TC07900

VAT – denial of input tax – 403 purchases of scrap metal – whether or not the deals were connected with the fraudulent evasion of VAT – yes – whether or not the appellant should have known that the deals were connected with the fraudulent evasion of VAT – no – appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/02183
TC/2016/03590

BETWEEN

CROW METALS LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE RICHARD CHAPMAN QC
MS GILL HUNTER

Sitting in public at Taylor House, 88 Rosebery Avenue, London, EC1R 4QU on 31 July 2019 to 9 August 2019 (including reading days) with further written submissions dated 23 August 2019.

Mr Tarlochan Lall, Counsel, instructed by Haslers Chartered Accountants for the Appellant

Miss Emma King, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents.

DECISION

INTRODUCTION

1. These appeals relate to two decisions ("the Decisions") denying input tax claimed by the Appellant, Crow Metals Limited ("Crow"), in respect of supplies of scrap metal. The first decision is dated 22 December 2015 ("the First Decision"), is in respect of the 12/13 period, and is a denial of input tax in the sum of £234,551.00. The second decision is dated 23 March 2016 ("the Second Decision"), is in respect of the periods 03/14 to 06/15, and is a denial of input tax in the sum of £405,908.80 (comprising £191,718.42 for the 03/14 period, £106,314.02 for the 06/14 period, £53,851.17 for the 09/14 period, £37,630.49 for the 12/14 period, £11,614.07 for the 03/15 period, and £4,780.63 for the 06/15 period). The Decisions relate to 403 transactions ("the Deals").

2. HMRC denied Crow's input tax claims by way of the Decisions because they alleged that Crow knew or should have known that its transactions were connected with the fraudulent evasion of VAT. In the course of the hearing of the appeal, HMRC withdrew its allegation that Crow had knowledge of such a connection. Crow does not accept that there was a tax loss, that any such tax loss was fraudulent, that its transactions were connected to any such fraudulent tax loss, or that Crow should have known of the same.

BACKGROUND

3. The following background was not in dispute, either because it has been expressly agreed or is evidence which has not been challenged.

4. Crow carries on business as a scrap metal trader. Crow was incorporated on 13 February 2004. This was the continuation in a corporate form of a family business which had been trading since 1943. Crow's directors are Mr William Wakefield and Mr Joseph Wakefield. For the avoidance of confusion, we refer to Mr William Wakefield as Mr Wakefield Senior and Mr Joseph Wakefield as Mr Wakefield. Crow's shareholders are Mr Wakefield Senior (with 28%), Mr Wakefield (with 25%), Mrs Claire Wakefield (with 23%) and Mrs Rachel Wakefield (with 24%).

5. Crow operates from a scrap yard in Romford, Essex. In doing so, they have the use of two weighbridges and two three tonne platform scales. Crow's core business is the processing of scrap metal. The scrap metal is purchased from a variety of sources, sorted and stock-piled into different types. It is then sheared, stripped or bailed and sold to customers.

6. For some types of scrap metal, the processing is considerable. By way of example, Crow purchases alloy turnings from factories and other merchants. These are in two main grades, termed group 7 alloy turnings and mixed commercial turnings. Crow can store 100 tonnes of each grade of turnings within its scrap yard. Crow then uses a caterpillar loading shovel machine to load these into another machine which compresses the turnings into a puck. This has the benefit of removing all moisture and oil which leaves a purer product which can be sold nationally and internationally for a higher price than the raw materials.

7. For other types of scrap metal, the processing focuses more upon the sorting of metals into different types and grades. Crow purchases all types of metals that can be recycled. This includes copper, aluminium, brass, lead, iron, and cable. Where necessary, Crow also provides skips, grab machines, cranes and bins which can be used by factories, demolition companies, and site clearance operators to load metals to be sorted and processed by Crow.

8. Crow is positioned in the middle of the supply chain. It acquires scrap metal from small merchants and what is called "door trade" (being small traders or members of the public

attending Crow's scrap yard) and, once processed, sorted and accumulated into the necessary volumes, sells to larger traders.

9. Crow has 20 employees. Thirteen work in the scrap yard itself and the remainder are involved in the administration of the business. Mr Wakefield is now the "leader" as he put it of the business and has overseen its growth in recent years, particularly leading the trading side of the business. In doing so, he is following the role carried on by his father before him, Mr Wakefield Senior (who is still involved in the business, dealing with his original suppliers and customers). Decisions about Crow's business are made as a team. Large strategic decisions are made by Mr Wakefield and his father. Day to day decisions are made by employees in accordance with their own responsibilities but in consultation with Mr Wakefield or Mr Wakefield Senior where necessary. Traders handle their own transactions but have discussions with Mr Wakefield if there are any uncertainties or if large amounts are involved. Mr Wakefield also dealt directly with various of Crow's suppliers, including some of those which are the subject of these appeals (namely, Mr Robert Gallagher, Scrap Safe Ltd ("Scrap Safe"), CUD Ltd ("CUD"), CAM Metals Ltd ("CAM"), Trent Skip Hire Ltd ("Trent Skip"), and Bexleyheath Metals Ltd ("Bexleyheath")).

10. Mr Dean Carroll was one of the traders working for Crow at the time of the Deals. He subsequently left Crow in September 2016. Whilst at Crow, he reported to and worked closely with Mr Wakefield but was given a considerable amount of independence. His role was to buy and sell as much scrap as possible for as much of a profit margin as possible. He sourced scrap metal from suppliers including Crow's existing contacts, scrap merchants he knew from his previous employment, newly contacted scrap merchants, engineering factories and door trade customers. He also dealt directly with various of Crow's suppliers, including some of those which are the subject of these appeals (namely, SMD Ltd ("SMD"), CUD, CAM, and Bexleyheath).

11. HMRC had various communications with Crow both before and during the periods in which the Deals took place. These particularly related to providing deregistration veto letters in respect of various suppliers and letters relating to tax losses commencing with defaulting traders who had supplied Crow.

12. The investigations into Crow's returns which are the subject of these appeals included a visit to Crow by HMRC's Officer Mr Chris Wells on 16 December 2013 and by HMRC Officer Mrs Mary Kinman on 28 July 2014. After correspondence and further investigations, Officer Kinman issued the First Decision on 22 December 2015, refusing the entitlement to deduct input tax in the sum of £234,551.00. As HMRC had already repaid the claimed input tax to Crow, this resulted in an assessment in the sum of £234,551. Crow requested a review of the First Decision, which resulted in a letter dated 18 March 2016 upholding the decision. Crow issued a notice of appeal dated 15 April 2016 with the reference TC/2016/02183.

