TC07818

VAT – denial of input tax – plant and machinery sales – whether the appellant knew that the transactions were connected with the fraudulent evasion of VAT – yes, save for certain deals with one supplier – whether the appellant should have known that the transactions were connected with the fraudulent evasion of VAT – yes, save for certain deals with one supplier – appeal dismissed, save for certain deals with one supplier

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/04245

BETWEEN

PETERBOROUGH PLANT SALES LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE RICHARD CHAPMAN QC
MR CHARLES BAKER

Sitting in public at Taylor House, 88 Rosebery Avenue, London, EC1R 4QU on 16 to 24 September 2019

Mr Mark Hildred (assisted by Mr Matt Storey), Chartered Accountant of Moore Thompson Chartered Accountants, for the Appellant

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

DECISION

INTRODUCTION

1. This appeal is in respect of a decision dated 28 June 2016 denying input tax claimed by Peterborough Plant Sales Limited ("PPSL") in the sum of £643,809, together with consequential assessments dated 12 July 2016 (collectively "the Decision").

2. The Decision related to 43 transactions in the VAT periods 06/15, 09/15 and 12/15. All the transactions related to the purchase of heavy plant equipment.

3. In essence, HMRC denied PPSL's input tax claims because they alleged that PPSL knew or should have known that its transactions were connected with the fraudulent evasion of VAT. PPSL accepts that there was a VAT loss, that the VAT loss was occasioned by fraud, and that its transactions were connected with such a fraudulent VAT loss. The dispute at the heart of the appeal, therefore, is whether or not PPSL knew or should have known that its transactions were connected with the fraudulent evasion of VAT.

BACKGROUND

4. The non-contentious background can be summarised as follows.

5. PPSL was incorporated on 23 March 2012 and was registered for VAT with effect from 1 May 2012. The sole director and sole shareholder of PPSL is, and has been since incorporation, Mr Ryan Swindell. Mr Swindell was aged 19 at the time of incorporation and 23 at the time of the transactions. Mr Sean Reilly was involved in PPSL's affairs. The precise extent and characterisation of that involvement is in dispute and so is analysed in detail below. However, the parties agree that Mr Reilly was the chief trader and driving force behind PPSL. Mr Reilly is Mr Swindell's stepfather, as he is married to Mr Swindell's mother, Mrs Kerry Reilly.

6. PPSL initially traded as a bar and restaurant. It first started trading in plant in approximately May 2014. The plant involved in the transactions which are the subject of this appeal comprise: excavators, bulldozers, tractor units, tippers, dump trucks, telehandlers, jaw crushers, and loading shovels.

7. HMRC first visited PPSL on 20 August 2014. Further visits to PPSL and meetings with PPSL's accountants, Moore Thompson, took place on (amongst other occasions) 19 November 2015 and 30 November 2015. Extensive correspondence also passed between HMRC and Moore Thompson. The investigations were carried out by Ms Pia Sievers-Greene and, from 21 January 2015, Mr Gareth Marklew.

8. Following these investigations, on 28 June 2016, Mr Marklew notified PPSL of HMRC's Decision, being the refusal of the entitlement to the right to deduct input tax. The total amount of input tax denied was £643,809, comprising £290,640 for the period 06/15, £187,300 for the period 09/15, and £165,860 for the period 12/15.

9. The basis for the Decision was as follows:

> "In the making of this decision the Commissioners have taken into account the features of trade evident from reviewing the transactions and activities of Peterborough Plant Sales Limited including:
>
> 1. The deals under consideration have been traced to an identified tax loss.
>
> 2. Despite the high value nature of the transactions it is apparent that limited commercial checks were undertaken to establish the legitimacy of the connected supply chains.
>
> 3. The repeated & continued presence of defaulting traders within connected supply chains."

10. The Decision included an annex which listed each of the 43 transactions which were denied ("the Deals"), setting out for each the purchase invoice date, the purchase invoice number, the supplier name, the description of the goods, the net amount of the invoice, the VAT and the gross amount of the invoice.

11. By way of a summary of the Deals, we set out below the relevant suppliers, the total amount of VAT denied in respect of each such supplier and the periods involved.

Supplier:	*Relevant periods (number of deals in brackets)*	*Total amount of VAT denied:*
Go Plant Rental Ltd ("Go Plant")	06/15 (5), 09/15 (1), 12/15 (2)	£145,044
PWC Commercials Ltd ("PWC")	06/15 (6), 09/15 (2)	£118,275
DFMS (NI) Ltd ("DFMS")	06/15 (3), 09/15 (3)	£55,805
William O'Grady (trading as North West Plant and North West Plant Sales) ("NW Plant")	06/15 (5)	£100,540
Roy Construction Ltd ("Roy Construction")	09/15 (1)	£18,300
Anderdale Services Ltd ("Anderdale")	09/15 (6)	£88,000
Erlemo (UK) Ltd ("Erlemo")	12/15 (7)	£83,685
Terence Johnston (trading as JJR Rentals) ("JJR")	12/15 (1)	£16,360
Liam Duggan ("Mr Duggan")	12/15 (1)	£17,800
TOTAL:		£643,809

12. On 12 July 2016, assessments were issued to PPSL, adjusting its 06/15 return to a net payment of £290,640, adjusting its 09/15 return from a repayment of £88,541.33 to a net payment of £98,758.67, and adjusting its 12/15 return from a net repayment of £3,962.52 to a net payment of £162,074.79.

13. PPSL did not request a review of the Decision and instead issued a notice of appeal on 5 August 2016.

THE ISSUES IN DISPUTE

14. The grounds for appeal as set out in the notice of appeal were essentially as follows:

(1) PPSL did not know and should not have known that its transactions were connected with the fraudulent evasion of VAT.

(2) PPSL made sufficient checks on its suppliers.

(3) PPSL did not accept that its transactions could be traced to identified tax losses.

(4) There was nothing unusual in PPSL's trading. The output tax had been declared, the total revenues from the plant sold was more than the total purchases, and any individual items of plant sold for a loss were subsidised by hire charges.

(5) The only reason PPSL participated in these transactions was to purchase the plant with a view to making a profit by selling to third parties or being held for rental to third parties pending such sales. PPSL did not know and had no way of knowing that it was connected to any allegedly fraudulent transactions.

15. We note (and the parties agreed during submissions) that it is well settled that HMRC must establish the following:

(1) That there was a VAT loss.

(2) That the VAT loss was a result of fraudulent evasion.

(3) That PPSL's transactions which are the subject of this appeal were connected with that fraudulent evasion.

(4) That PPSL knew or should have known that its transactions were so connected.

16. On 5 January 2018, PPSL served a notice of issues upon HMRC. These were then replaced to add further clarity on 12 January 2018. The substitute notice of issues is signed by Mr Swindell and states as follows:

> "1. I can accept from the witness statements provided by HM Revenue & Customs that there appears to be a tax loss.
>
> 2. I can accept from the witness statements provided by HM Revenue & Customs that it appears that the tax loss was fraudulent.
>
> 3. I can accept from the witness statements that the transactions conducted by Peterborough Plant Sales Limited were indirectly connected to that fraudulent tax loss.
>
> However, at no stage could Peterborough Plant Sales Limited know or should have known that these transactions have caused a tax loss or was part of a fraudulent transaction. Output tax, on all subsequent sales (except for sales outside the UK where the relevant evidence was obtained) on the plant involved in these transactions were declared on a VAT return and paid over to HM Revenue & Customs. Therefore, because Peterborough Plant Sales Limited could not have known that these transactions caused a loss the claim to input tax should not be denied."

17. As confirmed by Mr Hildred, it follows that the issues set out at 15(1) to 15(3) above are agreed and the issue set out at 15(4) above is in dispute.

THE LEGAL FRAMEWORK

18. The legal framework was not in dispute.

19. The starting point is the right to deduct VAT. Articles 167 and 168 of the Council Directive 2006/112/EC (replacing Article 17 of the Sixth Council Directive) provide as follows.

> "Article 167
>
> A right of deduction shall arise at the time the deductible tax becomes chargeable.

Article 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;
>
> (b) the VAT due in respect of transactions treated as supplies of goods or services pursuant to Article 18(a) and Article 27;
>
> (c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);
>
> (d) the VAT due on transactions treated as intra-Community acquisitions in accordance with Articles 21 and 22;
>
> (e) the VAT due or paid in respect of into that Member State."

20. This was implemented by sections 24 to 26 of the Value Added Tax Act 1994 and Regulation 29 of the Value Added Tax Regulations 1995. The principle to be taken from the domestic legislation, as put by Mr Carey and agreed by Mr Hildred, is that if PPSL (as a taxable person) has incurred input tax that is properly allowable, it is entitled to set it against their output tax liability and, if the input tax credit due exceeds the output tax liability, it is entitled to receive repayment.

21. However, this is subject to the potential for that entitlement to be lost. The CJEU set out the relevant circumstances where this may occur in *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (Joined cases C-439/04 and C-440/04) [2008] STC 1537 as follows at [54] to [61].

> "[54] As the court has already observed, preventing tax evasion, avoidance and abuse is an objective recognised and encouraged by the Sixth Directive (see *Gemeente Leusden v Staatssecretaris van Financien* (Cases C-487/01 and C-7/02) [2007] STC 776, [2004] ECR 1-5337, para 76). Community law Cannot be relied on for abusive or fraudulent ends (see, *inter alia, Kefalas v Greece and OAE*(Case C-367/96) [1998] ECR 1-2843, para 20; Case *Diamantis v Greece* (Case C-373/97) [2000] ECR 1-1705, para 33; and *IIS Fini H v Skatteministeriet* (Case C-32/03) [2005] STC 903,[2005] ECR 1-1599, para 32).
>
> [55] Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively (see, *inter alia, Rompelman v Minister van Financien* (Case 268/83) [1985] ECR 655, para 24*; Intercornmunale voor Zeewaterontzilting (in liquidation) v Belgium* (Case C-110/94) [1996] STC 569, [1996] ECR 1-857, para 24; and *Gabalfrisa* (para 46)). It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of

objective evidence, that that right is being relied on for fraudulent ends (see *Fini H* (para 34)).

[56] In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.

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

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

[59] Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'.

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

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

22. The principles to be taken from this were considered in *Mobilx Limited (In Liquidation) v HMRC* [2010] EWCA Civ 517, [2010] STC 1436 ("*Mobilx*"). Moses LJ stated as follows at [50] to [52], [58] to [60], and [81] to [85].

"Meaning of 'should have known'

[50] The traders contend that mere failure to take reasonable care should not lead to the conclusion that a trader is a participant in the fraud. In particular, counsel on behalf of Mobilx contends that Floyd J and the tribunal misconstrue para 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'(para 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 paras 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* (para 55).

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

Extent of Knowledge

…

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

[59] The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who 'should have known'. Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*.

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

…

Questions of Proof

[81] HMRC raised in writing the question as to where the burden of proof lies. It is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase is outwith the scope of the right to deduct it must prove that assertion. No sensible argument was advanced to the contrary.

[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.

[83] The questions posed in *BSG* (quoted above at para [72]) by the tribunal were important questions which may often need to be asked in relation to the issue of the trader's state of knowledge. I can do no better than repeat the words of Christopher Clarke J in *Red 12 Trading Ltd v Revenue and Customs Comrs* [2009] EWHC 2563(Ch) at [109]-[111], [2010] STC 589 at [109]-[111]:

> '[109] Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature eg that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.
>
> [110] To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain of transactions all of which have -identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.
>
> [111] Further in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them.'

[84] Such circumstantial evidence, of a type which compels me to reach a more definite conclusion than that which was reached by the tribunal in *Mobilx*, will often indicate that a trader has chosen to ignore the obvious explanation as to why he was presented with the opportunity to reap a large

> and predictable reward over a short space of time. In *Mobilx*, Floyd J concluded that it was not open to the tribunal to rely upon such large rewards because the issue had not been properly put to the witnesses. It is to be hoped that no such failure on the part of HMRC will occur in the future.
>
> [85] In so saying, I am doing no more than echoing the warning given in HMRC's VAT. Notice 726 in relation to the introduction of joint and several liability. In that Notice traders were warned that the imposition of joint and several liability was aimed at businesses who know who is carrying out the frauds, or choose to turn a blind eye (para 2.3). They were warned to take heed of any indications that VAT may go unpaid (pare 4.9). A trader who chooses to ignore circumstances which can only reasonably be explained by virtue of the connection between his transactions and fraudulent evasion of VAT, participates in that fraud and, by his own choice, deprives himself of the right to deduct input tax."

23. In *Megtian Ltd (In Administration) v The Commissioners for Her Majesty's Revenue and Customs* [2010] EWHC 18 (Ch), [2010] STC 840, Briggs J stated as follows at [37] to [38].

> "[37] In my judgment, there are likely to be many cases in which a participant in a sophisticated fraud is shown to have actual or blind-eye knowledge that the transaction in which he is participating is connected with that fraud, without knowing, for example, whether his chain is a clean or dirty chain, whether contra-trading is necessarily involved at all, or whether the fraud has at its heart merely a dishonest intention to abscond without paying tax, or that intention plus one or more multifarious means of achieving a cover-up while the absconding takes place.
>
> [38] Similarly, I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be, demonstrated precisely which aspects of a sophisticated multifaceted fraud he would have discovered, had he made reasonable inquiries. In my judgment, sophisticated frauds in the real world are not invariably susceptible, as a matter of law, to being carved up into self-contained boxes even though, on the facts of particular cases, including *Livewire*, that may be an appropriate basis for analysis."

24. Dishonesty is not a requirement for such knowledge. In *The Commissioners for Her Majesty's Revenue and Customs v Citibank NA, E Buyer UK Limited* [2017] EWCA 1416 (Civ), the Chancellor stated as follows at [90].

> "[90] Finally, if a summary of the applicable law is required along the lines of paragraphs 86 and 87 of the UT's decision, I would simply summarise the principles as follows:-
>
> i) The test promulgated by the CJEU in *Kittel* was whether the taxpayer knew or should have known that he Was taking part in a transaction connected with fraudulent evasion of VAT.
>
> ii) Ultimately the question in every Kittel case is whether HMRC has established that the test has been met. The test is to be applied in accordance with the guidance given by the Court of Appeal in *Mobilx* and *Fonecomp*.
>
> iii) It is not relevant for the FTT to determine whether the conduct alleged by HMRC might amount to dishonesty or fraud by the taxpayer, unless dishonesty or fraud is expressly alleged by HMRC against the taxpayer. If it

is, then that dishonesty or fraud must be pleaded, particularised and proved in the same way as it would have to be in civil proceedings in the High Court.

