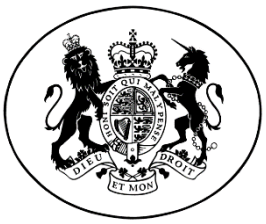

TC07065

Appeal number: TC/2015/06446

VAT – Denial of Input Tax – Assessment – Missing Trader Intra Community Fraud – trade in primary metals - Kittel – Knew or should have known transactions were connected to the fraudulent evasion of VAT – Attribution of knowledge of an agent to a partnership – appeal dismissed

FIRST-TIER TRIBUNAL

TAX CHAMBER

NICHOLAS AND CHARLOTTE SANDHAM **Appellant**

TRADING AS PREMIER METALS LEEDS

- and -

THE COMMISSIONERS FOR HER MAJESTY'S **Respondents**

REVENUE & CUSTOMS

TRIBUNAL: JUDGE RUPERT JONES

MOHAMMED FAROOQ

Sitting in public at Bradford Tribunal Service on 26, 27 & 28 September 2018 and 1 & 3 October 2018

Charles Bott QC instructed by Cohen Cramer solicitors for the Appellant

Jenny Goldring and Joshua Carey, Counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant partnership, Nicholas and Charlotte Sandham trading as Premier Metals Leeds ("Premier Metals" or "the Appellant" or "the partnership"), appeals against two decisions of the Commissioners of Her Majesty's Revenue & Customs ("HMRC" or "the Respondents"). Mr and Mrs Sandham ("the partners") were the partners of the partnership.

The Decisions under Appeal

Denial of Input Tax

2. The first decision under appeal is HMRC's decision to deny Premier Metals the right to deduct input tax in the total sum of £1,930,951 on 56 deals it entered into for the purchase and sale of primary metals in the VAT accounting periods 02/13 and 99/99. The decision to deny input tax in respect of the original deal number 21 in period 02/13 has been reviewed by HMRC and is no longer maintained. The number of deals remaining subject to this appeal is therefore 56 and not the 57 transactions on which input tax was originally denied. The deals have been renumbered accordingly.

3. The VAT return for 02/13 relates to the period 1 December 2012 to 28 February 2013.

4. The VAT return for 99/99 is in respect of the final VAT period for Premier Metals and relates to the period 1 March 2013 to 31 March 2013.

5. HMRC's decision was notified to Premier Metals by way of a letter dated 30 March 2015, which was upheld on review by decision letter dated 30 September 2015.

6. The sums of input tax denied were as follows:

Period	
02/13	£534,838
99/99	£1,409,056.37
TOTAL	£1,943,894.37

Recovery Assessment

7. Consequent upon the denial of input tax, HMRC made a second decision which is also subject to appeal. HMRC raised an assessment to VAT against the Appellant pursuant to Section 73 Value Added Tax Act 1994 ("VATA") dated 30 March 2015 in the sums set out above for periods 02/13 and 99/99.

8. An amendment to the assessment for VAT period 02/13 was made on 15 March 2016 as a result of input tax being allowed in relation to deal 21 and other arithmetical corrections. The sum remaining as denied and assessed for period 02/13 was reduced to £521,895 such that the total sum assessed for both periods is now £1,930,951.

Relationship between the Appellant partnership and Premier Metals (Leeds) Ltd

9. The partnership transferred its business to Premier Metals (Leeds) Ltd ("the Company") on 1 April 2013 and was voluntarily deregistered for VAT. Nicholas Sandham then became the sole director of the Company. The Company continued to trade in primary metals.

10. By letter on 26 June 2015, HMRC notified the Company of a decision to refuse the right to deduct input tax in respect of transactions in VAT periods 06/13 and 09/13. This denial related to 185 transactions and the total sum of input tax denied was £9,641,023. Assessments were also issued consequent upon the denial and the total sum reduced to £9,562,909. This decision was upheld on review on 30 September 2015 and appealed by the Company on 20 October 2015. The Tribunal issued directions on 29 April 2016 that the partnership appeal and the appeal of Company should be heard together. On 22 August 2016, the Company (in liquidation) withdrew its appeal.

11. The appeal before the Tribunal therefore relates solely to the appeal by the partnership, Premier Metals, in respect of the decision letter 30 March 2015 and consequent assessment as varied.

Issues in the appeal

12. HMRC's grounds for the decision to deny the right to deduct input tax were that Premier Metals' transactions in relation to the purchase of metals, in which the relevant input tax was incurred, were connected with the fraudulent evasion of VAT and that the partnership knew or should have known of such a connection. The fraudulent evasion of VAT alleged is missing trader intra-community ("MTIC") fraud.

13. The Appellant submitted a Notice of Appeal to the First-tier Tribunal ("the Tribunal") dated 20 October 2015 against the decisions referred to above. The Grounds of Appeal are as follows: "*The Partners of Premier Metals Leeds deny that they knew or should have known that the transactions were connected to the fraudulent evasion of vat. The burden of proof lies with the respondent to demonstrate such knowledge."*

14. Each of the 56 transactions upon which input tax has been denied have been traced back to a fraudulent VAT loss. The 56 transaction chains have been summarised by HMRC in an overview**.**

15. This overview of the deals shows that in VAT period 02/13 Premier Metals entered into 21 transactions, all of which involved the purchase and sale of metals (deals 1 to 21). In VAT period 99/99, Premier Metals entered into 35 transactions (deals 22 to 56), all of which involved the purchase and sale of primary metals. Each of the transactions traced to a fraudulent VAT loss.

16. It is not in dispute in the appeal that the relevant transactions were connected with the fraudulent evasion of VAT – the partnership has accepted as much in written correspondence prior to the hearing as detailed below.

17. The primary issue is whether the partnership knew (had knowledge) or should have known (had means of knowledge) that the transactions were connected to the fraudulent evasion of VAT. The burden is upon HMRC to prove knowledge or means of knowledge on

the balance of probabilities. If they do so, HMRC's denial of input tax and the consequent VAT assessment against the partnership will be upheld and affirmed.

18. In order to determine the primary issue, the Tribunal must decide two sub-issues.

The two sub-issues

19. The first sub-issue in the appeal ("the First Issue") is whether the knowledge of an agent acting on behalf of the partnership, its consultant Jonathan France, can be attributed to the partnership. If so, the appeal must be dismissed because the Appellant accepts that Mr France knew that the relevant transactions were connected to the fraudulent evasion of VAT.

20. On an application by HMRC, and after hearing submissions from both parties on the first day of the hearing, the Tribunal declined to determine this as a preliminary issue for the reasons it gave orally. The Tribunal begins by considering this issue first but will also seek to resolve the second issue even if deciding the first issue is determinative of the outcome of the appeal.

21. The second sub-issue in the appeal ("the Second Issue") is whether HMRC have proved that the partners of the partnership, Mr and Mrs Sandham, knew or should have known that the relevant transactions were connected to the fraudulent evasion of VAT.

The Evidence

22. The Tribunal received 12 lever arch files of evidence including witness statements and exhibits.

23. Witness statements were received from the following witnesses on behalf of the Appellant:

Witness	Date of statement(s)	Position (at the relevant time unless otherwise stated)
Nicholas Sandham	27/01/17	Partner of the Appellant
Charlotte Sandham	27/01/17	Partner of the Appellant
Nigel Broadbent	02/02/18	Solicitor

24. Mr and Mrs Sandham gave oral evidence and were cross examined during the hearing. Nigel Broadbent's statement was read as agreed.

25. Witness statements on behalf of HMRC were received from the following witnesses (all being employees or Officers of HMRC):

Witness	Date of statements(s)	Relevant role within HMRC
Andrew Mark Chisman	28/10/16, 27/03/17, 01/03/18, 07/03/18	Original decision maker
Colin Barry Needs	30/09/17	
John Thomas Hughes	30/09/16, 22/02/18	

Lana Dimitrova 30/09/16

Lee David Nevin 28/10/16, 27/02/18

26. The Tribunal only heard oral evidence from HMRC witness Officer Mark Chisman who was cross examined during the hearing. The statements of all other HMRC witnesses were read as agreed.

27. The Tribunal has considered all the evidence as lodged and served, even when it has not been referred to within the body of this decision. Given the volume of this evidence it would be impossible to refer to it all, even in a lengthy decision such as this. That does not mean that the Tribunal has not given it due consideration. However, the Tribunal is only required to refer to the evidence required to determine the issues before it in the appeal.

28. The Tribunal heard oral evidence beginning on the second day of the hearing, 27 September 2018, concluding on the fourth day, 1 October 2018.

29. Where the Tribunal has made no comment upon a witness's evidence, it has found it to be reliable and credible and accepted it on the balance of probabilities. Where it has found a witness's evidence to be unreliable or incredible the Tribunal makes findings that it rejects that evidence together with reasons in support.

30. The Tribunal has found all facts on the balance of probabilities, in particular indicating its reasons where there is a conflict in the evidence or where it finds a witness's evidence to be inconsistent, unbelievable or otherwise unsatisfactory.

The First Issue – agency of Jonathan France and attribution of knowledge to the partnership

31. The burden is on HMRC to prove the partnership had knowledge or means of knowledge that the transactions were connected to the fraudulent evasion of VAT. Mr and Mrs Sandham, the partners of Premier Metals, assert that they had no knowledge that the transactions were connected with the fraudulent evasion of VAT. They seek to place responsibility on Jonathan France, a consultant acting on behalf of the partnership, for conducting the fraudulent transactions. The partnership accepts that Mr France had full knowledge of the connection to VAT fraud when he conducted the relevant transactions.

32. It is not in dispute that Mr France was authorised to conduct transactions for the purchase and sale of primary metals on behalf of the partnership and did so in its name. The partnership's authority therefore extended to the relevant transactions. However, it is the Appellant's case that Mr France was not authorised by the partnership knowingly to engage in any fraudulent transactions. To act as Mr France did was outside the terms of his engagement as a consultant with the partnership and the terms of engagement they agreed. Nonetheless, the partnership accepts it was not the primary victim of the VAT fraud. The partnership accepts that the primary victim of the fraud was the Revenue due to the potential VAT loss it was exposed to.

33. HMRC argue that even if it were correct (which HMRC do not accept) that the partners did not authorise Mr France knowingly to engage in fraudulent transactions and the partners did not know or should not have known that the transactions were connected with fraud, the Tribunal must nevertheless attribute the knowledge of Jonathan France to the partnership.

34. HMRC submit that a partnership should not be permitted to escape liability for the actions of agents acting on its behalf and in its name, in particular Mr France. They submit that the partnership is bound by Mr France's knowledge pursuant to the legal principles of agency which apply to the attribution of knowledge.

35. The First Issue the Tribunal must therefore decide is whether the partnership is bound by the knowledge of its agent, Jonathan France, that the transactions were connected to the fraudulent evasion of VAT ("fraudulent transactions") even if the partners had no knowledge or means of knowledge of such. It must consider whether Mr France's knowledge must be attributed to the partnership even if he was acting outside the instructions of the partnership or any terms on which he was engaged to act for by knowingly conducting fraudulent transactions.

The Facts on the First Issue

Nicholas and Charlotte Sandham trading as Premier Metals Leeds ("Premier Metals" or "the partnership")

Partnership and Registration for VAT

36. The partnership submitted an application to register for VAT (VAT 1) on 10 January 2007. It was signed by Charlotte Sandham as partner.

 The main business activity was described as scrap metal trading with an estimated turnover in the next 12 months of £100,000.
 An account (03415961) at Barclays bank in the name of the partnership was detailed.
 The PPOB (Principal Place of Business was 1 Rombalds Court, Menston, Ilkley, LS29 6PX. This was also declared as the personal address of Charlotte and Nicholas Sandham.
 The partnership declared that it did not expect to purchase or sell goods to the EU.

37. The partnership had undertaken the scrap metal business for some years and this also continued after the partnership began to trade in primary metals in period 02/13. On 13 February 2007 HMRC sent a request for information to Premier Metals querying the premises that would be used by Premier Metals to conduct its business and the date of the first taxable supply.

38. Charlotte Sandham replied on 23 February 2007 stating that Premier Metals would not be storing scrap metal at the residential premises and that the movement of scrap metal would be between supplier and customer arranged through telephone calls. Premier Metals had not yet made its first taxable supply.

39. On 27 February 2007 HMRC sent a letter to Premier Metals informing the partnership that they were unable to proceed with the application as the partnership had not provided evidence to support the intention to trade.

40. On 12 March 2007 Charlotte Sandham replied with a letter from Network Rail Infrastructure Ltd stating that Network Rail intended to use the partnership for the removal of scrap cable from its depots.

41. Premier Metals became registered for VAT with effect from 9 March 2007 (VRN 897 995516).

42. On 17 December 2009 Premier Metals sent a letter to HMRC stating that they had changed address to 39 Shaw Lane Gardens, Guisely, Leeds, LS20 9JQ.

43. On 27 September 2011 "Charlotte Santan" (Charlotte Sandham) set up a direct debit instruction with HMRC to pay the VAT owed by the partnership.

HMRC's visit of 23 March 2012

44. On 8 March 2012 HMRC Officers Johnson and Carter undertook an unannounced visit to the premises of Premier Metals where they met Charlotte Sandham and arranged for a visit to be conducted on 23 March 2012.

45. A control log notes that HMRC informed Premier Metals' accountant on 9 March 2012 that fraud currently experienced in that trade sector was to be discussed at the further meeting.

46. An HMRC visit report for 23 March 2012 states that the visit occurred following a referral from the central co-ordination team ("CCT") as information suggested the partnership was buying from AM Trading (a high-risk trader in metals). The visit was undertaken by Officers Anthony Johnson and Ross Carter. Mr and Mrs Sandham were present at the visit.

47. At the visit on 23 March 2012 it was noted that the partnership's Principal Place Of Business (PPOB) was a residential address, namely 39 Shaw Lane Gardens, Guiseley, Leeds. The partners explained that there was no other business address although approximately 30 skips were stored at the unit of a friend of Mr Sandham at Peace Street in Bradford. Mr Sandham undertook the day to day work of the business and Mrs Sandham dealt with the business records and administration. One other person was employed for 3 days a week. The business traded as a mobile scrap metal dealer mainly in West Yorkshire but also across the UK. No EU trade was undertaken.

48. Mr Sandham explained that he kept no stock and that metal was generally bought and sold in the matter of a day or so at a mark-up of 10-20% (approximately) dependent on the grade and quality of the metal. Vehicles used by the business consisted of a skip loader lorry and tipper truck.

49. No evidence was seen of transactions with AM Trading about whom HMRC had been initially concerned. There was no evidence that the trader was involved in any MTIC related deals.

50. The partners were provided with two HMRC notices, namely Notice 726 - '*Joint and several Liability for Unpaid VAT'* and '*How to spot missing trader fraud'.* The visiting officers explained how HMRC had suffered a major loss of revenue due to MTIC fraud and certain aspects of the fraud were briefly described. Mr Sandham said they had previously been approached to do "deals" that "didn't appear to be right" and they had refused to go ahead with these. He mentioned a previous offer to purchase from a Norwegian company, but they had not done this, and they had never traded with any companies in the EC or abroad.

Mr Sandham's witness statement

51. The Tribunal accepted Mr Sandham's evidence that he set out in his witness statement dated 27 January 2017. He was cross examined upon that statement during the hearing. The Tribunal found Mr Sandham to be an honest and reliable witness.

52. Mr Sandham in his statement at §18 deals with HMRC's visit in March 2012. He gave background to the offer that he told HMRC that 'did not appear to be right' came about. He stated that around the time of being offered the deal he had spoken with a man called Patrick Knowles, the owner of a metal sourcing weighing company, who had stressed the importance of due diligence when dealing with high value metals especially if large amounts of money were involved.

53. Mr Sandham gave evidence about this visit at paragraph 18 of his witness statement

> "18. As to paragraph 24 of Mr Chisman's statement, it is correct to say that officer Johnson very briefly mentioned MTIC fraud at the very end of the meeting and explained that the real reason for their visit was that someone had used our business name for fraudulent activities. This is not mentioned in the visit report at AMC10. The visit didn't seem to be connected with MTIC fraud at all really. I agree they left us with a leaflet about MTIC fraud. It didn't seem to have any relevance to us at all. As we had never been involved in MTIC fraud or even heard of it before that visit, it seemed quite hard to understand why they were even giving us a leaflet. The visit seemed primarily to be about someone pretending to be Premier Metals. When I mentioned that we had been offered deals that didn't appear to be right this was not a reference to MTIC fraud, what I was referring to was that I had recently received a call on my mobile out of the blue from someone I didn't know asking if I would be interested in buying some copper cathode. I didn't know what it was at the time so I asked the person to send me a picture of it, which he did. I happened to be at Metal Sourcing weighing in some scrap at the time so I showed the picture to the owner Patrick Knowles and asked him if he knew what it was. To me it just looked like copper plate that had been gathering dust in a warehouse. It didn't seem right because who would leave copper plate standing in a dark warehouse gathering dust? It was quite a large quantity of metal, and the price of copper was nearly £5 a kilo at the time, and I was thinking why hadn't they sold it sooner? I can't remember why but for some reason we thought the scrap was located in Norway somewhere but we -weren't entirely sure. Patrick said that when you are dealing with high value metals, especially if it is in large amounts so there is a lot of money involved, it is important that you do "due diligence" so that you know exactly who you are dealing with. I hadn't heard the expression "due diligence" before but what Patrick said made good sense. It's not something that you would do with a £100 scrap metal customer (at that time, the rules have changed since then) but for high value trades it sounds very sensible. All of these factors, and what Patrick was saying about knowing the identity of who you are dealing with, made me think there was something not right about the deal I was being offered, and so I didn't do the deal. Charlotte and I are and always have been very law abiding, and we steer clear of anything that doesn't look right. Mr Chisman's statement appears to suggest that I was acknowledging that we had been targeted by MTIC fraudsters and that we must therefore have had a good understanding of what MTIC fraud was all about. Nothing could be further from the truth. MTIC fraud was, as far as we knew (having never even heard of it prior to the visit on 23 March 2012), a million miles removed from our little husband and wife home-run business. We didn't deal with international companies, we didn't even have a yard, and we wouldn't know the first thing about how to get involved in MTIC fraud. It just wasn't part of our lives, and as the officer's report states, there was no evidence of us being involved in any MTIC related activity. If we had been aware of anything like that we would have reported it to the police.
>
> 19. The officers left after the visit and we had our business records returned to us, and that was the end of the matter as far as we knew."

54. The Tribunal accepts that Mr Sandham's account, as set out above, is reliable.

Events following the March 2012 visit

55. Mr Sandham described how shortly after HMRC's visit of March 2012 the business purchased premises at Windmill Gate Works, 279 Tong Road, Wortley, Leeds and moved into the premises in December 2012. Scrap metal was stored on site. He also stated that just after he had opened the yard, he received a call from Jonathan France in December 2012.

56. He had known Mr France for 25 years and they were family friends. He stated at paragraph 22 to 31 of his witness statement:

"22. Just after I opened the yard in December 2012, I received a call from Jonathan France.

23. I had known Jonathan France for about 25 years. We were brought up with similar backgrounds, both our fathers eventually ran their own family run scrap yards. He was more educated than me, he went to a private school, but like me he spent most of his school holidays working in the family scrap yard. Also like me, when he left school he went to work for his father, who was called Eric France. Their scrap yard was in Ossett, which is about 20 miles away from where my dad's yard was, in Guiseley. Eric France was his father's name, and that was the name the business traded under, but it was actually a limited company called JKL (Wakefield) Ltd.

24. I remember the first time I met Jonathan France. It would have been in about 1990 or 1991. He called at my dad's yard asking if my dad had anything to sell. Eric France specialised in high value materials such as tinny metals i.e. tin solder and the like. My dad had accumulated quite a large number of solder joints, which he cut off from the lead and put in 45 gallon drums, he used to say "we'll save it for a rainy day". We ended up selling them to Eric France. After that first meeting my dad kept selling the odd load of scrap to Eric France and I would deliver it to them in a Transit truck. I would often see Jonathan and we would end up having a friendly chat.

25. When I left my dad's business and went off to work as a builder's labourer, and then doing rubbish clearances, Jonathan France bought a house in Woodlesford on the outskirts of Leeds. It needed completely gutting back to the joists and all the rubbish clearing away. He asked me to do it. It was a big job and I got paid for it. It really helped me out at the time and I appreciated it.

26. I encountered Jonathan France occasionally when I picked up some scrap metal customers such as Conservatories by Design. More often than not I would weigh the aluminium off cuts from there at Eric France's yard. During this time Eric France, Jonathan's father, started to take more of a back seat with his business and so it was often Jonathan that I saw when I called. As I saw Jonathan take over the running of his father's yard I was impressed by how he seemed to handle things. He seemed to run a very efficient operation. He always got into work before anyone else. He kept his vehicles clean, his yard was always very tidy, and his staff wore uniforms with the company logo on them. I would see his lorries going up and down the M1 between Leeds and Sheffield. He moved a lot of material — that was his business model: make a small profit on a lot of material, and have a fast turnover.

27. I remember Jonathan France ringing me — this would have been just after we got the portacabin — and asking me if I would drive his 7.5 tonne truck and collect some scrap from Cambian in Derbyshire, which I did. After that he asked me if I would like to act as a haulier to empty the scrap metal skips that he had hired out to his customers, good businesses such as Klinger (Bradford), Cornelius (Brighouse), Dempseys (South Kirby), Planet Platforms, CEM (Horbury), Broadbents (Huddersfield), and Jem Shopfitters (Ossett). I was happy to do that. At this time I had one skip wagon and Jonathan asked me if I wanted to buy one from him. It was a blue Mercedes 18 tonne wagon. It was quite old but it had been well maintained. The price was very reasonable. He also said I could have use of all of his skips (for both his customers and mine), though he would remain the owner of them. This was a good deal for me, especially because he agreed that I could

pay him for the wagon by paying a lump sum each time I gave him my invoice for the work I had done for him. In other words, he let me pay for it by instalments.

28. I also emptied Jonathan France's rubbish skips at his yard on a regular basis. I estimate that I called at his yard two or three times a week. This is when I would notice that he would receive articulated lorry loads of metal ingots being delivered to his yard. They would pull up outside his yard on the road and get unloaded. Sometimes I would have to wait outside whilst the wagon was unloaded. At this time Jonathan France seemed to be doing really well. His business seemed to have stepped up a gear. It did not seem at all out of the ordinary that Jonathan France would be dealing with high value ingots as his father had dealt in high value tinny materials prior to Jonathan France running the business.

29. Jonathan France's business appeared to be going from strength to strength. It benefitted me because he paid my invoices very quickly which helped a great deal with my cash flow. This along with giving me the extra haulage work and allowing me to work off the payments for the skip wagon helped me tremendously. It meant I didn't have to go to the bank for a loan and I was able to use his skip wagon and skips for my own work which was really helpful.

30. There were lots of other indicators that Jonathan France's business was doing very well. He seemed to be spending a lot of money on advertising his business on billboards and posters on buses, and he became one of the main sponsors for an annual charity event for Wakefield Hospice. Charlotte and I got invited to that event three times. He would put about thirty people up in the Cedar Court hotel, and transport everyone to, his home for a champagne reception, and then on to the event, with drinks, food, entertainment, everything laid on. Jonathan France would also provide the main raffle prize. I know Wakefield Hospice really appreciated his support at the time. I heard a rumour that he had helped them buy a new machine, though I couldn't say whether it was true or not.

31. Another sign of Jonathan France's apparent success was that he set up a racing team called Embassy Racing, which he ran as a business from a couple of units about five minutes away from his scrap yard in Ossett. I sometimes went there to empty a rubbish skip that was placed there. When I went, I would have to get my ticket book signed and there would often be three or four people working there. He employed a young man, Jodie Firth, who was a British Go Kart champion, to drive his car and also work by his side in the business. Later we were told that he also employed two other drivers, Ben Collins (supposedly The Stig from Top Gear) and Neil Cunningham, and that they tested the car in Spain before the season started. Again, the company image was flawless, all wearing uniforms, the workshop was spotless, more like a hospital than a garage. It all seemed like he had two thriving, successful businesses."

57. It is clear from Mr Sandham's evidence that he looked up to and admired Mr France, he was impressed by him as an apparently successful businessman.

58. At §33 to 35 of his statement dated 27 January 2017, Mr Sandham stated that Jonathan France asked to meet him and said he was doing some work for another company C&C Metals, but said it was too far to travel. Mr France said he had left JKL (Wakefield) Ltd because he saw things happening at the company he did not like. The concerns expressed fell on deaf ears and he was asked to leave. In December 2012 Mr France then said he could come and work for Premier Metals and bring some big customers.

59. Mr Sandham stated that Mr France would come as a consultant and help to grow the business giving the partnership 50% of the profits. Mr France joined Premier Metals as a consultant in January 2013. Mr Sandham puts it this way:

"35. True to his word, Jonathan France joined us as a consultant in January 2013. We agreed to pay him a fee of £100 per day for his consultancy/advisory work and generally helping, this being in

addition to the 50/50 profit shares on business he introduced. He started to bring his customers across, one by one. They were previously customers of JKL (Wakefield) Ltd but now I was putting skips into them for scrap metal.

36 Jonathan France seemed to help me in such a lot of ways. It was nice to have him in the business, with his knowledge of the industry. He was very easy to talk to and he seemed to give good business advice."

60. At §40 to 42 of his witness statement, Mr Sandham stated that in January 2013 Jonathan France received a call saying that JKF (Wakefield) Ltd ('JKL') had gone bust and that Jonathan France seemed really shocked and surprised. Mr France then said that with JKL going into liquidation this might be an opportunity for Premier Metals to go into primary metal trading. Mr France said they would need to act quickly and that his main customers were Centaur Metals & Alloys Ltd and CF Booth Ltd.

61. Nicholas Sandham agreed to go ahead the next day having discussed it with his wife, Mrs Sandham. Mr Sandham said it would be up to Jonathan France to make sure everything was done properly and that he did proper due diligence as he had not forgotten what Patrick Knowles had stated.

62. Mr Sandham put it this way in his witness statement:

"41 Jonathan France explained how the primary metals trading works. He said he had been doing them successfully for a long time and there was good money to be made, though the profits were small as a percentage. The volumes i.e. load sizes were large, and so the financial values were as well, but he said he would never buy a load unless he already had a customer lined up to purchase that precise load. I queried the cash flow side of things. How would we purchase a load costing tens or even hundreds of thousands of pounds? We didn't have that kind of money. He said he always arranged it so that the customer paid for the load before he had to pay for it. I queried that as well. Why would the supplier trust anyone with a valuable load without getting paid for it first? He said that he had built up close relationships with a number of suppliers, who trusted him based on the successful past dealings. Likewise, he trusted his customers, who were a group he had been dealing with over a number of years and it was all based on trust.

42. I said that I would think about it and speak to Charlotte. That night I told Charlotte what Jonathan France had suggested and I asked her what she thought. Charlotte had some knowledge of Jonathan France because we had socialised with him. He had always come across as a clever and astute business man and we both thought he would be bringing his successful business ideas to Premier Metals so we thought it was a good idea. The next day I told Jonathan France that we would agree to go ahead with it but that it would be up to him to make sure everything was done properly, and that he did proper due diligence. I used that exact phrase. I had not forgotten what Patrick Knowles had mentioned when the offer of some copper cathode was made to me from someone I didn't know. He assured me that it would be done.

43. I felt reassured that Jonathan France had the, relevant experience to undertake primary metals deals. I know the everyday scrap metal industry so I knew the money that Jonathan France and his dad's company had made over the years had not come from everyday customers, even though they had some very big customers and they got a lot of scrap. It was obvious the money he earned in order to run a racing team (even with sponsors) and live a very comfortable lifestyle was coming from the high value ingots that he was getting delivered. His father had worked for customers such as Fry's Metals who specialised in high value scrap and then did similar when working for himself. Jonathan France had worked alongside his father for quite a long time, • and then he had continued that type of trading when he had taken over his father's company's yard (and as I have stated above, I personally witnessed lorry loads of tin ingots being delivered on a number of occasions since about 2005). I also knew that Jonathan France often sold it in part

loads because I sometimes saw 1 tonne loads carried by Transit, whereas larger loads would be carried by 7.5 tonne lorries. So he was obviously doing part loads. I assumed that he was delivering to small foundries who couldn't afford to buy in bulk. So in summary my understanding was that there was at least fifty years combined experience of dealing with this type of metal, and Jonathan France was experienced and expert in it."

63. In February 2013 the partnership began to trade in primary metals, such as copper cathode, copper granules, dry bright wire (copper), nickel and tin ingots. The metals were never received at the Appellant's premises.

64. The business became extremely busy and at the suggestion of Jonathan France they took on former staff from JKL (Wakefield) Ltd, namely his step brother Phil Walker, Elaine Frost on the administration side and Dennis McGee and Robert Wilson who were drivers.

65. Mr Sandham described his understanding of the partnership's profits from primary metals trading as follows at paragraphs 49 to 51 of his statement:

"49. The deal we had with Jonathan France in relation to the everyday scrap metal customers was that we would share the profits 50/50 after we had paid suppliers out. With the primary metals deals Jonathan France said the profit from each deal was 0.75% and we would share that 50/50 too. I thought this seemed fair because it was a small profit, although the turnover was big. I didn't suspect anything was untoward with this. If Jonathan France had said the profits would be 10% or something like that then I'm sure alarm bells would have rung in my head because I would have thought, why isn't everyone doing it? We could see the flow of funds going into and out of the bank account but until the end of the month we didn't know what was profit and what was needed for trading until Jonathan France worked it out. It was not possible for us to do that because we didn't know the ins and outs of the deals, costs etc, so we had to leave it to him to work out and tell us what was due to us each month from the deals and from the everyday customers that Jonathan France had introduced into Premier Metals. He did this by drawing up a sort of reconciliation statement each month. These (in his handwriting) are reproduced at exhibit AMC40 and referred to in paragraph 100 of Mr Chisman's statement. Some of the entries on those pages relate to the period January to March 2013 though most relate to the post-partnership period, after all of the transactions which are the subject of this appeal had been completed. The entries relate in part to everyday scrap deals (e.g. Klinger), and in part to primary metals deals. The post-partnership entries are not relevant to the appeal, but the way • in which Jonathan France wrote up the deals didn't change throughout and that can be seen from the hand written documents.

50. We didn't take any money out of the partnership during this period. In fact during January and February 2013 we put in £50,000 from our life savings for cash flow. This was on top of £15,000 we had put in during November and December 2012 so that stood us to £65,000 the business owed us, which we wouldn't be able to take until there was some surplus in the account. We continued to live modestly as we always have done, our lives didn't change in any way, we just lived on the same amount of money we had always done, going out a couple of times a week for a meal, that sort of thing. We didn't start going to fancy restaurants or buying expensive jewellery. We never aspired to that kind of life. We are just ordinary people.

51. The profits on the primary metals deals were always worked out by Jonathan France. He had all the connections and put all the deals together. We relied on him to itemise the details of the transactions in relation to the everyday (scrap) customers he introduced (only), and the primary metals deals."