13. After further correspondence and further investigations, Officer Kinman issued the Second Decision on 23 March 2016 refusing the entitlement to deduct input tax in the sum of £405,908.80. Again, HMRC had already made repayments to Crow so broadly corresponding assessments were issued in the sum of £405,907. Crow requested a review of the Second Decision, which resulted in a letter dated 2 June 2016 upholding the decision. Crow issued a notice of appeal dated 30 June 2016 with the reference TC/2016/03590.

14. The grounds for appeal in both appeals are substantially similar. In essence, it is alleged that HMRC have not discharged their burden of proof in establishing the requirements for a denial of input tax upon the basis of *Kittel*. Both grounds for appeal include the following:

> "(a) HMRC have not established or provided particulars of the alleged or any fraudulent evasion of VAT ("the fraud") or any connection of the fraud with transactions entered into by the Appellant;
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> (b) HMRC have not established or provided particulars of the loss of VAT;
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> (c) the Appellant did not have knowledge of the fraud;
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> (d) the Appellant did not have the means to knowing that its transactions were connected with the fraud. Further, the Appellant did not have at its disposal the means such that it should have known that its transactions were connected with the fraud."

15. A direction was made on 1 February 2017 to the effect that the two appeals shall proceed together and be heard together by the same Tribunal.

16. We set out below a summary of the Deals for which the input tax was denied in the Decisions by reference to the relevant suppliers, the total amount of VAT denied relating to each supplier, the periods involved and the number of Deals within each period.

Supplier:	*Period:*	*Number of deals:*	*VAT denied grouped by period:*	*VAT denied grouped by supplier:*
Mr Gallagher	12/13	6	£7,818.00	£7,818.00
Scrap Safe	12/13	34	£211,698.00	£340,309.00
	03/14	14	£128,611.00	
SMD	12/13	6	£2,075.34	£34,348.00
	03/14	45	£27,738.80	
	06/14	7	£4,242.89	
	09/14	1	£291.01	
CUD	12/13	25	£12,959.55	£46,187.48
	03/14	17	£10,063.31	
	06/14	26	£15,685.19	
	09/14	12	£7,479.43	
CAM	03/14	22	£19.938/24	£70,120.00
	06/14	21	£13,028.01	
	09/14	18	£13,729.71	
	12/14	21	£23.424.55	
Trent Skip	06/14	4	£69,031.78	£86,745.61
	09/14	1	£17,713.83	
Bexleyheath	03/14	12	£5,366.78	£54,930.76
	06/14	12	£4,326.15	
	09/14	26	£14,637.19	
	12/14	26	£14,205.94	
	03/15	27	£11,614.07	
	06/15	20	£4,780.63	

THE ISSUES IN DISPUTE

17. The parties are agreed that it is well established that HMRC must establish the following:

(1) That there was a tax loss.

(2) That this loss resulted from a fraudulent evasion.

(3) That, if there was a fraudulent evasion, Crow's transactions which are the subject of this appeal were connected with that evasion.

(4) That if such a connection is established, that Crow knew or should have known that its transactions were connected with a fraudulent evasion of VAT.

18. All of these issues are in dispute within the present case, save that Miss King confirmed during the hearing that HMRC no longer pursued the allegation in the Decisions and in the Statement of Case that Crow *knew* that its transactions were connected with a fraudulent evasion of VAT (of course continuing to allege that Crow *should have known* the same).

THE LEGAL FRAMEWORK

19. The following elements of the legal framework were not in dispute.

20. Section 24 of the Value Added Tax Act 1994 ("VATA 1994") defines input tax. Section 25 of VATA 1994 provides for payment of output tax by reference to accounting periods and credit for input tax against output tax. Section 26 of VATA 1994 provides for the amount of input tax allowable under section 25. Regulation 29 of the Value Added Tax Regulations 1995 provides for claims for deduction of input tax to be made on VAT returns and for the holding of invoices or such other documentary evidence of the charge to VAT as HMRC may direct. The combination of these provisions therefore establishes the basis for a taxpayer's entitlement to the deduction of input tax. In doing so, these provisions implement the Articles 167 and 168 of Council Directive 2006/112/EC (which replaced Article 17 of the Sixth Council Directive).

21. The entitlement to deduction can be lost where the right to deduct has been exercised fraudulently. Where a taxable person knew or should have known that by his purchase he was taking part in a transaction which was connected with fraudulent evasion of VAT, that person is regarded as a participant in that fraud irrespective of whether or not he profited from the resale of the goods. This was established by the CJEU 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).
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> [55] Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively (see, *inter alia, 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)).
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> [56] In the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be

> regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.
>
> [57] That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
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> [58] In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.
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> [59] Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and to do so even where the transaction in question meets the objective criteria which form the basis of the concepts of 'supply of goods effected by a taxable person acting as such' and 'economic activity'.
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> [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.
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> [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 issues to be determined in a *Kittel* appeal were summarised as follows in *Blue Sphere Global Ltd v HMRC* [2009] STC 2239 ("*Blue Sphere*") at [29] *per* Sir Andrew Morritt C (and which are mirrored by the issues in dispute in the present appeals, as set out at paragraph 17 above):

> "[29] The tribunal started by setting out the four questions they considered that they must answer. It is common ground that they were the correct questions. They were:
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> (1) Was there a VAT loss?
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> (2) If so, did this loss result from a fraudulent evasion?
>
> (3) If there was a fraudulent evasion, were the BSG transactions the subject of this appeal connected with that evasion?
>
> (4) If such a connection was established, should BSG have known that its purchases were connected with a fraudulent evasion of VAT?"

23. The burden of proof on each of these issues is upon HMRC and is to the civil standard of proof of the balance of probabilities.

24. The fraudulent evasion of VAT was considered in a criminal context in *R v Dealy* [1995] 1 WLR 658. The Court of Appeal held that evasion in a VAT context simply means deliberate non-payment when a payment was due, rather than requiring any further intention to make a permanent default McCowan LJ stated as follows at 665:

> "Returning to *Reg. v. Fairclough*, 25 October 1982, as we have seen, the direction in that case was approved by the Court of Appeal (Criminal Division). There was nothing there about the need of an intention to make permanent default. The way it was being put by the judge to the jury in the present case was that if the person concerned knows that the time has come to send in the VAT returns but deliberately does not do so because he does not want to pay the tax, then from that moment onwards he is in law evading the tax. We see nothing basically different between that direction and the direction given by the judge in *Reg. v. Fairclough*. As we have already indicated, we believe that we are bound by *Reg. v. Fairclough*. We are indeed perfectly happy to acknowledge it. Why ever should the Crown have to prove a permanent intention to deprive? The legislature are perfectly capable of putting those words in a statute if they want to. To imply the words would only add to the difficulties of the prosecution in proving their case. They would constantly have to meet suggestions that there was an intention to pay in the end, just as there was here, even though we are bound to say that the case for the prosecution was overwhelming. Why should such words be implied? The word "evasion" does not, to our mind, imply any sense of permanence."