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

25. There is no requirement for HMRC to put an end to a fraud. In *Harwich GSM Ltd v The Commissioners for HM Revenue and Customs* [2012] UKFTT 279 (TC) (Judge Mosedale and Mr Adams), the Tribunal stated as follows at [140].

> "[140] It is an allegation of the appellant's that HMRC knew the scale of the fraud in early 2006 and failed to put an end to it. As we have said, this Tribunal is not undertaking a judicial review of HMRC's conduct. If the appellant considers that HMRC have failed to act properly, it should have taken its complaint to the High Court. It makes no difference to the question this Tribunal has to answer which is whether the appellant knew when it entered into its transactions to buy and sell mobile phones that it was entering into transactions connected with fraud."

26. We were also referred to *Ronald Hull Junior Ltd v The Commissioners for HM Revenue and Customs* [2018] UKFTT 198 (TC) (Judge Mosedale) to the same effect. We are conscious that both of these cases were heard in the First-tier Tribunal and so are not binding upon us. However, they do have illustrative force.

27. As set out below, a discrete issue arose as to whether or not Mr Reilly was a shadow director of PPSL. The legal principles as to when a person is to be treated as a shadow director were summarised as follows by Newey J in *Vivendi SA v Richards* [2013] EWHC 3006 (Ch) at [124] to [126].

> "[124] A 'shadow director' is:
>
> > 'a person in accordance with whose directions or instructions the directors of the company are accustomed to act'.
>
> However, a person is not to be considered a shadow director:
>
> > 'by reason only that the directors act on advice given by him in a professional capacity'.
>
> See section 741(2) of the Companies Act 1985, section 251 of the Companies Act 2006, section 22(5) of the Company Directors Disqualification Act 1986 and section 251 of the Insolvency Act 1986.
>
> [125] The Court of Appeal considered the statutory definition in *Secretary of State for Trade and Industry v Deverell* [2001] Ch 340. In paragraph 35, Morritt LJ (with whom the other members of the Court agreed) said:
>
> > '(1) The definition of a shadow director is to be construed in the normal way to give effect to the parliamentary intention ascertainable from the mischief to be dealt with and the words used. In particular, as the purpose of the Act is the protection of the public and as the definition is used in other legislative contexts, it should not be strictly construed because it also has quasi-penal consequences in the context of the Company Directors Disqualification Act 1986.... (2) The purpose of the legislation is to identify those, other than professional advisers, with real influence in the corporate affairs of the company. But it is not necessary that such influence should be exercised over the whole field of its corporate activities.... (3) Whether any particular communication from the alleged shadow director, whether by words or conduct, is to be classified as a direction or instruction must be objectively ascertained by the court in the light of all the evidence. In that

> connection I do not accept that it is necessary to prove the understanding or expectation of either giver or receiver. In many, if not most, cases it will suffice to prove the communication and its consequence. Evidence of such understanding or expectation may be relevant but it cannot be conclusive. Certainly the label attached by either or both parties then or thereafter cannot be more than a factor in considering whether the communication came within the statutory description of direction or instruction. (4) Non- professional advice may come within that statutory description. The proviso excepting advice given in a professional capacity appears to assume that advice generally is or may be included. Moreover the concepts of 'direction' and 'instruction' do not exclude the concept of 'advice' for all three share the common feature of 'guidance'. (5) It will, no doubt, be sufficient to show that in the face of 'directions or instructions' from the alleged shadow director the properly appointed directors or some of them cast themselves in a subservient role or surrendered their respective discretions. But I do not consider that it is necessary to do so in all cases. Such a requirement would be to put a gloss on the statutory requirement that the board are 'accustomed to act' 'in accordance with' such directions or instructions.'

[126] Morritt LJ went on to say this (in paragraph 36) about the 'use of epithets or descriptions in place of the statutory definition of a shadow director':

> 'They may be very effective in graphically conveying the effect of the definition in the light of the facts of that case, as shown by their frequent use in the reported cases to which I have referred. But, it seems to me, they may be misleading when transposed to the facts of other cases. Thus to describe the board as the cat's paw, puppet or dancer to the tune of the shadow director implies a degree of control both of quality and extent over the corporate field in excess of what the statutory definition requires. What is needed is that the board is accustomed to act on the directions or instructions of the shadow director. As I have already indicated such directions and instructions do not have to extend over all or most of the corporate activities of the company; nor is it necessary to demonstrate a degree of compulsion in excess of that implicit in the fact that the board are accustomed to act in accordance with them. Further, in my view, it is not necessary to the recognition of a shadow director that he should lurk in the shadows, though frequently he may, for example, in the case of a person resident abroad who owns all the shares in a company but chooses to operate it through a local board of directors. From time to time the owner, to the knowledge of all to whom it may be of concern, gives directions to the local board what to do but takes no part in the management of the company himself. In my view such an owner may be a shadow director notwithstanding that he takes no steps to hide the part he plays in the affairs of the company. Lurking in the shadows may occur but is not an essential ingredient to the recognition of the shadow director.'

28. A shadow director is to be contrasted with a *de facto* director. In *Revenue and Customs Commissioners v Holland* [2010] UKSC 51, [2010] 1 WLR 2793, Lord Collins (whose judgment contains the majority's ratio of the decision) stated as follows at [93]:

> "[93] It does not follow that 'de facto director' must be given the same meaning in all of the different contexts in which a "director" may be liable. It seems to me that in the present context of the fiduciary duty of a director not to dispose wrongfully of the company's assets, the crucial question is whether

the person assumed the duties of a director. Both Sir Nicolas Browne-Wilkinson V-C in *In re Lo-Line Electric Motors Ltd* [1988] Ch 477, 490, and Millett J in *In re Hydrodam* [1994] 2 BCLC 180, 183, referred to the assumption of office as a mark of a de facto director. In *Fayers Legal Services Ltd v Day* (unreported) 11 April 2001, a case relating to breach of fiduciary duty, Patten J, rejecting a claim that the defendant was a de facto director of the company and had been in breach of fiduciary duty, said that in order to make him liable for misfeasance as a de facto director the person must be part of the corporate governing structure, and the claimants had to prove that he assumed a role in the company sufficient to impose on him a fiduciary duty to the company and to make him responsible for the misuse of its assets. It seems to me that that is the correct formulation in a case of the present kind. See also *Primlake Ltd v Matthews Associates* [2007] 1 BCLC 666, para 284."

29. In *Smithton Ltd v Naggar* [2015] 1 WLR 189, Arden LJ stated as follows at [33] to [45].

"Practical points: what makes a person a de facto director?

[33] Lord Collins JSC sensibly held that there was no one definitive test for a de facto director. The question is whether he was part of the corporate governance system of the company and whether he assumed the status and function of a director so as to make himself responsible as if he were a director. However, a number of points arise out of *Holland's* case and the previous cases which are of general practical importance in determining who is a de facto director. I note these points in the following paragraphs.

[34] The concepts of shadow director and de facto are different but there is some overlap.

[35] A person may be de facto director even if there was no invalid appointment. The question is whether he has assumed responsibility to act as a director.

[36] To answer that question, the court may have to determine in what capacity the director was acting (as in *Holland's* case).

[37] The court will in general also have to determine the corporate governance structure of the company so as to decide in relation to the company's business whether the defendant's acts were directorial in nature.

[38] The court is required to look at what the director actually did and not any job title actually given to him.

[39] A defendant does not avoid liability if he shows that he in good faith thought he was not acting as a director. The question whether or not he acted as a director is to be determined objectively and irrespective of the defendant's motivation or belief.

[40] The court must look at the cumulative effect of the activities relied on. The court should look at all the circumstances "in the round" (per Jonathan Parker J in *Secretary of State for Trade and Industry v Jones* [1999] BCC 336).

[41] It is also important to look at the acts in their context. A single act might lead to liability in an exceptional case.

[42] Relevant factors include: (i) whether the company considered him to be a director and held him out as such; (ii) whether third parties considered that he was a director.

> [43] The fact that a person is consulted about directorial decisions or his approval does not in general make him a director because he is not making the decision.
>
> [44] Acts outside the period when he is said to have been a de facto director may throw light on whether he was a de facto director in the relevant period.
>
> [45] In my judgment, the question whether a director is a de facto or shadow director is a question of fact and degree. The principles of appellate review are well established. I need only summarise those applicable here. Where the decision depends on the judge's assessment of weight to be attached to various facts, the test to be satisfied on appeal is that in most cases the judge was plainly wrong. Where the appellant contends that the judge misdirected herself as to the law, the court must determine what the law is and whether the judge applied it."

THE EVIDENCE

30. When considering the evidence, we bear in mind that the burden of proof is upon HMRC. We also bear in mind that the standard of proof is that of the balance of probabilities.

31. We read the witness statements of, and heard oral evidence from, Mr Gareth Marklew and Ms Pia Sievers-Green on behalf of HMRC and from Mr Reilly and Mr Swindell on behalf of PPSL. HMRC's witnesses were helpful and credible, although given that their written evidence was largely a commentary upon documentation, there were very few disputes of fact for them to deal with. The cross-examination of both Ms Sievers-Green and Mr Marklew was understandably limited and largely focussed upon establishing the parameters of their investigations. Mr Hildred also tested Mr Marklew upon his conclusions as to PPSL's knowledge. Although Mr Marklew stood firm in his evidence that it was his conclusion that PPSL knew or should have known that its transactions were connected with the fraudulent evasion of VAT, the credibility or otherwise of the evidence of his opinion is not relevant; the question is whether or not we as the Tribunal are satisfied on the balance of probabilities that PPSL knew or should have known that its transactions were connected with the fraudulent evasion of VAT.

32. Our impression of Mr Reilly was that he gave evidence in a rather combative manner. However, this does not itself adversely affect our view of the credibility of the evidence which he gave. We make our findings below as to the extent to which we accept or reject his evidence in the context of our findings of fact on the relevant issues. Mr Swindell gave the impression of somebody who knew very little about the key factual matters within the appeal and kept returning to his central case that Mr Reilly carried out the trades. This lack of personal knowledge does not itself mean that Mr Swindell's evidence cannot be relied upon at all but is something which is to be taken into account where appropriate when considering his evidence.

33. We also read witness statements from Mr Andrew Hopkins, Ms Jeanette Lucas, Mr David Nixon, Ms Heather Arnold, Mr Jan Baltruschat, Mr Andrew Siddle, Mr Anthony Booth, Mr Andrew Robertson, Ms Jennifer King and Ms Kirsten Forrester on behalf of HMRC. These witnesses were not called to give evidence and Mr Hildred did not make any request to cross-examine them. We also read an undated witness statement made jointly by Mr Hildred and Mr Storey on behalf of PPSL. However, Mr Hildred and Mr Storey did not give oral evidence in the hearing as distinct from their representative role in making submissions, cross-examining HMRC's witnesses and adducing the evidence of Mr Swindell and Mr Reilly.

34. Mr Carey submitted that the Tribunal can, and should, draw adverse inferences against PPSL for its failure to call any witnesses from the counterparties to its transactions to support its case on the facts. In making this point, he relied upon *Prest v Prest* [2013] 2 AC 415 at [44], *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 and *British Airways plc*

v Airways Pension Scheme Trustee Ltd [2017] EWHC 1191 (Ch) at [141]-[143]. He also noted that it is not open to HMRC to call the relevant witnesses in order to challenge them and, in doing so, relied upon *Kasakhstan Kagazy plc v Zhunus* [2017] EWHC 3374 (Comm) *per* Picken LJ at [57].

35. Further, Mr Carey submitted that the Tribunal can draw the inference that PPSL was concerned that if it called these witnesses then they would expose facts unfavourable to it such as that it knew that the transactions were connected with fraud.

36. Mr Carey also submitted that adverse inferences can be drawn from the absence of documentation. In *Wetton v Ahmed* [2011] EWCA Civ 610, Arden LJ stated as follows at [14]:

> "[14] In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence."

37. We were also referred to *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) *per* Leggatt J at [15] to [22] to similar effect.

38. Mr Hildred did not dispute the legal principles relied upon by Mr Carey. However, his position was that PPSL was not in a position to call evidence from its suppliers because those suppliers were missing traders. In such circumstances, PPSL does not know the whereabouts of the suppliers. He also makes the point that HMRC has not argued that the sales to customers were anything other than genuine.

39. Whilst we accept the principle that such adverse inferences can be made in the absence of such witness evidence, we do not make any such inferences in the present case. We accept Mr Hildred's position as to the inability to contact the suppliers. Further, given that PPSL accepts HMRC's case that the suppliers were fraudulent traders, PPSL would not be relying upon such witnesses to establish that the transactions were free from fraud. If Mr Carey were correct, then the inference would be that the witnesses would be saying that PPSL knew or should have known about the fraud. However, in the circumstances of the present case and the acceptance that the suppliers were fraudulent, the competing inferences could equally be made that such witnesses would not admit their own fraudulent activity or that such witnesses would not wish to give evidence in a Tribunal hearing. Of course, we are not in a position to say whether or not any of these inferences can be made and do not make any such inference. However, it follows that it equally cannot be said that the inference to be taken from the absence of such witnesses is that they would be giving evidence unfavourable to PPSL. We also agree with Mr Hildred that there was no need to provide witness evidence from PPSL's customers as those onward transactions were not in dispute.

40. The minimal amount of contemporaneous documentation provided by PPSL in respect of the Deals is notable. PPSL's evidence is that such documentation was either not made in the first place or has been discarded. These are features which fall into the overall factual matrix and so are matters to be considered as part of our overall analysis of the facts. In the event of any circumstances in which we might accept that documentation upon a relevant matter would be expected, we must consider the reason for the absence of documentation and the credibility of the witness evidence relied upon. This does not mean that the absence of documentation gives rise to a sweeping inference that witness evidence which is uncorroborated by

contemporaneous documents cannot be accepted. Insofar as Mr Carey invites us to make a broad inference of this nature, we resist such an invitation.

FINDINGS OF FACT

Our Approach

41. The approach we take in this case is first to make our findings of fact upon each of the factors relied upon by the parties in support of their respective cases. We then consider the totality of those findings in order to reach our findings of fact as to whether or not PPSL knew, and whether or not PPSL should have known, that its transactions were connected with the fraudulent evasion of VAT.

The Tax Losses

42. In the light of PPSL's agreement to the issues relating to the tax loss, the existence of VAT fraud and the connection to that VAT fraud, Mr Hildred helpfully agreed HMRC's evidence in that regard. As such, and given that Mr Hildred (again, helpfully) agreed that there was no need for him to cross-examine HMRC's witnesses dealing with these matters, those witnesses were not called. We have, however, read their witness statements.