66. Mr Sandham describes how at some point in late February or early March 2013, Jonathan France informed him that he was using a commercial agent called Mohammed Urfan to source some of the commodities deals and that he would be paid a commission of around 1% of each

deal he was able to source. This was a cost to be deducted prior to the profits being shared 50:50. Mr Urfan wanted to be paid in cash which was not unheard of in the scrap metal industry.

67. Mohammed Urfan was formerly a director of Stonewhite Digital Ltd, a mobile phone wholesaler. On 8 August 2007, Officer Jackson issued a notification of her decision to deny input tax of £7,407,138 claimed by Stonewhite Digital Ltd in VAT period 03/06 to Mohammed Urfan. The transactions were in mobile phones and computer chips.

68. On 15 December 2010 Mr Urfan had been disqualified from acting as a Company Director with effect from 5 January 2011 for a period of 14 years. This was on the basis that his conduct as a director of Stonewhite Digital Ltd made him unfit to be concerned in the management of a limited company that had previously been denied input tax of over £7 million for its trading in period 03/06. Although he was disqualified as a director it appears that in 2011 he was the director of Askern Village Mini Market Ltd.

69. It is not suggested that Mr and Mrs Sandham knew anything of the background or past of Mr Urfan. The Tribunal finds that they did not know so.

Conclusion on Mr Sandham's statement

70. The Tribunal accepts all of the evidence as set out above in the extracts from Mr Sandham's witness statement as being reliable and established on the balance of probabilities.

The incorporation of the Company

71. On 7 March 2013 Premier Metals (Leeds) Limited (or "the Company") was incorporated. Nicholas Sandham was the sole director. Mr Sandham stated at §47 of his witness statement that the business was transferred to a limited company due to the increase in turnover and upon the advice of his accountant.

72. On 15 March 2013 "Charlotte" (Mrs Sandham) telephoned HMRC to enquire about deregistration and registration.

73. On 22 March 2013 HMRC received an application from the partnership to cancel its VAT registration dated 20 March 2013. The request was made to deregister the partnership from 1 April 2013. The form indicated that a VAT registration had already been applied for the new legal entity, the Company. It was signed by Charlotte Sandham.

74. On 1 April 2013 the partnership was voluntary deregistered to transfer the business to Premier Metals (Leeds) Ltd). The partnership was sold to the Company for £500,000 on 1 April 2013, and this comprised of the goodwill, stock, plant, equipment, book debt and contracts of the partnership.

75. Mr Nicholas Sandham and Mrs Charlotte Sandham were therefore partners of the partnership from 9 March 2007 to 1 April 2013 whereupon they became directors of the Company.

Information gathered after formation of the Limited Company

HMRC visit of 12 June 2013

76. Officers of HMRC, Janine Aveyard and Mark Chisman visited the Company on 12 June 2013. Mr Sandham discussed the wholesale metal trading as conducted by the partnership and Company in succession. The contents of the visit report are summarised below although it is Mr Sandham (at §56 to 70 of his witness statement 27 January 2017) disputes some of the assertions and states that they are misleading.

77. HMRC's evidence as to the June 2013 visit based upon the visit report was as follows.

78. The partnership had ended on 31 March 2013 and the Company began on 1 April 2013. Mr Sandham explained to the HMRC Officers that the Company had taken on staff from Eric France Metals when they had "gone bust round about March 2013." These staff had brought with them a knowledge of customers and suppliers. Mr Sandham acknowledged that he had not checked out these customers and suppliers as they were established businesses and had been trading for several years and his staff had worked with them.

79. Mr Sandham stated to the HMRC Officers that the majority of metals went straight from the suppliers to the customer. The supplier delivered the goods to a depot in Birmingham. Employees of the Company checked the goods at the depot. They were offloaded and weighed to ensure that they corresponded with the invoices and were then loaded on to customers' transport. He stated that the suppliers and customers provided and paid for the transport and insurance. The Company used the transport company H Starkey and Son Limited.

80. Mr Sandham acknowledged that he did not carry out checks on new counterparties although he had met some directors and managers. Elaine Frost completed the invoices an payroll having joined the business in March 2013. She advised that she did conduct checks on the Europa website.

81. Mr Sandham advised that the London Metal Exchange was used to obtain the current prices for the metals and that deals were generally done on the same day to avoid losses. He said that some metals have a higher mark-up than others. Mr Sandham advised that he had a trader called Jonathan France who worked for the Company and used the office as a base. He sourced new business. He invoiced the Company as a consultant and was paid electronically.

82. Mr Sandham was questioned about the partnership and asked why there had been a sudden increase in input and output tax in 02/13. He advised that this was due to trading in primary metals. Mr Sandham was advised that the final return was still outstanding, and he stated he would chase this up.

83. Mr Sandham agreed that HMRC Officers could uplift the purchase and sales invoices for the partnership for January to March 2013 and those for the company for April and May 2013.

84. He was also provided with Notice 726 and the leaflet "How to spot a missing trader fraud?" MTIC fraud was also explained in more detail.

85. In the concluding remarks to HMRC's visit report for June 2013 the Officer noted that there was a general scrap metal business operating from the PPOB. There were concerns over the purchase and supply of high value primary metals. The Officer noted that there had been

an increase in inputs and outputs when Eric France's staff were employed in March 2013 and Jonathan France was employed as a consultant in March 2013.

86. The Tribunal accepts that this visit report of HMRC is a reliable account of the meeting of June 2013 save where it conflicts with Mr Sandham's evidence as set out below. Mr Sandham does not dispute much of the factual content of the report but largely disputes the interpretation that is to be drawn from the questions and answers he gave.

87. Mr Sandham states as follows at paragraphs 57 to 70 of his witness statement regarding HMRC's June 2013 visit:

"57. On page'4 of the visit report it is claimed that Officer Aveyard "explained the reason for the visit." I dispute this. It is apparent now that the reason for the visit was to investigate the recent increase in our turnover, as revealed by the VAT return we had submitted at the end of February 2013. This was not mentioned. The main conversation was simply about the general running of the everyday business of Premier Metals. Paragraph 41 of Mr Chisman's statement records that the officers left information leaflets during the meeting, but they didn't explain very much at all about MTIC fraud. That was not what the meeting was about, as far as I could tell, otherwise I would expect them to have related some of their suspicions about how the trades were being conducted. The handing over of the leaflets appeared to be just a formality they were attending to as a matter of routine or something like that. It did not appear to be the main reason for their visit. If it had been then I expect the conversation would have included some advice from them about what we should do to reduce the risk created by Jonathan. France's presence in the business. They clearly had him on their radar because he is specifically mentioned at the end of the report, on page 7. They said nothing about this to me. They also failed to mention that they were aware that Jonathan France was an undischarged bankrupt, a fact that was unknown to me. At pages 1 to 17 of "NDS1" is a copy of the Directors' report to the creditors of JKL (Wakefield) Limited which has recently come into my possession. It records the fact that HMRC knew that Jonathan France was an undischarged bankrupt, as HMRC was the main creditor, having a claim for over £21,000,000. None of this was mentioned at this visit, or indeed any other visit.

…….

59. On page 5 of the visit report it is stated that the suppliers and customers which were brought over from Eric France had not been checked out by me. That is very misleading in two important respects. Firstly, the customers and suppliers had come to us on the basis of their personal business relationships with Jonathan France, not anyone else at Eric France. To the best of my knowledge, Jonathan France was a completely above board, respectable businessman, and no one — including HMRC — had suggested otherwise. Secondly, although we had not traded with the majority of the customers and suppliers we did know of them. We had done haulage work in the past for JKL (Wakefield) Limited and we had been to the business premises of most of them. There was nothing suspicious about any of them, as far as we knew, and there was no apparent need for me to "check them out" personally.

60. Further down the same page of the visit report, the paragraphs starting "The majority of metals go from customer to supplier..." (at AMC18) do not properly paint the picture of what happened in the business after Jonathan France's arrival as a consultant. I will try to explain it as simply as possible. There were two elements to the business: the everyday business of scrap metal we collect or have delivered to the yard by local businesses, and the primary metals trading which Jonathan France did. The everyday scrap we tended to sell to relatively local scrap firms in Leeds, Bradford, Sheffield etc. Occasionally we would sell certain scrap metal, brass swarfe, to Map Metals in Wolverhampton. When Jonathan France joined us as a consultant he introduced me to a company called Marens. They are based in Birmingham. Jonathan France had dealt with them in the past.

We started to take some of our everyday scrap to them. It wasn't always the same drivers, as the visit report suggests. Anyone who was available could do it.

……

64. On page 6 of Janine Aveyard's visit report at AMC18 it records that I said that I do not check new customers or suppliers. This is misleading. What the report should say is that the vast majority of everyday scrap suppliers and customers (prior to Jonathan France joining as a consultant) were already known to us, and if someone new came along as an everyday scrap customer then there were other people in the business who would do checks, not me personally. The due diligence for primary metals suppliers was to be done by Jonathan France.

……..

70. In short, the report of the visit on 12 June 2013 contains many inaccuracies, and is slanted to imply that I was closely involved in the primary metal trading, or that I was cavalier about the checks that were carried out in relation to the primary metals trades. It is seriously misleading. The checklist at the end does not suggest any protective steps being taken even though the officer was suspicious about Jonathan France."

88. The Tribunal accepts Mr Sandham's evidence as being accurate on the balance of probabilities regarding the June 2013 visit from HMRC.

Visit to H Starkey on 13 June 2013

89. HMRC Officers also visited H. Starkey and Sons Limited on 13 June 2013. Officer Mark Chisman gave evidence as to the details of HMRC's visit to the premises of H Starkey & Sons Ltd on 13 June 2013. The visit report records that Steve Starkey stated that Nicholas Sandham had walked into his premises in February 2013 and proposed to use his services. Nicholas Sandham had stated that he would arrange delivery and insure the goods. He stated that all the metal would be going to Centaur Metals and Ray Deakin, the director of that company would advise Mr Starkey of the vehicles that would pick up the goods. He also stated that Nicholas Sandham came to the premises in February 2013 to witness the first few loads being delivered, and that Mr Starkey had explained to Mr Sandham how the procedure worked.

90. HMRC suggest this is evidence that Mr Sandham knew how the trade was being operated and how the deals were being constructed.

91. Nicholas Sandham in his witness statement of 27 January 2017 at §105 onwards accepts that he visited H Starkey & Sons premises on 13 June 2013 in order to "have a look at the set up at Starkeys." He states that he did this as that was the place used by Jonathan France to offload materials from the supplier's transport to the customer's transport. Mr Sandham denied knowing how the trade was being operated and states he went along simply to introduce himself. He notes that Jonathan France had some history with H Starkey & Sons.

92. Again, the dispute between HMRC and Mr Sandham is not so much one of primary fact but the interpretation to be given to events. The Tribunal finds Mr Sandham to be for the most part a reliable and consistent witness and accepts his explanation on the balance of probabilities.

HMRC visit of 12 August 2013

93. HMRC Officers Janine Aveyard and Mark Chisman visited the Company again on 12 August 2013. The purpose was to discuss both the partnership and the successor Company. During the visit Mr Sandham provided the following information regarding Jonathan France:

 Mr Sandham gave HMRC a letter dated 8 August 2013, which explained that the Company would be ceasing all trade in "primary metals" with immediate effect "due to widespread problems within the industry regarding various types of fraud."
 He was asked how he started trading with Recycling Solutions (UK) Ltd and Mr Sandham replied that Mohammed Urfan (described as an "agent" for the company) had introduced them. N.b in his [witness statement 27 January 2017 at §77] he accepts that he stated this at the meeting but maintained it is incorrect.
 He had used consultants such as Jonathan France and Mohammed Urfan to deal with commodities traders on their behalf.
 He had known Jonathan France for many years and had left the "primary metals" side of the business to him.
 He had asked Mr France if he "had done due diligence checks and that everything was above board" and Mr France had confirmed it was.
 All the commodities (primary metals) suppliers and customers were people Mr France dealt with and Mr Sandham knew nothing about the commodities deals.
 Mr France had previously worked for C&C Metals Ltd. Mr France wanted to do his trading through Mr Sandham's business because he lived nearer to Premier Metals than C&C Metals Ltd.
 Mr Sandham re-stated that he knew nothing about trading in metal commodities such as copper, nickel and tin.
 Jonathan France was like a "closed book." He worked from his diary which he would let no one see because it was his private diary.
 Mohammed Urfan was paid in cash at his own insistence. He had introduced Paragon Commodities Ltd.
 Jonathan France introduced Lords Metal Ltd and C&C Metal Ltd. Other suppliers were introduced by Mohammed Urfan.
 Mr Sandham had not met any of the suppliers with the exception of Christian from C&C Metals Ltd who had visited Premier Metals once to see Jonathan France.
 Elaine Frost said Jonathan France would give her slips of paper showing amounts to pay to certain bank accounts and she would chase up the VAT invoices later.
 Officer Chisman explained that paying money into third-party accounts was a risk indicator of MTIC fraud as money was being removed from the UK and HMRC could not retrieve it.
 Mr Sandham did not ask Jonathan France if he could see his due diligence.
 Elaine Frost (the bookkeeper) handed a file of due diligence prepared by Jonathan France to Officer Chisman.
 Mr Sandham was asked if credit terms operated and he stated that all suppliers were paid instantly, and payment was usually received from customers instantly as well.
 Mr and Mrs Sandham, Phil Walker (site manager and brother in law Jonathan France) and Jonathan France had access to the bank account. Jonathan France was not authorised to use the bank account, but Elaine Frost stated that while she was away he was able to arrange his own payments for goods. Elaine Frost stated Phil Walker must have paid for the commodities when she was not there and Mr Sandham stated that he was not aware this was happening.
 Mr Sandham stated he shared the money made on deals to customers introduced by Jonathan France 50:50.

 When asked who set up the H Starkey account for unloading and freight forwarding services, Mr Sandham stated that Jonathan France arranged everything.

94. The Tribunal accepts HMRC's evidence as to what transpired at the August 2013 meeting – the questions and answers given by Mr Sandham – on the balance of probabilities. It is based upon the contemporaneous visit report. There is one exception to this – whether or not Mr Sandham stated to the officers that he asked Mr France if he could see his due diligence and whether or not this was the case. It is unnecessary to determine this matter within the First Issue. As part of the Second Issue the Tribunal will address what Mr Sandham said about due diligence at the meeting and whether he inspected Mr France's due diligence.

95. The Officers of HMRC concluded that Mr Sandham appeared to have no control over the running of his company and that Phil Walker and Jonathan France appeared to have day to day control. The Tribunal accepts that this was HMRC's conclusion. It will be necessary for the Tribunal to determine whether this is a fair conclusion in relation to the partnership. At this stage, and for reasons set out in due course, it suffices to record that the Tribunal accepts that Mr Sandham had very little control over the primary metals side of the partnership's business.

96. A pre-assessment letter for 99/99 VAT period and tax loss letters for 02/13 and 99/99 VAT period were also handed over at the meeting.

HMRC's visit of 3 September 2013

97. There was also a VAT visit to the Company on 3 September 2013. It was made at the request of David Sweeting, who was an agent acting on behalf of the Company to discuss the verification of the 06/13 return.

98. During the meeting Mr Sweeting confirmed that Mr Sandham had brought in Jonathan France in order to widen his customer base and they had split the profits equally. Mr Sandham had nothing to do with the commodities and primary metals dealing and the only thing he did was inspect the goods at H Starkeys. Mr Sweeting had written to Jonathan France to ask him questions about the trade and had received a letter back stating that all questions should be submitted in writing to his Solicitor. All contact with Jonathan France and all deals in primary metals had now ceased. Mr Sweeting stated that Jonathan France had used the Company's email address but that this had only forwarded mail to his own private email address. Mr Sweeting had tried to recover the emails from the server but there was nothing left.

99. HMRC considered that no control had been exercised over Mr France even though he was conducting deals worth millions of pounds.

100. The Tribunal accepts that the evidence regarding the September 2013 is reliable on the balance of probabilities and the conclusions that HMRC draws regarding the Company (as opposed to the partnership) are also accurate.

Liquidation of the Company

101. Liquidators were appointed over the Company on 11 November 2013. A creditors voluntary liquidation meeting was held on 11 November 2013. A director's report was provided at the meeting.

102. Mr Sweeting attended the meeting as an agent on behalf of the Company. He was asked about the third-party payments in respect of supplies from Paragon Commodity Trading Ltd, Greenway Wholesale Ltd and Recycling Solutions (UK) Ltd being made to a bank in Hong Kong owned by Williams and Aston Group Ltd. Mr Sweeting stated that he did not know and was trying to get an answer from Jonathan France.

103. Mr Sandham confirmed that he had recruited Jonathan France when Eric France and Sons (Metals) Ltd was entering into liquidation. He felt sorry for him. Mr Sandham had received a visit from HMRC advising him about due diligence. He had taken Mr France's word that Mr France was carrying out checks.

104. Mr Sandham stated that he thought the turnover for the scrap metal business was £2 million. The Officer of HMRC attending, Mr Chisman, stated that this was a small sum when compared with the turnover for the Company, which he estimated would have been at least £100 million for the year had the Company kept trading. Mr Sandham explained that Mr France also introduced Mohammed Urfan to the business and he was paid on a commission basis in cash on the instructions of Mr France.

105. Mr Sandham said that he had not considered patterns of trade by the Company and that he had left it all to Mr France. He had not looked at the amounts and unit prices across the deals. He said Mr France did consult the London Metal Exchange because he had seen him doing so on his laptop.

106. He said that the Company was always paid before it paid its supplier and there was no commercial risk. Officer Chisman pointed out that in one deal CF Booth Ltd was withholding payment.

107. Mr France had printed himself and Mr Urfan business cards bearing the details of the Company.

108. When asked whether he knew that Mr France was a disqualified director, it is suggested Mr Sandham stated that he did know when he joined the Company that Mr France could not be a director. Mr Sandham accepts saying this at the meeting but does not know why he said it when he did not know of Mr France's disqualification at the relevant time. For the reasons set out below when considering the Second Issue, the Tribunal accepts that Mr Sandham did not know Mr France was a disqualified director at the time he was hired or involved in the partnership or Company. Mr Sandham only subsequently discovered this after Mr France left in August 2013.

109. Mr Sandham also stated at the meeting that it never crossed his mind that Jonathan France could be working for other companies. He had been informed that Mr France was now working for a company called C&C Metals Ltd.

110. Officer Chisman asked whether Mr Sandham had checked the VAT returns before they were submitted. He stated that he had not done so.

111. The Tribunal accepts HMRC's evidence as to what was said at the creditors voluntary liquidation meeting of November 2013 is reliable on the balance of probabilities.

Jonathan France

112. For the purposes of determining the First Issue, certain facts were accepted by both parties.

113. Mr Jonathan France was a consultant for the partnership (if not an employee) and a duly authorised agent of the partnership. There was no written contract of consultancy or written terms of employment between Mr France and the partnership, but the terms upon which it was agreed he should be engaged have been set out above.

114. Mr France was authorised to conduct the relevant transactions on behalf of the partnership and conducted all of the partnership's trade in primary metals.

115. It was accepted on behalf of the partnership that the relevant transactions were connected with the fraudulent evasion of VAT (that they were fraudulent transactions). It was also accepted that Mr France knew at the time that the transactions he arranged and conducted on behalf of the partnership were connected to the fraudulent evasion of VAT.

116. The opening submissions on behalf of the partnership dated 20 September 2018 refer to the partners as the 'appellants' and argue at paragraphs 4 to 7:

"4. The appellants' response is equally clear. They accept that the transactions were connected with the fraudulent evasion of VAT. They accept that, with hindsight, it is perfectly clear that Jonathan France, at least, knew that the transactions were connected with the fraudulent evasion of VAT – and played a significant part in the planning and execution of the fraud.

5. Their case is that they were completely deceived by France and that he was so persuasive that they believed the transactions to be legitimate.

6. The relationship between the parties was most unusual and does not easily lend itself to conventional analysis. The appellants will rely, subject to arguments as to admissibility, on France's recent conviction for diverse offences of serious fraud - unconnected to the facts of this case and showing a propensity and ability to deceive people of sophistication.

7. The appellants are comparatively unsophisticated. The deception practised on them was cynical and carefully planned. It will be submitted that – in the peculiar circumstances of the case – the tribunal should find not merely that they did not know that the transactions were connected with the fraudulent evasion of VAT but that it is wrong to say they 'should have known' on a correct and fair application of that test. Inevitably the tribunal's view will depend on its assessment of the appellants when they give evidence: that view cannot usefully be foreshadowed in legal submissions. The various points relied on by the respondents in support of the suggestion of actual knowledge might be relevant and compelling **in other contexts**: it is submitted that, in this case, they need to be assessed by reference to the personalities in the case and their very unequal levels of understanding."

117. In an application for disclosure of the contractual disclosure facility ("CDF") between HMRC and Mr France made on behalf of the partnership dated 16 August 2018, it was submitted at paragraph 9:

"9. The appellants maintain that France is a singularly deceptive individual, operating at a different level of sophistication to them, and that he completely misled them. There is obvious support for this proposition in the facts of France's recent convictions for offences of fraud, perjury and deceiving his own trustee in bankruptcy. After entering pleas of guilty to a large number of counts, he received sentences totalling ten years imprisonment .The terms of the CDF are likely to shed further light on this

issue and help the appellants to substantiate their contention that this is an exceptional case in which they have been deceived by a very dishonest man."

118. For the reasons set out when later dealing with Second Issue, the Tribunal finds Mr and Mrs Sandham to be, for the most part, credible and reliable witnesses.

119. For the reasons set out below within the Second Issue, the Tribunal accepts the evidence of both partners that they did not have any actual knowledge of the transactions being fraudulent. Mr France was not authorised or instructed to commit any fraud by the partnership. Conducting fraudulent transactions was acting outside the instructions of the partnership or any terms on which he was contracted to act for the partnership as consultant or employee. Mr France was not authorised nor instructed to conduct fraudulent transactions on behalf of the partnership.

120. The partnership accepts it was not the primary victim of the fraudulent transactions because HMRC was (there was a potential loss of VAT to the Revenue). Nonetheless, the Tribunal accepts the evidence of Mr and Mrs Sandham that they were duped and misled by Mr France who took advantage of their historical association and friendship to involve himself in their business and conduct the fraudulent transactions. He did so without their knowledge and misused the trust the Sandhams placed in him.

121. The Tribunal concludes, for the reasons set out in the Second Issue, that Mr and Mrs Sandham failed to take reasonable care in allowing Mr France to take control over the primary metals part of the business and conduct the fraudulent transactions.

122. They failed adequately to supervise Mr France, giving him virtually free reign to conduct the primary metals part of their business. Mr France was virtually unfettered in arranging and conducting the primary metals deals including the 56 relevant fraudulent transactions. Mr and Mrs Sandham failed to ask sufficient questions of Mr France, their suppliers and customers about the relevant transactions which were conducted in their partnership's name. Whether this means that the Tribunal is satisfied that the partners themselves should have known the relevant transactions were connected to fraudulent evasion of VAT will be determined within the Second Issue.

123. It is sufficient for the purposes of determining this issue that Mr France arranged and conducted the transactions on behalf of and in the name of the partnership with their due authority to act as an agent, even though he went beyond the terms of that authority in that the transactions were connected to the fraudulent evasion of VAT.

Mr France's knowledge

124. In addition to the Appellant's admission, the evidence of knowledge against Mr France is both stark and compelling.

125. Mr France was convicted in July 2018 of multiple offences of dishonesty in relation to the prior business, JKL (Wakefield) Ltd ("JKL"), with which he was previously involved prior to coming to Premier Metals. The convictions included acting as a director while disqualified and defrauding creditors. While Mr France has not been charged or convicted of missing trader fraud or VAT fraud in relation to JKL or Premier Metals, Mr France had a previous history of involvement in businesses, which were connected with MTIC fraud and/or incurred large VAT debts.

126. The evidence in relation to the 56 transactions demonstrates that these deals were part of a contrived overall scheme in which Mr France played an important role, initiating, arranging and conducting the transactions. The picture of a disqualified director and his associate, Mr Urfan (who was likewise connected to businesses connected to MTIC fraud) coming into the partnership business and commencing a line of trading in which all bar one transaction in a 2-month period traced to a VAT loss is indicative of a knowing connection to fraud.

127. As soon as HMRC started to ask probing questions about the transactions in primary metals in August 2013, Mr France disappeared. Indeed, in his witness statement 27 January 2017 at §74, 75 & 113, Mr Sandham states:

"74. Right from the start of Jonathan France working as a consultant in my business I asked him to ensure that he did due diligence on the primary metals deals and he said everything necessary was being done. I believed him. He kept a folder on his desk with copies of passports and other papers. He wasn't secretive about it. I looked through it from time to time. There were usually papers in it, copies of passport photos, and company searches, and that sort of thing, which certainly looked to me like he was doing his due diligence. Since the start of these proceedings our VAT consultant David Sweeting has located some further papers which were provided to him by Elaine Frost at a meeting we had in the office prior to the company being liquidated. I attach these at pages 18 to 63 of exhibit "NDS1".

75. With the revelations about Jonathan France since then (which of course no one from HMRC or anywhere else had told me about at the time), I now wonder if he was deliberately manipulating me with the due diligence folder, which he would often leave on his desk precisely because he knew I would check through it (which I did quite regularly) and be reassured that he was doing it properly. I certainly did think he was doing it properly. I knew of no reason to be suspicious of what he was doing, and so when I looked through the due diligence folder I of course concluded that he was indeed doing due diligence. That was part of his job. I trusted him to do his job, as I trusted other people in the business to do the jobs they were employed to do.'

…….

113. Having known Jonathan France for many years as a friend (or so I thought) and business associate, and having known his father too, and witnessed their apparent success in the scrap metal industry including high value scrap, and having never had any cause to doubt the honesty and truthfulness of anything Jonathan France and his former colleagues at JKL (Wakefield) Ltd told me, it is very upsetting to Charlotte and me that we should find ourselves in our present position. We are devastated. I trusted Jonathan France to do his job when he worked as a consultant for those brief few weeks at Premier Metals. His job included doing the relevant checks and due diligence, and with what I saw and what he told me I thought everything was being done correctly. I paid the VAT across on all trades in good faith. Jonathan France was — I thought — well known to me as a trustworthy, hard working and successful business person. I had witnessed for many years lorry loads of material being offloaded at Jonathan France's yard. Just as his everyday customers were real bona fide customers, I had no cause to suspect that his primary metals suppliers and customers were anything other. Everything he said was believable. He had given me sound advice in the past over other business and family matters. With my dad having a stroke in 2010 I had missed having someone to talk to about business and so it had been nice to discuss things now and again with Jonathan France, who to all outward appearances was a very successful businessman.' I had no idea that in 2004 he was disqualified as a director for 14 years until I was told this by one of the professional advisers we consulted in August 2013. I knew he was no longer a director of JKL (Wakefield) Ltd because he had left that company, but I was not aware that he was a disqualified director. The Respondents have suggested that I stated that I knew when Jonathan France joined Premier Metals that he "could not be a director". I think this shows a misunderstanding by the Respondents. He was coming to work as a consultant for our partnership, so there were no directors and in any event we were only talking about a consultancy for him, not him becoming a partner in the business. As I have said above, I had been told by Lenny at JKL (Wakefield) Limited that Jonathan France had left, so I just naturally

assumed that he wouldn't be a director there. I didn't know he was a disqualified director until I was told by one of the professional advisors in about August 2013."

Mr France's convictions

128. There is substantial undisputed evidence of Mr France's serial dishonesty and criminality both in relation to JKL and other companies. Subsequent to his involvement with the partnership but prior to the hearing of this appeal Mr France convicted of numerous offences including that he acted as a director despite being a disqualified and fraudulently transferred assets out of his bankruptcy estate.

129. On 30 July 2018 Mr France was sentenced at the Crown Court at Leeds before His Honour Judge Belcher on a multi-count indictment. Prosecuting Counsel opened the facts behind the offences in the following way:

"In terms of an overview, this case arises from an investigation conducted by the Criminal Enforcement Team of the Insolvency Service, and due to the activities of the main defendant, Jonathan France, in seeking to frustrate the insolvency procedures and investigations into assets arising from his disqualification as a director and his subsequent bankruptcy, and also being assisted by his two co-defendants in that regard, this investigation has necessarily been lengthy and complex.

……

Mr France was disqualified from acting as a director through his own undertaking in 2004. He was declared bankrupt in November 2008, having been unable to pay the 7 million pounds plus he owed from the collapse of his sole trader business. In anticipation of his impending bankruptcy he deliberately transferred assets out of his personal estate; that is mirrored by Counts 1 to 4, the fraudulent transfer of property to which he has pleaded guilty.

……

Those assets comprise two vehicles being transferred, one to Mr Firth, reflected by Count 1, and a second to Mr Schofield, reflected by Count 2. The two significant payments, of £48,000 reflected in Count 3 and £103,000 reflected in Count 4, were made to two accounts of which Mr Schofield was a beneficiary. Mr France then acted together with Mr Schofield to conceal those assets transferred to Mr Schofield, contriving false and misleading explanations to the trustee in bankruptcy in that respect. Both Mr France and Mr Schofield have pleaded guilty to money laundering offences as reflected in Counts 18 and 20 as a direct alternative to perverting the course of justice to reflect that conduct.

…

During the course of the sustained campaign to frustrate and mislead the trustee and official receiver and the authorities generally, Mr France repeatedly failed to disclose a substantial amount of property comprised in his estate, including jewellery and paintings which is reflected in Count 7, failing to disclose that property to which Mr France has pleaded guilty as an alternative to Count 6 of perjury.

HHJ: I have ascribed somewhere -- I have produced a figure for those items of £250,000.

MR WHEELER: Your Honour is quite right, and that appears later in the opening. Mr France also lied whilst giving evidence under oath to Huddersfield County Court on two separate occasions in March and June 2012 in respect of the extent of his personal estate, dishonestly representing on oath on both of those occasions that he had previously sold jewellery and paintings to a third party, when in fact the same was provably untrue.

…….

Those two instances are reflected by Counts 8 and 9 alleging allegations of perjury. Mr France has pleaded guilty to Count 9, relating to perjury in June 2012, and in so doing accepts that the lie he told to the earlier -- on the latter occasion was a repetition of the same lie told at the earlier hearing as set out in Count 8.

……..

MR WHEELER: As an undischarged bankrupt Mr France was prevented from acting as a director or being concerned in the promotion, formation or management of a limited company. However in breach of that, although he was not formally listed as a director, Mr France managed and controlled a company called JKL (Wakefield) Ltd, which is reflected by Count 10, which operated between 2008 and 2013 before going into insolvent liquidation.

……..

In addition to being involved in the management of JKL Mr France was also involved in the formation and management in respect of two further limited companies, WFR Ltd and WFR Holdings Ltd, reflected by Counts 12 and 14 inclusive. Those companies operated from 2011 to 2014, before also going into liquidation. The pattern was the same as it had been for JKL, in the sense that Mr France's name did not appear on the formal company paperwork; Mr Schofield, the defendant, was recorded as a director of those companies.

…..