25. *R v Dealy* was applied in the context of a *Kittel* appeal in *CF Booth Ltd v HMRC* [2017] UKFTT 0813 (Judge John Brooks and Ms Gill Hunter). Whilst this case is not binding upon us as it is a First-tier Tribunal decision, we agree that this is the proper approach when considering whether or not a VAT loss resulted from a fraudulent evasion.

26. The dishonesty of a purported defaulter is therefore relevant at the stage of identifying whether or not there is fraudulent evasion. The Supreme Court clarified the test of dishonesty in *Ivey v Genting Casinos (UK) Ltd t/a Crockfords v Genting* [2017] UKSC 67. In essence, the first step is to ascertain the subjective state of mind of the person said to be dishonest and the second step is to determine objectively whether his conduct was dishonest according to the standards of ordinary decent people. Lord Hughes (with whom Lord Neuberger, Lady Hale, Lord Kerr and Lord Thomas agreed) stated as follows at [74]:

> "[74] These several considerations provide convincing grounds for holding that the second leg of the test propounded in Ghosh does not correctly represent the law and that directions based upon it ought no longer to be given. The test of dishonesty is as set out by Lord Nicholls in *Royal Brunei Airlines Sdn Bhd v Tan* and by Lord Hoffmann in *Barlow Clowes*: see para 62 above. When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the (objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

27. In *Mobilx Limited (In Liquidation) v HMRC* [2010] EWCA Civ 517, [2010] STC 1436 ("*Mobilx*"), the Court of Appeal explained what was meant by "should have known" and the extent of the knowledge which it must be established that the taxpayer had or ought to have had. The Court of Appeal held that 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, the right to deduct is lost. The Court of Appeal also held that the test in *Kittel* should

not be over-refined and so 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. 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.
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> Extent of Knowledge
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> …
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> [58] As I have endeavoured to emphasise, the essence of the approach of the court in *Kittel* was to provide a means of depriving those who participate in a transaction connected with fraudulent evasion of VAT by extending the category of participants and, thus, of those whose transactions do not meet the objective criteria which determine the scope of the right to deduct. The court preserved the principle of legal certainty; it did not trump it.
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> [59] The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who 'should have known'. Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to

fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*.

[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.'
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> [84] Such circumstantial evidence, of a type which compels me to reach a more definite conclusion than that which was reached by the tribunal in *Mobilx*, will often indicate that a trader has chosen to ignore the obvious explanation as to why he was presented with the opportunity to reap a large and predictable reward over a short space of time. In *Mobilx*, Floyd J concluded that it was not open to the tribunal to rely upon such large rewards because the issue had not been properly put to the witnesses. It is to be hoped that no such failure on the part of HMRC will occur in the future.
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> [85] In so saying, I am doing no more than echoing the warning given in HMRC's 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."

28. A distinction is to be drawn between "knew" and "should have known". Importantly, there is no need for dishonesty for "should have known". This was highlighted as follows by Briggs J in *Megtian Ltd (In Administration) v The Commissioners for Her Majesty's Revenue and Customs* [2010] EWHC 18 (Ch), [2010] STC 840, [37], [38] and [41]:

> "[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.
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> …
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> It is important to bear in mind, although the phrase 'knew or ought to have known' slips easily off the tongue, that when applied for the purpose of identifying the state of mind of a person who has participated in a transaction which is in fact connected with a fraud, it encompasses two very different states of mind. A person who knows that a transaction in which he participates is connected with fraudulent tax evasion is a participant in that fraud. That person has a dishonest state of mind. By contrast, a person who merely ought to have known of the relevant connection is not dishonest, but has a state of mind broadly equivalent to negligence."

29. It is not enough to establish that a taxpayer had a reasonable suspicion of fraud. The Upper Tribunal referred to the test as a high hurdle for HMRC in *Davis & Dann Ltd v HMRC* [2013] UKUT 374 (TCC), [2014] STC 39 (Judge Gammie QC and Judge Sadler) as follows at [37] and [38]:

> "[37] As Mr Scorey pointed out in opening, the appellants are not challenging the facts that were found by the FTT nor is there any substantive disagreement between the parties as to the relevant legal test that is to be applied to those facts. They were agreed that the correct test was 'the only reasonable explanation' test enunciated most notably by Moses LJ in *Mobilx*.
>
> [38] This test presents a high hurdle for HMRC which we think is most easily appreciated by noting that it is not enough that the circumstances of the taxpayer's transactions might reasonably lead him *to suspect* a connection with fraud; nor is it enough that the taxpayer should have known that it was *more likely than not* that his purchase was connected to fraud. In other words, he can appreciate that everything may not be right about the transaction but that is not enough. He should have known that the transactions in which he was involved *were* connected to fraud: he should have known that they were so connected because that is the only reasonable explanation that can be given in the circumstances of the transactions."

30. However, HMRC does not need to establish that the taxpayer should have known the details of the fraud. The Court of Appeal stated as follows in *Fonecomp Ltd v HM Revenue and Customs* [2015] EWCA Civ 39, [2015] STC 2254 ("*Fonecomp*") at [43] to [44] and [51], *per* Arden LJ:

> "[43] I turn to my conclusions on this issue. Under the jurisprudence of the CJEU it is for the national court to determine if there was a connection on the facts, and this question is to be determined on the objective evidence and without reference to the trader's knowledge.
>
> [44] Furthermore in my judgment, there is nothing in *Kittel* which would lead to the conclusion that HMRC has to show that the transaction provides tangible assistance in carrying out the fraud. If it did, it would be difficult to prove a connection with a fraudulent transaction upstream of the transaction for which the trader seeks a repayment. Furthermore, contrary to the submission of Mr Lasok, there is no warrant for reading in a requirement that, in a contra-trading case, the connection can be established only by

> inclusion of details of the transaction in question in a VAT return submitted by (in this case) Klick.
>
> …
>
> [51] However, in my judgment, the holding of Moses LJ does not mean that the trader has to have the means of knowing how the fraud that actually took place occurred. He has simply to know, or have the means of knowing, that fraud has occurred, or will occur, at some point in some transaction to which his transaction is connected. The participant does not need to know how the fraud was carried out in order to have this knowledge. This is apparent from paras 56 and 61 of *Kittel* cited above. Paragraph 61 of *Kittel* formulates the requirement of knowledge as knowledge on the part of the trader that 'by his purchase he was participating in a transaction connected with fraudulent evasion of VAT'. It follows that the trader does not need to know the specific details of the fraud."

