence which is to be preferred to his written evidence. We do not accept Mr Taylor's characterisation of Mr Wilson's oral evidence as evasive. In our view, Mr Wilson was instead doing his best to answer probing questions and in fact did make concessions, albeit, we accept, not immediately. Crucially, these matters do not mean that Mr Wilson's evidence should be rejected wholesale.

81. Thirdly, HMRC tried to build a case that Mr Wilson had financial difficulties and was therefore drawn into MTIC fraud. We do not accept that this was the case. There is nothing to gainsay Mr Wilson's evidence that his financial position was not particularly different to previous years and that he saw this as simply an opportunity to trade cars. Further, these deals were not particularly more profitable for Mr Wilson than usual.

82. Fourthly, there was no evidence that Mr Wilson was aware of the connections between QAL, Mr Cromie or RMC Autos or that he was aware of the parallel deals. Indeed, it was not put to Mr Wilson that he knew about these. As such, there is no evidence that Mr Wilson was aware of the contrived nature of various of the Disputed Deals.

83. We find as a fact that Mr Wilson should have known that the Disputed Deals were connected with the fraudulent evasion of VAT. This is for the following reasons, both individually and cumulatively.

84. First, Mr Wilson accepted that he had a general knowledge of MTIC fraud. He was also aware of the risk of MTIC fraud within the car trade industry. This arose from previous visits by HMRC and also Mr Wilson's knowledge and experience. Mr Wilson himself said that the issue of dealing with fraudulent traders was one with of which he was "acutely aware".

85. Secondly, it was clear from Mr Wilson's evidence that he was particularly on guard about this risk when entering into the first deals with QAL and Mr Cromie. As regards QAL, this was because QAL was a new supplier and was a newly incorporated company with no or little credit history. As regards Mr Cromie, this was because he would be selling zero-rated cars to the Republic of Ireland. We take it that this also applies to RMC Autos, albeit to a lesser extent.

86. Thirdly, we find that Mr Wilson's due diligence checks of QAL were superficial, should not have dispelled the concerns that he had and in fact should have created suspicion. The company checks established that QAL had only been in existence for a short period of time. Mr Wilson said that this gave him, "some cause for suspicion". Obtaining a copy of Mr Quinn's driving licence, a copy of his headed paper and details of his bank account would have done nothing at all to address this suspicion as it does not provide any comfort as to Mr Quinn's own business history. Similarly, whilst checking QAL's VAT number with HMRC's contact centre established that QAL existed and was properly VAT registered, this again does nothing to allay any concerns about QAL's short trading history. We do not read anything into the fact that Mr Wilson did not carry out Redhill or Wigan checks into Mr Quinn (or, for that matter, anybody else) as this would not have provided any further information at that stage.

87. We appreciate that Mr Wilson says that his suspicions were removed by his discussions with Mr Quinn as his "chitchat" as he called it confirmed that Mr Quinn was a car trader and was genuine. However, we fail to see that this gave Mr Wilson the comfort that he himself required and find that it did not give him this comfort. This is because the discussions were again superficial. He did not ask how long Mr Quinn had been a sole trader, he did not ask what sort of vehicles he had traded in and did not ask what Mr Quinn's VAT number had been as a sole trader. In short, it is difficult to see that the general discussions which he had with Mr Quinn told him anything new or gave him any comfort in the light of the concern that Mr Wilson himself expressed about dealing with a newly incorporated company. Given that this was the only time that Mr Wilson met Mr Quinn, we do not see why this should have improved over time. It is also significant that, whereas Mr Wilson took efforts to ask his contacts about Mr Cromie in order to test his reputation, Mr Wilson undertook no such research about Mr Quinn or QAL.

88. We do note in this regard that due diligence is not an end in itself. Mr Penman is correct to say on Mr Wilson's behalf that HMRC have not provided a list of due diligence which should, to their mind, have taken place. However, this misses the point. The relevance in the context of the present case is that Mr Wilson was (or at least should have been) suspicious of Mr Quinn and QAL and, contrary to Mr Wilson's stance, we find that nothing was achieved by Mr Wilson's due diligence to remove those suspicions. Mr Wilson traded with QAL nonetheless.

89. It is also convenient at this stage to make findings as to the relevance of checks of QAL's premises in the context of due diligence as the failure to make such checks was treated by HMRC as a significant shortcoming. We do not agree with HMRC in this regard. QAL did not have a need for premises as it did not retain vehicles. There was therefore no need for Mr Wilson to check the premises. If he had, it is the fact that there would be no signs of QAL's presence there which would be of concern rather than the absence of a garage or parking facilities. However, the driving licence was in our view sufficient documentary proof of address in this context.