During the trading of JKL Ltd substantial sums of company funds totalling just over 6 million pounds were diverted for the benefit of Mr France and/or persons and businesses associated with him, including WFR, largely by means of the falsification of company cheques, invoices and other paperwork to make it appear as if payments had been made to bona fide creditors of the company, when in fact they were made for the purposes already referred to. Mr France was involved in that process, reflected in Counts 16 and 17 alleging fraudulent trading and false accounting respectively. Mr Firth was also involved in a money laundering arrangement with Mr France in that regard, as reflected by Count 19.

……

In essence, therefore, it is alleged that Mr France used his two co-defendants to receive assets from him, to hold those assets on his behalf to assist Mr France generally in that regard, and also to front JKL (Wakefield) and WFR (Holdings) Ltd. In that way the insolvency process was frustrated over a lengthy period of time and huge quantities of company funds were diverted from JKL for the benefit of Mr France, and for in particular WFR, a company involved in high value cars and racing for which the defendant, Mr Firth, was a driver.

JUDGE BELCHER: Where does the loss lie in all of this, are there genuine creditors from when these companies have gone into liquidation; I mean there's 6 million pounds here, where has it come from?

MR WHEELER: There was a significant loss when JKL went into liquidation, with a substantial amount owed to creditors in the tens of millions of pounds."

130. On 31 July 2018 His Honour Judge Belcher sentenced Mr France to ten years imprisonment and disqualified him from acting as a director for twelve years.

Law on the First Issue

Attribution of knowledge - The general principles of agency

131. The principles of attribution are summarised by Lord Hoffman at paragraphs 506B-507A in the case of *Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 A.C. 500*. A company as a legal persona requires natural persons to act for it as its agents and servants. The rules of attribution are those by which acts of the company's agents and

servants are attributed to the company. The company's primary rules of attribution are generally to be found in its constitution supplemented by those inferred by the operation of company law. The primary rules of attribution are insufficient for a company to go out into the world and do business and the company therefore builds upon those primary rules by using general rules of attribution, the principles of agency.

132. By a combination of the general principles of agency and the company's primary rules of attribution the acts of a company's servants and agents will count as an act of the company. Lord Hoffman then went on to consider situations where the primary rules of attribution were not sufficient, and it was necessary to fashion a special rule of attribution to fulfil the purpose of the legislation or particular rule of law. The question of whether a special rule exists is one of interpretation taking into account the language of the rule, its content and policy.

133. HMRC submitted that the principles derived from this case are equally applicable to the partnership. Any knowledge of both the partners but also Jonathan France can be properly attributed to the partnership.

134. The policy guiding whether knowledge, be it actual or constructive, is properly attributable to a *company* engaged in MTIC fraud was set out in the Upper Tribunal's decision in *HMRC v Greener Solutions [2012] UKUT 19 (TCC).*

135. At paragraphs 16 to 20 inclusive of *Greener Solutions*, Warren J. followed the reasoning of Lord Hoffman in *Meridian* and agreed with the First Tier Tribunal that the person whose knowledge was to be considered was the individual with responsibility for undertaking the transactions and that it was not necessary in those circumstances to identify such a person as being the "directing mind and will" of the company.

136. At §47 Mr Justice Warren stated: -

I agree also with Mr. Foulkes' observations about the context of the substantive rule which gives rise to the issue: it is the objective of combating fraud within the context of the VAT legislation. A parallel objective was to be found in Bank of India, which led the Court of Appeal, in agreement with Patten J at first instance, to conclude that the application of section 213 required a special rule of attribution in order to make the policy effective. The purpose, or at least a major purpose, of the *Kittel* principle is to combat fraud. The Tribunal's decision would make a serious in-road into that principle: in cases where there were innocent shareholders or directors who had been deceived by a fraudulent employee or director, the company might be able to escape liability notwithstanding that it was able to profit considerably from the transactions conducted on its behalf.

Attribution of knowledge to a partnership

137. The authorities of *Re Drabble Bros* [1930] All ER Rep 450 ("*Re Drabble Bros")* and *Pauper Lloyd -v- Grace, Smith and Co* [1912] AC 716 ("*Lloyd v Grace*") which deal with the ordinary principles of agency in partnerships, are of assistance in addressing the First Issue before the Tribunal.

138. *Re Drabble Bros* was a case relating to attribution of an agent's knowledge to a partnership. The facts can be summarised as follows:

(1) Two brothers set up a partnership in the construction industry and employed a man named "Tiley" as their agent;

(2) Tiley was able to provide construction materials to the partnership through contacts that he had with building merchants;

(3) Tiley received some commission from the merchants, but it is unclear whether he received any commission from the partnership;

(4) Tiley secured a building contract for 198 houses on behalf of the partnership;

(5) Tiley then acquired materials for building the houses from Swan and Co;

(6) The partnership was having difficulty financing the contract, which was a matter known to Tiley;

(7) Payments were made by Tiley to Swan and Co prior to the last date by which payments were *required to be made* which resulted in a larger commission payment to him, but put the partnership in financial difficulties;

(8) The partnership subsequently committed an act of bankruptcy; and

(9) The trustee in bankruptcy went back to Swan and Co and sought repayment of a sum of money which had been preferred to them in circumstances where having done so gave them a fraudulent preference.

139. The Court of Appeal (per Lord Hanworth MR) recited the County Court Judge's reasoning on the point with approval as follows:

"Tiley was the servant and agent of the bankrupts and the person in control of the financial side of the bankrupts' business in connection with the Stoke contract. The payment of accounts was within the scope of his employment. I have found that he knew that the bankrupts were insolvent in September and October 1928, and that the payments of 100 pounds and 647 pounds 12s 5d were made by him with knowledge of the insolvency and with the view of giving the respondents a preference over the other creditors"

140. Lord Hanworth MR continued as follows:

"I think the evidence before the learned county court judge amounts to this, that Fred Drabble retained his control over the banking account, but he himself exercised no determination as to the creditors to be paid or the amounts to be paid to them. All such details he delegated to this man Tiley who was engaged in Drabble's business on terms which made him, Tiley, the servant and agent of Drabble in respect of that side of the business which had been placed by Messrs Drabble within his sphere. It is not an unnatural severance of business; it is common enough in the business of large firms that the conduct of the work is parcelled out into different departments. Fred Drabble, we are told, was a competent and practical builder, but it is plain that he was not a man who also combined with his qualification as a builder any clerical ability or any expert accountancy. All such matters he delegated to Tiley, and I think he did this, not only in respect of the Stoke account, as is plain from the letters, but of all other matters on which Tiley had a chat with Mr Drabble, including the Sheffield matter, either as a whole or at any rate as to a part which covered the payment of the 100 pounds.

It has been stated by Lord Halsbury, in words which are quite plain, how far you can impute the knowledge of an agent to the principal. He says in Blackburn Low & Co v Vigors (1) (12 App Cas at p 537):

"Some agents so far represent the principal that in all respects their acts and intentions and their knowledge may truly be said to be, the acts, intentions and knowledge of the principal," and again lower down, that "Where the employment of the agent is such that in respect of the particular matter in

question he really does represent the principal, the formula that the knowledge of the agent is his knowledge is I think correct.""

141. His Lordship concluded as follows:

"But it is said that you cannot have a fraudulent preference unless both the act of preferring and the motive are contained in and governed by one brain - that you cannot impute the intention and knowledge of the agent to the principal. That appears to me to be an unsound view. In the complexity of business it must be that in a number of undertakings the duties are severed into departments, and when Mr Drabble undertook to sign any cheque that was put before him for any amount and to any person which should be chosen and determined by Tiley, he so far delegated his authority as to make the act and intention and the knowledge of Tiley his own, because Tiley, on those details of the finance, represented his principal, and thus made his, Tiley's intentions, the intentions of his principal. On the facts of this case it appears to me quite clear that the actions of Tiley and the intentions of Tiley can be and ought to be imputed to the principal, for Tiley was delegated by the principal to represent him, Fred Drabble, in carrying out all this very necessary part of the business. That being so, it appears to me that the point of law which was taken in the Divisional Court is not sound, that it cannot be held that there is a divergence between the responsibility of Tiley and the responsibility of his principal, but that the principal, Fred Drabble, is to be hold bound by the intentions of Tiley, and that in fact there has been a payment made by a person unable to pay his debts and with a view to giving six creditors, which include Swan & Co, a preference over the other creditors, and that payment is to be deemed, within s 44, to be "fraudulent and void as against the trustee in the bankruptcy." For these reasons the appeal must be allowed and the order of the learned county court judge must be restored, with costs here and below." (Emphasis added)

142. Lord Justice Lawrence gave a short judgment dealing with the question and answer about attribution of an agent's knowledge to a partnership as follows:

"The question may be stated in this way. Where a bankrupt has employed a person to manage and control the financial side of his business and has not concerned himself in any way with the manner in which that employee has performed his duty, can the creditor escape the consequences of s 44 if it should turn out that the employee has made a payment to him with a view to giving him a preference over the other creditors of the bankrupt, who at the time when the payment was made, was unable to pay his debts as they became due?

…

There must be many concerns in which the principal leaves the financial side of the business to a cashier or other employee and does not trouble himself about the details of that part of the business or with the items comprised in the cheques which are brought to him for signature. It seems to me that it would lead to a strange result if it were held that a preferred creditor could successfully plead as a defence to a claim made against him under s 44, that the bankrupt when no longer able to pay his debts as they became due, had allowed his employee to remain in control of his finances without inquiring how his moneys were being employed, and that, therefore, the view to prefer admittedly entertained by the employee who was aware of the insolvency of his employer was not the view of the bankrupt but was the view of the employee, and consequently outside the section. Counsel for Messrs Swan & Co rightly contended that the view to prefer must be the view of the person making the payment, but in the special circumstances of the present case the knowledge and intention of the employee must, in my opinion, be imputed to the bankrupt and be deemed to be the knowledge and intention of the latter: see Blackburn, Low & Co v Vigors (1). To hold otherwise in the case of a principal who has not taken the trouble to inform himself or who has deliberately not informed himself of what is being done on his behalf by his own employee, would, in my judgment, be opening a wide door to fraudulent preferences by traders minded not to concern themselves with what their employees were doing on their behalf."

143. Finally, Lord Justice Romer, concurring with both other judgments, stated:

*"*I am not satisfied that there is any reason why the principle qui facit per alium facit [he who acts through another does the act himself] per se should not apply to a fraudulent preference under s 44 of the Bankruptcy Act*."*

144. The headnote of the judgment in *Pauper Lloyd -v- Grace, Smith and Co* [1912] AC 716 also makes it clear that, "*A principal is liable for the fraud of his agent acting within the scope of his authority, whether the fraud is committed for the benefit of the principal or for the benefit of the agent.***"** In that case Earl Loreburn stated as follows:

I have only to say, as to the authority of *Barwick v. English Joint Stock Bank* , that I entirely agree in the opinion about to be delivered by Lord Macnaghten. If the agent commits the fraud purporting to act in the course of business such as he was authorized, or held out as authorized, to transact on account of his principal, then the latter may be held liable for it."

Special rule of attribution

145. The Supreme Court recently considered the principles of corporate attribution in *Bilta (UK) Ltd (in liquidation) and others v Nazir and ors [2015] 2 All ER 1083 ("Bilta")*(per Lords Toulson and Hodge at [182] – [209]) [p.295 to p.303 AB] and stated as follows at [182] to [197] set out in full below and with which Lord Neuberger P agreed:

'[182] We set out our conclusions on the importance of context to the process of attribution in paras [202]– [209] below. Before then, we examine the case law which has led us to those conclusions.

[183] The starting point in an analysis of attribution is the recognition of the separate personality of the company, which the House of Lords recognised long ago in *Salomon v A Salomon & Co Ltd* [1897] AC 22, [1895–99] All ER Rep 33 and which this court recently confirmed in *Petrodel Resources Ltd v Prest* [2013] UKSC 34, [2013] 4 All ER 673, [2013] 2 AC 415. A company, the creation of law, is, in Lord Halsbury's words (Salomon p 33), 'a real thing' and has a legal existence even if it is controlled by one person. Because the company is not a natural person it can operate only by the acts of its officers, employees and agents. ….

……

[190] In *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 3 All ER 918 at 922–923, [1995] 2 AC 500 at 506 Lord Hoffmann pointed out that it is a necessary part of corporate personality that there should be rules by which acts are attributed to the company. First, he identified the 'primary rules of attribution' from company law, which is the first of the direct forms of liability which we describe above. He then referred to the general principles of agency and vicarious liability which in most circumstances determine a company's rights and obligations ([1995] 3 All ER 918 at 923, [1995] 2 AC 500 at 507). He recognised that there was a third category where, exceptionally, a rule of law expressly or impliedly excludes attribution on the basis of those general principles. For this third category, which is relevant to the third form of direct liability (above), he stated: 'the court must fashion a special rule of attribution for the particular substantive rule'. He described the fashioning of that special rule of attribution in these terms ([1995] 3 All ER 918 at 924, [1995] 2 AC 500 at 507):

'This is always a matter of interpretation: given that it is intended to apply to a company, how is it intended to apply? Whose act (or knowledge, or state of mind) was for this purpose intended to count as the act etc. of the company? One finds the answer to this question by applying the usual canons of interpretation, taking into account the language of the rule (if it is a statute) and its content and policy.' (Lord Hoffmann's emphasis.)

[191] The relevance of the context in which the question is asked – 'Is X's conduct or state of mind to be treated as the conduct or state of mind of the company for the purpose in hand?' – is not limited to Lord Hoffmann's third category. The legal context, i.e. the nature and subject matter of the relevant rule and duty, is always relevant to that question. In Bowstead & Reynolds on Agency (20th edn, 2014) Professor Peter Watts and Professor Francis Reynolds stated (at para 8–213):

'Before imputation occurs there needs to be some purpose for deeming the principal to know what the agent knows.'

In the 19th edition the learned editors made the same point in the same paragraph thus:

'The rules of imputation do not exist in a state of nature, such that some reason must be found to disapply them. Whether knowledge is imputed in law turns on the question to be addressed.'

We agree; an analysis of the relevant case law supports that view in relation to each category of rules of attribution. We turn first to the special rules of attribution which Lord Hoffmann saw as providing the answer in exceptional cases when the other rules did not determine the company's rights and obligations.

….

[195] In *McNicholas Construction Co Ltd v Customs and Excise Comrs* [2000] STC 553 Dyson J attributed to a main contractor the knowledge of its site managers that fraudulent invoices for sub-contract labour were being created, in circumstances in which the main contractor suffered no loss because it could claim input VAT but evaded income tax. Section 60 of the Value Added Tax Act 1994 imposes civil penalties on a person who dishonestly acts or omits to act for the purpose of evading VAT. Dyson J recorded that it was common ground in that case that the knowledge and dishonest acts of the site managers could be attributed to the main contractors only if a special rule of attribution, of which Lord Hoffmann had written in *Meridian v Securities Commission*, could be applied. He stated ([2000] STC 553 at [44]):

'The question in each case is whether attribution is required to promote the policy of the substantive rule, or (to put it negatively) whether, if attribution is denied, that policy will be frustrated.'

He held ([2000] STC 553 at [48]–[49]) that the statutory policy of discouraging the dishonest evasion of VAT would be frustrated if the knowledge of the employees of a company who had to play a part in the making and receiving of supplies, as well as those involved in its VAT arrangements, were not attributed to the employing company. Further, as the participants in the fraud had not intended to harm the interests of their employing company, there was no basis for excluding such attribution.

[196] The Court of Appeal took a similar approach in *Re Bank of Credit and Commerce International SA (in liq) (No 15), Morris v Bank of India* [2005] EWCA 693, [2005] 2 BCLC 328 which concerned a claim for fraudulent trading under s 213 of the Insolvency Act 1986. The court upheld Patten J's finding that the knowledge, which the general manager of Bank of India's London branch had of BCCI's fraud, was to be attributed to his employers for the purpose of s 213. In paras [156]–[162] above we discussed *Safeway Stores Ltd v Twigger* [2011] 2 All ER 841. What is relevant for present purposes is that the court in that case looked to the wording and policy of the relevant statute in order to determine whether the acts and the intention or negligence underlying those acts were to be attributed to the company.

[197] It is not only in the field of statute that the court, when deciding whether to attribute another's act or state of mind to a company, has regard to the purpose of the rule of law which is in play. In the different context of a claim based on knowing receipt of the proceeds of a fraud, the Court of Appeal in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 had to consider whether the knowledge of an agent who was also the director of a company should be attributed to that company. ...”

The breach of duty exception ("Hampshire Land Principle")

146. The Appellant has conceded that it does not seek to rely upon the breach of duty exception principle as expounded in *Hampshire Land*, whereby the knowledge of an agent is not attributed to a company where the company is a victim of his fraud. The Tribunal considers that this is the correct approach on the basis of the authorities and the facts of this case.

147. Following the decision in *Bilta*, the Upper Tribunal (Tax and Chancery Chamber) considered the case of *Mobile Sourcing Ltd -v- Revenue and Customs Commissioners* [2016] UKUT 274 (TCC). Principally, the Upper Tribunal considered whether *Bilta* had materially changed matters since it decided *Greener Solutions Limited -v- Revenue and Customs Commissioners* [2012] STC 1056 (a case specifically about attribution of knowledge in MTIC cases).

148. In *Mobile Sourcing*, Mr Justice Morgan and Judge Sinfield (current President of the FTT) considered the earlier authorities before turning to *Greener Solutions* where they approved the principle as follows:

'30. In *Greener Solutions*, the FtT held that the principle it should apply was as follows:

"The principle we derive from these authorities is that the *Hampshire Land* principle is of general application and applies to prevent the knowledge of the agent in breach of his duty to the company being attributed to a company where the company is a victim of his fraud. In determining whether there is a fraud against the company "one should consider the effect of the acts themselves, and not what the position would be if those acts eventually prove to be ineffective." And "In judging whether the fraud was in fact harmful to the interests of [the company], one should not be too ready to find such harm."'

149. The Upper Tribunal also considered the decision of *Moulin Global Eyecare Trading Ltd -v- Commissioner of Inland Revenue* (2014) 17 HKCFAR 218; [2014] 3 HKC 323; FACV 5/2013 (13 March 2014) which was decided post the Court of Appeal's decision in *Bilta* but prior to the Supreme Court's decision. It was said to be "illuminating", particularly the passages at [106] which relevantly states:

(1) the underlying rationale of the breach of duty exception is to avoid the injustice and absurdity of directors or employees relying on their own awareness of their own wrongdoing as a defence to a claim against them by their own corporate employer;

(2) the exception does not apply to protect a company where the issue is whether the company is liable to a third party for the dishonest conduct of a director or employee;

(3) the supposed distinction between primary and secondary victims, although sometimes a useful analytical tool, is ultimately much less important than the distinction between third party claims against a company for loss to the third party caused by the misconduct of a director or employee, and claims by a company against its director or employee (or an accomplice) for loss to the company caused by the misconduct of that director or employee." (Emphasis added)

150. In *Mobile Sourcing* the Upper Tribunal held as follows at [49] to [51]:

*"*49. We consider that the position is even more clear in the present case. MSL claims to be entitled to deduct input tax in relation to certain transactions. Those transactions were carried out for it by Wigig. MSL relies upon the actions of Wigig for the purpose of asserting an entitlement to deduct input tax. We consider that, applying the principles in *Bilta*, MSL is not able to rely upon the actions of Wigig to

claim that entitlement and, at the same time, to resist the attribution to it of the knowledge of Wigig that the transactions were connected with fraud.

50. Following the decision in *Bilta*, we do not consider that it is necessary to consider whether MSL was a primary victim or a secondary victim. Nor is it necessary to ask whether Wigig committed two frauds on MSL or only one overarching fraud. The first suggested fraud was carrying out trades on behalf of MSL when it knew (if it did) that HMRC might be able to resist the deduction of input tax on the ground that the trades were connected with fraud. The second suggested fraud was Wigig drawing money from MSL's bank account and using it for its own purposes and, in particular, purposes not authorised by its entitlement to draw on the account. We consider that it does not matter whether these two alleged frauds were connected or not.

51. Some of the cases dealing with the breach of duty exception make the point that where the exception applies, it is unlikely that the agent would make a clean breast of the wrongdoing to the principal. However, the cases do not establish that the question of attribution should ultimately turn on a factual inquiry as to whether it is likely in a particular case that the agent would make a clean breast of the wrongdoing to the principal. Accordingly, we do not consider that the answer in the present case involves such a factual inquiry. Accordingly, it is nothing to the point to submit that on the facts of this case it was unlikely that Wigig would admit to MSL that it was guilty of any kind of wrongdoing." **(**Emphasis added**)**

Appellant's submissions on First Issue - Attribution

151. Mr Bott QC, on behalf of the partnership, submitted that the knowledge of Mr Jonathan France should not be attributed to the Appellant even though Mr France acted as its agent. He disputed HMRC's Opening submissions in relation to *Greener Solutions* which they asserted that '*the principles derived from this case are equally applicable to the partnership*'. He submitted that HMRC had not cited any authority in support of this proposition and there is no analysis of why the positions of a company and a partnership are identical for these purposes in spite of their very different legal personalities. He submitted that a careful reading of *Greener Solutions* and earlier authorities shows that the conclusion depends directly on the application of principles of corporate attribution.

152. Mr Bott QC submitted that the Appellant accepts that the transactions were connected with the fraudulent evasion of VAT and that Mr France knew that they were. Mr France played a significant part in the planning and execution of the fraud.

153. He also accepted that the authorities do not permit the attribution of Mr France's knowledge to be avoided by defining the partnership as the victim or the object of the fraud – even though he submitted the partners have suffered greatly from Mr France's dishonest activities.

154. Nonetheless, he submitted that the attribution principle does not apply to a partnership. A partnership does not have a legal personality as a company does. It is not, in the words of Lord Hoffman, a '*persona ficta'*. There is no authority in this or in any other context to suggest that the principles of attribution – upon which this argument depends – can be transposed from a company to a partnership – simply because similar considerations of policy might apply.

155. Mr Bott QC submitted that the starting point is the analysis of Lord Hoffman at paragraphs 506B-507A of *Meridian Global Funds Management Asia Ltd v Securities Commission [*1995] 2 A.C.500. A company's primary rules of attribution will generally to be found in its constitution. These are supplemented by those inferred by the *operation of*

company law. The primary rules of attribution are sometimes insufficient and what Lord Hoffman described as 'special rules of attribution' will be required in some circumstances.

156. He submitted that this analysis depends on the peculiar quality of corporate personality. It embraces the concept of corporate criminal liability which arises when - but only when - the controlling mind of a company possesses the requisite intention or knowledge for the commission of a criminal offence. He accepted that the intention or knowledge of a controlling mind is to be attributed to the company for these purposes.

157. However, Mr Bott QC submitted that no such principle applies to a partnership.

158. Mr Bott QC submitted that a partnership is an entirely different legal concept. A partnership cannot in general commit a criminal offence unless a statute explicitly allows a monetary penalty to be imposed on it.

159. He relied on an analysis appears in the Joint Law Commission and Scottish law Commission report on partnership (2003):

'*Whether a partnership governed by English law can commit a criminal offence is rather obscure. There are some judicial dicta which indicate that it cannot…The courts have not explored the matter in recent years and we are not aware of any modern prosecutions of a partnership in England and Wales.*.

Our policy is that a partnership should not be capable of committing an offence unless an Act expressly or by necessary implication provides that it can.'

(para 4.43 and 4.44)

160. Mr Bott QC submitted that this analysis shows that principles of corporate attribution do not simply translate to partnerships because considerations of policy might favour an equivalence of approach.

161. He submitted that HMRC placed much reliance on the policy justifications in *Greener Solutions*. But these are justifications for the application of *an established principle of company law* to a particular situation – fraud committed by an employee of the company without the shareholders' knowledge. No equivalent principle of partnership law allows the same conclusion to be reached.

162. He submitted that the requirements of policy are compelling in those circumstances as the authorities make clear: they permit the established doctrine of corporate attribution to apply where it would be contrary to the overriding purpose of the VAT regime if it did not. They do not permit the courts to invent a principle of partnership attribution where none exists.

163. Likewise, Mr Bott QC submitted that it would not be an answer to say that a victim of Mr France's fraud might assert a cause of action in civil proceedings against Mr or Mrs Sandham, based on principles of agency or vicarious liability.

164. He submitted that the issue is whether the ordinary right to deduct input tax which vests in a VAT registered trader can be overridden by the trader's actual knowledge of fraud. If the human partners lack actual knowledge, this can only be achieved by attributing someone else's knowledge to the partnership. This only occurs, he submitted, where the knowledge of a trader (as a *persona ficta*) must be deduced by the rules and principles of attribution. A company cannot know anything. Someone's knowledge must be attributed to it. A partnership is not an artificial legal personality: it is an arrangement in which two or more people acquire rights and

obligations. Its inability to commit a criminal offence may be a different issue but it is a consequence of its lack of legal personality.

165. He submitted that the history of the appeals may be informative.

166. There were two appeals: one by the current Appellant ('the partnership'), one by Premier Metals Ltd ('the Company'). On August 22nd 2016, the liquidators of the Company gave notice that that they were withdrawing the appeal. By that stage, HMRC had set out their case in separately drafted Statements of Case ("SOC"). Although separately drafted, there was – not surprisingly – a measure of repetition of argument and analysis contained with them.

167. At paragraph 89 of the Statement of Case relating to the Company, after a long explanation of why the *Mobilx/Kittel* test was satisfied in the case, HMRC asserted:

'*The tribunal must be satisfied on the balance of probabilities that the company PML knew or should have known that the transactions were connected with fraud. In determining this question, the tribunal is entitled to attribute the knowledge of those individuals with the requisite knowledge of the transactions to the company*.'

168. In paragraph 90 of the SOC, HMRC asserted that the knowledge of Mr. France and Mr. Urfan can be attributed to the Company by the application of this test. In paragraph 91, HMRC relied upon Warren J at para 47 of *Greener Solutions*. This passage does not contain the legal analysis of the relevant principle of corporate attribution: it sets out the considerations of policy that make the application of the test appropriate in this context.

169. There is no dispute that this principle would have been relevant in an appeal by the Company. In the parallel Statement of Case relating to the partnership, paragraph 81 repeats paragraph 89, substituting the word 'partnership' for 'company' in the first sentence of the paragraph but not in the second, which continues to read:

'*In determining this question, the tribunal is entitled to attribute the knowledge of those individuals with the requisite knowledge of the transactions* ***to the company***.' (**Emphasis added**)

170. Mr Bott QC submitted that the use of the word 'company' in paragraph 81 is doubtless an oversight, but it shows pointedly that HMRC were applying, without legal analysis or justification, the principle of corporate attribution to a partnership as if it were self-evidently right to do so.

171. Paragraphs 82 and 83 of the SOC for the partnership effectively restated paragraphs 90 and 91 of the Statement of Case against the Cgompany. The same passage from paragraph 47 of *Greener Solutions* is cited.

172. In HMRC's Opening, they submitted at paragraph 2.20 that '*the principles derived from this case are equally applicable to the partnership*'. No authority was cited in support of this proposition and there is no analysis of why the positions of a company and a partnership are identical for these purposes. They are assumed to be identical because considerations of policy require them to be.

173. Mr Bott QC submitted that HMRC place much reliance on the policy justifications in *Greener Solutions*. But these are justifications for the application of an established principle of company law to a particular situation – fraud committed by an employee of the company

without the shareholders knowledge. No equivalent principle of partnership law allows the same conclusion to be reached.

174. There is no windfall or meritless technical victory in this outcome. On the contrary, the partners face financial ruin if they fail in their appeal: the assessments relate to sums that they never received and its enforcement will bite on their limited and legitimately owned assets.

HMRC's Submissions on the First Issue

175. Ms Goldring, on behalf of HMRC, submitted that the partners cannot avoid responsibility for the actions of both Jonathan France and Mohammed Urfan, whom Jonathan France then introduced. These men were permitted a free hand to undertake this new line business in wholesale metal trading. The partners put in place no proper checks or controls on the trading although it was undertaken in the name of the Appellant partnership. Premier Metals profited by this trade.

176. In addition, HMRC relied upon the cumulative reasons set out within the Second Issue below to prove that the partners knew/or at the very least should have known that this new and profitable line of business, was connected with VAT fraud.

177. Ms Goldring submitted that the knowledge of Mr France can properly be attributed to the partnership. The apparent case advanced by the Appellant is to seek to blame Jonathan France and rely upon his dishonesty, with a concession that he had actual knowledge that the relevant transactions were connected to the fraudulent evasion of VAT. If this is correct and HMRC are also correct about the attribution of knowledge, it is unclear on what basis the appeal was being pursued.

178. Ms Goldring, on behalf of HMRC, submitted that the factual situation in the current case is almost identical to that in *Mobile Sourcing*. The partnership cannot claim input tax on the basis of transactions conducted by Jonathan France and at the same time resist the attribution to it of the knowledge of the Jonathan France that the transactions were connected with fraud.

Primary argument – general principles of agency and attribution

179. Ms Goldring submitted that in accordance with the principles of agency and attribution outlined above, Mr France was authorised by the partnership to act on its behalf conducting the 56 transactions which form the subject of the partnership's appeal.

180. She submitted that even if Mr France acted outside the scope of instructions in committing a fraud, the partnership would still be bound by his actions. Mr France's knowledge is imputed to the partnership by the general principles of agency.

181. HMRC accepted that it may not always be appropriate to apply the general principles of agency to determine questions of attribution. Ms Goldring accepted the dicta in *Bilta* at [40] "it is not always appropriate to apply the general principles of agency." The caveat is recognised in *Bilta* at [40] where it was stated that the court's task was to identify the appropriate rules of attribution using, for example, general rules like those governing estoppel and authority on contract and vicarious liability in tort.

182. The Supreme Court stated that it was well recognised that a company may as a result of such rules have imputed to it the conduct by an ordinary employee. However, it was also recognised in *Bilta* that, "it is not always appropriate to apply the general rules of agency to

answer questions of attribution and this may be particularly true in a statutory context." It referred to statutory provisions which indicate that a particular act or state of mind should only be attributed when undertaken or held by the company's directing mind and will.

183. However, Ms Goldring submitted that there were no apparent reasons why the general rules of agency should not apply in the case of the partnership.

Alternative argument – context and purpose – a special rule of attribution – policy of prevention and combatting of the fraudulent evasion of VAT

184. Ms Goldring submitted in the alternative that if there is any doubt that general rules of agency apply then the Tribunal should look at the "context and purpose" and fashion "a special rule of attribution for the substantive rule."

185. She submitted that if there is any doubt that the rules of agency do not apply then it is correct to fashion a "special rule of attribution for the substantive rule." Further there is no reason that the decisions of *McNicholas Construction Co Ltd v Customs and Excise Commissioners [2000]STC 553 ("McNicholas"), Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2A.C. 500 ("Meridian"), Bilta (UK) Ltd (in liquidation) and others v Nazir and ors [2015] 2 All ER 1083 ("Bilta"), Moulin Global Eyecare Trading Ltd v Commissioner of Inland Revenue (2014) 17 HKCFAR 218 ("Moulin Eyecare"), The Commissioners for Her Majesty's Revenue and Customs v Greener Solutions [2012] UKUT 19 (TCC)("Greener Solutions")* or *Mobile Sourcing Ltd v Revenue and Customs Commissioners [2016] UKUT 274 (TCC) ("Mobile Sourcing")* should be limited to a company. The key to the question of attribution is the context and purpose.