43. Given the parties' agreement that each of PPSL's transactions which are the subject of this appeal were connected with the fraudulent evasion of VAT, we make findings to the same effect. We therefore highlight the following evidence by way of brief overview in order to provide some factual context.

Go Plant

44. Go Plant is a missing trader. It was dissolved on 31 May 2016. The company undertook trades of £900,000 in two VAT periods and then disappeared. Attempts were made to visit Go Plant in August 2015, but these were unsuccessful as the occupant of the principal place of business had not heard of Go Plant before. The output tax in respect of Go Plant's supplies to PPSL has been assessed and remains unpaid.

PWC

45. PWC was incorporated on 10 April 2015 and is still registered at Companies House. It is nevertheless a missing trader as it has not responded to HMRC's requests for contact. Further, no VAT returns have been submitted. The only director was Mr Woods, who had a history of criminal convictions, had no credible experience in the industry, and yet was able to reach a turnover of £2,000,000 for the periods relating to the Deals. The output tax in respect of PWC's supplies to PPSL has been assessed and remains unpaid.

DFMS

46. DFMS is still registered at Companies House. It is nevertheless a missing trader as HMRC has unsuccessfully attempted to visit DFMS both at the address on the invoices and at the VAT business address. HMRC received no other contact. The output tax in respect of DFMS' supplies to PPSL has been assessed and remains unpaid. Further, five of the Deals, comprising nine items, were with NW Plant, who then made supplies to PPSL. Again, the output tax in respect of these supplies has been assessed and remains unpaid. We note that Mr Hildred argued that one of the Deals with NW Plant (the invoice dated 23 April 2015 for a Takeuchi wheeled excavator) was reversed and the VAT repaid by PPSL as the machinery was not delivered. It follows that the appeal cannot be successful in respect of that particular Deal ("the Refunded Deal") if PPSL is not claiming any entitlement to input tax in respect of it. Any repayment which PPSL may have already made (about which we make no finding) relates to PPSL's statement of account with HMRC rather than PPSL's entitlement to claim input tax.

Roy Construction

47. Roy Construction was dissolved on 30 March 2016. It is a missing trader, as confirmed by HMRC's unsuccessful attempts to visit it and the absence of any contact from it. It emerged that the principal place of business was a residential property that had no connection to the company save that its director had lived in it until approximately 2013 or 2014. The output tax in respect of Roy Construction's supplies to PPSL has been assessed and remains unpaid.

Anderdale

48. Anderdale was dissolved on 5 July 2016. It is a missing trader in that HMRC's attempted visit in March 2016 was unsuccessful and there has been no contact from it. The principal place of business was a residential property which had no connection with the company. The output tax in respect of Anderdale's supplies to PPSL has been assessed and remains unpaid.

Elermo

49. Elermo was wound up on 13 October 2016 pursuant to HMRC's petition. It had previously been deregistered for VAT and was a missing trader in that it has been uncontactable other than by one telephone call on 20 May 2016 (in the course of which Erlemo's director refused to attend a meeting). There was also evidence of undeclared sales, demonstrating that VAT had been charged but suppressed in the VAT return. The output tax in respect of Elermo's supplies to PPSL has been assessed and remains unpaid.

JJR

50. JJR registered for VAT as a sole trader on 18 May 2015 and has now been deregistered for VAT and is a missing trader. HMRC visited Mr Johnston's registered address on 19 May 2016, which was found to be a residential property. The occupant of the property had never heard of either Mr Johnston or JJR. There was also evidence of undeclared sales, demonstrating that VAT had been charged but suppressed in the VAT return. The output tax in respect of JJR's supplies to PPSL has been assessed and remains unpaid.

Mr Duggan

51. Mr Duggan has been deregistered for VAT and is a missing trader. In July 2014, he made a late application for VAT registration, He described his business as "groundworks" with an estimated turnover of £95,000. He gave his business address as his home in Dumfries. In response to a questionnaire about his late registration, he said that he had gone over the registration limit two years earlier but that his previous accountant had failed to register him. He said he was trying to sort out his affairs but would have difficulty paying. HMRC visited his registered address on 26 May 2016 and the occupant said that she had never heard of Mr Duggan. HMRC also visited who Mr Duggan had said was his current accountants, who said that they had last written to Mr Duggan in October 2014 but had received no reply. There was no response to HMRC's penalty notices sent to Mr Duggan's address in January 2015 and February 2015. The output tax in respect of Mr Duggan's supplies to PPSL has been assessed and remains unpaid.

Connection

52. The connection to the fraudulent evasion of VAT for the five deals with NW Plant is clear given that NW Plant were supplied by DFMS. All other deals were directly with the relevant fraudulent trader.

The Control and Management of PPSL

53. Both parties actively submit that Mr Reilly, rather than Mr Swindell, was in fact the driving force and controlling mind of PPSL. We accept that this is the case.

54. Mr Swindell's oral evidence was clear that it was Mr Reilly who took the decisions in PPSL. Crucially, Mr Swindell stated in evidence that it was ultimately Mr Reilly's decision as to whether or not a deal went ahead.

55. Mr Swindell's oral evidence also made it clear that he knew very little about the activities of PPSL, effectively just making payments when told to do so. He was able to say very little about the mechanics of the negotiations or transactions. In particular, we note the following evidence.

> "Q. At paragraph 25 of this document … they say 'The appellant believes that it is not necessary that the director needs to carry out all of the due diligence and have knowledge of all the company's trading. As long as a senior representative of the company does that, then this has to be accepted.' Do you recall that passage in this?
>
> A. Yes.
>
> Q. Do you consider that to be a correct statement of your obligations as a director of a company that, in a relatively short space of time, turned over £17 million?
>
> A. Well, I have trust in – obviously, I have trust in Mr Reilly that he was doing as he said - as he says he was. And so I obviously took that – took him at his word.
>
> …
>
> Q. Why were you not applying any independent thought? You were just taking instruction to these deals – of these deals.
>
> A. That is probably down to – probably a bit down to my inexperience. I probably should have – I maybe should have done more checks – well, probably my own checks as well, which is an error on my part."

56. Tellingly, Mr Carey put to Mr Swindell that he knew or should have known that the transactions were connected with fraud, which Mr Swindell denied. This resulted in the following exchange.

> "Q. You should have known these transactions were connected with fraud.
>
> A. We did all our deals in good faith and we did not – we did not think that they were involved with fraud.
>
> Q. Of course, you say you think they were all done in good faith, but you have not been able to tell us any information about any of these deals, have you?
>
> A. No."

57. The evidence of both Mr Reilly and Mr Swindell was that PPSL had been incorporated to provide Mr Swindell with his own company, to involve him in what was effectively the "family business" of plant sales and plant hire, and for Mr Reilly to mentor him in that regard. PPSL did not trade in plant straight away, instead carrying on business as a bar and restaurant and social club. However, we take Mr Reilly and Mr Swindell's evidence to mean that, even before trading in plant, they had it in mind that this is what PPSL would ultimately be used for. Indeed, this is consistent with the choice of PPSL's name and its business objects. In any event, it is clear from Mr Swindell's evidence that it was Mr Reilly's idea for PPSL to trade in plant sales and plant hire.

58. Mr Reilly also appears to have been controlling PPSL's finances by way of his handling of PPSL's interplay with his own company, Kerry Plant Hire & Sales Limited ("Kerry Plant"). PPSL's return for the period 06/14 included £80,600 of input tax claimed for purchases from

Kerry Plant. HMRC took issue with this. By a letter dated 19 March 2015, Moore Thompson explained that no payment was made to Kerry Plant by PPSL in respect of these purchases and that, instead, the amount outstanding was applied to a loan account between PPSL and Kerry Plant. By a letter dated 6 May 2015, Moore Thompson said that this loan had commenced on 30 September 2014 and was made up of invoices passing between PPSL and Kerry Plant between 1 May 2014 and 1 September 2014. There was no formal loan agreement and no repayment date had been set. The balance as at 31 March 2015 was £1,126,399.08 owed by PPSL to Kerry Plant. Mr Reilly's evidence was that this was how PPSL achieved its funding to start its operations. We accept this evidence. However, it is clear that this was decided upon, organised and administered by Mr Reilly. This is reinforced by the fact that it was Mr Reilly's oral evidence that he received money from PPSL by way of the loan rather than being remunerated for his services by PPSL.

59. We take it from the combination of these matters that Mr Reilly gave directions or instructions to Mr Swindell and that Mr Swindell was accustomed to act in accordance with such instructions. We therefore find that Mr Reilly was a shadow director of PPSL in accordance with the legal principles set out above.

60. Indeed, it appears from Mr Reilly and Mr Swindell's evidence that Mr Reilly was also acting as if he was the director instead of Mr Swindell, in that he was actually directing and controlling PPSL himself rather than only giving directions or instructions to Mr Swindell. However, Mr Carey did not go so far as to suggest that Mr Reilly was a *de facto* director and so, in the absence of such a submission (or response to such a submission) we do not characterise his involvement as being a *de facto* director.

61. It follows from Mr Reilly's position as a shadow director that Mr Reilly's knowledge, acts or omissions are to be attributed to PPSL in the same way as if he was named as a director. Indeed, the findings of fact which we have made above as to the extent of his involvement in PPSL's affairs are such that, even if he did not fulfil the legal test of being a shadow director, his knowledge, acts or omissions would still be attributable to PPSL because he was an authorised agent acting on PPSL's behalf.

62. We also find that PPSL was attempting to shield Mr Reilly's involvement in the control and management of PPSL from HMRC's view. We reach this finding for the following reasons.

63. We accept the evidence that Mr Reilly had a laudable desire to mentor Mr Swindell. However, this would not preclude Mr Reilly from being a director of PPSL, particularly when this was effectively the role which he was undertaking. Indeed, the desire to mentor Mr Swindell made it even more important for Mr Swindell to be guided in his obligations as a company director. The fact that Mr Swindell was clear in his evidence that he knew very little about any such obligations begs the questions as to why he was a director at all, as to why Mr Reilly was not also a director (particularly given the scope of the role that he was undertaking), and as to why this structure was chosen in order to provide the necessary mentoring.

64. In any event, the amount of mentoring which took place during the period of the Deals was remarkably low. Mr Swindell's evidence was that he did very little beyond administration at the time of the transactions under appeal. There was no evidence that Mr Reilly was involving him in trading at the time (and, indeed, Mr Swindell's evidence was that he was not).

65. Crucial to our finding that Mr Reilly's involvement was being concealed from HMRC is HMRC's visit of 30 November 2015 ("the November Visit"). We find that Mr Swindell did not reveal the true scope of Mr Reilly's involvement and actively misled HMRC as to the true scope of his own involvement. There were two similar versions of the meeting notes. The version treated by both parties as the correct version included the following:

> "PSG asked RS who worked for PPS and RS said only himself for the plant and machinery side of the business but his mother ran the social club side.
>
> PSG asked what was the business and RS said RS said PPS purchases and sells plant and machinery.
>
> PSG asked what RS did on the daily basis and did he organise purchases from contacting potential suppliers, transport, money transfers and sales and RS said he was responsible for all the daily running of the company including the tasks described by PSG.
>
> …
>
> PSG then asked RS how PPS acquired customers and noted there was no website. RS said Sean Reilly (SR), his step-father was his 'mentor' and he finds customers and knows people.
>
> PSG asked how RS found plant/vehicles to buy and RS and MS said it was word of mouth and existing contacts and again SR's contacts were used.
>
> …
>
> PSG then asked if there had been any direct contact with these customers? RS did not answer and MS said RS was mentored by **SR** and **SR** could explain further how the deals had come about.
>
> PSG said she would like to know if there had been any email correspondence, whether PPS had organised the transport (as noted in the shipping docs provided) and marine insurance. MS said he would find out all this and speak to **SR**. **[emphasis added as explained below]**
>
> …"

66. In the course of the meeting, Mr Swindell was asked about the negotiation and performance of transactions with various suppliers. His answers gave the clear impression that he was the person dealing with the suppliers and the trading as a whole. Where he could not answer a question he put it down to a lapse of memory. We note that there were a large number of such lapses.

67. Mr Hildred argued that Mr Reilly's role was disclosed in the meeting. He notes the specific references to Mr Reilly, including the extract above stating that Mr Reilly was Mr Swindell's mentor and that he finds customers and knows people. There are two versions of the notes, one which uses the initials "SR" as set out in bold in the extract recited above and one which uses the initials "RS". As set out above, the parties agree that the correct version is "SR". It is HMRC's case that this was a second version to correct typographical errors. During submissions, Mr Hildred said that it was concerning that the meeting notes had been changed. However, we accept that this was merely the correction of typographical errors. We are reinforced in this view by the fact that Mr Swindell was present at the meeting (and so it would make no sense for Mr Storey to say that he would speak to Mr Swindell) and the fact that it would make no sense for the note to have been intended to read "RS was mentored by RS". In any event, we note that the version that HMRC expressly rely upon as the corrected version supports PPSL's position as to the accurate record of what was said.

68. We therefore agree with Mr Hildred that Mr Reilly was mentioned in the course of the meeting and that it was said that he could provide further explanation. However, these were fleeting references. Even the offer for Mr Reilly to provide a further explanation did not disclose the extent of his involvement or override what Mr Swindell had said about his own involvement. On any view, Mr Swindell's answers to HMRC are inconsistent with his witness statement and his oral evidence. Mr Swindell told HMRC that he was the person organising

purchases from and contacting potential suppliers, organising transport and sales, and that he was responsible for all the daily running of the company. By contrast, his written and oral evidence was clear that Mr Reilly carried out these functions.

69. Mr Swindell accepted in cross-examination that he had overstated his involvement in the business at the meeting and accepted that "maybe" (to use his word) he should have explained Mr Reilly's involvement in the business as well. Mr Swindell did not give any reason for this failure. We note the following evidence.

> "Q. So how is it the case that, during the course of that meeting, you didn't mention that it was Mr Reilly who was in fact running the whole thing day-to-day?
>
> A. I don't know why I didn't mention that he was involved with the buying and selling.
>
> …
>
> Q. In your witness statement, you now say 'Sean would make the big, important decisions on the day-to-day running of it, including negotiating plant and hire deals."
>
> A. Yes.
>
> Q. So these two things are not the same, are they?
>
> A. No.
>
> Q. Was it a lie to the Revenue at this visit, to prevent them discovering how closely Mr Reilly was associated with the business?
>
> A. I hadn't well, obviously, I didn't, obviously, state Sean's involvement at the time of the interview.
>
> Q. Because it would have been – you would probably agree with me, I expect – a pretty easy thing for you to have said – that passage I have just read from your witness statement about him making the big important decisions, it would have been a pretty easy thing for you to say to the Revenue officers?
>
> A. Yes."