31. There were also some elements of the legal framework upon which the parties disagreed.

32. Mr Lall submitted that HMRC must establish that a defaulter had an intention or plan to defraud at the time that Crow entered into its purchase transactions. Mr Lall relied upon the opinion of Advocate General Kokott in *Vetsch Int Transporte GmbH* (Case C-531-17) ("*Vetsch*") at [65] to [67] to the following effect:

> "[65] Furthermore, in its case-law the Court requires that the taxable person takes part in a transaction 'connected' with fraudulent evasion of VAT. If no VAT fraud was planned at the time of import or at the time of transfer, there can be no question of participation in a transaction connected with fraudulent evasion of VAT. At that time there is no connection with a (planned) fraudulent evasion of VAT in the absence of intent on the part of the perpetrator.
>
> [66] In addition, the Court's existing case-law on 'transactions vitiated by fraud' is manifestly geared to situations where – unlike in the present case – a VAT fraud was planned from the outset. It essentially relates to the area of organised (generally cross-border) crime.
>
> [67] The existence of a perpetrated or intended fraud, and thus fault in individual conduct at the time of the supply (here the transfer), constitutes a crucial element in refusing the perpetrator (and all 'accomplices', that is, anyone who knew or should have known about the fraud exemption and/or deduction."

33. Miss King disputes the need for an intention or plan to defraud at the time that Crow entered into its purchase transactions. She relies upon *Fonecomp*, above, *per* Arden LJ at [31] and [33] as follows (although for completeness we also include [30], [32] and [34]):

> "[30] Fonecomp submits that its interpretation is confirmed by the way in which *Kittel* is applied in France but it has not made this submission good by adducing the appropriate evidence. Therefore, I can place no reliance on this point.
>
> [31] HMRC further contend that this court has already considered the *Kittel* principle in *Mobilx Ltd (in admin) v Revenue and Customs Comrs; Blue Sphere Global Ltd v Revenue and Customs Comrs; Calltel Telecom Ltd v Revenue and Customs Comrs (No 2)* [2010] EWCA Civ 517, [2010] STC 1436 and approved the wider interpretation. Moses LJ, with whom Carnwath LJ and Sir John Chadwick agreed, held:

> '[62] The principle of legal certainty provides no warrant for restricting the connection, which must be established, to a fraudulent evasion which immediately precedes a trader's purchase. If the circumstances of that purchase are such that a person knows or should know that his purchase is or will be connected with fraudulent evasion, it cannot matter a jot that that evasion precedes or follows that purchase. That trader's knowledge brings him within the category of participant. He is a participant whatever the stage at which the evasion occurs.'
>
> [32] HMRC submits that we are therefore bound to conclude that the wider interpretation is correct. On this point, I prefer Mr Lasok's submission. I do not accept that we would be bound to follow *Kittel* if we considered that it was no longer good law simply because it had been approved in *Mobilx*. If we accept that *Bonik* changes the *Kittel* principle, then we would be bound to follow the later CJEU case law.
>
> [33] However, I am satisfied that the passage which I have cited from *Mobilx*, above, remains good law. This was also the conclusion of Hildyard J in *Edgeskill Ltd v Revenue and Customs Comrs* [2014] UKUT 38 (TCC), [2014] STC 1174.
>
> [34] In conclusion, I agree with para [22] of the judgment of Judge Bishopp in *Universal Enterprises (EU) Ltd v Revenue and Customs Comrs* [2014] STC 1515, cited by HMRC:
>
> > [22] The argument that a trader in a clean chain cannot be affected by anything which happens in a dirty chain is in my judgment wholly misconceived. Mr Young argued that there is nothing inherently wrong with contra-trading, a statement which, put in that way, is true: a trader who both imports and exports may legitimately organise his sales and purchases so that, at the end of a VAT period, he has little to pay, or a repayment claim. If he does so for reasons of cash flow, his conduct is unexceptionable. But that is not the reason for the contra-trading seen in cases of this kind. As has been said many times, not least by the then Chancellor in *Blue Sphere Global Ltd v Revenue and Customs Comrs* [2009] EWHC 1150 (Ch), [2009] STC 2239, its purpose is to conceal the fraud in the dirty chain and to make it harder to combat. The appellants' argument necessarily treats "clean" as synonymous with "innocent", but a clean chain in cases of this kind—that is, one in which each of the traders accounts correctly for VAT—is not innocent; it is an integral part of the fraudulent scheme. Even if I entertained any doubt (which I do not) that as a matter of EU law there is sufficient connection between a trader in the clean chain and the default in the dirty chain, there remains an insuperable connection with the fraudulent purpose of the clean chain.'"

34. We do not accept Mr Lall's submission that the purported defaulters must have an intention or plan to defraud at the time of Crow's purchases in order for Crow's input tax to be denied. Instead, we find that the connection to a fraudulent evasion of VAT can in principle arise if the fraud takes place after the purchase. This is for the following reasons.

35. First, *Vetsch* dealt with the following questions:

> "(1) Is the exemption under Article 138 of [the VAT Directive] for an intra-Community transfer from a Member State to be refused where the taxable person carrying out that transfer to another Member State does in fact declare in the other Member State the intra-Community acquisition linked to the intra-Community transfer, but commits tax evasion in connection with a

> subsequent taxable transaction concerning the goods in the other Member State by wrongfully declaring an exempt intra-Community supply from that other Member State?
>
> (2) Is it relevant to the answer to Question 1 whether the taxable person had intended at the time of the intra-Community transfer to commit tax evasion in respect of a subsequent transaction concerning those goods?"

36. As such, the context of *Vetsch* was that the fraudulent evasion took place in respect of a supply that was subsequent to the supply for which the input tax was being refused, both supplies being in respect of the same goods. This goes to the question of whether or not there is a connection to fraud in the context of exemptions for intra-Community transfers. This is different to the present case, in which there is only one transaction and where the alleged connection to fraud arises from the direct supplier and purchaser relationship between the purported defaulter and Crow.