186. In that regard she submitted that the substantive rule for which the special rule of attribution should be fashioned is the prevention of the fraudulent evasion of VAT.

187. She submitted that in this case, as is well understood, *Kittel* is a fraud prevention mechanism. HMRC are entitled to protect the Revenue using any lawful and proportionate means to achieve the aims set out in the Principal VAT Directive (see *Kittel, Halifax, Schoenimport*).

188. In particular, HMRC relied *upon Article 273(1) of the Principal VAT Directive [2006/112]* which provides:

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

189. Furthermore, Ms Goldring relied upon the CJEU's judgment in *Ablessio SIA* (C527/11) [27-30] that:

"*27 Consequently, Directive 2006/112, and particularly Articles 213 and 214, preclude the tax authority of a Member State from refusing to assign a VAT identification number to applicants solely on the ground that they are not in a position to show that they have at their disposal the material, technical and financial resources to carry out the economic activity declared at the time of submitting their application for registration on the register of taxable persons.*

*28 However**, according to settled case-law of the Court, Member States have a legitimate interest in taking appropriate steps to protect their financial interests, and the prevention of tax evasion, avoidance and abuse is an objective recognised and encouraged by Directive 2006/112** (see, in particular, Case C-255/02 Halifax and Others [2006] ECR I-1609, paragraph 71; Case C-285/09 R. [2010] ECR I-12605, paragraph 36; and Case C-525/11 Mednis [2012] ECR, paragraph 31).* **(Emphasis added)**

.....

30 Therefore, Member States can, in accordance with Article 273, first paragraph, of Directive 2006/112, legitimately take measures that are necessary to prevent the misuse of identification numbers, in particular by undertakings whose activity, and consequently their status as taxable persons, is purely fictitious. However, these measures must not go beyond what is necessary for the correct collection of the tax and the prevention of evasion, and they must not systematically undermine the right to deduct VAT, and hence the neutrality of that tax (see, to that effect, Case C-146/05 Collée [2007] ECR I-7861, paragraph 26; Nidera Handelscompagnie, paragraph 49; Dankowski, paragraph 37; and VSTR, paragraph 44)."

190. In a similar fashion, Ms Goldring relied upon the ECJ decision of *Halifax* [2006] ECR I-1609 at [68] – [76]:

"68 Notwithstanding that finding, it must be borne in mind that, according to settled case-law, Community law cannot be relied on for abusive or fraudulent ends (see, in particular 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).

69 The application of Community legislation cannot be extended to cover abusive practices by economic operators, that is to say transactions carried out not in the context of normal commercial operations, but solely for the purpose of wrongfully obtaining advantages provided for by Community law (see, to that effect, Case 125/76 Cremer [1977] ECR 1593, paragraph 21; Case C-8/92 General Milk Products [1993] ECR I-779, paragraph 21; and Emsland-Stärke, paragraph 51).

70 That principle of prohibiting abusive practices also applies to the sphere of VAT.

71 Preventing possible 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.

.....

74 In view of the foregoing considerations, it would appear that, in the sphere of VAT an abusive practice can be found to exist only if, first, the transactions concerned notwithstanding formal application of the conditions laid down by the relevant provisions of the Sixth Directive and the national legislation transposing it, result in the accrual of a tax advantage the grant of which would be contrary to the purpose of those provisions.

75 Second, it must also be apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage. As the Advocate General observed in point 89 of his Opinion, the prohibition of abuse is not relevant where the economic activity carried out may have some explanation other than the mere attainment of tax advantages.

76 It is for the national court to verify in accordance with the rules of evidence of national law, provided that the effectiveness of Community law is not undermined whether action constituting such an abusive practice has taken place in the case before it (see Case C-515/03 Eichsfelder Schalchtbetrieb [2005] ECR I-7355 paragraph 40)."

191. Therefore, Ms Goldring submitted it would be absurd to suggest that, where preventing and combatting abusive practices and the evasion of VAT are the aims, HMRC should not protect the Revenue by denying input tax to a partnership in circumstances where the partnership installed an agent or employee to deal with transactions that that agent or employee knew were connected with the fraudulent evasion of VAT.

192. She submitted that it must go against the established principles from the above decisions that where there are public policy reasons such knowledge ought to be attributed. It can be said no better than Dyson J (as he was then) in *McNicholas* at [48] (which has already been referred to above as quoted in *Bilta*)

"*48.* …..If the only persons whose acts and knowledge may be attributed to a company are those who are responsible for running the affairs of the company as a whole, and those involved in its VAT activities, then the policy to which I have referred would be seriously undermined. As Mr Parker points out, it would encourage those prepared to engage in fraud or turn a blind eye to fraud to set up separate VAT accounts departments for that purpose. Moreover, it would discriminate against small companies that do not have separate accounts departments insulated from what happens on site or in contracts departments.*"*

193. Public policy was also considered in *Greener Solutions* and at paragraph 47 of the decision, where the Upper Tribunal held that:

"I agree with Mr Foulkes observations about the context of the substantive rule which gives rise to the issue: It is the objective of combating fraud within the context of the VAT legislation."

194. Ms Goldring addressed the reliance in the current case placed by the Appellant upon principles of corporate criminal responsibility being embraced by *Meridia*n and being of assistance in determining the issue of attribution. The Appellant's skeleton argument dated 19 September 2018 ("ASA") submitted that *Meridian* depends on the peculiar quality of the corporate personality and *embraces the concept of corporate criminal liability.*

195. She submitted that the Appellant's argument was misconceived.

196. She submitted that *Meridian* does not "*embrace*" the concept of corporate criminal liability. It refers to it simply to explain why it is necessary to fashion a special rule of attribution in some instances. The reference in *Meridian* to corporate criminal liability is used to explain that there are some exceptional cases where the primary and general rules of attribution do not provide an answer to the question of attribution, for example rules of criminal law which impose a liability for actus reus and mens rea to a Defendant and it is not clear how this would apply to a company. It is explained that in some of those circumstances the Court should fashion a special rule. Lord Hoffman then cites examples of situations where the attribution rule was tailored to the terms and policies of the substantive rule. These examples are both criminal and civil.

197. Ms Goldring also relied on the decision in *Moulin Global Eyecare* at [95] and [106 (10)] which stated that "criminal law cases are of little assistance in determining issues of attribution

in civil law cases, because of the reluctance of the court, especially in earlier cases to treat offences as carrying strict liability."

198. The Appellant had referred to the Law Commission report of 2003 and quoted sections concerning partnership and criminal law. It is worth noting that the same report also recognises at paragraph 3.51 that treatment of a *partnership in tax law has a variety of special rules which* are nothing to do with the rules of criminal law.

199. Ms Goldring submitted that the Appellant's assertion that the principles of attribution derive from company law is incorrect.

200. The Appellant had referred to *Meridian* and submitted that the primary rules of attribution which are found in its constitution are supplemented by "those inferred by the operation of *company law*." Further the Appellant had submitted that *Greener Solutions* applies an "*established principle of company law"* to a particular situation.

201. Although HMRC fully accepted that the facts of those cases are concerned with companies, she submitted that the rules of attribution referred to in these cases do not however derive from company law but from the law of agency. For example, she relied on the decision in *Mobile Sourcing* at [43] in which the Tribunal stated that the "rules of attribution are derived from the law of agency*"(*see also the Supreme Court's judgment in *Bilta* at [9] which refers to "the agency-based rules of attribution.")

202. Ms Goldring submitted that there would be a breach of fiscal neutrality if partnerships are treated differently to companies. If the approach advocated on behalf of the Appellant were permitted it would breach the requirement of fiscal neutrality because it would treat partnerships in a way that is different to corporations in respect of the *Kittel* test. Fundamentally, fiscal neutrality encapsulates:

a. The principle of VAT uniformity; and
b. The principle of elimination of distortion in competition (see *Commission -v-France* C-481/98).

203. Whilst she accepted that there is some latitude given to member states about these issues and the implementation of the principle of fiscal neutrality, a member state is nevertheless bound to exercise its discretion in a way that is consistent with:

c. The objectives pursued by the VAT directive; and
d. Applicable EU legal principles (such as the fiscal neutrality) (see *Claverhouse, C-365/05).*

204. Ms Goldring submitted that in those circumstances, to refuse to read over the cases on attribution of knowledge in respect of corporate entities to partnerships would distort the principle of fiscal neutrality and give a VAT advantage to partnerships over corporate entities. She submitted that this could not be correct.

205. She submitted that the principles derived from the relevant case law referring to the questions of attribution should not be limited to companies. In *Bilta* the Supreme Court at [41] at stated that, *"the key to <u>any</u> question of attribution is ultimately always to be found in considerations of context and purpose"* (Emphasis added). Importantly at paragraph 39 of *Bilta* it was said that:

"Rules of attribution are as relevant to individuals as to companies. An individual may himself or herself do the relevant act or possess the relevant state of mind. Equally there are many contexts in which an individual will be attributed with the actions or state of mind of another, whether an agent or in some circumstances an independent contractor. But in relation to companies there is the particular problem that a company is an artificial construct and can only act through natural persons." (Emphasis added)

206. A similar stance was adopted in *Moulin Eyecare* at [41] where it was stated that, "*[o]ne of the fundamental points to be taken from Meridian is the importance of context (including, as in this case, statutory context) in any problem of attribution."*

207. In *Meridian* the Court of Appeal did not limit how the rules of attribution might apply to a company alone. At page 506F (page 7AB) the Privy Council (Lord Hoffman delivering the judgment on behalf of the Court) found that:

"These primary rules of attribution are obviously not enough to enable a company to go out into the world and do business. Not every act on behalf of the company could be expected to be the subject of a resolution of the board or a unanimous decision of the shareholders. The company therefore builds upon the primary rules of attribution by using general rules of attribution which are equally available to natural persons, namely, the principles of agency. It will appoint servants and agents whose acts, by a combination of the general principles of agency and the company's primary rules of attribution, count as the acts of the company…." **(**Emphasis added**)**

208. Ms Goldring relied upon *Bilta* [191] where the Supreme Court stated (albeit in the context of attributing the state of mind of an individual to a company) that the relevance of the context in which the question was asked was not limited to Lord Hoffman's third category. Bowstead and Reynolds on Agency was quoted; "Before imputation occurs there needs to be some purpose for deeming the principal to know what the agent knows." This suggests a wide interpretation and HMRC submit is inconsistent with a suggestion that the principles only apply to a company.

209. The language at other parts of the Supreme Court's judgment is also wide and does not restrict the principles to a company see *Bilta* - per curiam where the Court refers to the state of mind of a director or agent (see also [9] and also [36] which refers to the nature of the claim or parties involved).

210. In conclusion, Ms Goldring submitted that there was no credible reason advanced as to why a special rule of attribution should not be fashioned so as to avoid the partnership obtaining a windfall in the face of overwhelming public policy reasons to the contrary.

211. In all the circumstances, in the absence of a credible explanation being put forward as to why an agent's knowledge should not be attributed to the partnership (either through general rules of agency, or because of a special rule being fashioned) Ms Goldring, on behalf of HMRC, urged the Tribunal to adopt what she suggested was the orthodox position. She submitted that the Tribunal should attribute Mr France's knowledge to the partnership. She submitted that to do otherwise would drive a coach and horses through a doctrine which is specifically designed to combat a widespread fraud committed throughout the European Union.

Discussion and Decision on the First Issue – attribution of knowledge

212. The Tribunal is satisfied that it should attribute Mr France's knowledge to the partnership. The Tribunal is satisfied that the partnership cannot claim input tax on the basis

of the 56 relevant transactions conducted by Jonathan France and at the same time resist the attribution to it of the knowledge of the Jonathan France that the transactions were connected with fraud.

213. The Tribunal relies upon all the submissions of HMRC set out above for its reasons in coming to that conclusion. Therefore, it does not repeat them in any detail but summarises the principal submissions of HMRC as set out above:

a) The general principles of agency apply to the attribution of knowledge to partnerships;

b) It is not always appropriate to apply the general principles of agency. However, there are no apparent reasons why they should not apply in the case of the partnership;

c) If there is any doubt that general rules of agency apply then the Tribunal should look at the "context and purpose" and fashion "a special rule of attribution for the substantive rule";
d) The substantive rule for which the special rule of attribution should be fashioned is preventing or combating the evasion of VAT;
e) Reliance placed by the Appellant upon principles of corporate criminal responsibility being embraced by *Meridian* and being of assistance in determining the issue of attribution in the current case is misconceived;
f) There would be a breach of fiscal neutrality if the partnership were treated differently to companies;
g) The principles derived from the relevant case law referring to the questions of attribution should not be limited to companies; and
h) The breach of duty exception ("*Hampshire Land* Principle") is conceded not to apply on the facts of this case.

214. Therefore, the Tribunal is satisfied that the principle to be extracted from the authorities is that the knowledge of an agent can be attributed to the partnership, not that the principles of attribution should be limited to a company alone. The general rules of agency alone result in the attribution of knowledge of an agent of missing trader VAT fraud to the partnership. The general principles of attribution as defined in *McNicholas, Meridian, Bilta, Moulin Eyecare, Greener Solutions* or *Mobile Sourcing* are not limited to a company as the Appellant submits, they apply with equal force to a partnership.

215. Even if that were not so, there are compelling public policy reasons why the knowledge of an agent as to missing trader VAT fraud ought to be attributed to a partnership, namely the objective of combating and preventing the fraudulent evasion of VAT. For the Tribunal to conclude otherwise would risk the creation of a "fraudster's charter" through which fraudulent employees or agents could use partnerships to commit fraud but leave the Revenue unable to deny input tax unless the partners themselves could be proved to have actual or means of knowledge or the partnership falls within the breach of duty exception.

216. Therefore, even if the law of agency did not suffice, the context and purpose would require the Tribunal to fashion a special rule of attribution to attribute the knowledge of an agent regarding MTIC fraud to a partnership on behalf of which the transactions are conducted. No credible reason has been advanced as to why a special rule of attribution should not be

fashioned so as to avoid the partnership obtaining a substantial payment of VAT in the face of overwhelming public policy reasons to the contrary.

217. Applying these conclusions to the facts of this case. The partnership accepts that it does not fall within the breach of duty exception whether as the primary victim of the fraud or otherwise. It accepts that Mr France, its consultant and agent, arranged and conducted the 56 relevant transactions in question knowing that they were connected to the fraudulent evasion of VAT and he did so on behalf of and in the name of the partnership.

218. In light of the undisputed fraud to which the transactions were connected, Mr France's multiple relevant convictions for dishonesty in relation to companies with whom he was involved and the admissions as to his knowledge made by the partnership, Mr France's knowledge has been proved by HMRC on the balance of probabilities.

219. In all the circumstances, in the absence of a credible explanation being put forward as to why an agent's knowledge should not be attributed to the partnership (either through general rules of agency, or because of a special rule being fashioned) the Tribunal attributes to the partnership Mr France's knowledge that the relevant transactions were connected to the fraudulent evasion of VAT.

220. For the purposes of considering this issue, it is unnecessary to have regard to the Tribunal's factual finding (for which reasons are provided within the Second Issue) that the partners failed to take reasonable care in a number of ways in allowing Mr France to arrange and conduct the fraudulent transactions on behalf of the partnership. Nonetheless, this finding fortifies the Tribunal's conclusion on the First Issue.

221. The knowledge or means of knowledge of the partners themselves as to the fraudulent transactions is irrelevant to the First Issue but is the subject of the Second Issue.

Conclusion on the First Issue - Attribution of Knowledge of agent of partnership

222. Therefore, applying the law to the facts of this case, the Tribunal is bound to attribute to the partnership Mr France's actual knowledge that the partnership's 56 transactions which he conducted on its behalf were connected to the fraudulent evasion of VAT. In those circumstances, applying the principles set out in *Kittel* below, the partnership's appeal against the denial of input tax and consequent assessment to VAT must be dismissed.

223. In light of this finding, the Tribunal would not normally be required to consider the Second Issue as to whether the partners themselves knew or should have known that the transactions were connected to the fraudulent evasion of VAT. Nonetheless, the Tribunal will go on to determine the Second Issue in the event it has erred in law in coming to its conclusion on the First Issue.

The Second Issue - *Kittel* – knowledge or means of knowledge of the partners

224. The Second Issue for the Tribunal to determine is whether either of the partners of Premier Metals, Mr or Mrs Sandham, knew or should have known that the relevant transactions were connected to the fraudulent evasion of VAT.

225. In order to uphold HMRC's denial of input tax and subsequent VAT assessment, the Tribunal must be satisfied of the following in relation to the 56 transactions:

(1) There a VAT loss;
(2) If so, that it was occasioned by fraud;
(3) If so, that the Appellant's transactions were connected with such a fraudulent VAT loss; and
(4) If so, the Appellant partnership knew or should it have known of such a connection.

226. The Appellant accepts that HMRC have proved parts 1-3 of the test above in relation to all of the transactions subject to this appeal. This confirmation was provided in an email to HMRC dated 15 May 2017 in which the Appellant provided the following information in response to direction 7 issued by the Tribunal on 15 June 2016 (the terms 'Appellants' is presumed to refer to the partners Mr and Mrs Sandham):

(a) The transaction chains in the deal sheets are an accurate reflection of the trade conducted by or through the partnership. This is **not** an admission that the Appellants were personally engaged in the transactions or that they knew the detail or structure of the trading chains at the time.
(b) The Appellants accept (without making any admission of knowledge or means of knowledge) that the transactions were, in fact, part of a coordinated pattern of pre-arranged trades designed to produce a fraudulent VAT loss. The Appellants did not know at any time that the transactions were being coordinated in this way or that others intended to contrive a VAT loss through them.
(c) The Appellants accept that, in the chains said to be connected to a defaulting trader, there was pre-arranged VAT default through a defaulting trader.
(d) The Appellants accept that, in the chains where the loss is said to be achieved by contra trading, there was a pre-arranged VAT default through contra-trading.

227. In respect of part 4 of the test, knowledge or means of knowledge, at least by the time of the hearing, the Appellant partnership had accepted that Mr France who acted as their consultant and agent knew the transactions were connected with the fraudulent evasion of VAT.

228. In determining the First Issue, the Tribunal has decided that it is entitled to attribute to the partnership the knowledge of Mr France acting on behalf of the partnership with the requisite knowledge of the transactions. Mr France had responsibility for arranging and conducting the deals and it is accepted that he knew that they were connected with VAT fraud.

229. The Second Issue for the Tribunal to determine, which it has decided to consider in the event it has erred in respect of the First Issue, is whether HMRC have proved part 4 in relation to the partners, namely that Mr or Mrs Sandham (i) knew, or (ii) should have known, that the transactions were connected with the fraudulent evasion of VAT.

230. HMRC's primary contention is that either of the partners, primarily Mr Sandham, knew that the partnership's transactions were connected with a VAT fraud.

231. HMRC's secondary contention is that, in the absence of actual knowledge, the partners should have known of the connection of the partnership's transactions to a VAT fraud.

232. In deciding the Second Issue, the Tribunal must be satisfied on the balance of probabilities that either of the partners knew or should have known that the transactions were connected with fraud. HMRC's primary submission is that Mr Sandham as a partner knew or at the very least should have known that the transactions were connected with fraud.

The Law on the second issue

The Right to Deduct and Loss of Entitlement

The right to deduct

233. Article 17 of the Sixth Council Directive of 17 May 1977 (so far as material) provides:

"Origin and scope of the right to deduct
1 The right to deduct shall arise at the time when the deductible tax becomes chargeable.
2 In so far as the goods and services are used for the purposes of his taxable transactions, the taxable person shall be entitled to deduct from the tax, which he is liable to pay:
(a) value added tax due or paid within the territory of the country in respect of goods or services supplied or to be supplied to him by another taxable person;….."

234. Articles 167 and 168(a) of Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT (the Principal VAT Directive) provide:

"167 – A right of deduction shall arise at the time the deductible tax becomes charged.

168 – In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT, which he is liable to pay:
(a) the VAT due or paid in that member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person."

235. Sections 24, 25 and 26 of the Value Added Tax Act 1994 ("VATA"), in so far as relevant, provide:

"24.- (1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say-
VAT on the supply to him of any goods or services;
VAT on the acquisition by him from another member State of any goods; and
VAT paid or payable by him on the importation of any goods from a place outside the member States,
Being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him.
(2)...
(6) Regulations may provide-
(a) for VAT on the supply of goods or services to a taxable person, VAT on the acquisition of goods by a taxable person from other member States and VAT paid or payable by a taxable person on the importation of goods from places outside the member States to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases;

25.- (1) A taxable person shall-
(a) in respect of supplies made by him, and
(b) in respect of the acquisition by him from other member states of any
goods,
account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.
(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

26.- (1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.
(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

(a) taxable supplies;..."

236. Regulation 29 of the Value Added Tax Regulations 1995 (SI 1995/2518) provides:

"29.- (1) Subject to paragraph (2) below, and save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable.
(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of-
(a) a supply from another taxable person, hold the document, which is required to be provided under regulation 13;…
provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold, instead of the document or invoice (as the case may require) specified in subparagraph (a)…above, such other documentary evidence of the charge to VAT as the Commissioners may direct."

237. Thus, if a taxable person has incurred input tax that is properly allowable, he is entitled to set it against his output tax liability and, if the input tax credit due to him exceeds the output tax liability, receive a payment.

Loss of entitlement

238. However, the European Court of Justice ("the ECJ"), in its judgment dated 6th July 2006 in the joined cases of *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (C-439/04 & 440/04) ("*Kittel*") has confirmed that taxable persons who "knew or should have known" that the purchases in which input tax was incurred were connected with fraudulent evasion of VAT will not be entitled to deduct that input. Specifically:

239. At paragraph 56 of *Kittel*, the ECJ stated:

" …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."

240. Conversely, the ECJ had stated at paragraph 51 that "…traders who take every precaution which could reasonably be *required of them to ensure that their transactions are not connected with fraud…must be able to rely on the legality of these transactions".*

241. The rationale for the above approach was set out by the ECJ at paragraphs 57 and 58 of the judgment:

"*That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice."* (Paragraph 57); and

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

242. At paragraph 59, the ECJ therefore concluded:

"... 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.'"

243. At paragraph 61, the ECJ reiterated:

"...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."

244. In *Mobilx Limited (in Liquidation) v HMRC* [2010] EWCA Civ 517 ("*Mobilx*"), the Court of Appeal considered Kittel. At paragraph 52, Moses LJ stated:

"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 then 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."

245. At paragraph 59 of *Mobilx*, Moses LJ went on to state in relation to the "should have known" aspect of the test:

"The test in Kittel is simple and should not be over-refined, it embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances, which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraudulent evasion of VAT then he should have known of that fact..."

246. At paragraph 64 of *Mobilx,* Moses LJ then said:

"If it is established that a trader should have known that by his purchase there was no reasonable explanation for the circumstances in which the transaction was undertaken other than that it was connected with fraud then such a trader was directly and knowingly involved in fraudulent evasion of VAT."

247. Before, at paragraph 82, warning:

"...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 with fraudulent evasion of VAT..."

248. Moses LJ also gave guidance as to the sort of circumstances that might be relevant to the "should have known" question:

(i) In paragraph 72 of *Mobilx*, Moses LJ cited, and in paragraph 83 commended, a number of questions posed by the Tribunal including,
"(1) Why was [the Appellant], a relatively small company with comparatively little history of dealing in mobile phones, approached with offers to buy and sell very substantial quantities of such phones?"
"(2) How likely in ordinary commercial circumstances would it be for a company in [the Appellant's] position to be requested to supply large quantities of particular types of mobile phone and to be able to find without difficulty a supplier able to provide exactly that type and quantity of phone."
"(3) Was [the Appellant's supplier] already making supplies direct to other EC countries? If so, he could have asked why [the Appellant's supplier] was not making supplies direct, rather than selling to UK traders who in turn would sell to such other countries."
"(4) Why are various people encouraging [the Appellant] to become involved in these transactions? What benefit might they be deriving by persuading [the Appellant] to do so? Why should they be inviting [the Appellant] to join in when they could do so instead and take the profit for themselves?"

(ii) In paragraph 79, Moses LJ drew attention to the significance of the fact that *Mobilx*, aware that the CPU business in which it was engaged was "rife with fraud", nevertheless chose to ignore HMRC's warnings that its own transactions had, upon extended verification, been shown to trace back to fraud.

(iii) In paragraph 83 of *Mobilx*, Moses LJ adopted the passage from paragraph 110 of *Red12 v HMRC* [2009] EWHC 2563 in which Christopher Clarke J highlighted the following:

(a) "compelling similarities between one transaction and another."
(b) "pattern[s] of transactions."
(c) "transactions all of which have identical percentage mark ups ..."
(d) "... made by a trader who has practically no capital ..."
(e) "... as part of a huge and unexplained turnover ..."
(f) "... with no left over stock."
(g) "A tribunal could legitimately think it unlikely that the fact that all 46 transactions in issue can be traced to tax losses by HMRC is a result of innocent coincidence."

(iv) In paragraph 84 of *Mobilx* the Court of Appeal commended as significant the fact 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."*

Knowledge or means of knowledge

249. In determining "means of knowledge" the Tribunal does not simply look at Mr and Mrs Sandham's awareness of knowledge of the material, but also considers what should have been available to them if they had asked reasonable questions.

250. In determining the question of whether the Partnership "should have known" that its transactions were connected with fraud the key principles are derived from the judgment in *Mobilx* at [50]-[82]:

"50 The traders contend that mere failure to take reasonable care should not lead to the conclusion that a trader is a participant in the fraud. In particular, counsel on behalf of Mobilx contends that Floyd J and the Tribunal misconstrue § 51 of Kittel. Whilst traders who take every precaution reasonably required of them to ensure that their transactions are not connected with fraud cannot be deprived of

their right to deduct input tax, it is contended that the converse does not follow. It does not follow, they argue, that a trader who does not take every reasonable precaution must be regarded as a participant in fraud.

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

…….

75 The ultimate question is not whether the trader exercised due diligence but rather whether he should have known that the only reasonable explanation for the circumstances in which his transaction took place was that it was connected to fraudulent evasion of VAT. The Tribunal might have concluded that Mr Peters should have known that the transactions into which he entered were connected with fraud, by reference to the unconventional nature of those circumstances (a finding it came close to making at § 228). But it was not the only decision within the bounds of reasonable conclusion.

……

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." (Emphasis added)

251. The judgment of Lewison J in the Commissioners for *Her Majesty's Revenue & Customs v Livewire Telecom Limited* [2009] EWHC 15 (Ch) ("*Livewire*") is also of assistance:

'86. In so far as a domestic analogy is appropriate, I agree with Mr Anderson that the appropriate analogy is that of constructive knowledge or constructive notice. This was described by Denning J in Nelson v Larholt [1948] 1 KB 339 , 343 as follows:

> "He must, I think, be taken to have known what a reasonable man would have known. If, therefore, he knew or is to be taken to have known of the want of authority, as, for instance, if the circumstances were such as to put a reasonable man on inquiry, and he made none, or if he was put off by an answer that would not have satisfied a reasonable man, or, in other words, if he was negligent in not perceiving the want of authority, then he is taken to have notice of it."

87. The taking of every reasonable precaution has sometimes been referred to as a "positive duty". This is, I think, potentially misleading. The taxable person does not owe a "duty" to take precautions (unless it is a duty to himself). The taking of all reasonable precautions (and acting on the basis of what he discovers as a result of taking those precautions) provides him with an impenetrable shield against any attack by HMRC. The taking of every reasonable proportion is only a "duty" in the sense that the so-called "duty to mitigate" is a duty applicable to the recovery of damages.

88. At one stage, by reference to this supposed "duty", Mr Anderson seemed to me to be submitting that if a taxable person failed to take every precaution that could reasonably be expected, he would automatically be deemed to be a participant in fraud and would forfeit his right to deduct input tax. This, he said, followed from the phraseology in paragraph 56 of *Kittel* ("a person … must be regarded as a participant in the fraud"). However, as noted, an irrebuttable presumption imposing liability to VAT would fall foul of the principle of proportionality. In my judgment (as I think Mr Anderson in the end accepted) if a taxable person has not taken every precaution that could reasonably be expected of him, he will still not forfeit his right to deduct input tax in a case where he would not have discovered the connection with fraud even if he had taken those precautions.'

252. The decision of Judge Mosedale in *Pars Technology Limited v The Commissioners for Her Majesty's Revenue and Customs [2011] UKFTT 9 (TC) ("Pars")* is also instructive:

'16. What did the ECJ mean when it said in *Kittel* at paragraphs 56 & 59 that it is clear that a taxpayer who "should have known" his purchase was connected with the fraudulent evasion of VAT "must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud" and in these circumstances lose his right to deduct his input tax on that purchase? Does the phrase "should have known" impose on the taxpayer a duty to make enquiries?

17. Mr Beal's view is that "means of knowledge" is equivalent to Nelsonian blindness or blind eye knowledge or recklessness: the Appellant has the information but fails to make the obvious inferences from it. He does not consider it extends so far as to put on the Appellant a duty to take precautions (although it was also his case that his client did take reasonable and proportionate precautions and the results of these did not put Pars on notice that its chains were connected to fraud).

18. Mr Beal said that if "means of knowledge" was a negligence test it falls fouls of the legal certainty and equivalence tests and for these reasons would not have been endorsed by the ECJ. He says it falls foul of the legal certainty test as traders would not have known of it in 2006 and it falls foul of equivalence tests because it treats traders despatching goods less favourably than those undertaking purely domestic transactions.

19. On the contrary, HMRC's view is that blind eye knowledge (choosing to ignore what you ought to know or failing to ask the obvious questions) is a type of actual knowledge. Mr Cunningham's point is that the Court of Appeal in *Mobilx* concluded that the ECJ intended the phrase "knew or should have known" in Kittel to have the same meaning as the phrase "knowing or having any means of knowing" which they used in *Optigen*. Blind eye knowledge, says Mr Cunningham, is more than merely having the means of knowledge.

20. There is certainly some support for Mr Beal's view that "means of knowledge" equates with Nelsonian blindness in the Court of Appeal decision *Mobilx* at paragraph 61 where it is said: "If he [the taxable person] has the means of knowledge available and chooses not to deploy it he knows that, if found out he will not be entitled to deduct. If he chooses to ignore obvious inferences from the facts and circumstances in which he has been trading, he will not be entitled to deduct."

21. Mr Cunningham said that here "chooses" should be read as "fails to": a passive failure rather than necessarily a positive decision because the ECJ do not refer to a choice by the taxpayer in *Optigen or Kittel*. He points at that at paragraph 52 of the same judgment the Judge states that a "taxpayer [who] 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 … " and also that "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**".** HMRC do consider that a duty to take precautions arises and thus that the test is one of negligence.