70. We find that Mr Swindell lied to HMRC in the course of the November Visit. This was not only by way of omission. He provided answers which he now accepts were the province of Mr Reilly rather than him. Crucially, Mr Swindell expressly stated that he was the only person carrying out the day to day running of the business, when in truth he had very little involvement and this was carried out by Mr Reilly. In the absence of a credible reason for this, we are driven to the conclusion that this was because he wanted to conceal the extent of Mr Reilly's involvement from HMRC.

71. During his oral evidence, Mr Reilly resisted the contention that he was "running the show" (as it was put), even though this was inconsistent with his own witness statement and Mr Swindell's witness statement.

72. We note that Mr Carey did not put to Mr Reilly that he was not a director because he was trying to conceal his involvement. However, this was put to Mr Swindell and answered by him. Given that Mr Swindell was a director of PPSL and professed to have an understanding as to why the company was structured in the way it was, we are satisfied that the issue has been put to PPSL.

73. Mr Hildred submitted that there was no need to conceal Mr Reilly's involvement as it was clear from the creditors' meeting on 12 January 2016 that HMRC already knew about such

involvement. However, this was after the November Visit and after the Deals. He also submitted that Mr Reilly was still involved in trying to keep Kerry Plant afloat. We accept this, but this does not detract from the fact that Mr Reilly was hidden from view by virtue of not being a director and by virtue of Mr Swindell not revealing the true extent of his involvement at the November Visit.

The Dealings with the Suppliers

74. We make the following findings as to the dealings with each of the suppliers involved in the Deals.

75. Mr Swindell stated in his witness statement that Mr Reilly would be contacted by new customers and suppliers before entering into a transaction. Mr Swindell's oral evidence was that he did not know how the contacts with the suppliers came about other than that these came to him through Mr Reilly. Similarly, Mr Swindell was not himself involved in any negotiation. It follows that the evidence as to PPSL's dealings with its suppliers came from Mr Reilly.

76. We note that Mr Reilly did not explain in the body of his witness statements how he first came into contact with each of the suppliers for the Deals other than in general terms. However, commentaries on each of the suppliers were included as exhibits to Mr Reilly's witness statement. Mr Hildred's written submissions also included substantially similar commentaries, which Mr Reilly also adopted in his oral evidence. We refer to the combination of these commentaries for each supplier as a "Supplier Summary".

Go Plant

77. The Deals with Go Plant were for a total value including VAT of £869,639 and related to purchase invoices dated as follows: 23 April 2015 (a Hitachi ZAXIS 200LC excavator); 13 May 2015 (a JCB JS145LC Excavator); 21 May 2015 (a Liebherr dozer); 2 June 2015 (a Komatsu PC350LC-8 excavator); 6 June 2015 (a Volvo L110G wheel loader); 1 July 2015 (a DAF CF370); 24 April 2015 (a Volvo A30F dump truck); and 29 April 2015 (a Powerscreen XR400S jaw crusher).

78. Mr Reilly's contact at Go Plant was Mr Kevin Rabbitte. The Supplier Summary states that Mr Rabbitte was known to Mr Reilly in the plant machinery industry and that Mr Reilly had met him at previous auctions, including in Leeds and Donnington Park.

79. Mr Reilly said in the course of cross-examination that he had seen Mr Rabbitte at a hundred auctions. However, their direct contact appears to have been more limited. Mr Reilly stated in the element of the Supplier Summary exhibited to his witness statement that he and Mr Rabbitte had exchanged telephone numbers at an auction with a view to trading in the future.

80. The first contact with Mr Rabbitte beyond any interaction at an auction was by way of Mr Rabbitte telephoning Mr Reilly. This telephone conversation led to the deal on 23 April 2015 for the Hitachi ZAXIS 200LC excavator. Although Mr Reilly said in evidence that Mr Rabbitte had been "in and out of my yard", there was no evidence that this was before 23 April 2015 and so we take it that this was after 23 April 2015 and so after Mr Rabbitte (through Go Plant) had already started dealing with PPSL.

81. We accept Mr Reilly's evidence that he did the following checks on Go Plant.

82. He consulted the information on Go Plant held at Companies House ("the Companies House Check"). In doing so, he confirmed that Mr Rabbitte was a director of Go Plant. Although this also showed that a compulsory strike off application had been lodged, this had been withdrawn. Mr Rabbitte said that this was because paperwork had not been filed. It also showed that Go Plant had been dormant from 24 October 2013 until February 2015. When it

was put to him that this was a point of concern, Mr Reilly said that this was a matter for PPSL's accountant and that he was only checking Companies House to see that Go Plant was who it said it was. We find that the Companies House Check exposed that there was a financial and commercial risk in dealing with Go Plant as a result of the dormant accounts and the strike off application. We also find that Mr Reilly paid no real regard to any such concerns.

83. Mr Reilly checked the VAT number with the Europe website ("the VAT Number Check"). He also carried out HPI checks on the plant involved to check that it was free of finance and not reported as stolen ("the HPI Check"). He also carried out what he referred to as a bank check, which was explained in his witness statement and in oral evidence as checking with the supplier (not the bank or any other third party) that the bank details for payment matched the bank details on the invoice ("the Bank Check").

84. Mr Hildred stated in his closing submissions that Mr Rabbitte was not the director involved in the fraudulent default because Mr Rabbitte had resigned as a director and been replaced by Mr Steven McCaul on 1 April 2015 (and so before the first deal). However, the Companies House record was not updated until 31 July 2015 and so Mr Reilly would not have seen that on his earlier Companies House Check. Furthermore, an invoice dated 1 July 2015 specified the "sales rep" to be "Kevin Rabitte" and Mr Reilly's oral evidence was that he dealt with Mr Rabbitte throughout. We therefore find that Mr Rabbitte continued to act on behalf of Go Plant and so cannot be distanced from Go Plant in the way that Mr Hildred suggests.

85. We were referred to the oddity that there were two identical invoices dated 23 April 2015 for the supply by Go Plant; one was to Kerry Plant and one was to PPSL. Mr Reilly could not explain this. We are not in a position to make any findings as to why there were two such invoices.

86. The plant was delivered to PPSL and a full inspection took place which revealed that it was in the promised condition.

PWC

87. The transactions with PWC were for a total value including VAT of £709,650 and related to purchase invoices dated as follows: 1 May 2015 (a tipper grab); 7 May 2015 (a tipper grab); 12 May 2015 (a tractor unit); 12 May 2015 (a tipper grab); 3 June 2015 (2 Volvo tippers); 29 June 2015 (EC210 excavators); 6 July 2015 (a 210 excavator); and 22 July 2015 (a DAF CF370).

88. The Supplier Summary is silent as to who Mr Reilly's contact was. Mr Reilly's oral evidence was that Mr Reilly saw a lorry advertised in a trade magazine named Commercial Motors, he telephoned the number advertised, and he negotiated the Deal.

89. Mr Reilly carried out a Companies House Check, a VAT Number Check, an HPI Check and a Bank Check. The Companies House Check revealed that PWC was newly incorporated and that one of the directors was Mr Wood. Mr Carey put it to Mr Reilly that it was odd that PPSL was buying off somebody that he did not know. Mr Reilly said that this was not unusual and that he would make a profit on some deals, and a loss on others. He initially said that he stopped trading with PWC when he made losses. However, he then said that PPSL actually carried on after some initial losses as a profit was again made. We find that Mr Reilly was not concerned about the fact that he did not know PWC and that it was a newly incorporated company.

90. Mr Carey put it to Mr Reilly that Mr Wood had a number of criminal convictions. Mr Reilly said that he did not know this. We accept that Mr Reilly did not know this and there is no evidence that he should have known it.

91. Much was made by Mr Carey about the fact that three of the invoices referred to PCW rather than PWC. Further, the email addresses on all the invoices began "pcw". Mr Reilly said that he did not notice either of these inconsistencies. We accept Mr Reilly's evidence in this regard as there was nothing to suggest otherwise.

DFMS

92. The transactions with DFMS were for a total value including VAT of £334,830 and related to purchase invoices dated as follows: 8 June 2015 (three dumpers); 19 June 2015 (a JCB); 21 May 2015 (a Daewoo 290LC); 31 August 2015 (a Bell B30); 21 September 2015 (a Scania tipper); and 29 September 2015 (a Scania tipper).

93. The Supplier Summary states that Mr Reilly had met representatives of DFMS before and that he was happy that the company was genuine. However, Mr Reilly said that he was unable to remember who these representatives were or how he first began dealing with them. In cross examination, he accepted that Mr Shane McConnell had been appointed as a director of DFMS on 20 March 2015 but said that he did not know Mr McConnell and had never met him. In the absence of Mr Reilly even being able to remember who he dealt with or the circumstances of doing so, we do not accept his assertion that he had met them before the transactions. As such, we find that, on the balance of probabilities, Mr Reilly had not met representatives of DFMS before the transactions and so we find that this could not have been a basis for believing DFMS to be genuine.

94. Mr Reilly carried out a Companies House Check, a VAT Number Check, an HPI Check and a Bank Check. The Companies House Check revealed that the accounts to 31 December 2013 were for a dormant company. However, he was not concerned about this as it was 18 months prior to PPSL's deals. We accept this evidence as to what Mr Reilly did and that he was not concerned about any financial or commercial risks from what was shown by the Companies House Check.

95. We note that two telehandlers purchased from DFMS and found to be damaged were exported to a company in Saudi Arabia. Mr Reilly was asked about the customer and admitted that he had not done any due diligence on them and knew nothing about them.

96. We also note that Mr Hildred said in closing submissions that accounts for 2014 and 2015 were filed on 26 August 2016, making it clear that this was a legitimate company. He also notes that shareholder funds as shown in the 2015 accounts were £999,000. However, none of this would have been known to Mr Reilly at the time as they post-date the transactions.

Roy Construction

97. The transaction with Roy Construction was for a value including VAT of £109,800 and related to a purchase invoice dated 30 September 2015 (a Doosan DX480).

98. Mr Reilly said in his witness statement and during oral evidence that he met Roy Construction's director, Mr Jon Conmey, at an auction. He said that Mr Conmey came over to him to see if he was interested in purchasing plant from him and showed him a picture on his phone of what he had to sell.

99. Mr Reilly carried out a Companies House Check, a VAT Number Check, an HPI Check and a Bank Check. The Companies House Check revealed that Roy Construction had only been incorporated in August 2013. Mr Reilly said, and we accept, that he did not have any concern that this gave rise to any financial or commercial risk.

Anderdale

100. The transactions with Anderdale were for a total value including VAT of £528,000 and related to purchase invoices each dated 4 July 2015 (a Volvo A30F, a Volvo A30E, a Volvo loading shovel, a Volvo EC360 and a Volvo A30F).

101. According to the Supplier Summary, Mr Reilly was satisfied as to the genuine nature of the trades with Anderdale because he visited Anderdale's yard with the director of another local plant hire company. During cross-examination, it emerged that Mr Reilly's first contact with Anderdale was when he received an unexpected call. This was the only visit to a yard undertaken in the course of the Deals. However, he accepted that he did not know whether or not Anderdale owned the yard and the machines he saw there. We find that he could not have been satisfied from this visit that there was no risk in dealing with Anderdale.

102. Mr Reilly carried out a Companies House Check, a VAT Number Check, an HPI Check and a Bank Check. The Companies House Check revealed that Anderdale had only been incorporated on 11 November 2014. Mr Reilly said, and we accept, that he did not have any concern that this gave rise to any financial or commercial risk.

Erlemo

103. The transactions with Erlemo were for a total value including VAT of £502,110 and related to purchase invoices dated as follows: 5 October 2015 (a JCB); 19 October 2015 (a Liebher 2008 R954); 21 October 2015 (a CAT 312D); 21 October 2015 (a CAT 308E); 22 October 2015 (three CAT 308Es); 5 November 2015 (a JCB); and 19 November 2015 (a Powerscreen 2100).

104. It is noted in the Supplier Summary that Mr Kevin Rabbitte was Erlemo's representative in October 2015. Mr Rabbitte was already known to Mr Reilly as set out in respect of Go Plant.

105. Mr Reilly carried out a Companies House Check, a VAT Number Check, an HPI Check and a Bank Check. The Companies House Check revealed that a notice warning of an intention to strike Erlemo off the register had been issued on 1 September 2015. There was also a reference to Mr McConnell in the Companies House records, although Mr Reilly did not meet him. Mr Reilly said, and we accept, that he did not have any concern that this gave rise to any financial or commercial risk.

JJR

106. The transaction with JJR was for a value including VAT of £98,160 and related to a purchase invoice dated 30 November 2015 (a CAT 980K).

107. The Supplier Summary states that Mr Reilly met JJR's representative at a previous auction. However, when asked for further details about this during cross-examination, Mr Reilly could not remember the name of who he dealt with. He said that the representative had come up to him at an auction and offered him a deal. Although he said that he was not a stranger, this was at odds with the fact that he does not remember his name and had no record of it.

108. Mr Reilly carried out a VAT Number Check, an HPI Check and a Bank Check. Mr Reilly said, and we accept, that he did not have any concern that there was any financial or commercial risk in the transaction.

Mr Duggan

109. The transaction with Mr Duggan was for a value including VAT of £106,800 and related to a purchase invoice dated 5 October 2015 (a new and unused Volvo EC 300).

110. Mr Reilly said in the Supplier Summary that he had previously met Mr Duggan at plant auctions including Leeds and Donnington Park. He said that he had previously traded him with no issues. However, when it was put to him in cross-examination that there was no evidence of him having traded with Mr Duggan, he accepted that he was not sure whether he had traded with Mr Duggan or whether Mr Duggan had, as he termed it, "put people onto" him (which we took to mean introduced him to other suppliers). We do not accept it as credible that Mr Reilly could be so unsure of the position. Further, the address given on the invoice was one that Mr Duggan had vacated a year earlier; had there been an ongoing relationship we infer that Mr Duggan would have used his current address. We therefore take it that he did not have a trading history with Mr Duggan at all.

111. Mr Reilly carried out a VAT Number Check, an HPI Check and a Bank Check. Mr Reilly said, and we accept, that he did not have any concern that there was any financial or commercial risk in the transaction.