90. Fourthly, Mr Wilson was clearly concerned enough about Mr Cromie to want to ask Mr Walsh about him. Mr Wilson sought to give HMRC in correspondence and the Tribunal in his witness statement the impression that he had been reassured by Mr

Walsh that Mr Cromie was reputable and trustworthy. We find that Mr Wilson was untruthful as to this. As Mr Wilson fairly accepted during cross-examination, he had exaggerated what Mr Walsh had said. The reason for trusting Mr Cromie therefore fell away and so there was no basis for Mr Wilson to have felt reassured.

91. Fifthly, this failure to be reassured about Mr Cromie provides a backdrop in which other features add to suspicion which might on their own not have been of great concern. Whilst we accept that it was not unusual and perhaps even common for Mr Wilson to deliver cars to a car park in the Republic of Ireland, we find that it was suspicious for Mr Cromie to require this in a context in which Mr Wilson had yet to be satisfied that he was genuine. The fact that Mr Cromie contacted Mr Wilson about the same car that commenced the relationship with QAL and that both QAL and Mr Cromie quickly became lucrative sources of purchases and sales respectively might have been dismissed as coincidence but was (or should have been) a concern in circumstances in which Mr Wilson had not dispelled his own suspicions of either trader. Again, the fact that Mr Cromie did not have premises with a garage or forecourt does not have the significance which HMRC place on it. However, what is significant is that Mr Wilson was keen to create an impression that he had visited Mr Cromie's premises in order to be satisfied that he was genuine, when in fact he had just driven past his flat and so could not have been satisfied by this.

92. Sixthly, we find as a fact that QAL were given a blank cheque which they or a third party later made out to Grange Motors. There is no evidence for Mr Wilson's assertion that the cheque was tampered with. Mr Stewart's evidence was unsatisfactory; he should know whether or not he gave out a blank cheque and yet he found himself unable to say one way or the other. Mr Wilson accepts that he provided Mr Stewart with a signed blank cheque for him to fill out and, given that the payee is obviously written in different handwriting to the body of the cheque and that Mr Stewart does not remember writing Grange Motors, on the balance of probabilities it was left blank when handed to QAL.

93. Seventhly, the fact that the Disputed Deals involved Mr Wilson taking possession of the cars adds nothing. All this means is that the cars were genuine; it provides no comfort as to the circumstances of QAL selling them to Mr Wilson.

94. Eighthly, Mr Wilson was inconsistent in his evidence as to why he ceased trading with QAL and Mr Cromie. We were variously told that this was because of cashflow, concerns raised with the 09/12 VAT return and because Mr Quinn or Mr Cromie disappeared. Although Mr Penman submitted that this was also because of HMRC's visit on 21 September 2012, this was not borne out by Mr Wilson's evidence and in any event ignores the fact that a further purchase was made from QAL on 27 September 2012. We find that on the balance of probabilities Mr Wilson carried on trading until Mr Quinn disappeared rather than because of his own concerns about fraud.

95. Ninthly, we must say that we had some sympathy for Mr Penman's submission that it is difficult for HMRC to say that Mr Wilson should not have traded with QAL when Officer Wilkinson said in her visit report that she had no concerns about MTIC.

However, we find that this was a view taken without the benefit of the evidence which we have heard and so is not something that we can be bound by.

Application to the legal principles

96. The parties were agreed that the effect of the legal principles was that whether or not the input tax on the Disputed Deals could be claimed turned upon whether or not Mr Wilson knew or should have known that his transactions were connected to fraud. As we have found that Mr Wilson should have known this, he is not entitled to claim input tax upon them.

97. A recurring theme in Mr Penman's submissions was that HMRC had chosen to target Mr Wilson because they could not obtain payment from QAL. Mr Penman did not develop any argument to the effect that HMRC was not entitled to do this and did not provide any authority in this regard. We find that for the reasons set out above HMRC was entitled to deny Mr Wilson's claim for input tax in respect of the Disputed Deals.

Disposition

98. It follows that we dismiss the appeal insofar as it relates to the £116,582.36 claimed in respect of the Disputed Deals and allow the appeal insofar as it relates to the £2,833.33 agreed as properly claimed in respect of the thirtieth deal.

99. 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

TRIBUNAL JUDGE
RELEASE DATE: 20 August 2018