37. Secondly, the CJEU's answer to the first question asked of it turned upon the already well-established need to establish on the facts a connection to a fraudulent transaction and that the importer knew or ought to have known that the later supply would entail tax evasion. This carries with it the implication that it is in principle (and in appropriate cases) possible for there to be a connection to a subsequent fraudulent transaction and for a taxpayer to know (or that the taxpayer should know) that he will be participating in that fraud by virtue of his transaction. The CJEU stated as follows at [24] to [26] and [42] and [43]:

> "[24] According to the referring court, it is apparent from the case-law of the Court of Justice that the right to VAT deduction or exemption in respect of an intra-Community supply is to be refused where tax evasion is committed by the taxable person himself.
>
> [25] In that regard, it notes that that case-law applies not only where the taxable person committed the offence of tax evasion but also where the taxable person knew or should have known that the transaction which he carried out was part of a tax fraud committed by the supplier or by another trader acting upstream or downstream in the supply chain.
>
> [26] The referring court is thus uncertain as to the relevance of that case-law in a situation such as that in the main proceedings, given that the tax evasion in question occurred only downstream in the supply chain, after the intra-Community transfer at issue and the intra-Community acquisition subsequent to that transfer.
>
> …
>
> [42] Once it has been established that that tax evasion does not relate to the transfer on which the right to the exemption from import VAT, as laid down in Article 143(d) of the VAT Directive and Article 143(1)(d) of the amended VAT Directive, depends was granted, that exemption cannot be denied to the importer designated or recognised as liable for payment of that tax, within the meaning of Article 201 of that directive, in a situation where, as is apparent from the order for reference, there is no evidence to support the conclusion that the importer knew or ought to have known that the supply subsequent to the import entailed tax evasion on the part of the Bulgarian recipients.
>
> [43] In the light of all the foregoing considerations, the answer to the first question is that Article 143(d) of the VAT Directive and Article 143(1)(d) of the amended VAT Directive must be interpreted as meaning that the exemption from import VAT laid down in those provisions may not be refused in respect of an importer designated or recognised as liable for

> payment of that tax, within the meaning of Article 201 of the VAT Directive, in a situation, such as that in the main proceedings, in which, first, the recipient of the intra-Community transfer of goods effected after that import commits tax evasion in connection with a transaction which is subsequent to that transfer and is not linked to that transfer and, secondly, there is no evidence to support the conclusion that the importer knew or ought to have known that that subsequent transaction entailed tax evasion on the part of the recipient."

38. Thirdly, in view of its answer to the first question, the CJEU did not answer (and therefore did not comment upon Advocate General Kokott's opinion) in respect of intention and planned fraud. The CJEU stated as follows at [44] and [45]:

> "[44] By its second question, the referring court asks what would be the implications, in the light of the answer to its first question, if it were established that the recipient of the goods transferred had intended, at the time of the intra-Community transfer of those goods, to commit tax evasion in respect of a subsequent transaction concerning the goods.
>
> [45] It is apparent from the order for reference that such an intention has not been established in the present case. In those circumstances, that question is hypothetical and therefore inadmissible."

39. Fourthly, we agree with Miss King that *Fonecomp* is binding authority for the proposition that the fraudulent tax evasion can take place after the transaction for which the input tax is denied. As set out in *Fonecomp* itself, the question of participation in the fraud on the basis that the taxpayer knew or should have known of the connection to the fraudulent evasion of VAT applies whenever the fraud takes place.

40. Fifthly, as explained in *Fonecomp* at [51], there is no need for a taxpayer to know the specific details of how the fraud has taken place or how it will take place. It follows that there is no requirement that the existence of an intention or plan to commit fraud are within the taxpayer's knowledge or means of knowledge. In the context of means of knowledge, the question, as set out in *Mobilx*, is whether the taxpayer 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.

41. Sixthly, the Court of Appeal held in *Blue Sphere* that the connection to fraud is context specific and is not dependent upon the order of events. Sir Andrew Morritt C stated as follows at [42] and [44] to [46]:

> "[42] In both *Optigen* and *Kittel* the ECJ was concerned with carousel fraud, not contra-trading. In the former the principle was expressed in terms which confined its operation to transactions in the dirty chain and in terms which, if satisfied, excluded liability. By contrast in *Kittel* the principle was expressed in affirmative terms extending beyond transactions in the dirty chain. On that formulation all that is required is that the transaction in which the trader participated was 'connected with fraudulent evasion of VAT'. *Just Fabulous (UK) Ltd* also concerned a carousel fraud but was a strike out application not a consideration of how the concept of 'connection' is to be applied. The first reported case at the level of the ECJ or the High Court involving contra-trading is *Livewire*.
>
> …
>
> [44] There is force in the argument of counsel for BSG but I do not accept it. The nature of any particular necessary connection depends on its context, for example electrical, familial, physical or logical. The relevant context in this

> case is the scheme for charging and recovering VAT in the member states of the EU. The process of off-setting inputs against outputs in a particular period and accounting for the difference to the relevant revenue authority can connect two or more transactions or chains of transaction in which there is one common party whether or not the commodity sold is the same. If there is a connection in that sense it matters not which transaction or chain came first. Such a connection is entirely consistent with the dicta in *Optigen* and *Kittel* because such connection does not alter the nature of the individual transactions. Nor does it offend against any principle of legal certainty, fiscal neutrality, proportionality or freedom of movement because, by itself, it has no effect.
>
> [45] Given that the clean and dirty chains can be regarded as connected with one another, by the same token the clean chain is connected with any fraudulent evasion of VAT in the dirty chain because, in a case of contra-trading, the right to reclaim enjoyed by C (Infinity) in the dirty chain, which is the counterpart of the obligation of A to account for input tax paid by B, is transferred to E (BSG) in the clean chain. Such a transfer is apt, for the reasons given by the tribunal in *Olympia* [2009] STC 643 (at [4] quoted in [4], above), to conceal the fraud committed by A in the dirty chain in its failure to account for the input tax received from B.
>
> [46] Plainly not all persons involved in either chain, although connected, should be liable for any tax loss. The control mechanism lies in the need for either direct participation in the fraud or sufficient knowledge of it. It is important, as the tribunal recognised in para 131 of its decision, that such tax losses are only used once. Thus having used the tax losses attributable to AS Genstar and Wade Tech by allocation to the tax reclaimed by BSG they are no longer available to be allocated to other transactions or claims."

42. The parties also differed in their submissions as to the way in which the tax loss should be identified and calculated.

43. Mr Lall submitted that when assessing whether there was a tax loss and the level of tax loss, it is necessary to look beyond the assessments raised and assess the economic reality of whether there was a tax loss and its scale. He said that in assessing whether there was a tax loss and its amount, whether or not the evidence shows that the supplier made a profit margin should be taken into account as the tax loss would be the VAT on that margin.

44. Mr Lall also submitted that the tax loss is the net amount of VAT payable, and so the difference between the output tax due and the input tax claimed.