NW Plant

112. The transactions with NW Plant were for a total value including VAT of £603,240 and related to purchase invoices dated as follows: 8 April 2015 (a vehicle); 12 April 2015 (four CAT 312E machines); 12 April 2015 (three CAT 308E machines); 23 April 2015 (a Takeuchi wheeled excavator); and 24 April 2015 (a CAT 308E).

113. Mr Hildred explained that PPSL was not seeking to claim the input tax in respect of the purchase of the Takeuchi wheeled excavator (with a net cost of £15,200 and VAT of £3,030) as the machine was not delivered and a credit note was issued (the Refunded Deal referred to at paragraph 46 above). Mr Hildred said that PPSL had repaid HMRC the VAT previously claimed and so PPSL should not now be assessed for it.

114. The Supplier Summary states that Mr Reilly knew Mr O'Grady for five or six years, having met him at auctions in Leeds and so, "PPS therefore knew he was a genuine trader and Mr Reilly had never had any issues in his trades with him," and "PPS had previously checked his VAT number …" Mr Reilly said in the Supplier Summary that he had previously purchased machines from Mr O'Grady and his son without any issues. We take it from the use of the words "previously purchased" that this relates to transactions before those in dispute in the present appeal, either on behalf of PPSL or Mr Reilly's companies.

115. We note from Mr Antony Booth's witness statement on behalf of HMRC that NW Plant's main business was the purchase and sale of plant, machinery and trucks. Although NW Plant was registered to Mr O'Grady's house, it had the use of a yard in Wales owned by Mr O'Grady. Mr Booth also states that NW Plant was de-registered for VAT with effect from 6 October 2016, although Mr Marklew explains in his witness statement that this was because NW Plant had ceased trading.

116. The Supplier Summary also includes the following:

> "The first transaction which HMRC are disputing actually originated from a customer of mine, JGE Truck and Plant Limited contacting Mr Reilly to see if PPS could supply them with a Scania tipper. The machine arrived, it was inspected and the deal proceeded. In addition, some of the other transactions queried by HMRC were also originated from specific enquiries from customers of PPS."

117. We take it from this that Mr Reilly contacted Mr O'Grady to source the machines rather than, as with other traders, the introduction to the dealings being either initiated by the supplier or being a response by Mr Reilly to an advert. However, even though this first disputed Deal was initiated by the supplier, NW Plant invoiced PPSL on 8 April 2015 but PPSL did not

invoice JGE Truck and Plant Limited ("JGE") until 11 May 2015. As we note in paragraph 142 below, Mr Reilly treated PPSL as entering into a binding contract when an invoice was sent, with the effect here that PPSL was committed to purchasing the vehicle from NW Plant before JGE was committed to purchasing it from PPSL.

118. Mr Reilly carried out a VAT Number Check, an HPI Check and a Bank Check. Mr Reilly did not carry out any other investigations or checks into Mr O'Grady's business or history.

119. Mr Carey put to Mr Reilly that he should have known that Mr O'Grady had been convicted of dumping waste in 2013. He was referred to a newspaper article which stated that Mr O'Grady had run one of the biggest illegal waste dumps ever seen in North Wales and made millions of pounds from his crimes. Mr Reilly said that he did not know this. However, he went on to say as follows:

> "Q. But if you had known about it, it might have made you more cautious?
>
> A. I still probably would have traded with him. That is an environment issue isn't it?
>
> Q. It is a criminal conviction.
>
> A. Yes, with the Environment Agency. So you cannot deal with a criminal; is that what you are saying?"

120. We find that there were no meaningful commercial checks upon NW Plant carried out by PPSL. We accept that Mr Reilly did not know about Mr O'Grady's conviction as there is no evidence to the contrary. It is a matter of concern that although Mr Reilly says he knew Mr O'Grady, he did not know him well enough to know about the conviction. Nevertheless, we accept Mr Reilly's position that he felt comfortable dealing with NW Plant for the Deals because he already had a commercial relationship with Mr O'Grady and there had been no problems in the past. Crucially, Mr Carey did not put it to Mr Reilly in cross-examination that there was no previous trading relationship and so, unlike any of the other suppliers, we find that Mr Reilly did have reasonable grounds for confidence that there was no financial or commercial risk in PPSL's dealings with NW Plant.

Significant Features of the Deals

121. We make the following findings as to the significant features which are to be drawn from the Deals.

Generation and Negotiation of the Deals

122. PPSL's position as to how the Deals were generated and negotiated is that Mr Reilly has vast experience in the plant hire and sales industry and has built up a series of contacts. The tenor of PPSL's case was that Mr Reilly drew upon those existing contacts, as well as new contacts coming to him by virtue of his reputation.

123. It was put to Mr Reilly that each of the suppliers were new contacts rather than pre-existing ones. Mr Reilly resisted this, arguing that they were people he had met at auctions. We have already dealt above with his individual contacts for each of the suppliers. However, by way of overview, we find that (with the exception of NW Plant) the Deals were with people with whom he had not had a business relationship before and, to the extent that he had met them before, had only done so in passing or, at most, had seen (rather than met) at auctions. Again with the exception of NW Plant, we find that the Deals were not with contacts that had been cultivated by him prior to the deals in question and instead were generated either by him being contacted for the first time by the supplier or Mr Reilly contacting the supplier for the first time as a result of seeing an advert in a commercial magazine. We note as regards Go Plant and Erlemo that Mr Reilly and Mr Rabbitte had exchanged telephone numbers at an auction.

However, this does not constitute a pre-existing commercial relationship that Mr Reilly could have had any confidence in.

124. Mr Reilly's oral evidence was that he would generally have to work hard for his deals. In particular, he said as follows.

> "Q. In terms of what has been said several times, would you agree that your deals were easy money.
>
> A. No. Listen, there is no such thing as easy money. I am in that yard at 5.00 in the morning until 6.00 or 7.00 at night, or on the road, so if that is called easy money, I wouldn't want to get hard money.
>
> Q. How do you think you have been successful in your dealings in the plant industry.
>
> A. I know a lot of people. I put myself about a lot. I am a bit like a dog with a bone, if you would call it like that, you know, I will chase every deal I can get. I enjoy it. You know, I'd go out at 10.00 at night and do a deal if I thought I could do a deal."

125. We accept that this reflected Mr Reilly's general trading process as there was no evidence to the contrary. However, there was no evidence that the Deals involved any work by Mr Reilly in generating the contacts for PPSL's purchases in the Deals; instead, they arose easily and, for the most part, unexpectedly. Indeed, it is of note that it was only the first contact with PWC which arose by virtue of Mr Reilly generating the deal by responding to an advert in the Commercial Motors magazine.

126. There is an absence of any evidence as to the process of negotiating the Deals. Mr Hildred suggested in his submissions that much of this was by telephone. However, Mr Reilly's evidence was that most of the negotiation which he undertook on behalf of Kerry Plant was by email. Given that he approached his work for PPSL in the same way as he did for Kerry Plant, we would expect there to be email correspondence in evidence beyond just the emails sending the invoices. Mr Reilly later said that there was no email correspondence to adduce for PPSL. However, this is inconsistent with the answers Mr Reilly gave in the course of a creditors meeting of Kerry Plant on 12 January 2016. The minutes of the creditors meeting included the following exchange ("RS" being an HMRC officer, Mr Roy Stoddart, and "SR" being Mr Reilly).

> "RS – Peterborough Plant Sales Limited ("PPSL") was incorporated in March 2012 and operated a social club which you and your wife own. You have invested capital of £104,000
>
> …
>
> RS – HMRC enquiries revealed large numbers of suppliers have invoiced Kerry Plant Hire but have not declared any output tax. Many gone into liquidation and examination of statement of affairs suggest Kerry Plant Hire creditors were overstated by hundreds of thousands. Can you explain this?
>
> SR – No. all done with emails. Don't meet half the people we deal with.
>
> RS – But you're buying lost of stock from them.
>
> SR – As long as the stuff turns up we can only check the VAT number and tel number on the invoice. Can't do any more. A lot of people I haven't me but he emails have their details. Invoice comes in and send bank transfer."

127. We find that on the balance of probabilities there was email correspondence between PPSL and the suppliers which has not been provided to us. Only a small number of emails were provided in respect of Go Plant and Elermo and none at all for other suppliers. It follows that

Mr Reilly and Mr Swindell did not present us with the whole picture of the contact with the suppliers and did not provide us with any credible reason for not doing so. We find that the appropriate inference to draw from this (in the context of all the other circumstances of the case) is that these emails would have adversely affected PPSL's case.

Commercial Checks and Due Diligence

128. When considering the matter of commercial checks and due diligence we keep in mind the warning in *Mobilx, per* Moses LJ at [82] (set out above) that we should not unduly focus on the question whether a trader has acted with due diligence. Instead, the due diligence conducted, and whether or not the trader took into account the answers to any questions asked, should be considered as part of the circumstances in which the transactions took place.

129. We find that the commercial checks and due diligence were cursory, not meaningfully considered by PPSL, and did not have any impact upon whether or not PPSL entered into the Deals. This is for the following reasons.

130. We accept that the Companies House Check were carried out in respect of each of the corporate suppliers at the start of the dealings with each of the suppliers. In principle, the Companies House Checks were capable of revealing (and did reveal) potential concerns about those suppliers. However, we find that PPSL, and in particular Mr Reilly, did not consider any risks of dealing with the suppliers in the light of the Companies House Checks. All such checks revealed that the companies were relatively new. In the case of Roy Construction, the company had only been incorporated in August 2015 notwithstanding that the relevant Deal was in September 2015. It is clear from Mr Reilly's evidence that he was unphased by the absence of trading history for these companies and did not ask the suppliers (or even consider for himself) how these suppliers could break into such a specialised industry so easily.

131. Mr Hildred submitted that there was nothing unusual in a newly incorporated company trading in such circumstances. We disagree. Mr Reilly was clear in his evidence that this is an industry in which he has thrived because of his experience and contacts. This is entirely at odds with new entrants into the market being able to provide plant of such value. At the very least, this warranted some consideration as to how the suppliers were able to do this. Mr Reilly did not apply any such consideration. Indeed, Mr Reilly's own evidence was that the purpose of the Companies House Checks was as an identification check; he said, "you have just got to make sure that they are who they are." This ignores the process of considering whether or not there were any risks involved in dealing with the relevant supplier.

132. Various irregularities also arose, such as compulsory strike off notices or dormant accounts. The only occasion upon which Mr Reilly appears to have raised his findings from the Companies House Checks with the supplier was in respect of Go Plant, and yet Mr Reilly was easily reassured by the explanation that paperwork had not been filed, without being concerned to ask why the paperwork had not been filed or to ask why Go Plant had been dormant from 24 October 2013 to February 2015.

133. Mr Hildred submitted that each of the irregularities raised by HMRC about the suppliers were explicable. Even if this were correct, the key is that Mr Reilly failed to consider those irregularities at the time. Crucially, there was no meaningful attempt by Mr Reilly to understand who PPSL was dealing with in its purchases.

134. This failure to consider the background of the suppliers was even starker in the case of the personal traders, JJR and Mr Duggan. There was no evidence of any background checks having been made in respect of these suppliers at all. The following exchange during cross-examination was illustrative of Mr Reilly's approach in this regard:

> "Q. JJR, had the appellant – had Peterborough Plant Sales done a check on JJR, or obtained their VAT certificate from them, you would have discovered, I suggest, or the appellant would have discovered, that in fact it was – its main business activity was gardening equipment, a rental business that specialised in lawn mowers, clippers and general gardening tools. You would agree with me that, if you had seen that, that might have caused you to ask a few questions, mightn't it?
>
> A. Yes. As I said to you earlier, I have never seen that –
>
> Q. Yes.
>
> A. Which I will look into.
>
> Q. As with previous traders, … they were all of limited financial wealth and the either did, or would have, put you on notice that they were unable, realistically unable, to source the goods to the value they were and sell them to your business? Do you think that is fair?
>
> A. I probably should have looked into it more, but I didn't. I will leave it like that, I will answer it like that."

135. The VAT Number Checks simply established that the relevant supplier was VAT registered. The Bank Checks did nothing more than to ensure that the bank payment details were correct. The HPI Checks were important in that they established whether or not there was finance and whether or not the machinery had been reported as stolen. However, the HPI Checks did nothing to address any commercial or financial risks in dealing with the suppliers.

136. We find that Mr Reilly's only concern was that the plant existed and that it was in a satisfactory condition. As set out above, his evidence was that he would have dealt with Mr O'Grady even if he had known about his criminal convictions. Mr Reilly's own evidence was that he had no interest in the financial worth of his suppliers. The following exchange is significant.

> "Q. Generally, their financials show the companies are quite poor. All of that means you really should have asked some more questions than you did, doesn't it?
>
> A. Well, I weren't giving them credit, so I didn't need to ask them questions like that, whether they were poor or not."

137. For completeness, we note at this stage that Mr Carey argued that the email addresses of various of the suppliers should have alerted Mr Reilly to concerns about whether or not those suppliers were genuine. He noted that the emails were of generic varieties rather than bespoke to the company. We do not accept that this is something that should have raised concern as the choice of email address (on its own) says nothing about the trustworthiness of the supplier involved. We also note that Mr Carey argued that the fact that many of the suppliers had registered offices which were residential properties ought to have given cause for concern. In our view, this adds little in the circumstances of the present case as it is not necessarily the case that the registered office should be the same as any premises for holding machinery. It is of concern, however, that Roy Construction and Mr Duggan were no longer resident at the addresses given by the time of the transactions; Mr Reilly did not carry out any checks which could have revealed this.

The Risks Involved

138. Mr Hildred argued that there was no unusual level of risk in the Deals. There was no evidence before us as to what constituted a standard transaction in the industry other than Mr Reilly's unsubstantiated assertion that the Deals were typical. However, whether unusual or

not, we find that there was a high level of commercial and financial risk in the Deals in the manner in which they were described to us. We also find that Mr Reilly had no appreciation of these risks and did not consider them at the time of the Deals. We reach these conclusions for the following reasons.

139. As set out above, PPSL was making purchases from suppliers whom he knew very little about. This is particularly stark given the high value of each of the machines.