22. We agree with HMRC, although as can be seen from our conclusions on the facts this is not strictly necessary to our decision. We think the ECJ does expect a taxpayer to take reasonable precautions and to make further enquiries where there are negative indicators. We also consider that such a test would not breach equivalence (fiscal neutrality) or legal certainty. The ECJ in stating its test in Kittel was declaring what the law has always been and not making new law: in any event a person who ought to have known of the fraud and desisted from trading ought not to be surprised to lose their input tax. We think the right to recover input tax is matched by an objective duty to take reasonable precautions.'

253. Therefore, on the basis of the above guidance in *Mobilx*, *Livewire and Pars*, the Tribunal is not limited to what Mr and Mrs Sandham were actually aware of but what they should reasonably have been aware of and assessing what they should have known if they had taken reasonable precautions and deployed the means at their disposal available to them. An appropriate analogy is constructive knowledge or constructive notice.

254. The Tribunal is entitled to consider if the Sandhams failed to deploy the means of knowledge available to them. It can consider whether they had the means at their disposal to know that they were participating in fraud. This would include what material would have been available to them had they asked appropriate questions. However as §82 of *Mobilx* states, it is not simply a case of whether they "*asked appropriate questions*" or deployed the means of knowledge available to them (which HMRC submit they clearly did not). Even if a trader had asked appropriate questions, he would not be 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.*

255. The Tribunal therefore will consider what information was collectively available to the partnership when considering whether the partnership "should have known," that the transactions were connected to the fraudulent evasion of VAT.

256. The Tribunal is satisfied that the policy behind *Kittel* and the Principal VAT Directive dictates that the Tribunal is entitled to consider what information was *collectively available to Mr and Mrs Sandham* in determining whether the partnership "should have known" the transactions were connected with VAT fraud.

257. To do otherwise would mean that a partnership could avoid liability for means of knowledge by hiving off separate functions to different partners and forbidding them to communicate. Equally it would discriminate in favour of larger businesses where distinct

functions are dealt with by individual departments (e.g. compliance/trading/money laundering/banking). If the means of knowledge of those individual departments could not be combined to demonstrate constructive knowledge it would prove difficult if not impossible to implement the policy objective behind *Kittel*.

258. Support for this approach can be found in the decision of *Citibank NA v The Commissioners for Her Majesty's Revenue & Customs [2014] UKFTT 1063 (TC)*. This decision was overruled on the issue of dishonesty in the Court of Appeal but the specific paragraphs referred to below, [81]-[88], were not:

'81. Four persons employed by the appellant are named in the SOC (§77). No allegations are made in the SOC against any of them and the appellant's Request asks if HMRC is making any allegation that any of them knew or ought to have known of the (alleged) connection to fraud.

82. HMRC's response is that they do not have the information to form an opinion whether any particular individual working at Citibank knew or ought to have known of the connection to fraud. Their position is (as I understand it) that they would not have to prove that to succeed in the appeal.

83. Nevertheless, they do allege that Citibank as an entity had actual knowledge of the fraud. I have ruled that that is in effect an allegation of dishonesty and that HMRC must make this explicit or withdraw the allegation (see §40). Assuming HMRC does make the allegation explicit, it must be an allegation that they have proper grounds to make.

84. Mr Kinnear accepted in the hearing that to prove actual knowledge against Citibank would require them to prove actual knowledge against an individual whose knowledge could be vicariously attributed to the bank. Yet they do not (so far) seek to prove actual knowledge against any named individual. Would the individual whose (alleged) knowledge they seek to vicariously attribute to the bank have to be identified by them to make good the allegation of knowledge by the bank? Because if so, HMRC should not make that allegation against the appellant without identifying such an individual.

85. But I do not think identification would be required: otherwise a corporate entity could avoid allegations of actual knowledge by simply refusing to cooperate with HMRC's enquiry or call any witnesses, making it impossible to identify which particular person had actual knowledge. If the circumstantial evidence was sufficient to justify it, I think a Tribunal could draw the inference that at least one person, albeit unidentified, acting on behalf of the bank had actual knowledge.

86. So I consider that HMRC can (if they have proper grounds in the evidence) make an allegation of knowledge against a corporate entity, such as the appellant, even if they are unable to identify any particular individual whose knowledge should be vicariously attributed to the bank.

87. I agree with HMRC that to prove merely constructive knowledge they would only have to prove that various persons individually had separate elements of knowledge, which, when collectively attributed to Citibank, would mean that Citibank as an entity had constructive knowledge of the connection to fraud.

88. Therefore, I agree that it is proper (subject to having the evidence) that HMRC can make allegations of knowledge and means of knowledge against the bank without making any allegations of dishonesty or even constructive knowledge against any of the named individuals. Therefore, HMRC should not be required to answer Request 63 or 2(a)(i): the answer is in the

existing SOC. HMRC do not (yet) allege that any particular individual knew or ought to have known of the connection to fraud.' (Emphasis added)

259. Albeit dealing with the acts of the partnership as opposed to the question of knowledge there is some further support for "a collective approach" in section 5 of the Partnership Act 1890 which states:

5. Power of partner to bind the firm**.**

Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner.

Burden and standard of proof

260. As noted, the burden of proving each of the limbs required in *Kittel* including knowledge or means of knowledge rests upon HMRC: *Mobilx Ltd (in admin) v HMRC* [2010] STC 1436, at [81].

261. In terms of what HMRC must prove:

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

(2) They must demonstrate either:

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

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

(3) It is thus not sufficient for HMRC to show that the taxpayer knew or should have known that he was *running the risk* that by his purchase he might be taking part in a transaction connected with fraudulent evasion of VAT: *Mobilx*, at [56].

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

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

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

Contra-trading

262. The Court of Appeal in *Mobilx* drew no distinction between the principles to be applied in cases of contra-trading to those in other cases of MTIC fraud, notwithstanding that the appeals of *Blue Sphere Global Limited and Calltel Telecom Ltd & Opto Telelinks (Europe) Ltd*, which were two of the other cases before the Court of Appeal, were themselves cases that involved contra-trading.

263. In the appeal of *Fonecomp Ltd v HMRC* [2015] EWCA Civ 39, the Court of Appeal addressed and dismissed the argument raised by Fonecomp Ltd that the case of *Bonik Case C – 285/11* suggested that the *Kittel* principle did not apply to contra-trading.

A VAT recovery assessment

264. There is no dispute in this case that if HMRC's denial of input tax upon the transactions is upheld, they were entitled to raise an assessment for the recovery of VAT pursuant to section 73 of the Value Added Tax Act 1994 ("VATA"). There was no issue raised by the Appellant that the assessment issued was not raised within the statutory time limits.

265. Section 73(2) & (6) of VATA provides as follows:

'73 ……..

(2) In any case where, for any prescribed accounting period, there has been paid or credited to any person—

(a) as being a repayment or refund of VAT, or

(b) as being due to him as a VAT credit,

an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly.

……..

(6) An assessment under sub-section (1), (2) or 3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in Section 77 and shall not be made after the later of the following –

(a) 2 years after the end of the prescribed accounting period; or

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify

the making of the assessment, comes to their knowledge,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under sub-section (1), (2) or (3) above, another assessment may be made under that sub-section, in addition to any earlier assessment.'

266. Section 77 VATA provides, in as far as is relevant:

‘(1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made–

> (a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned,….’

Facts on the Second Issue

267. In determining the Second Issue the Tribunal takes into account all the facts it has found on the First Issue together with the following additional facts.

Explanation of MTIC fraud

268. When the VAT system is correctly operated, it is axiomatic that:

(i) an amount of VAT charged by one VAT registered trader to another VAT registered trader should be accounted for as output tax; and then
(ii) the amount of VAT previously charged as output tax may subsequently be reclaimed by the purchaser as input tax (so as to ensure that the tax is neutral regardless of how many transactions are involved); and
(iii) when a business's input tax claim exceeds its output tax it will be entitled to make a claim for a repayment of VAT.

269. The 56 transactions which form the subject of this appeal were connected with MTIC fraud. MTIC fraud involves the fraudulent default by a taxable person of its obligation to account to HMRC in respect of output tax payable on its rated taxable supplies.

270. A transaction chain in an MTIC fraud typically involves a “missing” “hijacked” of “fraudulent defaulting” trader who acquires (imports) goods from another EU member state; one or more intermediary or “buffer” traders and a “broker” trader. The missing or fraudulent defaulting trader is a VAT registered entity in a transaction chain who purports to acquire goods zero-rated from another EU member state, sells them in the UK charging VAT at the standard rate, and then either disappears or deliberately fails to account for the VAT due to HMRC.

271. A “hijacked” trader adopts the identity of a VAT registered trader and takes on the role of the fraudulent defaulting trader and does not complete or submit a VAT return and deliberately does not pay the VAT when it becomes properly due.

272. Buffer traders are each VAT registered and entitled to claim the VAT charged to them as input tax and in turn charge VAT when they make an onward sale. A buffer trader usually acts as a conduit in holding or transferring title to the consignments concerned which also puts distance between the fraudulent defaulting trader and the broker.

273. The final entity in the UK transaction chain is the broker which will dispatch (export) goods to another EU member state or export them outside the EU. The broker is entitled to reclaim the VAT from HMRC charged by its supplier and subject to certain conditions may zero-rate the removal of goods from the UK.

The relevant transactions were connected to fraudulent evasion of VAT and tax loss - not in dispute

274. In each of the 56 transactions which are the subject of this appeal the Appellant acted as a "buffer" trader. It purchased from a UK based company and sold to another UK based company. Each of the Appellant's deals traced directly to a fraudulent VAT loss either with the Appellant being supplied directly by the fraudulent defaulting trader or tracing back to the fraudulent defaulting trader via other buffer traders.

275. This appeal therefore primarily involves the basic form of MTIC fraud. However, three transactions trace to the fraudulent contra trader Intekx Ltd (with the caveat as outlined in witness statement of HMRC Officer Mark Chisman dated 1 March 2018). The witness statement of Mark Chisman, dated 1 March 2018 at §10 to 14 explains that the alternative scenario is that deals 27 and 32 traced to another fraudulent defaulting trader namely Global Electronic Network Ltd. The ambiguity in terms of naming the supplier to Conrad Lea Distribution Ltd arises due to the failure of Conrad Lea Distribution Ltd (which acts as the first buffer in the chain) to provide deal documentation to HMRC other than a list of documents. In either event the deals trace to a fraudulent default either by the contra trader Intekx Ltd or Global Electronic Network Ltd.[1]

276. In the Appellant's email dated 15 May 2017, the partnership accepted that where the tax loss was said to be achieved by contra-trading, there was a pre-arranged VAT default through contra-trading. The relevant authorities in relation to contra trading have been summarised briefly above.

277. In deals 27, 32 and 43 the transaction chains traced back via other buffer traders to a fraudulent contra trader Intekx Ltd ("Intekx"). Contra trading is a more complex variation of MTIC fraud. A contra trader will offset, in whole or in part, the output tax payable on its taxable supplies against input tax, to which it claims to be entitled as a result of its purchases. Those purchases will in turn be traced to a defaulting trader. The precise mechanism however is unimportant. The only necessary ingredient is that a trader should default on its obligation to account to HMRC for the output tax payable on its taxable supplies.

278. The 56 transaction chains which are the subject of this appeal bear the hallmarks of transactions which were part of an orchestrated MTIC fraud. It is a reasonable inference that the goods which Premier Metals sold on were ultimately purchased by a broker, who in turn dispatched them from the UK in a sale, in each case to a trader based in another EC country. The broker's sale would be zero rated for VAT and would result in the broker seeking to reclaim the input tax paid on its purchases.

[1]See also the witness statement of Officer Mark Chisman dated 7 March 2018 at §2 to 8 in which he summarises why he considers that the deals the subject of the appeal are transactions in MTIC supply chains rather than acquisition tax fraud chains. He explains that all customers of the Appellant made supplies to Centaur Metals and Alloys Limited. He summarises evidence in relation to substantial sales by Centaur Metals and Alloys Limited to the EC in VAT periods 02/13 and 03/13 and evidence of the same obtained during a visit to this company on 8 July 2013. In addition, he summarises HMRC records regarding CF Booth Limited recording substantial supplies to the EC in VAT periods 02/13 and 03/13. He also exhibits a visit report to CF Booth Limited on 31 July 2013 in which it was confirmed that there was no stock control system and it was difficult to establish a clear supply chain. Finally, he summarises substantial EC supplies by WH Marren Limited in the same VAT periods.

279. As recorded in the visit report of 12 August 2013, Mr Sandham stated that he understood from conversations with Ray Deakin of Centaur Metals & Alloys Ltd that they exported the metals which they bought from Premier Metals.

280. In any event, even if this were not accepted, the tracing as conducted by Officer Chisman demonstrates a fraudulent VAT loss at the beginning of each transaction chain, which is sufficient for the purposes of proving that the right to deduct input tax was properly denied (subject of course to knowledge and/or means of knowledge).

281. It is accepted that all of Premier Metals' 56 transactions were part of an overall MTIC fraud scheme involving a web of companies and chains of "transactions" where the sole aim was to defraud the Revenue of VAT due to it.

The VAT Returns in Question

282. The relevant VAT returns are as follows:

VAT Period	**Output VAT total**	**Input VAT total**	**Net outputs**	**Net inputs**	**Net tax**
02/13 [1.12.12 to 28.2.13] *(due 7.4.13 submitted on 6.4.13)*	£585,491.90	£534,838	£2,927,541	£2,832,884	£50,653
99/99 [1.3.13 to 31.3.13] *(due 15.5.13 submitted on 14.6.13)*	£1,506,247	£1,475,939	£7,531,444	£7,482,433	£30,307

283. On 25 October 2013 Officer Chisman issued a notice of VAT assessment for 99/99.

284. On 30 March 2015 Officer Chisman withdrew this assessment and notified Premier Metals that there was to be a replacement assessment in the sum of £1,409,056.

285. On 30 March 2015 the partnership was issued with a decision refusing it the right to deduct input tax in the sum of £534,838.41 for the period 02/13 and £1,409,056.37 in respect of the period 99/99.

286. A corresponding VAT assessment in the same amounts was also issued on 30 March 2015.

287. On 7 July 2015 the partnership requested a review of the decision to refuse the entitlement to deduct input tax and consequent assessment.

288. On 30 September 2015, the review concluded that the decision should be upheld.

289. On 15 March 2016 a notice of amendment was made to the assessment reducing the amount of input tax denied to:

- 02/13 - £521,895
- 99/99 - £1,409,056

The Transactions Subject to this Appeal – Fraudulent VAT Loss and Connected with Fraud

290. HMRC provided an overview of the 56 transaction chains which are the subject of this appeal. Each of the 56 transactions traced to a fraudulent defaulting trader or contra trader as per **Tables 1 and 2** below:

Table 1: Fraudulent defaulting traders in Premier Metals' transaction chains in VAT period 02/13

Deal no.	Defaulter	Witness Statement
1-20,22	Recycling Solutions (UK) Ltd	John Thomas Hughes

Table 2: Fraudulent defaulting traders in Premier Metals' transaction chains in VAT period 99/99

Deal no.	Defaulter	Witness Statement
Deals 1-26,28-31,33,35-40,42,44,51-54	Recycling Solutions (UK) Ltd	John Thomas Hughes
Deals 47-50, 55-56	UAA Holdings Ltd	Colin Barry Needs
Deals 27, 32, 43	Intekx Ltd	Lee Nevin

Evidence of contrivance - an orchestrated scheme to defraud the Revenue

291. HMRC's case is that the Appellant's transactions were carried out as part of an orchestrated scheme to defraud the Revenue and that the Appellant partnership and partners knew, or in the alternative should have known, that the transactions were connected with fraud. HMRC rely upon the inferences that can be drawn from the evidence as a whole in relation to the Appellant's transactions.

292. HMRC submit that the "surrounding circumstances" of the Appellant's transactions include that they took place as part of a highly orchestrated and well-oiled fraud so that, following *Mobilx* at §§82-83 the Tribunal could, and it is submitted should, take that into account in determining whether the Appellant knew or should have known that its transactions were connected with the fraudulent evasion of VAT.

293. The Tribunal is entitled to conclude that the more heavily orchestrated and efficient a fraudulent scheme is the more likely it is that each party knew its role therein. It is the facts of such a scheme in the individual case that can give rise to the irresistible inference that the relevant Appellant knew of its role therein.

294. The Tribunal has examined the wider context of the Appellant's transaction chains, as set out below, and conclude that they were the product of orchestration by fraudsters as part of an overall scheme to defraud the Revenue, as opposed to transactions which occurred in an ordinary commercial market.

295. The Appellant, whilst disputing knowledge, accepts by email 15 May 2017 that the transactions were "part of a co-ordinated pattern of pre-arranged trades designed to produce a fraudulent tax loss."

296. The Tribunal is satisfied that the following factors suggest that the transaction chains were orchestrated as part of an MTIC fraud:

i. The general patterns in the transaction chains;
ii. Continued trade after defaulting traders have been deregistered;
iii. The speed of the transactions; and
iv. Other parties in transaction chains who were also not credible.

i. The general patterns in the transaction chains

58. HMRC demonstrated the consistency in the composition of the deal chains, with the same traders regularly appearing in the same order in the chains, all of which then trace back to a VAT loss, a factor beyond coincidence in a supposedly open commercial market. For example, bar one transaction in which Premier Metals sold the goods on to WH Marren Ltd (deal 37), all of the transactions featuring Recycling Solutions (UK) Ltd followed the same patterns in 02/13 and 99/99.

297. In VAT period 02/13 the deals followed the pattern:

 Recycling Solutions – Premier Metals – Centaur Metals (deals 1 to 9, 11-14, 16-19)
 Recycling Solutions – Premier Metals – CF Booth (deal 10, 20, 21)
 Recycling Solutions – Premier Metals – C&C Metal Trading (deal 15)

298. In VAT period 99/99 the deals followed the same pattern:

 Recycling Solutions – Premier Metals – Centaur Metals (deals 23-26,28-31,38,40,44,52,54)
 Recycling Solutions – Premier Metals – CF Booth (deal 22,33,35,51)
 Recycling Solutions – Premier Metals – C&C Metal Trading (deal 36,39,42,53

299. Montana Angels Ltd has varied its supply chain once in the 02/13 and 99/99 period. In deals 27 and 32 it purchased the metal sold to Premier Metals from Conrad Lea Distribution Ltd and in deals 34 ,41, 45 and 46 it purchased the metal from FGF Consultants Ltd. Deals 47 to 50 and 55 to 56 followed identical patterns in lengthy transaction chains (with 6 identified traders) featuring the fraudulent defaulting trader UAA Holdings.

300. Further in his Officer Mark Chisman observes that there is no commercial rationale to the chains, nor are they hierarchical because they all show small companies with no staff and limited resources selling to increasingly bigger companies.

ii. Continued trade after traders deregistered

301. **Table 3** below sets out the deregistration dates of the fraudulent defaulting traders and contra trader in relation to their trade in the transaction chains which are the subject of this appeal. It is apparent that both Recycling Solutions (UK) Ltd and Westgate Metals Ltd featured in transaction chains with Premier Metals after they had been deregistered.

302. It appears that those organising this fraud showed a flagrant disregard of the fact that traders at the commencement of their transaction chains had been deregistered in the pursuit of profit. In addition, had Premier Metals conducted proper due diligence it would have identified, for example, the fact that Recycling Solutions (UK) Ltd (which was its direct supplier) had been deregistered prior to conducting numerous further transactions with it, namely deals 36 to 40, 42 to 44 and 51 to 54.

Table 3: Defaulter deregistration dates

Fraudulent defaulting trader.	**Date of last deal in Premier Metals' 56 transaction chains**	**Date of deregistration**
Recycling Solutions (UK) Ltd	Deal 54 is on 26 March 2013	***11 March 2013*** *Deregistered on 11 March 2013 - letter following visit to accountant who advised not a client. Deregistration date amended to **3 April 2013** as invoices raised by Recycling Solutions (UK) Ltd up until that date.*
UAA Holdings Ltd	Deal 56 is on 26 March 2013	*Deregistered on **1 May 2013** following visit to Mr Adeyeri where he explains how VAT number compromised.*
Westgate Metals Ltd	Deal 46 is on 21 March 2013	*Deregistered following visit to business address where occupier unaware of Westgate Metals Ltd on **17 January 2013.** However sales continued after deregistered.*
Intekx Ltd	Deal 43 is on 19 March 2013	*Deregistered on **21 May 2013** due to abuse of VAT system.*

iii. The speed of the transactions

303. The transactions were undertaken on a back-to-back basis, occurring on the same day or within a very short period of time, for both the same goods and the same quantity of goods. In each deal, the Appellant was able to match its customer's order to its supplier's available stock without being left holding excess stock, and without having to obtain stock from one or more

other suppliers. The Appellant's ability to achieve this on a repeated basis was incredible. It is submitted that such synchronicity does not exist beyond contrived trading schemes.

iv. Other parties in the transaction chains were also not credible

304. Miya Trading Ltd was the supplier to Premier Metals in deal 43. Officer Chisman has exhibited evidence of a visit to Miya Trading Ltd by HMRC on 7 August 2013. During the course of the visit the director Mr Amin was questioned about his one supply to Premier Metals which occurred on 19 March 2013 at the time Miya Trading Ltd had been dissolved. During the course of the visit he denied all knowledge of this transaction. However, he reversed this statement by email a couple of hours after the visit.

305. See also the evidence below concerning other companies in the transaction chains which had a connection with Jonathan France, e.g. Centaur Metals & Alloys Ltd, CF Booth Ltd and C&C Metals Ltd.

306. HMRC submit that the correct inference to be drawn by the Tribunal from the evidence of contrivance set out above is that the Appellant knew full well that its transactions were connected with the fraudulent evasion of VAT.

307. The Tribunal is satisfied by the fact that the transactions were orchestrated by fraudsters as part of an overall scheme, which is indicative of the fact that someone acting on behalf of the Appellant partnership had knowledge of the fraud as part of the "surrounding circumstances."

308. However, it does not assist with identifying who that person would likely be. It is conceded that Mr France had knowledge that the transactions were connected to the fraudulent evasion of VAT. The fact that the transactions were orchestrated as part of an MTIC fraud does not assist in deciding whether the partners knew or should have known of this.

Other Factors relevant to Knowledge or Means of Knowledge

(i) Repeated connection with fraud – the unlikelihood of coincidence

309. Officer Chisman states at §72 of his witness statement dated 28 October 2016 that 97.5% of the partnership's input tax claim for 02/13 and 95.4% of the partnership's input tax claim for 99/99 has been traced back to a fraudulent VAT loss.

310. Between 4 February 2013 and 26 March 2013, the Appellant conducted 56 deals, which traced to a fraudulent VAT loss. Only one wholesale metal deal did not.

311. The repeated tracing of transactions to a fraudulent VAT loss is no coincidence and is indicative of the fact that the Appellant's transactions formed part of one or more fraudulent and contrived schemes to defraud the Revenue. Further HMRC submit that the noncoincidental tracing of deals to a VAT loss is also strongly supportive of their primary case that the Appellant knew that its transactions were connected with fraud and the alternative case that it should have known of the same.

312. The Tribunal is entitled to ask why it was that companies engaged in MTIC chains were so readily attracted to Premier Metals? HMRC submit that the answer to this question is that someone at Premier Metals knew exactly what it was involved in.

(ii) New line of business and increased turnover

313. It is apparent from Officer Chisman's witness statement of 27 March 2017 at §93 that the vast proportion by turnover of the Appellant's trade in the VAT periods 02/13 and 99/99 related to primary metal trading as opposed to scrap metal trading, namely 99.05% and 95.46% respectively. This is to be contrasted with the previous VAT return 11/12 in which there was no trading in primary metals. The trading in primary metals coincided with the arrival of Mr France as a consultant.

314. As noted in HMRC's decision letter 30 March 2015, HMRC took into account the increase in turnover in a new line of business in making its decision to refuse the right to deduct input tax. When the partnership was registered for VAT it stated that its main business would be scrap metal trading. The turnover in the first 12 months of trading was estimated to be £100,000.

315. The decision letter notes that turnover gradually increased from £113,405 in 05/08 to £206,512 in 11/12 VAT period. The turnover then increased exponentially. The partnership declared turnover of £2,927,541 on its 02/13 VAT return and £7,531,444 on its 99/99 VAT return. This was achieved despite the lack of any evidence of significant advertisement and promotional expenditure and without any of the infrastructure that would normally be expected of a business with such level of turnover.

316. The sudden increase in turnover (without significant investment) in a new line of business (primary metals) introduced by a disqualified director, is strongly suggestive of fraud. When coupled with the fact that all bar one deal in primary metals traced to a fraudulent VAT loss, the evidence is overwhelming that Mr France (and possibly also Mr Urfan) had knowledge of fraud.

317. The question is whether the knowledge of the partners can be inferred. They were responsible for ensuring that the partnership was run properly. It is fair to record that alarm bells should have been ringing loudly when the turnover increased so suddenly without any investment. They were also receiving 50% of the profit which should have caused them to question whether the arrangement was quite simply "too good to be true."

(iii) Awareness of MTIC fraud

318. The partners' awareness of MTIC fraud is also relevant to determining the question of knowledge or means of knowledge of a connection with fraud.

319. The history of contact between HMRC and the partnership is set out in the facts relating to the First Issue decided above. On 23 March 2012 during HMRC's visit the risks of MTIC were briefly described and Notice 726 was also issued to the partners. Prior to this visit Premier Metals' representative was also warned in a telephone call on 9 March 2012 that fraud in the trade sector would be discussed at the visit. However, the Tribunal has accepted that these 'warnings' to the Sandhams were not given with much weight as set out in its factual findings in relation to the First Issue.

320. As set out above, at HMRC's visit of 23 March 2012 Mr Sandham volunteered that they had previously been approached to do "deals" that "didn't appear to be right" and they had refused to go ahead with these. He mentioned a previous offer to purchase from a Norwegian

company, but they had not done this, and they had never traded with any companies in the EC or abroad.

321. In his witness statement dated 27 March 2017, at §18 (set out above) Nicholas Sandham referred to the fact that he had a conversation with a "Patrick Knowles" around the time of this visit who told him "when you are dealing with high value metals, especially if it is in large amounts so there is lot of money involved, it is important that you do "due diligence." Mr Sandham stated, "It's not something you would do with a £100 scrap metal customer (at that time – the rules have changed since then) but for high value trades it sounds very sensible."

322. Therefore prior to undertaking the transactions which form the subject of this appeal the partners had been given some, although limited warning about MTIC fraud and should also have reasonably been aware from Notice 726 of the type of checks which it could conduct in order to avoid being caught up in MTIC fraud.

323. In addition, by his own account Mr Sandham had been warned about the need to conduct proper due diligence when dealing in high value metals.

324. Despite this, the Appellant partnership's due diligence was wholly inadequate and Mr Sandham's evidence (as referred to in the discussion section in more detail) was inconsistent regarding whether he inspected the due diligence files or not. At the minimum it revealed a failure to take reasonable care in ensuring that due diligence was conducted in relation to primary metals trading by delegating responsibility to Mr France without adequate supervision.

iv. Background of Jonathan France and further information about Eric France & Son (Metals) Ltd, JKL (Wakefield) Ltd, CF Booth Ltd, Centaur Metals and Alloys Ltd and C&C Metals Ltd.

325. In addition to the evidence set out within the First Issue regarding Mr France's subsequent criminal conviction in 2018 for multiple offences, there is earlier and additional evidence which demonstrates significant impropriety in relation to Mr France. This is not least the fact that he had been disqualified as a director for 14 years in 2004.

326. This evidence supports the fact that Mr France was knowingly involved in a fraudulent and contrived MTIC scheme. It also demonstrates his connection with other traders which feature in the 56 transaction chains and the fact that HMRC has issued tax loss letters and significant assessments against these traders.

327. Some of this evidence, where publicly available at the time – at or before March 2013 - is also relevant to the state of mind of the partners, Mr and Mrs Sandham. It would be reasonably incumbent upon the partners to make adequate checks upon those conducting valuable transactions in their name. It was not reasonable to delegate all trading, watch the turnover increase exponentially, profit from the transactions by 50% and yet fail to make proper enquiries about the persons doing the deals.

328. Mr Sandham notes in his witness statement 27 January 2017 at §97, HMRC's information Notice 726 does not apply to metals. However, at the same as this was issued he was also provided with "How to Spot Missing Trader Fraud" leaflet which refers to KYC checks and the fact that HMRC can deny input tax if traders do not conduct intelligent risk assessment or ignore adverse indicators of risk and they knew or should have known of a connection with fraud.

Eric France & Son (Metals) Ltd

329. Jonathan France was a director of Eric France & Son (Metals) Ltd which traded from the same premises as JKL (Wakefield) Ltd. It was placed into voluntary liquidation on 14 February 2012 with debts of £314,501.

330. His acceptance of an undertaking on 30 January 2004 by Mr France prevented him from being a director of a company for 14 years from that date. The disqualification notice notes that he failed to keep, preserve and deliver up adequate accounting records when required to do so by the liquidator of Eric France.

Sole proprietor Jonathan Dean France

331. The next entity to trade from the PPOB of JKL (Wakefield) Ltd was Jonathan Dean France as a sole proprietor. He was registered for VAT from 14 January 2002. He appears to have ceased to trade on or around 30 September 2008 and was made personally bankrupt on 3 December 2008 and is still undischarged. The amount of HMRC's claim in the bankruptcy was £65,004.584.

JKL (Wakefield) Ltd

332. The business of JKL (Wakefield) Ltd then traded from the same premises from 30 September 2008 to its insolvency on 26 February 2013. HMRC's claim in the insolvency has been accepted by the liquidators as £69,813,557. The directors of the business have both been disqualified as directors and their misconduct included allowing Jonathan France, a disqualified director and undischarged bankrupt to act as a director of JKL (Wakefield) Ltd.

333. Mr France was convicted of multiple offences in relations to his dealings on behalf of this company as are set out within the First issue.

334. In the visit report in respect of the creditors voluntary liquidation meeting of November 2013 it is recorded that Mr Sandham stated that he did know when Jonathan France joined the Company that he could not be a director. Mr France joined the partnership in December 2012 / January 2013 and this became the Company in April 2013.

335. Mr Sandham does not dispute that he said this at the meeting but states in his witness statement 27 January 2017 at §113 that he only became aware of Mr France's disqualification in August 2013 when Mr France left – therefore not at the time Mr France joined the partnership in January 2013 or Company in April 2013. He was cross examined about this. Mr Sandham stated he did not know why he said what he did at the creditors' meeting in November 2013 when he stated he did know of Mr France's disqualification at the time of Mr France joining the 'company' (for which read 'partnership') but there was a lot going on at the time of the November meeting because the Company had just gone into liquidation.

336. The Tribunal has already accepted this evidence of Mr Sandham that despite what he said at the Creditor's meeting, Mr Sandham was not aware Mr France had been disqualified when Mr France joined the partnership. The Tribunal returns to this topic in the discussion section below.