45. However, Mr Lall accepted that it is not necessary for the tribunal to calculate the tax loss and in doing so rightly drew our attention to *S&I Electronics plc v Revenue and Customs Commissioners* [2012] UKUT 87 (TCC), [2012] STC 1620 ("*S&I*") at [39]:

> "… the extent of the tax loss does not matter: there need be no correlation between input tax denied and tax lost."

46. Mr Lall further submitted that the only relevance of the quantum of the tax loss is that it goes to whether or not Crow should have known that its transactions were connected with the fraudulent evasion of VAT. This is because, he contends, that if the tax loss is likely to have been low, the amount of tax loss would carry lower or minimal weighting when assessing whether or not Crow should have known of this.

47. Miss King submits that the ability to offset input tax against output tax is restricted to input tax that is properly allowable. Where the input tax is not properly allowable, the tax loss is the output tax with credit for any payment made. She further submits that where an

assessment has been made, the tax loss is the amount of the assessment, again with credit for any payments made.

48. Further, Miss King submits that there is no need to quantify the amount of the default when the amount of input tax is being considered. The first limb of *Kittel* is satisfied when there is tax loss. Miss King relied upon *Calltel Telecom Ltd v Revenue and Customs Commissioners* [2009] EWHC 1081 (Ch) ("*Calltel*") *per* Floyd J at [96] to [99]:

> "[96] In my judgment there is no principle which requires HMRC to acknowledge a claim to repayment to the extent that the claim exceeds HMRC's tax loss. Firstly, as Mr Cordara emphasised in other connections, the correct unit of fiscal analysis is not the entire chain but the individual transaction. This proposition was emphasised in both *Optigen* and *Kittel* (*supra*). The question is accordingly whether the taxpayer has or does not have the right to deduct or reclaim his input tax in respect of an individual transaction. Consideration of this question does not justify recourse to the overall fiscal impact on HMRC of all the transactions in the chain.
>
> [97] Secondly, none of the statements in *Kittel* suggest that the right is lost only to the extent that tax is lost elsewhere in the chain. It is true that measures adopted by Member States to combat MTIC fraud must be proportionate: see e.g. *Netto* (*supra*) at [18]-[23]. Thus irrebuttable presumptions of illegality, for example, are not permitted: *Garage Molenheide* Joined Cases C-286/94; C340/95; C-401/95 and C-47/96: [1998] STC 126 at [52]. But, once it is established that a taxpayer has, by his purchase, participated in the fraudulent evasion of VAT, it seems to me to be impossible to argue that, by withholding repayment of VAT in respect of that very purchase the taxpayer is being subjected to a disproportionate remedy. In fact, to use the VAT legislation to achieve any benefit from such a purchase seems to me to be wrong in principle.
>
> [98] Thirdly, although fiscal neutrality is a fundamental feature of the system of VAT, and the right of any trader to deduct input tax is an important feature of the system of ensuring fiscal neutrality (see e.g. *Kittel* at [48]), the fiscal neutrality of an individual transaction will, as *Kittel* shows, have to give way to the objective of combating fraud.
>
> [99] It seems to me that the objective of not recognising the right to repayment is not simply to ensure that the exchequer is not harmed by fraud: the objective includes combating fraud and discouraging taxpayers from entering into transactions of this nature. In that context, considerations of fiscal neutrality of the impugned transaction are, it seems to me, beside the point."

49. We find that the tax loss is not based upon any profit margin or any set off of input tax against output tax. The essence of *Kittel* is that it overrides the principle of fiscal neutrality that would otherwise apply.

50. Further, the tax loss does not need to be quantified and does not limit the amount of the input tax denied. This is because it is clear from *S&I* and *Calltel* that the touchstone is the connection to the fraudulent evasion of tax. Indeed, Mr Lall appears to accept this, as set out above.

51. Finally, in appropriate cases it might be that the size of the tax loss has a bearing upon the circumstances to be taken into account when analysing whether or not a taxpayer should have known that his or her transactions were connected with the fraudulent evasion of VAT. However, this is wholly different to analysing whether or not there was a fraudulent tax loss for the purposes of the first two stages of the analysis identified in *Blue Sphere*.

52. For completeness, we note that we were also referred to various authorities which we have considered but which we have not quoted from within this decision as they either reinforce the framework which we have already set out above or because they are not of direct relevance to the present appeals. These authorities were as follows: *Bonik EOOD v Direktor na Direktsia* (Case C-285/11), *Collée v Finanzamt Limburgg an der Lahn* (Case C-146/05) [2008] STC 757, *Mahagében* (Case C-80/11), *Megtian Ltd v Revenue and Customs Commissioners* [2010] EWHC 18 (Ch), *NG International Ltd v Revenue and Customs Commissioners* [2012] UKUT 259 (TCC), *Red 12 Trading Ltd v Revenue and Customs Commissioners* [2010] STC 589, *SC Paper Consult SRL v Directia Regionalã a Finantelor Publice ClujNapoca, Administratia Judeteana a Finantelor Publice Bistrita-Nasaud,* (Case C-101/16), *Total Network SL v Revenue and Customs Commissioners* [2008] UKHL 19, *Société Financière d'Investissements SPRL v Belgium* (Case C-85/97) [2000] STC 164, *Atec Associated Limited v The Commissioners for Her Majesty's Revenue and Customs* [2016] UKFTT 0714 (TC).

THE EVIDENCE

53. We heard oral evidence on behalf of HMRC from Officer Kinman, Officer Elaine Emery, Officer Gerard Dixon, Officer Shaheen Rehman, Officer Theresa Launder, and Officer Christine King. We also read witness statements from each of these witnesses, as well as from Officer Joyce Schultz.

54. We heard oral evidence on behalf of Crow from Mr Wakefield Senior, Mr Wakefield and Mr Dean Carroll. We also read witness statements from each of these witnesses, as well as from Kelly Reader, Paul Reynolds, and Lee Ervin.

FRAUDULENT TAX LOSSES

Our Approach

55. Mr Lall stated as follows in his written closing submissions:

> "Crow is in no position to, therefore does not, dispute the fact of its suppliers having defaulted in complying with their VAT obligations subject to submissions on specific matters made below. Whether or not those defaults were dishonest and fraudulent is a matter for the Tribunal."

56. However, Mr Lall went on to dispute that HMRC had established fraud in respect of various of the suppliers. We also note that Mr Lall did not go so far as to accept that there was a tax loss. In the circumstances, we have taken Mr Lall's submissions as meaning that Crow effectively puts HMRC to proof as to the existence of a tax loss and that any such tax loss was fraudulent.