140. Mr Reilly's evidence was that there was no risk as he was not giving the suppliers any credit. However, it cannot be correct that this removed all risk. Mr Reilly was committing PPSL to purchase the plant and was making payment of very substantial sums. Indeed, the total amount (including VAT) of the Deals was £3,862,229. The trustworthiness of the supplier should therefore be important in considering whether or not the supplier would see the deal through, whether or not the supplier was entitled to sell the machine, and whether or not the supplier would satisfy any complaint which PPSL (or PPSL's customer) might later have about the machine. Mr Reilly said in evidence that occasionally deals would go wrong and money that had been paid to him by customers would have to be returned and that money paid by PPSL would have to be recovered from the supplier. We find that this carried with it a need to trust the supplier to act fairly in such circumstances. This is reinforced by the absence of any contractual documentation between PPSL and the supplier.

141. Mr Carey put the question of ownership to Mr Reilly in cross-examination. He noted that PWC was not the registered owner of one of the vehicles sold and suggested that Mr Reilly did not do any checks about ownership. Mr Reilly's answer was to explain that the logbook would not need to be in a trader's name. However, Mr Reilly did not provide any evidence at all as to how he could feel comfortable that the plant was either owned by the supplier or that the supplier had the right to sell the plant.

142. This failure to appreciate the high level of risk is well illustrated by Mr Reilly's lack of understanding as to when a binding contract had been formed with PPSL's suppliers and PPSL's customers. In the course of his evidence about the Deal with Roy Construction, Mr Reilly explained the contractual relationship between PPSL and Roy Construction and between PPSL and its customer, Boundary Plant. Mr Reilly's evidence was that he regarded an agreement as having been reached when an invoice was sent. He stated as follows.

> "Judge Chapman QC: At some point, I would like to know about the respective contractual rights and obligations and when you were obligated to buy it and when you were obligated to sell it. Now, I don't mind whether that is done through cross-examination or –
>
> A. The contract is an invoice. There is no written contract. There no signing or nothing, unless it goes to a finance company. The contract is an invoice."

143. Mr Reilly's evidence in his witness statement was that the steps in the process of purchasing plant were negotiation, agreement, inspection, invoices, checks and then payment. He stated as follows in his first witness statement.

> "Once the prices have been negotiated and the deals have been agreed, which also involves receiving and seeing the plant in question in emails and texts, then purchase invoices are sent via post or email, the checks are made and if sufficient, payment of goods is arranged."

144. During cross-examination, Mr Reilly's initial position was that he purchased the plant "sold as seen" and so inspected it before committing to a purchase. He stated as follows.

> "Q. Well, is it important to know what your rights are on these types of high-value deals, contracts and the like?

A. Well, you buy sold as seen, but I look at it and, if I don't want it, I don't have it."

145. However, Mr Reilly later said that there would be situations in which PPSL would pay for vehicles before they had been inspected. He sought to draw a distinction between situations in which he had already found a customer for the plant (which he referred to as pre-sold plant) and situations in which he was buying plant for stock either to sell on at a later date or to hire out. For the pre-sold plant, PPSL would be paid by its customer, PPSL would then make payment to the supplier, and the machinery would then be delivered. Mr Reilly's evidence in this regard was as follows.

"[Questions by the Tribunal]

Mr Baker: So they were extending quite a lot of credit to you.

A. No. I got the money off Boundary Plant before I paid for it to make sure he wanted it.

Mr Baker: Yes, but Roy Construction's machine was sold, you sold Roy Construction's machine before you paid for it.

A. Yes.

Mr Baker: So what did Roy Construction know about you that made them willing to trust you?

A. Well, no, they never delivered the machine until after I paid for it. I got the money off Boundary.

Mr Baker: Ah, and then the machine was delivered later?

A. Yes.

…

[Cross-examination by Mr Carey]

Q. So is it the case you didn't actually check this piece of equipment before you had already bought and sold it?

A. No, Boundary Plant, they bought the machine.

Q. I am not talking about Boundary Plant for a minute, I am talking about you saying that you checked the condition of the machine and, once you were happy with the condition of the machine –

A. Yes, and then I sent it to Boundary Plant and they were happy with it, so I done them an invoice, they paid me and then I paid Roy Construction.

Q. But my point is, if they already paid you –

A. I would have to get the money back if they weren't happy, wouldn't I?

Q. Was that written down anywhere?

A. No. I think, to be honest with you, the way you keep asking me these questions, I really need a secretary with me 24/7.

Q. We are talking about risk here, though, Mr Reilly, and £110,000 worth of risk with no contract in place, that is –

A. There is no contract in place with any plant, so there never will be. Well, not in this day and age there will be.

…

> Q. So this whole – in all of your evidence where you say that you don't purchase it until you have inspected it and it has been delivered to your premises, that is nonsense, isn't …
>
> A. It's not nonsense, sometimes they have been pre-sold.
>
> Q. It doesn't follow, does it Mr Reilly?
>
> A. That is the way it works, so …
>
> [Questions by the Tribunal]
>
> Mr Baker: Perhaps you would just like to explain in your own words how it does work?
>
> A. Sometimes, like, he was on about a Doosnan, and we sold it to Boundary, but Boundary paid us before we paid them because I wouldn't have bought it if I couldn't sell it.
>
> Judge Chapman QC: Why are you able to get paid first?
>
> A. I pay people first for machines, if I've got it sold. If they ain't got the money to pay for it -"

146. Mr Reilly's evidence did not enable us to identify which of the Deals were pre-sold and which were not. Mr Reilly's evidence was also that he funded the Deals which had not been pre-sold by PPSL's own cashflow and from the bank.

147. Mr Reilly did not explain why there should be any difference in risk profile between a situation in which the plant had been pre-sold and a situation in which it had not. If there was a problem with a machine that had been pre-sold, PPSL would be liable to repay its customer. Indeed, we find that there is a greater commercial risk in such circumstances because the money at stake was a third party's which PPSL would have to reimburse in the event of a problem rather than PPSL's own. It is therefore odd that Mr Reilly would be prepared to make payment before inspection for pre-sold plant but would not be prepared to do so for purchases funded by PPSL itself. In any event, if (as he says) Mr Reilly understood that a contract had been reached when an invoice was issued, it follows that in the pre-sold plant situations in which an invoice had been issued (and payment made) before inspection, PPSL was in his eyes already bound by the purchase and sales contract before the plant had been inspected. Again, this means that the risk in a pre-sold plant case is even greater than in other cases.

148. In the light of the above, we find that Mr Reilly did not make any distinctions in the degree of commercial or financial risk involved in the different Deals, and in fact did not perceive there to be any risk in any of the Deals at all. We also find that this is wholly at odds with the commercial and financial risks that would be present if the Deals were to be taken at face value; namely, the risks that that the supplier might not fulfil its agreement to sell the plant, that there might be a problem with the plant after payment had been made, or that the supplier might not own or be entitled to sell the plant.

Transportation and Inspection

149. Mr Reilly said that plant would be transported to PPSL's yard in order to allow it to be inspected. He said that the supplier would organise and (with the exception of one Deal) pay for this and, if the machine was damaged, then it would be returned at the respective supplier's cost. Mr Carey's submission was that this was wholly uncommercial whereas Mr Hildred's submission was that this was normal for the industry. There is no evidence before us as to what is normal in the industry save for Mr Reilly's broad assertions. However, we do not agree with Mr Carey that this was wholly uncommercial; it is in the interests of a supplier to meet the cost of transport in order to achieve a sale and, if plant is not of satisfactory quality, then it is

unsurprising that PPSL would not be prepared to meet the cost of transporting it back to the supplier.

150. As set out above, we find that the absence of inspection in the pre-sold plant situations was uncommercial and ignored obvious commercial and financial risks.

151. Mr Carey's criticism of the inspections which took place prior to payment is that damage was not noticed on some of the plant. Mr Hildred's submission in response was that this only occurred for two of the Deals and that not every "sold as seen" deal can be a successful one. We find that these deficiencies on two occasions are not sufficient to bring into question the whole inspection process. We note that there is no suggestion by HMRC that the plant was not of satisfactory quality. We also note that it was sufficiently marketable for the plant to be sold to PPSL's customers (and, for some of the plant, hired out prior to such sale).

Insurance

152. Mr Reilly's evidence as to insurance was that PPSL was not obliged to insure the plant whilst it was with the supplier or whilst it was being transported to PPSL's yard. He said that he did not check that the supplier or haulier had insurance in place because he was of the view that he did not need to. We find that this is another example of Mr Reilly not considering or taking into account the commercial and financial risk present in various of the Deals. Crucially, in the case of pre-sold plant, PPSL had already paid the supplier, and been paid by its customer, for the plant before it came into PPSL's possession. As such, it would be important for PPSL to know whether or not insurance was in place.

153. Mr Reilly also said that PPSL had insurance for while the plant was in its possession. We were shown a proposal dated 12 July 2013 which included £300,000 of cover for stock. We were told that this policy was entered into and was renewed on substantially similar terms each year. We were also shown a policy for the year from July 2017 to June 2018, again in substantially similar terms to the proposal dated 12 July 2013. In the absence of any evidence to the contrary, we accept this evidence. We agree with Mr Carey in his submission that PPSL was under-insured given the value of the plant and the likely value of the stock at the yard. However, Mr Carey went on to submit that this was indicative of the Deals in fact being risk free. Mr Hildred disputes this and we find that he is right to do so; the need to insure the plant does not related to the risk in making the Deals but instead relates to the risk of theft, fire or other damage to the plant once the plant is in PPSL's possession.

The Commerciality of PPSL's Business

154. Mr Carey mounted a number of attacks upon the overall commerciality (or otherwise) of PPSL's business.

Turnover

155. Mr Carey submitted that PPSL underwent a huge increase in its turnover, moving from being only a bar to being involved in plant sales and plant hire. This was in a context in which Kerry Plant had suffered a downturn in the same market. Between 03/14 and 06/14, turnover had rocketed from £41,000 to £1,200,000 and the Deals themselves had a value of over £3,200,000 (excluding VAT). During his evidence, Mr Reilly accepted that this was a very large increase and said that it was a matter for his accountants to explain rather than him.

156. Mr Hildred submitted that this must be seen in the context of a thriving business and that the margins were quite low. He said that the increase in turnover was not unexplained at all; Mr Reilly had brought in a large amount of work and carried out trading that might otherwise have been channelled through Kerry Plant.

157. We find that the increase in turnover is not itself surprising. As we have set out above, PPSL was incorporated with a view to moving into plant sale and hire; the increase in turnover reflects that intended transition. The size of the turnover is impressive but does not on its own lead to a conclusion that it was a result of anything untoward. The plant was generally of high value and the Deals were in a setting of other sales which were for plant of equally high value and which have not been criticised. The VAT returns for the periods 06/15, 09/15 and 12/15 declare net inputs of £4,325,675, £2,586,984 and £2,068,461 respectively (totalling £8,981,120). The purchase prices in respect of the Deals (excluding VAT) for the same periods were approximately £1,453,200, £936,500, and £823,345 respectively (totalling £3,213,945).

Added Value

158. Mr Carey submitted that PPSL did not add any value to the Deals in order to justify such a turnover. Mr Hildred submitted that this was simply part and parcel of a normal trading pattern, was similar to other unquestioned transactions, there had been no attack by HMRC upon PPSL's sales, that this was normal for the industry, and that PPSL would not have anything to gain from being involved in such a fraud. Mr Hildred also argued that there was no evidence to suggest that the Deals or sales were orchestrated.

159. As we have set out above, we have not heard any evidence as to what was "normal for the industry" other than Mr Reilly's unsubstantiated assertions. We are not, therefore, in a position to make any findings in that regard. Further, whilst HMRC did challenge a small number of PPSL's sales, we accept that HMRC did not go so far as to submit that PPSL's sales were fraudulent.

160. Further, as we have set out above, we find that Mr Reilly's approach to generating the Deals was quite different to his (and PPSL's) normal method of trading. Whereas he would normally work hard to achieve transactions, telephoning a number of different potential sources for plant, the most of the first contacts with the suppliers in the Deals unexpectedly came to him. The exceptions to this were North West Plant (who Mr Reilly telephoned) and PWC (where Mr Reilly initiated the contact by responding to an advertisement or listing in the Commercial Motors magazine). We find that the Deals were orchestrated in that the suppliers dealt with PPSL with a view to perpetrating a VAT fraud. We reach this finding because of the agreed facts as to the connection to fraudulent VAT losses and (with the exception of NW Plant) because of the manner in which the contacts were made with Mr Reilly and the ease with which the Deals were carried out. Whether or not PPSL knew or should have known of this orchestration is a separate matter and is part of whether or not PPSL knew or should have known of the connection to fraudulent VAT losses.

161. Similarly, we do not accept that PPSL would have nothing to gain from its involvement in such a fraud. The tenor of Mr Reilly's evidence is that his aim was to get a deal done whenever he could. At the very least, the Deals gave him access to transactions which would not otherwise have been available to PPSL and from which PPSL could make profits from onward sales or hire.

162. Mr Carey cross-examined Mr Reilly upon some of PPSL's overseas sales. However, HMRC does not go so far as to say that any of PPSL's sales (as distinct from the purchases forming the Deals) were orchestrated and, in any event we do not have sufficient evidence to reach any such conclusion. We also note that PPSL hired out the plant if an early sale (or sale prior to the purchase transaction) could not be found. However, this goes to the question of whether or not there is anything to bring into question the onward sales; the key question in the context of the present case is that of knowledge or means of knowledge of fraud in respect of the purchases of plant comprising the Deals.

163. Mr Carey also submitted that there was a high number and repetition of defaulting traders. Mr Hildred responded by submitting that the Deals formed only a part of PPSL's business. As set out above, the Deals represented about 35% of PPSL's purchases.

164. We note that the number and frequency of defaulting traders are agreed facts as they flow from the acceptance of the Deals' connections to fraudulent tax losses. As such, we find that the prevalence of defaulting traders is part of the context in which we consider PPSL's involvement in the Deals rather than this of itself giving rise to any inference that PPSL knew or should have known that this was the case.

165. We also note in this regard that Mr Rabbitte and Mr McConnell were openly connected to more than one of the suppliers. Mr Reilly did not appear to have been concerned by this at the time and there is no evidence that he questioned either of them as to the reason for this. This is effectively a further illustration of Mr Reilly's failure to consider whether or not there was any commercial or financial risk in the Deals.