337. In his witness statement dated at §78 Mr Sandham stated that Jonathan France had come from JKL (Wakefield) Ltd. At §89 of his witness statement, Officer Chisman describes that

JKL (Wakefield) Ltd was actively involved in MTIC fraud and HMRC had appointed its own insolvency practitioner in the liquidation. The Tribunal accepts this evidence.

338. A VAT assessment was issued against JKL (Wakefield) Ltd on 21 December 2012 in the sum of £20,480,852. A further assessment was issued on 30 January 2014 in the sum of £21,445,517. Neither of these assessments were appealed.

339. On 3 June 2015, HMRC served a statutory demand on Jonathan France. On 9 June 2015 the legal representative of Mr France wrote to HMRC to dispute the statutory demand. HMRC responded on 15 June 2015. Although Jonathan France initially disputed the statutory demand, he never filed an appeal in relation to it.

340. At §20 of Officer Chisman's witness statement he refers to the fact that JKL(Wakefield) Ltd went into liquidation in March 2013. Mr Sandham in his witness statement stated at §40 states that he was in the office at the yard when Jonathan France received a call to say that JKL(Wakefield) Ltd "had gone bust." It was the then that Jonathan France suggested going into primary metals trading with his main customers CF Booth Ltd and Centaur Metals and Alloys Ltd.

CF Booth Ltd and Centaur Metals and Alloys Ltd

341. Officer Chisman in his witness statement at §23 to 27 detailed the fact that in January 2013 JKL (Wakefield) Ltd was the sole supplier of copper cathode to CF Booth Ltd and they also supplied one load in February 2013. When JKL (Wakefield) Ltd was put into provisional liquidation by HMRC in February 2013 none of these sales were declared to HMRC.

342. HMRC issued 17 tax loss letters to CF Booth Ltd, the eighth and thirteenth related to supplies by JKL (Wakefield) Ltd at a time when Jonathan France was working for them. The tax loss incurred in these transactions relating to supplies from JKL(Wakefield) Ltd totals £4,156,463.

343. Officer Chisman in his witness statement dated 27 March 2017 at §28 to 31 detailed the fact that Centaur Metals & Alloys Ltd have also received tax loss letters, not only in relation to its supplies from Premier Metals but also supplies from Prism (Leeds) LLP.

344. On 14 October 2014, liquidators were voluntarily appointed to Centaur Metals & Alloys Ltd and on 20 January 2016 it was dissolved.

C&C Metals Ltd

345. Nicholas Sandham stated in a visit by HMRC on 12 August 2013 that Jonathan France had told him he previously worked for C&C Metals Ltd and wanted to work with Premier Metals as he lived nearby. Premier Metals subsequently sold metal to C&C Metals Ltd in deals 36, 39, 42 and 43. Given the connection with Jonathan France this might have alerted Mr Sandham to the fact that these transactions were potentially not arms' length in their commerciality.

Publicly available information about Jonathan France and connected companies

346. Information about JKL (Wakefield) Ltd's debts were in the public domain as evidenced by a newspaper report 27 February 2013 and Companies House documents. The newspaper

report referred to a statement of the liquidators which stated that, "according to the director's statement of affairs, £21m of the company's total debts of £22m relate to unpaid VAT."

347. A basic google search reveals that any person can check if a person or company has been declared bankrupt or insolvent. A search of Jonathan France in the Bankruptcy and Insolvency register results in 2 records for Jonathan Dean France born on 21 February 1972. The searches reveal that there was an insolvency case in 2008 in which with effect from 20 November 2009, the bankrupt's discharge was suspended until fulfilment of conditions as specified in the order.

348. On 10 July 2013 (albeit after the relevant transactions had taken place) there was a bankruptcy restriction undertaking for a period of 12 years. A basic google search of "Jonathan Dean France" provides information as to his disqualification and business activities. In addition, SKS (GB) Ltd have released a report regarding Jonathan France's relationship with Premier Metals (Leeds) Ltd dated 20 September 2013.

349. There is no evidence that the Sandhams were aware of any of this information at the relevant time or any time prior to August 2013.

v. Involvement of Nicholas Sandham with H Starkey & Sons Ltd

350. HMRC's visit report of 13 June 2013 suggests that Nicholas Sandham visited H Starkey & Sons Ltd on at least one occasion.

vi. Disqualification of Mr Sandham

351. The transactions of the Company post-dated those which are the subject of this appeal. They resulted in the disqualification of Mr Sandham being a director for 10 years. The decision was made on the basis that Mr Sandham caused or allowed the Company to participate in transactions which were connected with the fraudulent evasion of VAT. The report refers to the amount of input tax which was denied in respect of transactions by the Company, namely £5,498,985 in VAT period 06/13 and £4,142,038 in VAT period 09/13. The Tribunal pays no regard to the subsequent disqualification of Mr Sandham as it relates to events taking place in the Company rather than the partnership and there may be reasonable reasons, as were relied upon, that he chose not to appeal this disqualification.

vii. Transactions were not being run on ordinary commercial lines

352. The Tribunal concludes for the reasons set out below that the primary metal trading of Premier Metals was not being run on ordinary commercial lines. The question is whether it can be inferred from this that Mr and Mrs Sandham, knew or should have known of this, and more particularly that the transactions were connected to the fraudulent evasion of VAT.

353. In the following key areas the evidence shows that Premier Metals' relevant transactions were not being undertaken on ordinary commercial lines:

i. Profits and pricing;
ii. Premier Metals' transaction documentation;
iii. Premier Metals' inspection of goods; and
iv. Premier Metals' due diligence checks.

(i)Profits and pricing

354. No one in the supply chains ever made a loss which is remarkable given the fluctuating price pf "primary metals" being traded. There is evidence that the prices at which Recycling (UK) Ltd supplied copper cathode and nickel to the Appellant was lower than the London Metal Exchange spot price for copper cathode. The Appellant partnership, through Jonathan France, was aware of the spot prices on the LME or should reasonably have been and should have questioned why supplies were being made at a lower price than the spot value.

(ii)Premier Metals' transaction documentation

355. If the transaction chains had occurred in ordinary commercial circumstances, the anomalies set out below would not have arisen.

Retention of title clauses

356. The majority of the participants in the transaction chains had no terms on their transaction documents covering important matters such as the passage of risk and passage of title.

357. However, some purported to retain title on their sales invoices. For example, Miya Trading Ltd and Montana Angels Ltd both had terms and conditions specified on their invoices with retention clauses.

358. A Montana Angels Ltd invoice states, "Title of goods remain the property of Montana Angels until full and final payment has been received." A Miya Trading Ltd invoice states, "Title for the above product(s) will not be passed to the purchaser until full payment has been received and the payment terms are on delivery."

359. However, at §81 to 82 of his witness statement Officer Chisman notes that Premier Metals always received payment from its customer Centaur Metals & Alloys Ltd before paying Montana Angels Ltd. It therefore appears that Premier Metals did not have title to the goods when it sold them to Centaur Metals & Alloys Ltd. In the Miya Trading Ltd deal the goods were sent to CF Booth Ltd and CF Booth Ltd paid Premier Metals on 19 March 2013. This was prior to Premier Metals paying Miya Trading Ltd. Once again it appears that Premier Metals did not have title to the goods when it sold them to CF Booth Ltd.

360. It can be seen that on these occasions, Premier Metals sold goods that it did not own, to companies who were willing to pay Premier Metals for goods that it did not own. The Tribunal is satisfied that this degree of unregulated trust shows that each party was sure that they would be paid because they knew that payment would be made down the chains come what may.

Appellant paid by customers before it paid its suppliers

361. In the vast majority of the denied deals the Appellant did not pay its suppliers until it had received payment from its customers. This is the case save for deals 28, 33, 35, 42, 46 and 47 where the Appellant made payment first, followed very shortly by payment from its customer.

362. At §90 of his witness statement, Nicholas Sandham acknowledged that Jonathan France's method was to find a buyer for a load and get their commitment to take it before he agreed to

purchase the load in the first place. The customer would pay for it and that would provide funds for Premier Metals to pay the supplier for the load.

363. At §7 of her witness statement Charlotte Sandham states that they were able to undertake the large transactions in primary metals because "the cashflow was based on the customer paying before the supplier had to be paid, which was important because we couldn't possibly have funded it otherwise."

364. The partners did not properly question why Mr France was able to secure such favourable terms and why the customers were prepared to extend credit in this way. In addition, it is extraordinary given the lack of due diligence and lack of formal written contracts that someone within the Appellant appears to have trusted the counterparties to honour their obligations in repeated transactions for metals over the value of £100,000. If they had not honoured their obligations, then the partnership would have been exposed to the risk that it would be left with goods for which its purchasers could not pay.

365. The conclusion to be drawn is that someone within the partnership knew perfectly well that its suppliers and customers would not let it down because the transactions had been pre-arranged. Given that Mr France had knowledge, the question remains whether the partners knew or should have known of this.

366. In the circumstances, in conjunction with the exponential increase in turnover and 50% of the profits, it would have been reasonable for the partners of Premier Metals, had they examined and analysed it, to conclude that the actual payment pattern which it was being allowed to enter was not a reasonable commercial arrangement. The Tribunal returns to this topic in the discussion section below.

Payments in dollars

367. In some of the invoices upon which Premier Metals claimed input tax, it was charged in US Dollars by Recycling Solutions (UK) Ltd. Given the trade between the 2 entities was conducted in the United Kingdom it is unclear why the invoices were made out in US dollars. Mr Sandham in his witness statement at §95 simply states that he took Jonathan France's word that they needed to have a dollar account as opposed to making enquiries regarding the same. The Tribunal returns to this topic in the discussion section below.

Third party payments

368. Of greater significance is the fact that the Appellant repeatedly made third-party payments to foreign bank accounts in respect of its purchases from Recycling Solutions (UK) Ltd. In each of these supplies by Recycling Solutions (UK) Ltd, it was supplied by Triotrade a company based in Cyprus. Recycling Solutions (UK) Ltd requested payment be made by Premier Metals to a third-party bank account.

369. In his witness statement dated 28 October 2016, Officer Chisman at §78 has set out a table showing the destination of the third-party payments in respect of the transactions with Recycling Solutions (UK) Ltd.

- In respect of invoices PM001 to PM005 payments were made to Eurowire in WBK Bank Poznan, Poland.
- In respect of invoices PM006 to PM012 payments were made to N.E.W Business

Solutions AG in Valartis Bank (Lichenstein) AG.
 In respect of invoices PM013 to PM025 payments were made to Williams and Aston Group in Hong Kong.

370. The partners of Premier Metals did not question this arrangement, refuse to make the payments, or seek instead to make payments to its known suppliers. It would be expected that a business carrying on a normal commercial trade would query a request to make third-party payments and, if the request was made prior to the transaction taking place, seek to extricate itself from the deal. Such a request would also alert a business to the fact that it might be able to purchase goods from someone lower down the chain and reduce the cost of goods. The fact that no one with the partnership questioned the request to make third-party payments suggests that the transactions were artificially contrived.

371. In his witness statement, Mr Sandham at §86 and 89 states that he was unaware that payments were being made to third-party bank accounts and this was something he left to a member of staff in the office. In addition, he cannot explain why this practice was occurring.

372. Officer Chisman notes at §136 and 137 of his witness statement that Mr Sandham as the main partner and manager of Premier Metals delegated the responsibility of payments to suppliers to employees of Premier Metals without properly reviewing and ensuring that the payments were done appropriately. Further he refers to the fact that Mr Sandham did not properly supervise the activities of the business and appears to have lost control of the management of Premier Metals. The Tribunal accepts Officer Chisman's conclusions but returns to this topic in the discussion section below.

373. The turnover as noted above was £2,927,541 on its 02/13 VAT return and £7,531,444 on its 99/99 VAT return. It was an unreasonable abnegation of responsibility to fail to make any enquiries into the amounts and destination of the monies involved in transactions to this value.

No formal written contracts

374. Despite the high value of the goods being purchased and sold the Appellant partnership did not enter into any formal written contracts with its suppliers or customers in respect of the transactions, which are the subject of this appeal. There was no formal returns/exchange policy for any party, should the goods be damaged, and matters such as transfer of title, payment and delivery terms were also not subject to any formal agreement. It would be expected that a business carrying on a normal commercial trade would ensure that redress in such cases would be set out in a formal written agreement. The absence of written contracts suggests that they were not required as the transactions had been pre-arranged.

375. In his witness statement at §91 Mr Sandham states that it is misleading to state that there were no formal contracts and cites the fact that the transactions were supported by invoices and delivery notes. Officer Chisman in his witness statement 27 March 2017 at §140 to 154 considers the question of contracts. He states that it is HMRC's experience that in metal trades formal contracts exist between a supplier and customer. The invoices and delivery notes do not demonstrate the contractual relationship and terms agreed. In any event he states that only 35 of the 56 deals had delivery notes. The Tribunal returns to this topic in the discussion section below.

No insurance

376. No evidence has been produced to demonstrate that Premier Metals insured the goods it purchased or sold despite the value of the goods. Nicholas Sandham informed Officer Chisman at the visit on 12 August 2013 that suppliers paid for transport to H Starkey & Sons Ltd, Premier Metals paid for the unloading and the customer was responsible for transport from H Starkey & Sons Ltd.

377. In his witness statement at §93 Mr Sandham states that Premier Metals did not insure the goods. He states that he understood Starkeys insured the goods whilst in their possession and the hauliers insured them whilst they were in transit. Jonathan France told him this was how it worked, and he believed him.

378. As Officer Chisman states in his witness statement 27 March 2017 at §151, Mr Sandham relied upon the word of Jonathan France without confirming what the practice was or verifying the goods were insured. If indeed there was no insurance, then the practical effect was that if the goods were lost stolen or damaged in transit then the Appellant would be unable to recoup any loss. An absence of insurance suggests that the Appellant knew that no matter what happened to the goods it would obtain payment. The Tribunal returns to this topic in the discussion section below.

Premier Metals' inspection of goods

379. At §85 witness statement, Nicholas Sandham, stated that there was always somebody from Premier Metals present at the offloading of the materials to make sure the weights were correct, usually Dennis McGee or Robert Wilson. However, no evidence has been supplied regarding this. In addition, there are not delivery notes for every deal.

Premier Metals' Approach to Assessing its Counterparties – Due Diligence Checks

380. The Appellant's checks were inadequate, and superficial. At the visit on 12 June 2013 Nicholas Sandham advised that Premier Metals, "had taken on staff from Eric France Metals when they had gone bust around March 2013. These staff brought with them a knowledge of suppliers and customers. Nicholas Sandham acknowledged that he had not checked these out as they were established businesses and had been trading for several years and his staff had worked for them."

381. In addition, he acknowledged that "he does not check new customers and suppliers although he has met with some directors and managers." The bookkeeper Elaine Frost stated that she checked the Europa website. Officers of HMRC advised Premier Metals that they could use HMRC to verify the VAT registration numbers of new customers and suppliers. Notice 726 was also provided as were leaflets concerning "How to spot missing trader fraud."

382. At the visit on 12 August 2013, Nicholas Sandham stated that "he asked Jonathan France if he had done due diligence checks and everything was above board a number of times and Jonathan France told him it was." He did not check his work. He stated, "Jonathan France was like a closed book. He worked from his private diary which he would let no one see because it was his private diary." Nicholas Sandham also confirmed that he did not ask Jonathan France to see the due diligence.

383. Mr Sandham's witness statement 9f 27 January 2017 at §75 and §99 appears to contradict this. In the witness statement he describes Jonathan France as leaving the due diligence folder on his desk and not being secretive. Mr Sandham raises the possibility that Jonathan France was deliberately manipulating him as he knew Mr Sandham would look through the folder. Further Mr Sandham says that he did inspect the due diligence file.

384. Nicholas Sandham confirmed in the visit on 12 August 2013 that he had not met any of his suppliers with the exception of Christian from C&C Metals who had visited Premier Metals once to see Jonathan France. He had not met or spoken with anyone from Paragon Commodities or Recycling Solutions.

385. With regard to customers, Ray Deakin from Centaur Metals had visited Premier Metals and Nicholas Sandham understood from the conversations which Ray had with Jonathan France that Centaur exported the metals which they bought from Premier.

386. The Tribunal returns to this topic in the discussion section below.

Due Diligence

387. During the course of the meeting on 12 August 2013 Elaine Frost confirmed that Jonathan France had prepared a file of due diligence which he had conducted. She provided this to HMRC at the meeting.

388. Analysis of the due diligence contained in demonstrates that in relation to the direct counterparties of Premier Metals (which feature in the 56 transactions forming the subject of this appeal) the only checks which Premier Metals conducted were in respect of:
- Montana Angels Ltd
- C&C Metal Trading Ltd

389. However, the checks were valueless, in terms of being effective due diligence, as they postdated the relevant transactions by 3 to 4 months.

390. It is notable that there no due diligence was provided in relation to the following suppliers:

- Recycling Solutions (UK) Ltd
- Miya Trading Ltd

391. It is notable that no due diligence was provided in relation to the following customers:

- Centaur Metals & Alloys Ltd
- CF Booth Ltd
- WH Marren Ltd

392. The entirety of the due diligence handed over to HMRC on 12 August 2013, is summarised in the table below. The majority relates to traders who are not counterparties in the relevant transactions:

Name of company/individual checked on Europa	**Date of check on Europa**	**Other checks conducted**	**Date of first transaction with this trader where the subject of this partnership appeal**
H Starkey and Sons Ltd	18.6.13		Freight forwarder used in transactions. First deal on 1.2.13
Paragon Commodity Trading Ltd	18.6.13		
Montana Angels Ltd First transaction	**18.6.13**		**4.3.13 [Deal 27]**
Lords Metal Ltd	5.8.13		
Intertrade Global	2.7.13		
Jonathan Dean France	18.6.13		Consultant engaged to conduct transactions. First deal on 1.2.13
C&C Metal Trading Ltd	**18.6.13**		**First transaction 18.2.13 [Deal 15]**
CMS Metals Ltd	18.6.13		
Acorn Commodity Ltd	2.8.13	VAT certificate	
AG Global Markets	8.8.13	VAT certificate Certificate Incorporation Bank details Self-disclosure form Confirmation shareholding Companies House details	
Anna A J Associates	24.6.13	Website details Companies House details	

		Vat certificate Certificate of Incorporation Passport	

393. In Nicholas Sandham's witness statement at §99, he makes further assertions regarding due diligence and produces additional due diligence which he states that his VAT consultant David Sweeting has located since the start of the proceedings Officer Chisman has analysed this material and at §104 to 122 of his witness statement he concludes that the majority of the material is irrelevant to the transactions which form the subject of this appeal. The Tribunal accepts this conclusion. It is summarised in a further table below.

394. The only relevant traders for whom further due diligence has been provided are:

- Recycling Solutions (UK) Ltd
- Miya Trading Ltd

395. With regard to Recycling Solutions (UK) Ltd it is notable that the introduction letter is dated 6 June 2012 which pre-dates the involvement of Jonathan France by 6 months and Premier Metals was not doing any deals in primary metals at that time.

396. With regard to Miya Trading Ltd, the first transaction which Premier Metals conducted with this trader was on 19 March 2013 therefore the email referring to "all the stuff on Miya Trading" was dated 5 months too late.

397. The additional Companies House documentation appears to have been printed out on 12 July 2011, suggesting that the due diligence documentation held for Miya Trading Ltd was old, out of date and a held for a significant time prior to the involvement of Jonathan France. In addition, Miya Trading Ltd was dissolved on 19 February 2013 prior to the transaction it conducted with Premier Metals on 19 March 2013. The payment in relation to the Miya Trading Ltd deal was to a bank account held by a company named Anushya Ltd.

Name of company/individual	**Date of check/information**	**Date of first transaction with this trader where the subject of this partnership appeal**
Miya Trading Ltd	**14.8.13 email referring to "all the stuff on Miya Trading."**	**First transaction 19.3.13 (Deal 43)**
CMS Metals Ltd	Date unclear re when received VAT certificate Trade application form	

	Introduction letter Passport Certificate Incorporation Company information	
Recycling Solutions (UK) Ltd	**VAT certificate** **Certificate of incorporation** **Introduction letter 6 June 2012 [EX7-28]**	**First transaction 1.2.13 (Deal 1)**
Paragon Commodity Trading Ltd	VAT certificate Certificate of incorporation Passport	
Miya Trading Ltd	**Certificate of incorporation** **Passport** **Companies House information [dated 12.7.11]** **Driving licence [EX7-34]**	**First transaction 19.3.13 (Deal 43)**
CMS Metals Ltd	Email to "Charles J" undated Invoices 1.7.13, 28.7.13 Email from "Charles J" 28.6.13 Bank statement in June 2013 Invoice 27.6.13 Undated inter account transfer 56 Email 27.6.13 Jonathan to Jordan Certificate of quality Sales confirmation 26.6.13 Purchase order 26.6.13 Supplier declaration 27.6.13 and 1.7.13	

HMRC's submissions on the Second Issue

398. Ms Goldring on behalf of HMRC submitted as follows.

399. The Appellant's trading bears the hallmarks of those who knowingly involve themselves in deals connected with MTIC trading. The Appellant achieved an exponential increase in turnover in a matter of less than 2 months, trading in a field it was not previously experienced

in. It did so by using the services of a disqualified director (Jonathan France) and a man experienced in MTIC related trading (Mohammed Urfan) who had also been disqualified as a director in 2011 for a period of 14 years.

400. The Appellant purchased from a group of traders that were previously unknown to it. It was well aware of the risks of MTIC fraud because Nicholas Sandham had received advice personally from HMRC on that subject and on his own account from Patrick Knowles.

401. The Appellant made virtually no attempt to check its counterparties. Jonathan France and Mohammed Urfan were given a free hand without real supervision or oversight to trade with whomsoever they chose.

402. The Appellant's turnover increased exponentially. This reason for this increase in trade was not questioned apparently nor were the uncommercial practices adopted in this trading questioned; for example the Appellant did not question:

 How it managed to increase its turnover so quickly in a new line of business with little investment;
 Why if metals were being delivered from its supplier to its customer directly this would not result in its losing business;
 Why its supplier would agree to waiting for payment until the Appellant had been paid;
 Why a customer could always be found quickly for the exact quantities of metal the Appellant was looking to sell or why a supplier could always be found quickly for the particular quantities of goods sought by the customer, ('back to back' deals);
 Why trade should be carried out without contracts or evidence of insurance, nor apparently any record of inspections;
 Why it was being asked to make third-party payments; and
 How suppliers would be accounting for the VAT they had invoiced if payments for supplies were being made into the accounts of third parties.

403. The disappearance of Jonathan France from the Appellant's business in August 2013 once HMRC had started asking questions about the metals trading speaks volumes. The picture of a disqualified director coming into this business and starting a line of trading whereby the Appellant enters numerous deals with fraudulent defaulters is clearly indicative of knowledge of a connection to fraud. When he later declined to answer questions about the same this is of itself is a powerful indication of his own state of mind and intentions.

404. In all the circumstances there is no reasonable conclusion other than that the partners, primarily Nicholas Sandham, knew that the partnership's transactions were linked to VAT fraud.

405. If that is wrong, then the circumstances must lead inexorably to the alternative conclusion that the partners should have known of such connection.

406. Ms Goldring, on behalf of HMRC, submitted that the evidence above, with the key points summarised here in bullet point fashion, is compelling so as to prove the partners' actual knowledge of the connection between its transactions and the fraudulent evasion of VAT or, in the alternative, that the cumulative circumstances presented to it permitted of no explanation other than VAT fraud. She relied on the partnership's:

i. Repeated appearance in transactions that did not take part in an ordinary market but were highly orchestrated as part of a scheme to defraud the Revenue;
ii. Repeated tracing of deals to fraudulent VAT losses in the relevant VAT period;
iii. Exponential increase in turnover;
iv. Awareness of MTIC fraud;
v. Background of Jonathan France and companies with which he was connected;
vi. Appearance in chains of transactions where documentation was inconsistent with ordinary commercial sequences or with other documentation e.g. payment by customer prior to paying supplier, third-party payments, no contract, no insurance, failure to inspect goods; and
vii. Failure to properly assess the commercial viability of its counterparties;

Conclusions on Due Diligence and Commercial Checks

407. Ms Goldring submitted that there were limited checks on some but not all of the counterparties. It is not clear from where the VAT consultant obtained the later batch of due diligence provided, or why it was not handed to HMRC at the meeting on 12 August 2013.

408. Where checks were made on behalf of the partnership they consisted, for example of Companies House and VAT certificates and Europa checks on some VAT numbers.

409. These checks did not assess the financial strength and viability of the Appellant's counterparties. In addition, they were not contemporaneous with the relevant transactions and were therefore valueless. As shown in the tables above, they were often conducted many months prior to or subsequent to the transactions taking place.

410. The absence of cogent checks is indicative that the Appellant knew that it was operating in contrived risk-free chains.

411. Nicholas Sandham's evidence concerning his involvement in the due diligence and whether he inspected the "due diligence file" or not is contradictory. In addition, given his knowledge of MTIC fraud prior to 2013 and his recognition of the warning received from Patrick Knowles about due diligence when dealing in primary metals, he ought to have exercised control over the checks conducted and ensured that they were adequate given the risks in trading in high value metals.

412. Ms Goldring submitted that the partners of the Appellant were content to enter into deals without undertaking or being satisfied of adequate due diligence to establish the credibility and legitimacy of the partnership's counterparties. She submitted that the partners knew or should have known that the transactions were connected to the fraudulent evasion of VAT.

Appellant's submissions on the Second Issue

413. Mr Bott QC submitted that the partners' case on knowledge or means of knowledge was clear. They accept that the transactions were connected with the fraudulent evasion of VAT. They accept that, with hindsight, it is perfectly clear that Jonathan France, at least, knew that the transactions were connected with the fraudulent evasion of VAT – and played a significant part in the planning and execution of the fraud.

414. The partners' case is that they were completely deceived by France and that he was so persuasive that they believed the transactions to be legitimate.

415. He submitted that the relationship between the parties was most unusual and does not easily lend itself to conventional analysis. The partners relied on Mr France's recent conviction for diverse offences of serious fraud – only lightly connected to the facts of this case - showing a propensity and ability to deceive people of sophistication.

416. Mr Bott QC submitted that the partners were comparatively unsophisticated. The deception practised on them was cynical and carefully planned. He submitted that – in the peculiar circumstances of the case – the Tribunal should find not merely that they did not know that the transactions were connected with the fraudulent evasion of VAT but that HMRC have not proved they 'should have known' on a correct and fair application of that test.

417. He submitted that inevitably the Tribunal's view will depend on its assessment of the partners' reliability and credibility when they gave evidence. The various points relied on by HMRC in support of the suggestion of knowledge or means of knowledge might be relevant and compelling in other contexts. Nonetheless he submitted that, in this case, they need to be assessed by reference to the personalities in the case and their very unequal levels of understanding.

418. Mr Bott QC submitted that the 'should have known' test undoubtedly gives a second and free-standing exception to the general right to deduct input tax – said by Moses LJ to be 'fundamental to the system of VAT'.

419. Mr Bott QC submitted that this part of the *Kittel* test was not intended - and does not apply – to a rare case of this type where the trader has acted in good faith and been completely deceived by a prominent actor in MTIC fraud.

420. He relied upon the rationale for the exception found in the well-known passage of Moses LJ in *Mobilx* (2010) STC 1436:

'43.A person who has no intention of undertaking an economic activity but pretends to do so in order to make off with the tax he has received on making a supply, either by disappearing or hijacking a taxable person's VAT identity ,does not meet the objective criteria which form the basis of those concepts which limit the scope of VAT and the right to deduct (see Halifax § 59 and Kittel § 53). A taxable person who knows or should have known that the transaction which he is undertaking is connected with fraudulent evasion of VAT is to be regarded as a participant and, equally, fails to meet the objective criteria which determine the scope of the right to deduct.

421. In other words, Mr Bott QC submitted that the test attempts define a person who has 'no intention of undertaking an economic activity but pretends to do so.' It does not limit the exclusion to people with actual knowledge of the fraud but includes those with an equally culpable indifference to the obvious truth.

422. The policy reasons for widening the exclusion beyond those with actual knowledge are reasonably clear.

423. He submitted that before *Kittel*, the domestic courts endorsed HMRC's preferred approach (see *Optigen & Bondhouse*) which was to stifle MTIC fraud by denying input tax claims made by any trader whose transactions could be connected to an MTIC regardless of knowledge or blame. In early phases of the fraud, this was a repayment claim by the exporter funded the trading chain.

424. Mr Bott QC submitted that the *Kittel* test requires more than participation in a trading chain that is contrived for VAT fraud: it requires participation in the fraud. Someone who 'knows or should have known' that the transactions are connected to fraud is a participant.

425. He submitted that this makes sense. Large numbers of intermediate traders (unlike Mr and Mrs Sandham) control the transactions in MTIC chains. They are playing the roles that the organisers or 'ringmasters' of the fraud have ascribed to them. There is a script and they know their lines. The frauds would not work unless they did exactly what was required of them: buying from X and selling to Y at fixed prices in sterile trade. In actually controlling the transactions, they are well placed to see the lack of commerciality. They are the very people who do not look outside the trading chains and talk only to those within them. They choose whom to trade with and they choose the traders that the fraud requires. They have the ability to negotiate prices but choose not to.

426. He submitted that often these traders give wholly implausible accounts of their involvement. They find a customer; they find a supplier; they fix a price. But objectively, these accounts (with which the tribunal will be familiar), do not explain the coincidental way in which transactions they control fulfil the purpose of the fraud.

427. He submitted that it is sometimes difficult (and often unnecessary) to say that these traders 'knew' the transactions were connected with the fraudulent evasion on VAT. But their direct involvement in the contrived trading patterns compels the conclusion that, from their perspective, the truth was obvious and, if they shut their eyes to it, they are no less to be regarded as participants than if they actually knew.

428. Mr Bott QC submitted that the position of Mr and Mrs Sandham, the partners of Premier Metals was decisively different. They neither knew nor should have known that the partnership's transactions, conducted by Mr France, were connected to the fraudulent evasion of VAT.

429. On that basis, coupled with his submissions on the First Issue, he submitted that HMRC's decision to deny input tax and raise an assessment should be cancelled and the appeal allowed.

Discussion and Decision

Knowledge of the partners

430. The Tribunal begins by considering whether HMRC have proved that either of the partners of Premier Metals, Mr or Mrs Sandham, had actual knowledge that the relevant transactions were connected to the fraudulent evasion of VAT.

Unusual Features

431. The Tribunal is satisfied that this case has distinct and unusual features:

(i) The transactions in questions were not arranged, structured, conducted or controlled by the partners of Premier Metals.

(ii) The transactions were arranged, structured, conducted and controlled by Mr Jonathan France, who acted as a consultant for the partnership, arriving in December 2012 and beginning to work for it in January 2013.

(iii) Mr France has subsequently been convicted of multiple offences in relation to the company he was previously involved in prior to coming to Premier Metals, namely JKL (Wakefield) Ltd t/a Eric France Metals ("JKL").

(iv) Between 2008 and 2013, Jonathan France was controlling JKL despite his disqualification and personal bankruptcy.