57. Our approach, therefore, is to consider each supplier in turn, making our findings of fact and then analysing whether or not HMRC has discharged its burden of establishing a tax loss and of establishing that that tax loss was fraudulent.

58. Many of Mr Lall's submissions related to the absence of evidence of a plan or intention to defraud at the time of the purchases. However, as set out above, no such pre-existing intention or plan is necessary. Further, Mr Lall submitted in respect of various of the suppliers that the economic reality was that the tax loss was lower than HMRC submitted as it was necessary to take into account the true profit margin as they had been purchased in the UK subject to VAT. As set out above, however, the parties rightly agreed that there is no need to quantify the amount of the tax loss. As such, we do not deal any further with Mr Lall's submissions in respect of a plan or intention to defraud or the economic reality of the tax loss when analysing the position in respect of the individual suppliers.

Mr Gallagher

Findings of Fact

59. We make the following findings of fact upon the basis of the documents and witness evidence before us, including the evidence of Officer King and Officer Kinman.

60. Mr Gallagher was a sole proprietor who was registered for VAT on 19 July 2013. He stated on his VAT1 that his main business activity was demolition, groundworks and drainage. His VAT1 also estimated that his annual turnover would be £150,000, although, as it emerged, he was registered for VAT for only 7 months and declared outputs of £6,627.

61. Mr Gallagher had given a business address which HMRC found to be an accommodation address consisting of mail boxes. He had also given a home address which HMRC found to be a café. Although the café had accommodation above it, there was no evidence that Mr Gallagher had occupied it. Officer King's colleague, Officer Wells, telephoned Mr Gallagher on the mobile number provided by him but there was no reply.

62. Mr Gallagher filed VAT returns for the periods from 19 July 2013 to 31 August 2013 (declaring output tax of £424.45), 1 September 2013 to 30 November 2013 (declaring output tax of £797.91), and 1 December 2013 to 7 January 2014 (declaring output tax of £103.20). However, Crow's purchases from Mr Gallagher during his period to 30 November 2013 (being Deal references 201, 206 and 209) were in the net sum of £23,863.77 plus VAT of £4,772.75. Further, Crow's purchases from Mr Gallagher during his period to 7 January 2013 (being Deal references 210, 213 and 216) were in the net sum of £15,232.77 plus VAT of £3,046.55. It follows that Mr Gallagher did not declare these sales to Crow and did not account for output tax in respect of them. We note that the sums that were declared by Mr Gallagher do not correlate with the output tax due any of the Deals with Crow. As such, we find on the balance of probabilities that there was a tax loss to which each of Crow's deals have been traced.

63. Officer King raised assessments in the sum of £7,818 representing the VAT on the undeclared sales to Crow. Penalties were also issued in the sum of £5,472. These have not been paid. Correspondence relating to these assessments and penalties were sent to the addresses held by HMRC but were returned to sender. There has been no contact from Mr Gallagher and no appeal issued.

64. In the course of cross-examination, Officer King accepted that she had not seen any invoices relating to the undeclared sales and instead took the information from SAGE records available to her. She also accepted that she had not visited Mr Gallagher, although she explained that this was because it was clear from a Google search that the business premises were a mailbox and so unsuitable for a visit. She also accepted that she did not have any evidence to support her position that he was not trading in demolition, groundworks and drainage.

Submissions and Discussion

65. Miss King submitted that the evidence established that there was a fraudulent tax loss.

66. Mr Lall submitted that the low amount involved cast doubt on HMRC's allegation that Mr Gallagher's defaults were fraudulent. He also submitted that it was not clear why it was found that all of Crow's sales had been undeclared.

67. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. As set out above, we find that the sales to Crow were not declared at all (rather than being underdeclared) as those that were declared do not correlate in amount with any of the Deals. Mr Gallagher was a missing trader, he did not respond to HMRC's enquiries, he has not paid the assessment or the penalties and he has not appealed or

otherwise challenged them. This is reinforced by the fact that the principal place of business was a mailbox and there was no trace of him occupying either the business address or his home address. We do not accept that the amount of the defaults makes any difference to whether or not they were fraudulent.

Scrap Safe

Findings of Fact

68. We make the following findings of fact upon the basis of the documents and witness evidence before us, including the evidence of Officer Dixon and Officer Kinman.

69. Scrap Safe was incorporated on 21 September 2011. Mr Jack Dobson was Scrap Safe's sole director until his resignation on 22 September 2013, the same date upon which Mr Danut Emandache was appointed. Mr Emandache was registered as the sole director (and Mr Dobson removed from the register) on 11 November 2013. Scrap Safe went into creditors' voluntary liquidation on 25 April 2014. Mr Douglas Yerrill was appointed as liquidator.

70. Scrap Safe had been registered for VAT from 4 October 2011. Its main business activity was the recycling of scrap motor vehicles and the buying and selling of non-ferrous metals. Until Mr Dobson's resignation, Scrap Safe's outputs varied from £170,000 to £240,000 between periods 03/13 and 09/13. In the period from November 2013 to February 2014, Scrap Safe's sales were approximately £2,500,000 plus VAT.

71. On 11 February 2014, HMRC tried to contact Scrap Safe. When they were unable to make such contact, a letter was sent to Scrap Safe's registered address stating that it would be de-registered as of 18 February 2014 if contact was not made. On 17 February 2014, Mr Dobson telephoned HMRC and explained that he had sold Scrap Safe to Mr Emandache and gave HMRC what he understood to be the new trading address. HMRC sent letters to this new address on 28 February 2014 and 10 March 2014 but received no response. Scrap Safe's liquidator has also been unable to make any contact with Mr Emandache.

72. HMRC's investigations revealed that the only known supplier to Scrap Safe was Lynx Metal Ltd ("Lynx"). Lynx made nil VAT returns for the periods 06/13 to 09/13 but made undeclared sales to Scrap Safe. Lynx was de-registered on 12 February 2014 and has been treated by HMRC as a defaulting trader. Five of Scrap Safe's sales to Crow can be traced back to Lynx.

73. Scrap Safe's VAT return for the period 12/13 was submitted on 7 February 2014 and declared output tax in the sum of £96,100.36. By a letter dated 5 May 2016, Officer Dixon raised an assessment for the period 12/13 in the sum of £189,259. Officer Dixon explained the calculation of this assessment in his letter including the following:

> "This sum relates to:
>
> - Sales made during October through December 2013, to your customers, Crow Metals Ltd and JED Logistics Ltd. A schedule of the invoices relating to these sales is enclosed with this letter. The schedule shows VAT due in the sum of £291,318.00 yet you have only declared output tax on the VAT return as £96,100.36 – a difference of £195,217.64 is due to HMRC.
>
> …"

74. The 12/13 VAT return included EC acquisition tax declared in the sum of £94,867.17. Scrap Safe had sought to amend this to represent input tax reclaimed on domestic purchases. This amendment was rejected upon the basis that no such amendment could be made given

that Scrap Safe had been de-registered for VAT. We find that on the balance of probabilities this was an error on the VAT return as there is no evidence of any EC acquisitions.