Mr Reilly's Previous Companies

166. Mr Reilly was a director of Sean Reilly Groundworks Ltd ("SRG"). SRG went into liquidation on 10 December 2002. Mr Reilly was also a director of Kerry Plant Hire (Peterborough) Ltd ("Kerry Peterborough"). Kerry Peterborough began trading on 1 February 2005 when it took over as a going concern the business carried on by Mrs Kerry Reilly. Kerry Peterborough went into liquidation on 21 September 2009. At the time it went into liquidation, Kerry Peterborough owed HMRC £88,250.05 in VAT. He was also a director of Garfield Hydraulics Ltd ("Garfield") from 2008. Garfield went into liquidation on 19 March 2013. At the time it went into liquidation, Garfield owed HMRC £25,138.75 in VAT. Further, Mr Reilly was a director of Kerry Plant from 8 April 2009 until it went into liquidation on 12 January 2016. Mrs Kerry Reilly was also a director from 8 April 2008 until 2 July 2014. Mr and Mrs Reilly each held 50% of the shares in Kerry Plant.

167. As set out above, we read a witness statement of Mr Andrew Siddle adduced on behalf of HMRC which related to HMRC's investigations into Kerry Plant. Although Mr Siddle was to attend the Tribunal on the second day of the hearing, the parties agreed that he would not be required for cross-examination. We do not take this as an acceptance by PPSL of everything that is said in Mr Siddle's witness statement. However, when considering any factual dispute we must take into account the fact that Mr Siddle's evidence was not challenged. This is to be distinguished from PPSL simply not accepting Mr Siddle's opinion as to the conclusions which are to be drawn from those facts – which conclusions we do not take into account in any event as an individual officer's opinion in such circumstances does not constitute relevant factual evidence.

168. The following facts emerge from Mr Siddle's witness statement. Kerry Plant's 07/09 return was selected for verification by HMRC. £51,150 of input tax was subsequently disallowed. Part of this disallowed sum related to input tax claimed in respect of invoices from TAG Plant Sales Limited ("TAG") It was established that the declared purchases from TAG did not in fact take place. This was confirmed by a letter from Moore Thompson dated 3 February 2012, stating that the plant had in fact been purchased from Kerry Peterborough rather than TAG, and that Kerry Peterborough had accounted for all relevant output tax. Moore Thompson also informed HMRC that the bookkeeper had created false invoices to inflate the profits of the company and her employment had been terminated as a result. Kerry Plant made a voluntary disclosure to this effect on 13 October 2015. The remainder of the repayment claim for 07/09 related to purchases from McPhee Demolition and Waste Management Ltd. Each of

these have been traced to a tax loss. However, there is no evidence that Kerry Plant or Mr Reilly were notified of these tax losses before the time of the Deals. Mr Siddle's evidence also referred to a VAT assurance visit to Mr Reilly at Kerry Plant which took place on 30 April 2013 in which concerns were raised about Kerry Plant's disclaimer on the annual accounts for 2012, stating that, "Due to limitations placed on the scope of our work by the directors in respect of fixed assets, stock, trade creditors … we are unable to confirm that they are not materially misstated." Mr Reilly as asked during cross-examination as to what these limitations were and why they were imposed, but he refused to accept that Kerry Plant's accountants had been fettered at all. In addition, there was undeclared output tax for periods from 30 April 2010 to 30 April 2013 amounting to £497,876.67 which was agreed and further amounts which were disputed.

169. We accept Mr Siddle's evidence as set out above. This is because it was not challenged by PPSL and is wholly consistent with the documents which Mr Siddle effectively provides a commentary upon.

170. Mr Hildred submitted that the liquidation was caused by these VAT errors. Further, Mr Reilly's evidence was that Kerry Plant had been let down by various companies. We accept these points as they are consistent with the liquidator's reports.

171. This begs the question as to the significance of these findings. Mr Carey was clear in accepting that he was not seeking to establish a case that Kerry Plant knew or should have known at the time of its transactions that those transactions were connected with the fraudulent evasion of VAT. If this had been HMRC's case, we would not have accepted that they were entitled to pursue it without setting this out in the statement of case or at least well before the hearing of the appeal.

172. As such, we consider that the relevance of these findings of fact is that Mr Reilly brought with him to PPSL the knowledge and experience that he gained from trading on behalf of Kerry Plant. In particular, Mr Reilly was aware of the following from his involvement in Kerry Plant and his other companies: his long experience of trading in, and the hiring of, plant; the fact that Kerry Plant's VAT affairs had been investigated; that Kerry Plant had been let down by other companies; and the existence of fraud by his bookkeeper (albeit such fraud was the inflation of profits rather than it being suggested that this was a VAT fraud).

The Alleged Vendetta

173. A recurring theme in Mr Hildred's submissions was that HMRC was pursuing a vendetta against Mr Reilly and PPSL as a result of his history with Kerry Plant. Mr Hildred noted that HMRC had analysed PPSL's business in fine detail and were determined to find some connection to fraudulent transactions. As part of this, he noted that it would have been open to HMRC to take earlier action, but they did not do so.

174. In short, we find that there is no evidence of any such vendetta. The evidence within the case does reveal an in-depth investigation into PPSL's affairs and Mr Reilly's background. However, there is no evidence that this was taken to any improper levels. Even if there had been, it is not clear why that would have any impact upon the only issues now in dispute in this appeal; PPSL's knowledge or means of knowledge.

175. Similarly, it is not clear when it is said that HMRC should have taken sooner action. In any event, as set out in our analysis of the agreed legal principles, this would have no impact upon PPSL's knowledge or means of knowledge.

WHETHER OR NOT PPSL KNEW THAT ITS TRANSACTIONS WERE CONNECTED WITH THE FRAUDULENT EVASION OF VAT

176. Taking all of the above matters into account, we find on the balance of probabilities that PPSL knew that its transactions were connected with the fraudulent evasion of VAT as regards all Deals with the exception of those with NW Plant. We approach this by making findings of general application to the Deals as a whole except those with NW Plant ("the General Findings") and then considering the position in respect of each of the suppliers. In doing so, we note that the parties grouped the Deals by supplier and did not submit that there should be any differentiation between the Deals carried out by any particular supplier-specific submissions below, many of which have already been considered above.

Findings of General Application (Other Than as Regards NW Plant)

177. PPSL (and particularly Mr Reilly) knew that there was a risk of the fraudulent evasion of VAT in the plant sales industry at that time. We take this from the fact that Mr Reilly and Mr Swindell were so keen to check that VAT registration numbers were genuine and also because Mr Reilly had experience of HMRC wishing to ensure that Kerry Plant's VAT affairs were in order. Although the fraud perpetrated by Kerry Plant's bookkeeper was not of a missing trader variety, it nonetheless involved fraud in accounting for VAT.

178. Crucially, a significant feature of the Deals is the absence of any substantial or credible information as to how they were generated and negotiated. They came to Mr Reilly without the effort that he would normally have to exert. With the exception of those Deals where he initiated the contact, the initial contact with the relevant supplier came to him unexpectedly. The absence of any email correspondence whatsoever is particularly telling. For the reasons set out above, we find that these have been deliberately withheld. In the context of the circumstances of the case, we infer that the reason for this deliberate withholding is because they would contradict PPSL's case that it did not know the Deals were connected with the fraudulent evasion of VAT.

179. We have set out above under the headings "The Risks Involved", "Transportation and Inspection" and "Insurance" our analysis of the risks involved in the Deals and the fact that Mr Reilly was not concerned about them. We infer from the facts and circumstances of the case that the reason Mr Reilly did not have any concerns about commercial or financial risk was because he knew that there was no such risk because the Deals were connected to the fraudulent evasion of VAT rather than being genuine Deals. This is because it would be remarkable for Mr Reilly to be prepared to enter into the Deals if he had not been comforted in this way.

180. This is compounded by Mr Reilly's experience in the industry, the absence of any meaningful commercial checks or consideration of the results of the checks that were carried out, and his evidence that he had no real interest in the financial health of his suppliers. We repeat our findings above under the heading "Commercial Checks and Due Diligence" in this regard. We keep in mind the warning in *Mobilx* at [82] (set out at paragraph 22 above) that we should not unduly focus on the question of whether or not PPSL has acted with due diligence. The significance of the absence of due diligence in the present case is that we find that it is one of the factors in establishing that Mr Reilly was not concerned with risk because he knew that the Deals were connected with the fraudulent evasion of VAT.

181. The inability for Mr Reilly to be clear about when PPSL was contractually obliged to purchase or sell the plant, coupled with the fact that on occasion PPSL made payments before inspection (which, for the reasons set out above, is not credibly explained by the fact that there was any less risk where plant had been pre-sold) raises the inference that the Deals were not genuine. There would be no need for Mr Reilly to be well-versed in the law on contractual implications of his agreement. However, we would expect him to be clear as to his view as to

the point at which the parties were committed to a Deal and as to how the date of payment fitted into that view; instead, Mr Reilly was unclear and inconsistent as to these matters.

182. It is in the light of all these matters that the concealment of Mr Reilly's role should be seen. We do not place any emphasis upon the fact that PPSL was incorporated with Mr Swindell rather than Mr Reilly as a de jure director or upon the fact that Mr Reilly was not subsequently so appointed. For the reasons set out above, we do not accept that this was because Mr Reilly was mentoring Mr Swindell; this might explain why Mr Swindell was a director but would not explain why Mr Reilly was not. There could be any number of other reasons for this, about which we do not propose to speculate. We do, however, place emphasis upon the fact that Mr Swindell misled HMRC at the November Visit. Despite making reference to Mr Reilly, Mr Swindell was concealing the extent of Mr Reilly's involvement in PPSL from HMRC. Again, this was during the final period of the Deals themselves. We infer that this was because Mr Swindell and Mr Reilly were seeking to distance Mr Reilly (and, importantly, the knowledge that he had about those deals) from the Deals and from HMRC.

183. For the reasons set out above, we find that HMRC's allegations in respect of turnover, added value and the incidence of defaulting traders does not establish any knowledge that the Deals were connected with the fraudulent evasion of VAT.

Findings in relation to the Deals, grouped by supplier

184. We note that whilst Mr Hildred made specific submissions about knowledge in relation to the specific suppliers by reference to each Supplier Summary, Mr Carey's submissions focussed upon what he said were factors common to the transactions. We have already set out Mr Carey's and Mr Hildred's submissions on these factors above under the heading "Significant Features of the Deals". We set out Mr Hildred's supplier-specific submissions below, albeit that many of these have already been dealt with above, again under the heading "Significant Features of the Deals".

Go Plant

185. Mr Hildred submitted that: Mr Rabbitte was not a director of Go Plant at the time of the tax losses; Mr Rabbitte was known to Mr Reilly; PPSL carried out full due diligence, a Companies House Check, a VAT Number Check and an HPI Check before the first deal with Go Plant; all items of plant were received and invoices received; no issues have been raised with the onward sale; the total profit was £64,764 out of the total transaction value of £725,220; and PPSL declared its own output tax.

186. For the reasons set out in paragraph 78 to 80 above, we do not accept that Mr Reilly knew Mr Rabbitte sufficiently well for him to have any comfort that he was genuine when he rang Mr Reilly to make contact to begin trading.

187. For the reasons set out in paragraphs 128 to 137 above, we find that the due diligence checks, Companies House Checks, VAT Number Checks and HPI Checks were cursory, not meaningfully considered by PPSL, and did not have any impact upon whether or not PPSL entered into the Deals.

188. As regards Go Plant specifically, we repeat our findings set out in paragraphs 82 to 83 above that Mr Reilly did not pay any real regard to the concerns that should have been raised by the fact that Go Plant had been dormant from 24 October 2013 to February 2015.

189. We agree with Mr Hildred that the machinery was invoiced and paid for. We also agree that HMRC have not taken issue with the propriety of the onward sale to PPSL's customers or the fact that output tax was declared and paid by PPSL. However, we find that in the present case this simply means that the transactions took place and were properly accounted for by

PPSL; it does not preclude PPSL from having knowledge of the connection to the fraudulent evasion of VAT as regards the transaction with PPSL's supplier.

190. As set out above, we are not in a position to make any findings as to what a typical profit was. In the present case, therefore, we find that the level of profit is a neutral factor in relation to knowledge.

191. All of our General Findings are applicable to the Deals with Go Plant.

192. Taking all these matters together, we find that PPSL knew that that its transactions with Go Plant were connected with the fraudulent evasion of VAT.

PWC

193. Mr Hildred submitted that: PPSL first contacted PWC through an advert in the trade magazine; PPSL carried out a Companies House Check, a VAT Number Check and an HPI Check; the deal completed without any problems including delivery to PPSL's yard and a full inspection; the purchase invoices were properly paid for and funds received; and HMRC's arguments as to the misspelling of the invoices are flawed.

194. We repeat paragraphs 187, 189 and 190 above in respect of Mr Hildred's arguments relating to due diligence and checks, invoicing and payment, onward transactions, and profits. For the reasons set out in paragraph 89 above, the Companies House Check could not have provided PPSL with any confidence as to who it was dealing with as it disclosed that PWC was a newly incorporated company.

195. All of our General Findings are applicable to the Deals with PWC, save that Mr Reilly initiated the first contact. However, as set out at paragraph 88 above, Mr Reilly was unable to tell us who the contact that he dealt with was. We find that it is not credible that Mr Reilly should carry out eight deals between 1 May 2015 and 22 July 2015 for a total value including VAT of £709,650 without even knowing the name of the person he was dealing with.

196. We are driven to the conclusion, taking into account all matters together, that his confidence in dealing with PWC in these circumstances was because Mr Reilly knew that PPSL's transactions with PWC were connected with the fraudulent evasion of VAT.

197. For completeness, we note that we take no account of the misspelling of PWC's name on one of the invoices for the reasons set out in paragraph 91 above.

DFMS

198. Mr Hildred submitted that: Mr Reilly had met representatives of the company before and was happy that it was genuine; the Companies House Check, VAT Number Check and an HPI Check were carried out; the machinery was delivered and inspected; all purchases were paid for and all amounts received; the vehicles were transported to the end user; there was a good explanation for commercial losses on some of these deals; and PPSL declared its own output tax.

199. Mr Swindell and Mr Reilly's position in their witness statements was that Mr Reilly knew many of the suppliers who telephoned him from previous encounters at auctions. As set out above, we do not accept this evidence at all as regards DFMS, JJR, and Mr Duggan. Mr Swindell and Mr Reilly were therefore trying to hide the fact that DFMS, JJR and Mr Duggan were suppliers who were entirely new to PPSL. This was not simply in the context of this appeal; Mr Swindell had taken the same stance in the November Visit, which of course was during the final period of the Deals. We infer from this that Mr Reilly and Mr Swindell's lack of candour was because they were hiding their knowledge that the Deals from these suppliers were connected to the fraudulent evasion of VAT.

200. We again repeat paragraphs 187, 189 and 190 above in respect of Mr Hildred's arguments relating to due diligence and checks, invoicing and payment, onward transactions, and profits.