(v) In that time, Mr France defrauded the company and its creditors of at least £ 6 million. He diverted large sums for his own personal benefit. He created false documents and wholly misrepresented his own and the company's position to a wide range of officials and other parties.

(vi) He lied to his own receiver in bankruptcy, the Insolvency Service and the Huddersfield County Court (on oath). He repeatedly lied to HMRC in the Code of Practice ("COP") 9 process.

(vii) HMRC claimed £68.9 million in the insolvency of JKL Ltd including £50.2 million of VAT. By clear inference, that amount includes sums that are referable to input tax claims made in the course of MTIC fraud.

(viii) The transactions in question in this appeal begin in February 2013, the month of JKL's insolvency.

(ix) In the appeal of CF Booth Ltd, the First-tier Tribunal's decision states: '*After ceasing to be supplied by JKL, CFB bought copper from Premier Metals, a partnership …*' (para 118).

(x) Mr France brought 4 members of staff to Premier Metals. Premier Metals agreed to pay their wages. They acted upon instructions given by Mr France, creating invoices and making payments at his direction.

(xi) Mohammed Urfan was unknown to the partnership before Mr France's involvement. So were Starkeys, the supposed carriers of the goods.

(xii) Unlike Mr France, and many others whose trading entities feature in MTIC chains, there is no sensible suggestion that Mr or Mrs Sandham have had any previous involvement in fraudulent transactions. On the contrary, their previous trading history and personal reputations are impeccable.

(xiii) Since the partnership registered for VAT in 2007, it received only one visit from officers of HMRC (in March 2012). The partners had very little awareness of the existence or nature of MTIC fraud in the primary metals trade at the relevant time. The Tribunal accepts that the partners had very little understanding of what MTIC fraud was or involved at the relevant time.

(xiv) The transactions in question occurred in a period of 50 days in February and March 2013. According to Mr and Mrs Sandham, which the Tribunal accepts, the transactions began only a day after Mr France first told them he was proposing to conduct the transactions through the partnership. This is to be contrasted with the much longer period of the Company's trading between April and August 2013 during which the partnership transferred its business to the Company and engaged in a far larger volume of trade. The Tribunal is not concerned with Mr and Mrs Sandham's knowledge or means of knowledge during the trade of the Company.

(xv) It is accepted that Mr France had actual knowledge that the relevant transactions were connected to the fraudulent evasion of VAT.

432. The Tribunal is satisfied that Mr France, a professional fraudster with a plausible personality and long history of deceit, took the opportunity to continue MTIC fraud transactions through the partnership.

433. Although he offered a 50 per cent return on the profit margins to the partnership (some incentive was necessary), the arithmetic is likely to have been 'massaged' or altered by the payment of a secondary commission to Mr Urfan.

434. Participants in fraudulent missing trader chains may personally profit in a number of different ways. Some traders may simply take the margin on contrived transactions; others may take an equity share in the tax which is diverted through the missing trader. It seems likely that a player of Mr France's sophistication would have profited in some way from the total amount of the fraud.

435. The Tribunal is satisfied that Mr and Mrs Sandham were deceived by Mr France and took him – as many others did – at face value. All the available evidence supports this conclusion.

436. The Tribunal formed its own view of Mr and Mrs Sandham after hearing them give evidence and gives answers in cross examination. It is satisfied on the balance of probabilities that they were honest witnesses and, for the most part, their evidence was reliable and credible. They had every reason to believe what Mr France said.

437. Mr Sandham gave largely consistent evidence, admitted where he had made failings and made reasonable concessions during cross examination even when this was potentially adverse to his case. He was willing to accept that he did not know why he had given answers to HMRC officers that were unhelpful to his case, rather than attempting to deny that he made the statements or attempting to invent alternative explanations.

438. The Tribunal accepts that Mr Sandham, lacked sophistication and did not fully understand or appreciate the nature of the trade Mr France was involving the partnership in.

439. Mrs Sandham had far less involvement in the relevant transactions, her witness statement was simply corroborative of Mr Sandham and the Tribunal is of the view that her evidence was likewise credible and reliable.

440. There is no suggestion that others with experience of Mr France's business in the past - including his former employees - warned them about him. There is no reasonable inference that Mr France explained to Mr or Mrs Sandham his intentions or knowledge about the fraudulent primary metals trade he was engaging in or any previous fraudulent activity. There is no evidence he had shared any of his previous criminal activity or fraudulent behaviour with the Sandhams or that they were aware of it. The Tribunal is satisfied that they had misplaced trust in Mr France and he tricked them, relying on confidence, charisma and their longstanding personal relationship.

441. The Tribunal also gives weight to the fact that Mr Sandham – the more active partner in a husband and wife team - was not particularly good with paperwork and lacked relevant IT skills at the time. He lacked a formal education and a level of sophistication.

442. For all of these reasons, HMRC have not proved that either Mr or Mrs Sandham knew that the relevant transactions were connected to the fraudulent evasion of VAT. There is no evidentially safe or probable route to the conclusion that either partner knew that these transactions were connected to the fraudulent evasion of VAT.

Should have known – means of knowledge

443. The Tribunal turns to consider whether HMRC have proved that either of or both Mr and Mrs Sandham should have known (had means of knowledge) that the transactions were connected to the fraudulent evasion of VAT.

Addressing HMRC's submissions

444. HMRC submitted that Mr Sandham's evidence was unsatisfactory, and extremely telling. The Tribunal has rejected this submission for the reasons set out above. It found him to be, for the most part, a credible and reliable witness.

445. However, the Tribunal is satisfied that must accept some responsibility for the fraudulent transactions that were conducted in his partnership's name.

446. Mr Sandham appears to have had limited control over the partnership's primary metals business which he accepted he virtually left to Mr France to conduct. The Tribunal is satisfied that Mr Sandham failed to take reasonable care in allowing Mr France to arrange and conduct the relevant transactions on behalf of the partnership.

447. Mr Sandham, as partner, failed to supervise Mr France adequately given that he was conducting millions of pounds worth of business on behalf of the partnership. Mr Sandham failed to ensure that adequate due diligence was conducted in relation to suppliers and customers in the primary metals business and failed to ask Mr France sufficient questions as to the nature and purpose of the transactions which he was conducting. The Tribunal gives its reasons for these conclusions below.

448. The Tribunal is also satisfied that the reason that Mr Sandham failed to take reasonable care and supervise the transactions for which the partnership was responsible was because he placed undue trust in Mr France. He was deceived by Mr France based on their longstanding personal relationship and Mr Sandham was overly impressed by Mr France's apparent business acumen. The Tribunal is not satisfied that Mr Sandham conspired with Mr France or turned a blind eye to Mr France knowing or suspecting that Mr France was committing fraud.

449. HMRC submitted that there are two scenarios: -

A – Mr Sandham knew the transactions were connected with VAT fraud
B - he should have known the transactions were connected with VAT fraud.

450. In Scenario A, HMRC submitted that Mr Sandham deliberately closed his eyes to the obvious because he knew that the transactions were connected with fraud/or he knew they were connected with fraud due to his lengthy (25 years) and close connection with Jonathan France. The Tribunal rejects this submission for the reasons set out above.

451. In Scenario B, HMRC submitted that the Tribunal is entitled to take into account the fact that Mr Sandham failed to deploy the means of knowledge available to him (as did Mrs Sandham). HMRC submit that Mr Sandham had the means at his disposal to know that the partnership was participating in fraudulent transactions. This would include material which would have been available to him had he asked appropriate questions/made further enquiries.

452. The Tribunal considers below whether Mr and Mrs Sandham had the means of knowledge at their disposal such that either or both should have known that the only reasonable explanation for the transactions was the fraudulent evasion of VAT.

Asking probing questions

453. Given the earlier warnings from HMRC and Patrick Knowles in 2012, HMRC submitted that Mr and Mrs Sandham should have asked some basic regarding the primary metals trade conducted by Mr France on behalf of the partnership. By way of example:

- Why were no questions asked as the partnership's turnover went through the roof and the Sandhams' earned 50% of the profits for doing nothing?
- Why did the Sandhams not question the level of turnover and profit in comparison to their previous trade?
- Why not question the reason that Mr France had come to them given the fact they could offer nothing in terms of primary metals experience/contacts?
- Why not question why Mr France required their business as a conduit through which he could run this trade?
- Why were no questions asked regarding 1 million US dollar payments abroad to accounts in different company names?
- Why were UK companies asking that payments be sent abroad?
- Why were no questions asked about the payment of amounts totalling £60,000 in cash to a man they did not know?
- Why were no questions about the complete absence of any due diligence?
- Why were the partnership's suppliers in primary metals willing to take the risk of extending large amounts of credit?
- Why were there no contracts given the value of the goods involved?
- Where were insurance policies not requested?
- Why were no checks conducted on Messrs France/Urfan or JKL Wakefield given the circumstances and the level of trade and sums involved?

454. It is true that the Sandhams might have asked all these questions with the benefit of hindsight and that they failed to take reasonable care in allowing Mr France to conduct the transactions on behalf of the partnership without asking these types of questions. They either mistakenly relied on the explanation given to them by Mr France as to the nature and purpose of the trade or asked inadequate questions of Mr France or satisfied themselves based on only a superficial understanding of the trade that was being conducted. The reason the Sandhams failed to ask appropriate questions is as set out above – they were convinced by Mr France and placed undue trust in the explanations they gave him.

455. However, any finding of means of knowledge is not dependent upon whether Mr and Mrs Sandham should have asked further questions and probed Mr France and the transactions. The question to determine is whether the partners should have known that the transactions were connected with fraud because the surrounding circumstances (when taken cumulatively) permitted of no other reasonable explanation than VAT fraud.

456. HMRC submitted that the following factors set out below were probative of both the Sandhams' knowledge or means of knowledge. The Tribunal considers these factors individually and cumulatively.

Mr Sandham's experience as a businessman

457. The Tribunal accepts HMRC's submission that Mr and Mrs Sandham lacked adequate control over the partnership's primary metals business conducted by Mr France. The Tribunal accepts Mr Sandham's evidence as to what was going on day to day within the business and his failure to maintain sufficient control and supervision were due to his naivety/simplicity and undue trust placed in Mr France.

458. The Tribunal accepts that there was an unreasonable willingness by the partners to cede control to Jonathan France but rejects HMRC's submission that Mr Sandham's lack of control occurred because of a willingness to turn a blind eye to fraudulent activity and not ask questions.

459. The Tribunal accepts that Mr Sandham is not a naïve "babe in arms," lacking in business experience. Mr Sandham accepted that he was a "good businessman" and had run a profitable scrap business and been in business since the age of 16, working for himself from the age of 30. He had sold a business in 2007 for £290,000, found a buyer and negotiated a price. He had also built up a successful buy to let business with 13 rental properties. He had spotted a niche in the scrap market and also improved his product. He accepted that he knew what questions to ask when a business opportunity presented itself. H e was also assisted by Mrs Sandham, who was quite capable of dealing with paperwork and VAT and banking transactions. They were a team.

460. However, this must be weighed up against the fact that Mr Sandham had limited formal education, no IT skills and little business experience outside scrap metal and the property rental market. He was clearly impressed by what he perceived to be Mr France's superior business acumen and experience. Mr Sandham's answers in cross examination did not reveal a deep understanding of business nor VAT nor the ability to invent or create explanations to excuse the obvious failing to control the partnership's business.

461. The Tribunal also accepts Mr Sandham's evidence that he was not making considerable money out of the primary metals trade – indeed the partnership borrowed money to cover their VAT outlay. The profits during the partnership period in question were limited and were believed to amount to approximately 0.375% of the transactions (50% of 0.75 profit on each deal). The Sandhams received no sudden influx of cash during the relevant period although their business became more profitable. The Tribunal has already accepted that the Sandhams did not know the transactions conducted on behalf of the partnership were connected with the fraudulent evasion of VAT.

Awareness of fraud and MTIC fraud in the primary metals trade

462. Mr Sandham accepted that when Officers Johnson and Carter visited his home on 8 March 2012, they had left a business card with "Special Investigations Unit" written on it. In response to the question "Did that worry you?" he stated, "It did." Mrs Sandham also agreed it was a matter of some concern. The Tribunal is of the view that this was the evidence of witnesses who made reasonable concessions and did not seek to avoid giving answers that were unfavourable to their case.

463. Mr Sandham also accepted that he had received a warning from Patrick Knowles regarding trade in the primary metals market, the importance of due diligence and specifically the risks associated with trading in copper cathode prior to the visit from HMRC on 23 March 2012. He also accepted that if he was going to trade in primary metals as opposed to scrap that

he needed to be careful. He had the warning from Patrick Knowles in his head before he went into business with Jonathan France.

464. However, this needs to be balanced against the fact that he had previously refused to accept an offer to trade when he believed it to be suspicious but had good reason to trust Mr France initially due to their longstanding association and experience of doing business with Mr France and his existing clients.

465. During the visit from HMRC on 23 March 2012 the partners were warned about MTIC fraud and provided with an MTIC awareness leaflet. In his evidence in chief, Mr Sandham suggested that the leaflets were left on his kitchen table. He then gave the following evidence:

"Q. Did you realise that one of those contained a strong and specific generalised warning about MTIC trade and how it worked?

A. No, sir."

466. The partners' knowledge of awareness and understanding of MTIC fraud was limited. Although Mr Sandham's evidence was that this was the first visit from HMRC and he was concerned by the fact that Officers came from Special Investigations, when material was left for the Appellant's express consideration, he and his wife failed to examine this leaflet. While with hindsight, the partners might have taken reasonable care in so doing, it is not surprising they believed they had little to be concerned about in March 2012 (some ten months before the trade in question and before they were involved in the primary metals trade).

467. In re-examination, Mr Sandham was asked to clarify the nature of the call which he had previously about copper cathode (where he refused to do the deal) and why it was different from the transactions which Jonathan France was proposing. His response was that he believed these were all existing customers whom he had been aware of for a number of years. This was a credible answer and consistent with what he had said at paragraph 78 of his witness statement:

"78 Paragraph 48d of Mr Chisman's statement is incorrect. It quotes from the visit report, and the visit report is wrong. I did not say that Jonathan France said he wanted to come to work for Premier Metals so he could do commodities trading. As stated above, when Jonathan France came to us he came as a consultant to generate new business, and to bring former JKL (Wakefield) Ltd customers with him. Those customers were all known to me. I hadn't worked for them directly but I had done haulage to their premises. It was not until the end of January 2013, when JKL (Wakefield) Limited went bust, that Jonathan France first suggested that we should do primary metals trading. He did say that working at Premier Metals would be better because it wasn't as far from his home as C&C Metals was. C&C Metals was not a customer or supplier of Premier Metals until after Jonathan France became a consultant."

468. Therefore, the type of questions Mr Sandham asked himself in relation to the previous offer made out of the blue in 2012 were not necessarily also applicable to the later transactions with Jonathan France.

469. In 2012 he wondered why the caller had contacted him rather than other scrap yards. Similarly, he could have asked why Jonathan France came to him when there were other persons dealing in copper when he had no such experience? In 2012, he was concerned that he did not know the person making the call "from Adam." The difference in relation to Mr France was that he knew him well and trusted him.

470. Mr Sandham also referred to the issue of funding the deal at the time of the phone call. This was also something he considered when Mr France approached him, and which ought to

have prompted him to question further why he was being extended such large credit. The Tribunal accepts that with the benefit of hindsight there are more parallels than differences not least because the product was the one he had been warned about, namely copper.

471. The Tribunal also accepts HMRC's submission that Mr Sandham should have asked more questions about the involvement of Mohammed Urfan, who was the finder for his main supplier. He knew nothing about Mr Urfan or Recycling Solutions who supplied him with £9 million worth of goods. However, the Tribunal accepts Mr Sandham's evidence at paragraphs 53 and 77 of his witness statement on this issue:

"53.At some point in (I think) late February or early March 2013 Jonathan France informed me that he was using a commercial agent called Mohammed Urfan to source some of the commodities deals, and that he would be paid a commission of somewhere around 1% for each deal he was able to source. This was a cost to be deducted before the profits were shared 50/50. I did not know Mr Urfan. He was a contact of Jonathan France's. He wanted to be paid in cash, which is not unheard of in the scrap metal industry. That is not to say it was "cash in hand" or anything illegal — it all went through the business's bank account and was properly accounted for — and he provided invoices (example at pages 65 and 66 of "NDS1").

…

77. Paragraph 47 of Mr Chisman's statement is correct in saying that Jonathan France ran the primary metals side of the business, and that he had decided to buy metal from Recycling Solutions (UK) Limited ("RSUKL"). It is not correct to say that Mohammed Urfan introduced RSUKL to Premier Metals, though it is true that I said that at the meeting on 12 August 2013 (it is mentioned at page 5 of he visit report at AMC20). I just assumed that, because Urfan was the finder (sales agent) Jonathan France was using to source business i.e. materials (and for which he was being paid a commission of around 1%, referred to above), he must be the person who introduced RSUKL to Premier Metals. Urfan was never employed by Premier Metals, either the partnership or Premier Metals (Leeds) Limited."

472. Therefore, the Tribunal is satisfied that HMRC place too much reliance on the previous refusal to engage in a deal in 2012 – which is to Mr Sandham's credit – and HMRC's March 2012 visit from officers when assessing the Sandhams' awareness of MTIC fraud. The Tribunal observes that:

(i) It lacks any first-hand evidence from HMRC as to what emphasis was put on MTIC fraud or how detailed any explanations were.
(ii) The summary of the visit report shows that it was a relatively short visit at which any general discussion of MTIC fraud was 'described briefly'.
(iii) Much of the visit was devoted to generalised questioning of the partners, the purpose of which was not apparent to them at the time.
(iv) HMRC was specifically trying to establish whether the partnership had traded with AM Trading.
(v) They had not.
(vi) It became clear they had not.
(vii) The partners co-operated fully and handed all documentation to the officers.
(viii) HMRC concluded that 'PML are an MTIC low risk."
(ix) There were no further visits by HMRC during the currency of the partnership until the Company was visited in June 2013, well after the relevant transactions had been completed.

473. The partners' awareness of MTIC fraud prior to the relevant trade was minimal and is in marked contrast with other cases. It is common for traders in high risk areas to be the subject of regular and sceptical attention from HMRC in the period before and during suspect trading activity. This pattern of contact between the revenue and the trader – often intensive – can support or reinforce the conclusion that the 'means of knowledge' of VAT fraud was available.

The decision of the partners to enter into the primary metals trade

474. In response to questions from the Judge, Mr Sandham stated that when he and his wife discussed whether they should go into the primary metals business with Jonathan France that Mr Sandham mentioned the discussion they had with HMRC officers when the they first visited. The Tribunal is satisfied that this was a reasonable approach to take.

475. HMRC assert that despite the warnings from HMRC and Patrick Knowles, and an appreciation that they should consider these before entering into the primary metals trading, the Appellants simply did not care and were blinkered by the substantial profits which they could make.

476. HMRC submitted that it was too good to be true, and that is because it was. The partners ignored these earlier warnings and carried on trading for 7 weeks. The complete absence of due diligence referred to below should be viewed through the prism of these warnings.

477. The Tribunal does not accept this for the reasons set out above. Further, there were no substantial profits received by the partners in relation to the 7 weeks of trade the partnership was involved in, certainly none that there were 'too good to be true'. The Tribunal accepts that the partners were partly motivated by a desire to expand their business and increase profits for the partnership but there is nothing untoward in this and they were partly motivated by the desire to have Jonathan France involved in their business.

Appellant paid by customer before paying its supplier

478. In his evidence, Mr Sandham suggests that at the time he queried why a supplier would extend large sums of money to the business. He specifically stated as follows:

"*Q. And so if we look again at paragraph 41 of your witness statement, Jonathan France comes to you, says there's good money to be made, and you query the cash flow side of things. He says:*

"It's all arranged so the customer pays for the load before you have to pay for it."

And you query that, don't you?

A. Yes, sir.

Q. Now, why do you query that?

A. I query it because obviously to buy primary metals you need to have the finances to actually pay for the metals.

Q. Yes. And so you query, don't you, why a supplier would in effect extend you that credit? It's in your witness statement, why would the supplier trust anyone with a valuable load without getting paid first?

A. Yes, sir.

Q. And why did you query that?

A. I queried it because, like I said, you need the money in place to actually purchase the scrap.

Q. Yes.

A. Yes.

Q. But the point about the supplier, why did you -- why would the supplier trust anyone? Why did you say that?

A. Because it's a lot of money, isn't it, to -- it's a lot of money for somebody to, like, lend you, if you like.

Q. Yes, exactly it doesn't happen very often, does it?

A. No, no, sir.

Q. And in a business context, based on your past experience, you considered this was something unusual?

A. Yes, sir. (Pause)."

479. Mr Sandham made a reasonable concession in his evidence. Despite the obvious concern that Mr Sandham had about why substantial sums of credit were being extended to the business, he failed to place sufficient weight on this as a warning indicator and permitted the business to enter into substantial transactions on this basis. Mr Sandham was asked about the paperwork in a specific deal which demonstrated that the goods had been delivered to his customer prior to him even paying his supplier and agreed that this was "risky in the extreme" for his supplier. With the benefit of hindsight these were indicators to the business that something was wrong, a matter that Mr Sandham acknowledged in cross examination. Mr Sandham dealt with the matter this way in his witness statement:

"90. Paragraph 79 of Mr Chisman's statement does not take account of how (as I understood it) Jonathan France did all of the primary metals trades. His method was to find a buyer for a load, and get their commitment to take it, before he agreed to purchase the load in the first place. The customer would pay for it, and that would provide the funds for us to pay the supplier for the load. As I explained above, Jonathan France told me when he first described his business model that he had been doing this for a long time, it was a tried and tested business model, which he used to trade with a number of trusted customers and suppliers. Their deals were based on trust. The fact that the quantities were exact is not odd or difficult to understand. The deals were based on specific loads that were offered for sale, and so of course the customer would pay for the exact amount of the load."

480. While there were adverse indicators at the time and Mr Sandham failed to take reasonable care to explore them, the Tribunal is not satisfied that it means that he should have known that the only reasonable explanation for the trade was the fraudulent evasion of VAT.

No contracts/No insurance

481. In his evidence Mr Sandham accepted he had no contracts with supplier and customer companies. He stated that he was led to believe that the goods were insured and that this would deal with any issue with the goods being lost or damaged. He was unclear as to when he owned the goods and he never asked to see any insurance policies from either Starkeys or his counterparties. This demonstrates a reasonable lack of care given the value of the primary metals being transacted and should have been reason to suspect non-commerciality.

482. However, it has to be weighed up against the other evidence available to Mr Sandham as he set out in his witness statement and which the Tribunal accepts as reliable and credible:

"91. Mr Chisman says in paragraph 80 and 81 of his statement that there were no formal contracts between Premier Metals and its suppliers and customers, and that title to the goods could never pass.

This is misleading. According to the deal logs at exhibit AMC46, all of the transactions appear to be supported by invoices and delivery notes. I do not understand what other contracts Mr Chisman may be referring to. Certainly in the scrap metal business there is never anything more than an invoice and perhaps a consignment note or something like that. In relation to the primary metals trade, as far as I am aware the documents which Mr Chisman has produced in AMC46 are sufficient to prove what transactions took place. I do not regard the retention of title clauses as being relevant to anything. Jonathan France was doing the primary metals deals with people he trusted, he assured me. He negotiated all the prices, which to the best of my knowledge were proper commercial prices. I am not aware of any legal disputes in relation to any of the deals in AMC46, which is not surprising because, as I understood to be the case, all prices were agreed by Jonathan France and all loads were inspected by someone from Premier Metals and weights were checked. It is not correct to say the goods were not inspected.

……..

93. In response to paragraph 83 of Mr Chisman's statement, I agree that we did not insure the goods. I understood it to be the case that Starkeys insured the goods whilst in their possession, and the hauliers insured them whilst they were in transit. That is how Jonathan France said it worked. I believed him."

No proper explanation for why payments were made in US dollars

483. Mr Sandham was cross examined as follows:

24 Q.Why were a lot of these payments in dollars when the

25 companies weren't in the United States?

1 A. I can't answer that one, sir.

2 Q. Again, did you not think to ask Mr France about that?

3 A. We asked Elaine Frost when she was working in the

4 office, but I could not remember what she said. But

5 there was a reason for it.

484. During his evidence Mr Sandham did not attempt to invent an explanation, he relied on what others told him. In his witness statement, which evidence the Tribunal accepts, he dealt with the opening of dollar accounts:

"95. Regarding paragraphs 85 and 86 of Mr Chisman's statement, I reiterate what I said above about Jonathan France saying we needed to have a dollar account. I took his word for it. Payments were made in accordance with the agreements which Jonathan France made. His handwriting appears on a number of the documents which Mr Chisman has included in the deal log (AMC46)."

485. Again, even without the benefit of hindsight this was a risk factor and one that Mr Sandham should have explored more fully. It should have made Mr Sandham suspicious that his trade may not be commercial but the Tribunal is not satisfied that in itself or coupled with the other adverse indicators, it meant Mr Sandham should have known the trade was connected to the fraudulent evasion of VAT.

486. Mr Sandham's means of knowledge is not merely assessed against the adverse indicators available but also against Mr Sandham's subjective understanding and the explanations which

he received from Mr France, which at the time appeared reasonable and he had insufficient reason to ignore.

Primary metals trade/Scrap Metals from the outset

487. Mr Sandham accepted in his evidence that Jonathan France was a friend who he would occasionally socialise with. He said that there was no discussion about Jonathan France bringing suppliers or trading in the primary metals industry at the outset of him joining the business. He maintained that initial discussions focused solely on scrap metal customers. It appears that this assertion was perhaps to make the apparent move into primary metals appear less stark and more incremental – see paragraph 78 of Mr Sandham's witness statement set out above.

488. HMRC suggest the visit report of 12 August 2013 records Mr Sandham telling HMRC Officers that Jonathan France had expressly stated that he wanted to do commodities (primary metals) trading at the outset of involvement in the partnership. In reply to this Mr Sandham, suggested that Officer Chisman's visit report was incorrect. If one reads the visit report carefully (internal page 5, EX1-93) it does not record Mr Sandham (NS) suggesting Mr France (JF) raised commodities (ie. primary metals) trading at the outset, rather it supports the incremental approach:

"NS stated that he received a phone call in December 2012 and that they had met in private on the site of Premier Metals (Lees) Ltd in January 2013.

NS stated that JF had offered to bring customers to NS on a scrap for commission basis.

……..

NS stated that JF was in the Premier Metal (Leeds) Ltd office when JF receive a phone call to state that JKL had gone into receivership.

……JF asked NS if he wanted to start trading in commodities"

489. Mr Sandham in his evidence had more difficulty explaining the Director's Report prepared by him which was prepared for the Creditor's meeting on 11 November 2013. The report stated that "*In December 2012, the Partners were approached by a consultant with a proposal whereby the consultant would work for the partnership with a view to introducing new customers and suppliers thereby diversifying the Partnership's business into the dealing of commodities*." Having accepted that the Creditor's Report needed to be accurate, Mr Sandham then attempted to explain what was contained therein stating that he must "not [have] read [the Creditor's Report] properly" and the paragraph was "not true".

490. Mr Sandhams' evidence on this point was unsatisfactory based on the contemporaneous evidence from the time. Nonetheless, the Tribunal is not satisfied that this report on its own undermines Mr Sandham's evidence suggesting Mr France initially joined the business to deal with scrap metal. This is consistent with the evidence that it was only after Mr France said that JKL had gone into liquidation in January 2013 that the potential to move into primary metals and to take over JKL's customers arose. This is also consistent with the move of JKL's former staff to the partnership.

New line of business and increased turnover/first deals in copper – about which warned

491. When asked about the increased turnover, Mr Sandham's evidence was that the first he knew of it was the tonnage on the invoices themselves. He accepted in evidence that given the weights and price per tonne, considerable amounts of money were being traded. He specifically accepted that it was "a lot of money". Of significance was the fact that the first deals (for large sums of money) were in the copper, similar to the commodity he had been warned about in 2012, namely copper cathode.

492. Having accepted that he looked at the invoices for day 1 trade (which amounts to approximately £740,000), he denied that he knew the value of all the deals being undertaken. He stated that he worked out in the yard, did not look at all the invoices and left the commodities trading to Mr France. The Tribunal accepts Mr Sandham's evidence, but it is clear that he failed to exercise proper control or supervision of his business – he should have realised that ¾ of a million pounds of trade had been undertaken on the first day and that very substantial sums were being transacted, even if the percentage profit margins were small. Furthermore, when he was asked about the level of trade with Recycling Solutions Limited and the approximately £9.1M worth of trade with it, Mr Sandham said that he realised it was a "very large sum of – a large amount of money".

493. Mr Sandham, having seen invoices from day 1 which included values of the supplies being made, should have had regard to such a dramatic escalation of trade in a commodity similar to the one he had been warned about. This should have led him *to suspect* that the transactions may be connected with something untoward – such as the fraudulent evasion of VAT - but not come to the conclusion that the only reasonable explanation was because the transactions were connected with the fraudulent evasion of VAT.

494. Mr Sandham was also questioned about the increase in turnover in comparison to the 11/12 VAT return and the increase from £200,000 for a 3-month period to £2.7 million for the month of February 2013. His response was that "I thought my turnover had gone up considerably." The reason he stated it did not ring alarm bells was that he knew the figures would go up "because it was a person who actually came to my premises who'd done -- who'd done these deals for the last eight years what came across".

495. Mrs Sandham did not question the increase in turnover as she understood the counterparties came through Jonathan France. However, when asked about Recycling Solutions she said she did not particularly make a judgment on them. She agreed that although they were their main supplier she knew nothing about them and did not think to ask about them. Mrs Sandham accepted that she did not ask Jonathan France any questions as to what had gone wrong at JKL Wakefield and did not really think about asking why the business had collapsed.

496. In light of this evidence, the Tribunal is satisfied that Mr and Mrs Sandham failed to take reasonable care and respond to reasonable grounds for suspicion regarding the partnership's primary metal trading but the reason for this was their misplaced trust in Mr France.

Profits and pricing

497. Mr Sandham was questioned about the profits that the partnership business was making. He accepted in cross-examination that the business was making a "good profit". It was accepted that there was seven weeks of trade and in that time the business made approximately £210,000 in profit, which was split 50/50 with Mr France, although Mr Urfan's commission

also came out of this sum (Mr Sandham was not clear if the commission was 1% of the deal as he left Mr France to calculate it).

498. Mr Sandham accepted that he had given evidence that prior to the arrival of Mr France and the partnership's move into primary metals trade his yearly turnover was in the region of £400,000 to £500,000 with a profit of £100,000. This was possible because he worked a ten-hour day, five days a week. By way of comparison, he accepted that on any view a profit of £210,000 in 7 weeks was "an awful lot of money," and that he did not have to do anything to earn his share of that profit because he left it all to Mr France. He accepted it was an 'awful lot of money for doing nothing'.