201. All of our General Findings are applicable to the Deals with DFMS. We are particularly concerned that Mr Reilly could not say who he dealt with at DFMS and we have found that he had not in fact met any such representatives for the reasons set at paragraph 93 above,

202. Taking all these matters together, we find that PPSL knew that its transactions with DFMS were connected with the fraudulent evasion of VAT.

Roy Construction

203. Mr Hildred submitted that: PPSL carried out a Companies House Check, a VAT Number Check and an HPI Check; full payment was made upon receipt of the funds from PPSL's customer; and PPSL made a normal commercial profit.

204. We again repeat paragraphs 187, 189 and 190 above in respect of Mr Hildred's arguments relating to due diligence and checks, invoicing and payment, onward transactions, and profits.

205. All of our General Findings are applicable to the Deals with Roy Construction. We also note that the Companies House Check revealed that Roy Construction had only been incorporated in August 2015 when the relevant Deal was in September 2015. Mr Reilly was not concerned about this at all. Further, Mr Reilly's confusion as to when PPSL came under a contractual obligation to purchase or sell the machinery was in the course of his evidence about the Deal with Roy Construction, as was his confusion as to the existence of any difference in risk between situations where the plant had been pre-sold and where it had not.

206. Taking all these matters together, we find that PPSL knew that that its transactions with Roy Construction were connected with the fraudulent evasion of VAT.

Anderdale

207. Mr Hildred submitted that: PPSL carried out a Companies House Check, a VAT Number Check and an HPI Check; PPSL received a valid purchase invoice and properly claimed the VAT and paid for the goods; and normal profits were made.

208. We again repeat paragraphs 187, 189 and 190 above in respect of Mr Hildred's arguments relating to due diligence and checks, invoicing and payment, onward transactions, and profits.

209. All of our General Findings are applicable to the Deals with Anderdale. We also note that Anderdale first contacted Mr Reilly with an unexpected call.

210. Taking all these matters together, we find that PPSL knew that that its transactions with Anderdale were connected with the fraudulent evasion of VAT.

Erlemo

211. Mr Hildred submitted that: Mr Rabbitte was the representative of Erlemo, who Mr Reily already knew; Mr Rabbitte contacted PPSL about a JCB; PPSL carried out full due diligence including a Companies House Check, a VAT Check and an HPI Check; as there were no issues with the first transaction further transactions took place; the machines were sold to a third party and output tax declared; and a normal commercial profit was made.

212. We again repeat paragraphs 187, 189 and 190 above in respect of Mr Hildred's arguments relating to due diligence and checks, invoicing and payment, onward transactions, and profits.

213. All of our General Findings are applicable to the Deals with Erlemo. Further the Companies House Check revealed that a notice warning of an intention to strike Erlemo off the register had been issued on 1 September 2015, but Mr Reilly did not perceive any commercial or financial risk. We also note that Mr Rabbitte was Erlemo's representative, but there is no

evidence that Mr Reilly questioned why Mr Rabbitte should be a representative of both Erlemo and Go Plant.

214. Taking all these matters together, we find that PPSL knew that that its transactions with Erlemo were connected with the fraudulent evasion of VAT.

JJR

215. Mr Hildred submitted that: PPSL knew that the transaction was a genuine and normal commercial deal as Mr Reilly had met the representative at a previous auction; PPSL carried out a Companies House Check, a VAT Number Check and an HPI Check; PPSL received a valid purchase invoice and properly claimed the VAT and paid for the goods; the machine was properly sold; the machine was properly delivered to the yard at Ramsey Road and the condition of the machine checked; and PPSL made a normal commercial profit.

216. We repeat paragraph 199 above as regards the extent of Mr Reilly's previous contact with JJR at auctions.

217. We again repeat paragraphs 187, 189 and 190 above in respect of Mr Hildred's arguments relating to due diligence and checks, invoicing and payment, onward transactions, and profits.

218. All of our General Findings are applicable to the Deals with JJR. Further, although Mr Reilly maintained that he knew JJR's representative from an auction, for the reasons set out at paragraph 107 above we find that he did not in fact know the representative. This is compounded by the fact that he said that he could not remember who he was dealing with.

219. We are again driven to the conclusion, taking into account all matters together, that Mr Reilly's confidence in dealing with JJR in these circumstances was because he knew that PPSL's transactions with JJR were connected with the fraudulent evasion of VAT.

Mr Duggan

220. Mr Hildred submitted that: Mr Reilly had previously met Mr Duggan at various plant auctions; PPSL was contacted by a customer requiring a Volvo and PPSL managed to source this through Mr Duggan; PPSL carried out a VAT Number Check; the machine was physically delivered and as PPSL were happy with the machine they proceeded with the transaction; PPSL received a valid purchase invoice and properly claimed the VAT and paid for the goods; PPSL sold the machine and accounted for the output tax; and made a normal commercial profit.

221. We again repeat paragraph 199 above as regards the extent of Mr Reilly's previous contact with Mr Duggan at auctions.

222. We again repeat paragraphs 187, 189 and 190 above in respect of Mr Hildred's arguments relating to due diligence and checks, invoicing and payment, onward transactions, and profits.

223. All of our General Findings are applicable to the Deals with Mr Duggan. Further, although Mr Reilly maintained that he had previously traded with Mr Duggan, for the reasons set out in paragraph 110 above we do not accept that Mr Reilly had a trading history with Mr Duggan at all.

224. Taking all these matters together, we find that PPSL knew that that its transactions with M Duggan were connected with the fraudulent evasion of VAT.

NW Plant

225. Mr Hildred submitted that: Mr Reilly had known Mr O'Grady for several years; PPSL carried out a VAT Number Check and an HPI Check; the first transaction which HMRC dispute originated from a customer of PPSL (JGE Truck and Plant Ltd) contacting Mr Reilly to see if PPS could supply a tipper, the machine arrived, it was inspected and the deal proceeded; some

of the other transactions queried by HMRC also originated from specific enquiries from customers of PPSL; invoices were received and were correct; funds were paid for the machines and then sold to external parties with a typical profit margin; on one occasion PPSL did not take the machine and a credit note was raised; and the trading pattern was completely normal and on commercial terms.

226. Mr Carey's submissions as regards NW Plant were that, to use his words, even a cursory consideration of NW Plant would have resulted in significant concerns. He particularly focused upon Mr O'Grady's conviction for dumping waste and Mr Reilly's position that he would still have traded with NW Plant even if he had known of this. Mr Carey also submitted that the same factors relied upon as regards the other suppliers were equally relevant to NW Plant, with the exception that NW Plant was not itself a defaulting trader.

227. We note that HMRC's statement of case treats the allegations of knowledge in relation to NW Plant in the same way as for the other suppliers. They only way in which NW Plant is differentiated is for HMRC to note that NW Plant was not itself a defaulting trader, but that this makes no difference to the position because NW Plant purchased the plant from DFMS. There was no allegation that PPSL knew or should have known that NW Plant had purchased the plant from DFMS at the time of the Deals with NW Plant.

228. We also note that the cross-examination of Mr Reilly in relation to NW Plant was relatively limited. The only questioning which was specific to NW Plant as distinct from the other suppliers related to Mr O'Grady's conviction and Mr Reilly's knowledge and attitude to that. It was not put to Mr Reilly (or any other witness) that PPSL knew or should have known that NW Plant had purchased the plant from DFMS at the time of the Deals with NW Plant.

229. Our approach to whether or not the general findings above are to be applied to NW Plant is as follows.

230. PPSL's knowledge of VAT fraud in the industry, the inability for Mr Reilly to be clear about when PPSL was contractually obliged to purchase or sell the plant, and the earlier concealment of Mr Reilly's role are all equally applicable to NW Plant as they are to the other suppliers.

231. As regards, the generation and negotiation of deals, the position with NW Plant was very different to the other suppliers. As set out above, Mr Reilly contacted Mr O'Grady. The Deals were not, therefore, generated by either an unexpected call from a supplier or a response to an advert.

232. As regards commercial and financial risk, for the reasons set out above we find that Mr Reilly already had a trading background and trading history with Mr O'Grady. Again, this was very different to any of the other suppliers. We accept that PPSL was taking a risk in the first disputed Deal with NW Plant by (on Mr Reilly's analysis of the contract) committing PPSL to purchasing the vehicle from NW Plant before JGE was committed to purchasing it from PPSL. Again, however, we find that Mr Reilly was taking this risk because of his prior knowledge of, and trading with, Mr O'Grady.

233. As regards commercial checks and due diligence, it does weigh in the balance against PPSL that no greater checks were made about Mr O'Grady (and, indeed, fewer checks were made than for some of the other suppliers given that he was a sole trader rather than a company and so no Companies House checks could be made). However, this is not determinative because Mr Reilly already felt comfortable dealing with Mr O'Grady because of the trading background and trading history, as well as the absence of any problems with past supplies by Mr O'Grady.

234. We do not accept Mr Carey's submission that a cursory glance at NW Plant at the time of the Deals would have resulted in significant concerns. Indeed, we find that significant concerns would not have been discovered even with substantial analysis. This is for the following reasons.

235. First, again, Mr Reilly already had a trading background and trading history with Mr O'Grady and had not experienced any problems.

236. Secondly, NW Plant was genuinely engaged in the sales of plant and machinery.

237. Thirdly, NW Plant used a yard, which Mr O'Grady had owned for many years.

238. Fourthly, HMRC's own initial analysis at a visit to NW Plant on 10 June 2015 was as follows:

> "Conclusions. Initially it was thought that the business operated by Mr O'Grady would not pose an MTIC risk for the fact that the way he described how his business operates (ie buying-in plant and taking it to his premises where he would carry out repairs and maintenance) and then sell them on sometime later – he also has large stock on hand) did not meet the classic MO of commodities we see in MTIC transactions. However, form an initial examination of his records we have already identified one immediate supplier in Northern Ireland that appears to be a missing trader with VAT of £114l + undeclared. There is also a UK customer who has just recently been referred to CI who have adopted the case."

239. Notwithstanding the identification of concerns, HMRC also stated in the "Action Required" section in the notes of the meeting that NW Plant's VAT number did not need to be temporarily blocked and deregistration action was not required. HMRC's knowledge and approach is not itself relevant to PPSL's own knowledge. However, HMRC's factual explanation about Mr O'Grady's mode of business reinforces our view that it would not have been obvious to Mr Reilly that anything was untoward. There was no allegation that PPSL knew or should have known that Mr O'Grady had purchased machinery from a defaulting trader.

240. Fifthly, Mr Carey places emphasis in his skeleton argument upon the assessments made against NW Plant, the irregularities in NW Plant's VAT returns, and the fact that NW Plant was ultimately de-registered for VAT. However, we find (as set out in Mr Booth's witness statement and from the documents exhibited to it) that the assessments against NW Plant were not on a *Kittel* basis, did not involve any allegations of fraud by NW Plant, and that the cancellation of NW Plant's VAT registration certificate was because it had ceased trading, not because of any connection to the fraudulent evasion of VAT.

241. Sixthly, the fact that Mr O'Grady had a conviction for dumping waste does not give rise to a risk of VAT fraud as there is no connection between the two activities.

242. We repeat paragraphs 183, 185 and 186 above in respect of Mr Hildred's arguments relating to invoicing and payment, onward transactions, and profits.

243. Taking all these matters together, we find that PPSL did not know that its Deals with NW Plant were connected with the fraudulent evasion of VAT. In our view, the way in which the Deals were initiated by Mr Reilly, the fact that contact was therefore unexpected, and the pre-existing trading background and trading history explain the absence of commercial checks and due diligence by PPSL and also explain his attitude to any commercial risks in dealing with NW Plant. PPSL's general knowledge of the risk of VAT fraud in the industry and Mr Reilly's approach to the contractual position are not enough in themselves to establish knowledge of the connection to the fraudulent evasion of VAT in the Deals with NW Plant.

WHETHER OR NOT PPSL SHOULD HAVE KNOWN THAT ITS TRANSACTIONS WERE CONNECTED WITH THE FRAUDULENT EVASION OF VAT

The Deals with suppliers other than NW Plant

244. If we had found that PPSL did not have such actual knowledge, we would have found that PPSL should have known that its transactions were connected with the fraudulent evasion of VAT. This is because, for the same reasons as those set out in paragraphs 176 to 224 above (all of which we repeat and adopt for this purpose), PPSL should have known that the only reasonable explanation for the circumstances in which the Deals took place was that they were transactions connected with the fraudulent evasion of VAT.

The Deals with NW Plant

245. We do not accept that PPSL should have known that the only reasonable explanation for the circumstances in which the Deals with NW Plant took place was that they were transactions connected with the fraudulent evasion of VAT. This is for the same reasons that we have set out in paragraphs 225 to 243 above (all of which we repeat and adopt for this purpose). It is significant in this regard that Mr O'Grady and NW Plant appeared to Mr Reilly (and to any other reasonable trader) as a genuine trader in plant and machinery and that it was Mr Reilly who had initiated the Deals with NW Plant (as a result of inquiries from his own customer) in the usual manner in which he would do so in the ordinary course of PPSL's trading. Whilst it may well be that Mr Reilly could have found out about Mr O'Grady's conviction, the fact that this related to completely unconnected activities means that it cannot be said that this would have disclosed that the only reasonable explanation for the circumstances in which the Deals took place was that they were transactions connected with the fraudulent evasion of VAT.

THE REFUNDED DEAL

246. The denial of input tax included the Refunded Deal. Mr Hildred's submissions as to the Refunded Deal (namely, that this was reversed by a credit note as the machine was not delivered) is effectively an acceptance that PPSL is not entitled to that input tax. The assessment must in principle therefore be correct in relation to the Refunded Deal as it reverses the claim for input tax in that regard. If the position is that PPSL has already paid or otherwise accounted for the amount of that element of the assessment, then this goes to the state of PPSL's account with HMRC rather than whether or not the denial of input tax and subsequent assessment should be amended.

247. It follows that the appeal must be dismissed in respect of the Refunded Deal as PPSL has not established a right to that input tax (and, indeed, has positively asserted that it is not entitled to it).

DISPOSITION

248. For the reasons set out above, we allow the appeal as regards the Deals with NW Plant other than the Refunded Deal.

249. For the reasons set out above, we dismiss the appeal as regards all the other Deals (which, for the avoidance of doubt, includes the dismissal of the appeal as regards the Refunded Deal).

RIGHT TO APPLY FOR PERMISSION TO APPEAL

250. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

RICHARD CHAPMAN QC

TRIBUNAL JUDGE

RELEASE DATE: 18 AUGUST 2020