499. In response to questioning about what Mr Sandham was bringing to the table to obtain his 50 percent stake of the profits, he refused to accept that it was too good to be true. Despite this refusal to accept, he could give no credible explanation about why he was entitled to 50 percent of the profits, or what he was doing to achieve 50 percent of the profits that were being brought in. The explanation that he gave lacked coherence and demonstrative of the fact that he lacked any understanding or ability to analyse the commercial reality which provided the business with profits. However, the profits themselves are not determinative of Mr Sandham's knowledge of the connection with the fraudulent evasion of VAT or the means of knowledge of such.

500. Mr Sandham specifically responded in evidence on this topic as follows:

"Q. No. So did it not cross your mind why on earth this man would offer you 50 per cent of all of this business?

A. I -- I knew with the previous -- with the previous -- what we'd seen previous and what was happening now with the trades, I did know obviously -- I didn't realise that the profit's quite as much as what your colleague's mentioned.

……

Q Why do you get 50 per cent?

A. Because when -- when he came to -- when he -- when he first mentioned it, I'd seen the operations already - already working so, like I've said, I realised with that kind of metals that obviously the profit margin would be –"

501. Mr Sandham was not able to give a helpful answer to what should have been a relatively easy question. HMRC submit the difficulty with which Mr Sandham had answering it is demonstrative of the fact that there was no credible answer that could be given.

502. An alternative explanation is that Mr Sandham is not sophisticated enough to give answers comfortably when questioned on the spot. In fact, the answer he appears to have given in cross examination – that he did not expect much profit because the profit margin was small is consistent with his witness statement. He gave an explanation at paragraph 49 of his witness statement – see the factual findings above within the First Issue – that he only expected a small profit when he agreed the 50/50 split with Mr France:

"*With the primary metals deals Jonathan France said the profit from each deal was 0.75% and we would share that 50/50 too. I thought this seemed fair because it was a small profit, although the turnover was big. I didn't suspect anything was untoward with this*."

503. The Tribunal therefore is of the view that while Mr Sandham was not able always to give clear, coherent or easy answers to questions this was not through an attempt to deceive or because there was no credible answer to give.

504. Mrs Sandham did not question why they were receiving 50 per of the profit for doing nothing and bringing very little to the table (although as far as Mr France was concerned the partnership did bring a valid VAT registration number and a legitimate business name and premises) but she stated that it was only obvious with hindsight that there was something wrong. The Tribunal accepts her explanation as being a true reflection of her understanding and beliefs.

"Q. So did you when you saw that the turnover in one month was 7.9 million have a conversation with Mr Sandham, your husband, about it?

A. No, I didn't.

Q. Did you ever have a conversation as to why it was Jonathan France was willing to give you 50 per cent of these profits?

A. I didn't, no.

Q. Because on the face of it you had no experience in primary metals, did you?

A. No.

Q. Neither did your husband?

A. No.

Q. He didn't have to do anything?

A. Not really, no.

Q. He brought all the contacts in. He did the majority of paperwork.

A. Yes, for the deals, yes.

Q. And so did it not occur to you that this was a rather strange arrangement, that you would get to keep 50 per cent of the profits?

A. It didn't, no.
……

A. Well, you know, you can sit here with hindsight and think "Isn't it obvious this is what you have done?" But at the moment, at that time, everything seemed to be fine because we were dealing with somebody that we viewed as a friend, good businessman, who had explained where the metals were going to, that they were going to end-users. There didn't seem to be any issue with it so far as we could see. My husband had seen him doing it for years previously, so taking all that into consideration for us at that time, no, everything seemed --

Q. Everything seemed fine.

A. – fine."

505. The Tribunal accepts that Mrs Sandham's is credible as to her understanding and beliefs at the time in question and is careful not to apply the benefit of hindsight.

506. The Tribunal is satisfied that HMRC's criticism is fair – Mr and Mrs Sandham should have asked more questions regarding the profit share. After the initial trading it should have become obvious that the profits were greater than they were expecting. However, while this should have been a warning signal that something may be untoward with the trading it had to be balanced against their trust in Mr France. During the seven weeks in question, the Tribunal is not satisfied that this factor, in isolation or in conjunction with the other factors relied upon by HMRC, meant that Mr and Mrs Sandham should have known that the only reasonable explanation for the trading was that it was connected with the fraudulent evasion of VAT.

507. As Mr Sandham set out in his witness statement at paragraph 50, the partners did not receive a sudden windfall in profits and in fact had to invest in the business during this time:

"50. We didn't take any money out of the partnership during this period. In fact during January and February 2013 we put in £50,000 from our life savings for cash flow. This was on top of £15,000 we had put in during November and December 2012 so that stood us to £65,000 the business owed us, which we wouldn't be able to take until there was some surplus in the account. We continued to live modestly as we always have done, our lives didn't change in any way, we just lived on the same amount of money we had always done, going out a couple of times a week for a meal, that sort of thing. We didn't start going to fancy restaurants or buying expensive jewellery. We never aspired to that kind of life. We are just ordinary people."

Third party payments

508. A variety of third-party banks were being paid by the Appellant partnership. Despite the fact that the partnership was not trading with the companies that were being paid (nor were the banks even located in the United Kingdom) no questions were ever asked.

509. Mr Sandham originally suggested that he had no involvement with the banking. He stated:

"Q. But you had access to the Internet banking because presumably you were the main signatory along with Mrs Sandham?

A. I never -- I never did any banking.

Q. But you saw what was going in and out of the bank account, didn't you?

A. I didn't -- I didn't actually -- I would notice when I come into the office the amounts, if I was in the office."

510. Despite this having been his starting point, in response to cross-examination Mr Sandham accepted that he had undertaken some of the banking, including the actual authorising of the third-party payments to the overseas banks.

511. He was taken to the CHAPS transfers and accepted that his signature appeared on the documents. He agreed that it was pretty odd that the money was being sent abroad to a different account name when the company was supplying him from the UK. Again, this was a reasonable concession to make.

512. On the basis of his evidence during the hearing, it appeared that Mr Sandham failed to ask any questions about why, despite the trading partners being based in the United Kingdom, such substantial sums of money were being transferred to overseas jurisdictions. With the benefit of hindsight Mr Sandham was able to identify that there were warning signals.

513. In Mr Sandham's later cross examination he was asked to look at invoices requiring him to make payment to companies in Poland, Lichenstein and Hong Kong that he thought that the goods were actually being supplied by these companies and it was for that reason he was transferring money to accounts in those countries. He said he fully trusted Jonathan France**.**

514. Mrs Sandham was asked where she thought the goods were coming from given her husband's answers and stated that she did not have that thought process.

"Q. Did you think you were getting -- your husband said he thought that the goods were coming from Liechtenstein, where did you think they were coming from?

A. I didn't -- I didn't have that -- as I say I didn't have that thought process. Because Jonathan was dealing with it and I trusted that what he was doing was correct, that if he was making a payment to this person or this bank, then that is where it was supposed to go to."

515. Mr and Mrs Sandham's answers display an undeniable failure to take reasonable care as to the nature of the trade the partnership was conducting. This is all the more so given that Mrs Sandham must have seen the invoices in order to complete the VAT returns. Even if she did not examine them in close detail it should have been obvious the goods were coming from another UK company as opposed to from outside of the UK and the VAT returns were completed accordingly.

516. In cross-examination Mr Sandham was also referred back to his previous day's evidence where he had initially stated that he did not make payment to suppliers and stated that he had forgotten this. He was also referred back to his witness statement in which he stated that he was unaware of payments to foreign bank accounts. He again maintained that he had forgotten the bank transfers:

*"*Q. Could you turn in your witness statement, please, to witness statement page 168, paragraph 89. (Pause). Now, you've just told us that you were aware that money was going to foreign bank accounts. Why in your witness statement do you say: "I did not do the banking and was completely unaware that payments were being made to foreign bank accounts." That's completely different to what you've told us today. (Pause).

A. I had forgotten about these invoices in question."

517. Mr Sandham was questioned as to whether it would have an effect upon his VAT position if the goods were obtained from Poland, Lichtenstein and Hong Kong as opposed to from the UK and he stated that he did not know:

*"*Q. If you were obtaining the goods from Poland, Liechtenstein and Hong Kong, as opposed to from UK companies, wouldn't this have an effect on your VAT position?

A. I'm not too sure, sir.

Q. Are you seriously answering that -- you don't know?

A. Are you saying that goods what come in --

Q. Well, if the goods are coming in from outside of the UK, do they not come in zero-rated?

A. I did not know that at the time, sir."

518. As Mr Sandham confirmed in response to questions from the Judge, he had traded in scrap metal all his life which was subject to VAT. He also confirmed an awareness of the VAT threshold and the VAT percentage on goods. Nonetheless, the reality is that Mr Sandham knew little about VAT and gave little thought to the nature of the trade that Mr France was conducting on behalf of the partnership. Mr Sandham did not appraise himself of the VAT position if he really thought the goods were coming from outside of the UK.

519. Mr Sandham was questioned about an account given by Elaine Frost in HMRC's visit to the Company on 12 August 2013 as to the partnership's EU trade where she stated in response to questions from Officers that there had been 2 transactions with Holland. If Mr Sandham genuinely thought that the goods were coming from Poland amongst other countries, why did he fail to correct her? There was no answer to this. Mr Sandham's memory was unclear.

520. Mr Sandham's lack of attention to detail demonstrates an unreasonable abnegation of responsibility and proper oversight in respect of the transactions going through his business and his VAT returns. If he genuinely thought that goods were coming from outside of the UK why was his business claiming input tax on the basis that they were supplied by UK companies? The Tribunal is satisfied that Mr Sandham gave little thought to where his goods were coming from and placed undue trust in Mr France.

521. This is demonstrated by the passage of cross-examination set out below:

"Q. Now, this is a transaction where you've sent £440,000 to Eurowire in Poland, haven't you?
A. Yes, sir.
Q. And you've told us that you believed the goods were coming from Eurowire in Poland?
A. Yes, sir.
Q. Your partnership has claimed input tax, if you go back to page 370, on the basis that those goods came not from Poland but they came from a UK company called Recycling.
A. Yes, sir.
Q. Input tax some 73,000 on that invoice. What do you say about that?
A. I'd -- I had not seen this invoice.
Q. No. These were submitted on behalf of your partnership, weren't they?
A. Yes, sir.
Q. For a large number of deals. This is just one example.
A. Yes, sir.
Q. Does that not cause you some concern that you thought the goods were coming from Poland and yet you're submitting invoices which suggest they come from the UK?
A. It does now, sir. (Pause)."

522. The Tribunal accepts that Mr Sandham was being honest in his answers – the fact is he did not think about relevant matters at the time.

523. He also stated that he had failed to spot within his company paperwork (submitted by the Appellant to HMRC) a number of transportation documents (CMRs) which suggest that the

goods came not from the countries whom he stated he believed were supplying the Partnership but from different countries again, including Cyprus and Holland. When asked if he noticed it at the time, he said he had not. He agreed if he had noticed it, this would have led to some basic questions. This again demonstrates his failure to take reasonable care.

"Q. So did you notice that at the time?

A. No, sir.

Q. You accept that you handed all these documents over to Mr Chisman on behalf of your partnership, don't you?

A. Yes, sir.

Q. If you had noticed it, what would it have made you think?

A. If I'd have had it pointed out to me, I'd have thought that different companies were getting paid --

…….

A. That's fine. If I'd have realised -- if it had been pointed out to me, I would have realised that goods was coming in from different companies and -- to what it was saying on the invoice.

Q: And how would that have made you feel?

(Pause).

A. I'd have probably asked questions if it were --

Q. What kind of questions?

A. How come -- how are we paying this company when it's -- when the invoice is to Recycling Solutions?

Q. I mean, basic questions; yes?

A. Yes, sir."

524. Mrs Sandham dealt with the VAT returns and accepted in evidence that she would have seen the invoices from Recycling Solutions Limited but "it was literally just a case of getting it in the book" as she was also at home looking after her young son. She accepted that she had probably made one of the substantial transfers to Lichtenstein or Hong Kong and was shown examples of sums of just under 1 million US dollars. She did not think to question this.

525. The above evidence demonstrates a complete lack of oversight and care about the transactions conducted in the name of the partnership, other than the fact that profits were being made. Mr and Mrs Sandham should reasonably have asked many more questions regarding the transactions, but at the time they placed undue trust in Mr France.

Due diligence

526. When asked about Recycling Solutions Limited, Mr Sandham said that he did not know much about the company or Mohammed Urfan. Mr Sandham said that he may have looked in the due diligence folder about the trader but that he did not know much.

527. The Tribunal is satisfied that there was a serious failure at the partnership in respect of its due diligence processes. Premier Metals did not undertake any meaningful checks, having outsourced their function to Mr France, and then failed to have any meaningful oversight of his due diligence.

528. Mr Sandham was questioned in detail about the extent to which he examined the due diligence undertaken by Mr France. He maintained that he did occasionally look at the file. He stated that an account recorded in the visit report prepared at the creditors meeting 11 November 2013 that he did not look at the due diligence and just took Mr France's word was untrue and he was not sure why he had said that at the meeting.

529. Mr Sandham's account as to Jonathan France's behaviour is inconsistent. On the one hand Mr Sandham questioned whether he was being manipulated with the due diligence folder deliberately left open. On the other hand, Mr France was "a closed book" and secretive about the diary recording the deals, behaviour which appears contradictory. Mr Sandham said he did want to see what was in the diary, but the horse had bolted. He did not ask to look in it beforehand because he left it all to Jonathan France.

530. It appears that from Mr Sandham's perspective the reason for due diligence was not to ascertain that the counterparties were VAT registered, creditworthy etc. but as Mr Sandham stated, to ensure the paperwork was up to date. This appears to be an extremely lax attitude to what Mr Sandham stated in his witness statement about his preconditions to entering into the primary metals trade, namely a purported to desire to ensure everything was above board. At §42 he stated, "it would be up to Jonathan France to make sure everything was done properly and that he did proper due diligence." He also stated that what had not forgotten what Patrick Knowles had said.

531. Given the large increase in turnover in a new commodity and the fact that the partnership was being paid 50% of the profits for doing very little (other than providing a business name, premises and VAT registration number), Mr Sandham should have ensured that he was satisfied with the due diligence in respect of his counterparties. Mr Sandham appears to have done almost nothing and in fact no relevant due diligence appears to have been conducted by Mr France.

532. He accepted that the due diligence provided on 12 August 2013 contained no evidence of any checks conducted on his counterparties prior to the transactions in February and March 2013. The only checks upon suppliers were Europa checks on Montana and C&C on 18 June 2013, many months after the relevant transactions had occurred.

533. In respect of the later due diligence provided on 27 January 2017, Mr Sandham accepted that the material regarding Miya Trading was also of no assistance as it was attached to an email 14 August 2013 many months after the relevant trade in March 2013.

534. The material provided in respect of Recycling Solutions raises more questions than it answers with a trade classification of "non-hazardous waste". The company did not appear to have been registered for any purpose connected with primary metals. The introduction letter

also predated the involvement of Jonathan France with the Partnership and was not addressed to them but to a company dealing in customs clearance, transportation and bonded goods.

535. The timing of the due diligence is also questionable, in both instances it appears to have been conducted or collated a few days after visits from HMRC as opposed to before the relevant transactions.

536. Likewise, Mrs Sandham never looked at the due diligence folder or asked what due diligence had been done.

537. Nonetheless, while all of these failings are obvious with hindsight, they need to be counterbalanced against the fact it was not obvious to the partnership that the primary metals trade was at high risk of being involved in VAT fraud. The level of reasonable due diligence required was not circumscribed or prescribed by HMRC nor through any publicly available industry instructions. The Sandhams were not acting in flagrant breach of any industry or HMRC warnings, the sum total of information available to the partners on VAT fraud in the primary metals industry was that delivered by HMRC at the meeting in March 2012.

538. Mr Sandham believed he knew or was familiar with the suppliers through their longstanding connection to Mr France and his experience in the scrap metal industry. Further, Mr Sandham did not know that the true reason for his partnership being used to conduct the trade by Mr France was likely to be its available VAT Registration Number and air of legitimacy.

539. The Tribunal accepts that it can take into account the undue trust Mr and Mrs Sandham placed in Mr France when considering what the partners should have known, just as it did when considering whether they actually knew that the transactions were connected with the fraudulent evasion of VAT.

Payments to Jonathan France and Mohammed Urfan

540. Mr France appears to have been paid substantial sums by electronic transfer and was also paid in the form of vehicles. In addition to £45,000 paid through the bank account during the relevant period, he was given a Toyota Hilux worth £30,000 (later during the course of the Company's trade Mr France was also given a Jaguar worth £60,000). It is not immediately apparent where these vehicle purchase transactions appear in the partnership's bank statements. Mr Sandham's evidence was imprecise as to the amounts paid – it does not easily tally with 50% of the £210,000 profit appearing from examining the invoices. Mr Sandham does not appear to have kept a close check on the sums calculated or how the commissions were calculated, taking Mr France's word for it.

541. Further it was accepted that substantial sums of cash were paid to Mr Urfan at his own insistence - £60,000 in less than 2 months. This does not appear to have been questioned save that Mr Sandham accepted it was "a bit funny".

542. It appears that Mr Sandham was satisfied with the partners' easy share of profit for doing very little and did not trouble himself to understand the detail of amounts paid to France and Urfan.

543. Neither of the partners knew very much about the person who had apparently introduced their main supplier Recycling Solutions, namely Mr Urfan. It was suggested in evidence that

Mr Sandham thought Mr Urfan was also connected with JKL Wakefield although this suggestion had not been made before in visit reports or in his witness statement.

544. Mr Sandham queried at one point whether Mr Urfan's commission came out of the £210,000 but he left Mr France to work out Mr Urfan's commission and payments. This underlined the low level of involvement and oversight Mr Sandham had over the primary metals business for which the partnership was responsible. He did not seem to know the material details about how much each person was making under the contract.

545. In response to re-examination, Mr Sandham stated that Urfan may have been being paid more than Mr France and the partners put together. If that were the case, one would expect the partnership to be aware and ask the relevant questions about Mr Urfan, his contacts such as Recycling Solutions and his need to be paid in cash. Checks would also have revealed Mr Urfan was a disqualified director since 2011.

546. Mrs Sandham stated that she was not particularly aware that Mohammed Urfan was paid £60,000 from the partnership. She thought she knew that her husband had paid him cash once in a car park. When asked if it caused her concern, she said she did not particularly think about it.

547. Mrs Sandham did not know when Mohammed Urfan first became involved in the business. She thought it was not until they made the first payment to him. She had never met him, and it had never occurred to her to ask to meet him.

548. Again, the Tribunal is satisfied that the payments to Mr France and Mr Urfan should reasonably have concerned Mr and Mrs Sandham a great deal more at the time but they paid insufficient attention to the detail. They left Mr France not only to run the business but decided the levels of profits and arrange the payments as reward. This should have been a warning indicator that their trade may not be commercial but it is not when taken in isolation or cumulatively with the other factors sufficient to prove they should have known the only reasonable explanation for the trade was the connection to VAT fraud.

When Mr Sandham found out that Jonathan France was a disqualified director

549. Mr Sandham's evidence was inconsistent as to when he first found out Mr France was a disqualified director.

550. In evidence in chief Mr Sandham suggested he was still unaware that Mr France had been disqualified for a lengthy period as late as April 2016. In the report of the creditors meeting of 11 November 2013 Mr Sandham appears to have suggested that he knew Mr France could not be a director when Mr France joined 'the company' ('the Company' was formed on 1 April 2013 after Mr France joined the business but Mr France initially joined the partnership in December 2012 / January 2013). It would be damaging evidence for the partners if Mr Sandham had indeed been aware that Mr France was a disqualified director at the time he allowed Mr France to join the business and at the time of the relevant transactions in February to March 2013.

551. In cross examination Mr Sandham said he did not know why he had stated this at the time and he was a duck out of water at the meeting in November 2013. In his oral evidence and in his witness statement Mr Sandham suggested he only found out about Mr France's disqualification only in August 2013 when Mr Sandham sought professional assistance.

Curiously, in his evidence Mr Sandham could not recollect properly how he found out this significant news:

“Q. When do you say you became aware that France could not be a director of a company?

A. I think it was when it had all started kicking off.

Q. What date would that have been?

A. It would have been August -- August.

Q. Of when?

A. 2013.

…….

Q. You knew before 2016, didn't you?
A. Yes.
Q. Yes.
A. Yes.
Q. So that answer's not right, is it, on Friday?
A. I am looking at page 71.
Q. Yes.
A. Paragraph 70 -- question 17 to 19.
Q. Mr Bott says: "This is about a letter of 15 April 2016. Presumably even at this stage you didn't realise he'd actually been disqualified for almost the maximum period. Did you know that?
“Answer: No, sir."
You did know by 2016, didn't you?
A. Yes, sir.
Q. And when do you say you found out in 2013?
A. I'm not sure if it was when -- in August or at the insolvency meeting.
Q. So August 2013. The insolvency meeting's November 2013. Can you remember how you found out? I mean, it must have been something which came as quite a shock to you.
A. I don't know if it was one of Jonathan France's colleagues.

Q. So you don't remember at all how you found out?

A. Not properly, no.

Q. But this was a man who you'd, on your evidence, trusted, allowed to conduct millions of pounds' worth of transactions and all of a sudden you find out the shocking news that he's a disqualified director.
A. Yes, sir.
Q. And you don't remember how or when?
A. There was a lot going on at the time and I'm not sure if it was during the August visit or if it was actually in the insolvency meeting.
….

Q…..But at that meeting there you are saying that you did know when France joined the company he could not be a director. What I'd like you to help us with is whether you were referring to the partnership there or the company?
A. If I could just make you aware what the situation was at the creditors' meetings, I was totally like a duck out of water and a lot of things had gone wrong – were going wrong and questions were coming

thick and fast, and when -- when Jonathan France left the company I knew he was not a director at his company, but I did not know that Jonathan France was a disqualified director.
Q. So when you said he did know that he could not be a director, why did you say that? (Pause).
A. I don't know, sir."

552. The Tribunal does find Mr Sandham's inconsistent evidence to be unsatisfactory. It is unlikely that Mr Sandham would not be able to recall when he discovered Mr France was a disqualified director. This would have been fairly shocking given his intimate involvement in the partnership and then the Company. If Mr Sandham had let Mr France work for the business despite knowing he was a disqualified director this would suggest Mr Sandham should have known that there was a real risk that Mr France's trade was untoward or fraudulent and that Mr Sandham may have been assisting Mr France in committing criminal offences.

553. The context of these inconsistent accounts is that Mr Sandham and Mr France had known each other 25 years. The only reason for Mr France to bring all of his contacts and business to Mr Sandham once Mr France had left JKL and that Mr France and Sandham were existing associates in related metals businesses.

554. If Mr Sandham had asked more questions of Mr France or conducted investigations as to why Mr France did not simply start up his own business or go to an existing trader in primary metals, he may have discovered the fact that Mr France was a disqualified director and a bankrupt and needed a conduit for the transactions. Mr Sandham should have asked some basic questions as to why he was being offered 50% of the profits from Mr France's lucrative trade. In addition, investigations or searches should have revealed the truth about Mr France.

555. Nonetheless, the Tribunal has to weigh up this evidence carefully. Mr Sandham was giving evidence about events that had occurred five a half years before and concerning the collapse of his business which was emotionally distressing.

556. On balance, the Tribunal cautiously accepts Mr Sandham's evidence that he only discovered about Mr France's disqualification in August 2013 after the Company's trade was disrupted, it ceased trading in primary metals and Mr France left. The Tribunal accepts that the reason he told the creditors otherwise in November 2013 was that he was confused and he was not party to dishonest conduct in allowing Mr France to operate from the partnership and lying to the creditors meeting about his knowledge of Mr France's disqualification. However, the Tribunal is bound to find that Mr Sandham failed to take reasonable care and placed undue trust in Mr France.

Mr Sandham's admissions in evidence

557. HMRC submit that Mr Sandham, made admissions which were damaging to his case during the course of his evidence as to his conduct being reckless and of the type that no sensible business person should engage in. Mr Sandham stated in response to cross-examination as follows:

"Q. It's quite obvious, isn't it, you had absolutely no control over what was going on, on your own account?

A. That's correct, sir.

Q. And as a sensible and prudent businessman, do you not accept that was reckless in the extreme?

A. I -- yes, sir.

Q. And you should have known what was going on, shouldn't you? Any sensible businessman should have known what was going on. All you needed to do was to ask a few questions, didn't you?

A. Yes, sir.

Q. So you accept that?

A. I -- all I can say is because previous I'd seen it going on for such a long time at JKL for seven years I just -- and Jonathan France was running the companies for seven years, he was doing all the deals, I presumed or I thought when he came across to Premier that --

Q. It would just continue. I mean, you had no expertise in primary metals, did you?

A. I had none at all, sir.

Q. You could bring nothing to the table, could you?

A. No, sir.

Q. You were out there on the lorry dealing with the scrap side of things.

A. That's correct, sir.

Q. You gave nothing to Jonathan France, did you? You brought nothing to the primary metals table, if I can put it that way.

A. No, no.

Q. No. So did it not cross your mind why on earth this man would offer you 50 per cent of all of this business?

A. I -- I knew with the previous -- with the previous -- what we'd seen previous and what was happening now with the trades, I did know obviously -- I didn't realise that the profit's quite as much as what your colleague's mentioned."

558. The Tribunal accepts that this passage of evidence was a clear admission by Mr Sandham that he acted negligently in allowing Mr France to take control over the primary metals business of the partnership and conduct the relevant fraudulent transactions.

559. However, it does support Mr Sandham's credibility that he was ready to make reasonable concessions. It is also based on the hindsight that Mr Sandham was armed with five and a half years after the events in question with full knowledge of Mr France's criminal activities. The reason for Mr Sandham placing undue trust in Mr France was consistent throughout – Mr Sandham's long association and knowledge of Mr France and Mr France's conduct of primary metals trading while at JKL.

560. Ms Goldring, on behalf of HMRC, submits that this was an admission that Mr Sandham should have known that the transactions were connected with the fraudulent evasion of VAT.

561. The Tribunal does not go so far as to accept this. It was an admission that with the benefit of hindsight Mr Sandham should not have let Mr France take over the primary metals part of his business and that Mr Sandham should have known there was something untoward going on with this part of the business. However, the Tribunal is not satisfied it was a full admission of

means of knowledge of VAT fraud nor that Mr Sandham believed he had means of knowledge at the time, as distinct to his means of knowledge years after the event.

Factors militating against the Sandhams having means of knowledge

562. HMRC submit that, the cumulative evidence referred to above proves that either or both of the partners should have known that the transactions were connected with the fraudulent evasion of VAT, whether Mr France's knowledge is attributed to the partnership or not.

563. The Tribunal is satisfied that there were more than reasonable grounds at the time to suspect that the transactions were connected to the fraudulent evasion of VAT and that the partners should have known that the transactions were *more likely than not* connected to VAT fraud.

564. However, for all the reasons set out above and below, the Tribunal is not satisfied HMRC have proved to the requisite standard that the partners should have known that the transactions *were* connected to the fraudulent evasion of VAT.

565. The Tribunal is satisfied the partners failed to take reasonable care in relation to the primary metals trade of the partnership in a number of ways already set out above. The Tribunal is satisfied that Mr and Mrs Sandham failed to supervise and control the primary metals business conducted by Mr France on behalf of their partnership. They failed to ask basic questions and conduct investigations into Mr France's background, the nature of the supplies, the invoices, the due diligence, the profit margins and the division of the profits. They were partly motivated by their association with Mr France and partly motivated by the increase in profits. They should have been far more sceptical about Mr France and the trade generally.

566. The Tribunal relies on all of its findings above in coming to this conclusion, in particular its findings at paragraphs 430-442 above as to why the partners did not have actual knowledge.

567. Mr France took charge of the transactions. The exhibits of Officer Chisman show his complete control of the process and are strongly confirmatory of the Sandhams' evidence. Mr Sandham had never seen anything like this before. The material at the disposal of the partners was being filtered by Mr France and their view of it was wholly determined by his dishonest explanations. This is a long way from the usual position.

568. The correct application of the 'knows or should have known' test is set out at para 59 and 60 of *Mobilx* in terms that are themselves well known:

"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."

569. So the question, in narrow terms, here is: should Mr and Mrs Sandham have known that the only reasonable explanation for the transactions undertaken by Mr France was that they were connected to fraudulent evasion of VAT?

570. In answering that question, the following factors are relevant:

(i) The imbalance in sophistication between the parties;

(ii) The Sandhams' lack of any experience of MTIC fraud;

(iii) Mr France's singular history of lying to and deceiving other people, including investigators and officials;

(iv) The chronology of these events – and Mr France's obvious need to acquire a trading entity through which he could continue to commit MTIC fraud;

(v) The role of the ex JKL staff who went to work for the partnership after Mr France joined;

(vi) The absence of HMRC contact with the partnership before the March 2012 visit and until after these transactions had concluded;

(vii) The concentration of these transactions into a short period of partnership activity in February and March 2013.

571. The Tribunal has found Mr and Mrs Sandham to be, for the most part, credible in their evidence. They made reasonable concessions which were consistent with the undisputed facts including that a convicted fraudster took over their business. They may have been credulous or naïve and had their trust abused but during the currency of the partnership they did not even know whether they were making substantial profits and did not feel the effects of the profits they were making.

572. Overall, the Tribunal is of the view that the factors which HMRC relied on to prove knowledge or means of knowledge of the lack of commerciality or fraudulent activity in the trade are not decisive – either of actual knowledge, constructive knowledge that flows from wilful blindness or means of knowledge.

573. This was an unusual case where a professional fraudster known to the partners as an associate for a very long time has taken control of a modest trading partnership, run by straightforward and, for the most part, honest people.

574. Mr France, a convicted fraudster has conducted his own fraudulent trading through the partnership on his terms and with his contacts without the knowledge of the partners. The state of mind of the partners and their being deceived by a sophisticated criminal is also relevant to their means of knowledge.

575. All fraud is transparent with hindsight. All victims have missed some clues. In this case, the Sandhams were genuinely deceived. The Tribunal is satisfied their means of knowledge of VAT fraud has to be judged through that prism.

Conclusion on Second Issue

576. If the means of knowledge test were applied over a longer period, the conclusion of the Tribunal might have been different: for instance if the Tribunal were considering the Sandhams' means of knowledge after 1 April 2013 once the Company had been incorporated, the trading had continued for a longer period and the sums at stake increased greatly. However, in the brief duration of the partnership trading, HMRC has not proved that Mr or Mrs Sandham should have known that the only reasonable conclusion was that the relevant transactions were connected to fraudulent evasion of VAT.

Conclusion on the appeal

577. The appeal is dismissed. The denial of input tax and VAT assessment for the two periods 02/13 and 99/99 is upheld and affirmed.

578. For the reasons set out within the decision on the First Issue Mr France's knowledge that the relevant transactions were connected to the fraudulent evasion of VAT is to be attributed to the partnership. Nonetheless, for the reasons set out within the Second Issue, the partners of the partnership neither knew nor should have known that the transactions were connected to the fraudulent evasion of VAT.

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.

RUPERT JONES
TRIBUNAL JUDGE

RELEASE DATE: 2 APRIL 2019