75. Scrap Safe did not submit a return for the 03/14 period. The final period central assessment was in the sum of £47,968, although it is not known how this figure was calculated. The output tax on sales to Crow was £121,495.53 and the output tax on sales to JED was £63,032.02. Allowing for the £47,968 central assessment already made, on 10 February 2016 an assessment was issued in respect the period to 12 February 2014 in the rounded down sum of £136,558.

76. We find that the invoices to Crow referred to in respect of both these periods include the Deals which are the subject of these appeals. Indeed, there does not appear to be any dispute as to this.

77. Penalties were subsequently issued in respect of both these periods. Scrap Safe has neither paid nor appealed these assessments or penalties.

Submissions and Discussion

78. Miss King submitted that Scrap Safe did not produce its records or co-operate with HMRC, the sales figures were vastly understated, and the assessment has not been appealed. She further submitted that the evidence established that there was a fraudulent tax loss.

79. Mr Lall submitted there is no evidence as to where Scrap Safe purchased the goods it sold to Crow other than the five identified as tracing back to Lynx.

80. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. Scrap Safe was a missing trader to the extent that Mr Emandache was uncontactable either by HMRC or (importantly) by the liquidator, Scrap Safe has not paid the assessment or the penalties and has not appealed or otherwise challenged them. Although there was also a very large increase in sales when Mr Emandache took over as director of Scrap Safe, this would not be sufficient on its own to be indicative of fraud as it is equally consistent with a change of approach to the business with the introduction of a new director. However, this does become an indicator of fraud when seen alongside the entry into voluntary liquidation soon after and the lack of contact with HMRC and the liquidator. It is correct that only five sales to Crow can be traced back to Lynx. However, we find on the balance of probabilities that the input tax reclaimed represented the VAT on supplies from Lynx because Lynx was the only known supplier to Scrap Safe. Given that Lynx was itself a missing trader, we find on the balance of probabilities (for the same reason as set out above) that Scrap Safe's input tax claim was itself a part of the fraudulent evasion of VAT.

SMD

Findings of Fact

81. We make the following findings of fact upon the basis of the documents and witness evidence before us, including the evidence of Officer Schultz and Officer Kinman.

82. SMD was incorporated on 13 June 2013 and registered for VAT on the same day. The director was Mr Mikolaj Sieminski. SMD changed its registered address on about 1 April 2013. On 30 July 2014, Officer Schultz visited SMD's new address with a colleague, Officer Limpkin. There was no answer. They spoke to a neighbour who said that somebody answering Mr Sieminski's description lived there and had done so for one to two months. Officer Schultz then posted a 7 day de-registration letter and direction letters relating to amending the due date of VAT returns through the letter box. Officer Schultz returned the following day but there was again no answer. SMD did not respond to the letters and made no contact whatsoever. On 12 December 2014, Mr Sieminski applied for SMD to be struck off the register. SMD was dissolved on 7 April 2015.

83. SMD had submitted a payment VAT return and then nil returns for all subsequent VAT periods. These nil returns did not reflect Crow's self-billed invoices for supplies of metal from SMD to Crow between December 2013 and April 2014, being the Deals with SMD which are the subject of these appeals. Officer Schultz issued assessments on 21 October 2014 reflecting these undeclared sales in respect of 12/13 in the sum of £2,075, 03/14 in the sum of £27,999 and 06/14 in the sum of £4,533. The assessment for 06/14 includes the invoice for which input tax was claimed by Crow in 09/14. SMD has neither paid nor appealed these assessments.

Submissions and Discussion

84. Miss King submitted that the evidence established that there was a fraudulent tax loss.

85. Mr Lall realistically acknowledged that:

> "Given that nil returns were filed which understated sales, it is recognised that in SMD's case the Tribunal may well find that it fraudulently evaded VAT. Crowe's case is that it did not have the means to know that it would fraudulently evade VAT."

86. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. Crucially, SMD completely failed to declare the sales to Crow, was uncontactable, applied to be struck off the register soon after HMRC's correspondence, and has not paid, appealed or otherwise challenged the assessments.

CUD

Findings of Fact

87. We make the following findings of fact upon the basis of the documents and witness evidence before us, including the evidence of Officer Rehman and Officer Kinman.

88. CUD was incorporated on 31 May 2013 and was registered for VAT from 15 June 2013. Its business description on the VAT1 registration form was "Wholesale of Waste & Scrap". The directors of CUD were Mr Lukasz Urmanski from 31 May 2013 until 14 December 2014 and Mr Mariusz Cryzweski from 17 May 2014. Crow's contact with CUD was Mr Jan Kwiatkowski who worked for CUD but was not a director.

89. Officer Rehman wrote to CUD and tried to telephone the mobile number on HMRC records but did not get any response. Officer Rehman and another HMRC officer, Officer Reynolds, visited CUD's premises on 17 December 2014. The premises displayed a sign for a different company, Vector Signs. A neighbour told Officer Reynolds that CUD had left the premises. This was confirmed by the new occupant of the premises, who said that CUD had left sometime before he moved into them in September 2014 and had not left a forwarding address. Officer Rehman's evidence was that the premises were a herbalist shop and not suitable for scrap metals trading. Mr Carroll said during cross-examination that he had visited the premises. He said this visit was on 21 May 2013. However, CUD was not incorporated until 31 May 2013 and so we find that he must have been wrong as to this date. He remembered a lock up unit between houses with a small ramp up to it. He was clear in saying that it was not a herbalist. We note that by the time of Officer Rehman's visit there were new occupants of the premises and it is not part of her evidence that it had been a herbalist shop prior to the new occupants moving in. We have no reason to disbelieve the evidence of either witness and so find that the property was an office when Mr Carroll visited and was being used as a herbalist shop by the new occupants when Officer Rehman visited.

90. CUD was de-registered for VAT on 17 December 2014 and was later dissolved on 22 September 2015.

91. CUD filed a VAT return for the period 08/13 declaring VAT due in the sum of £34,552, which it paid in full. It also filed a VAT return for the period 11/13 declaring VAT in the sum of £18,918, which it again paid in full. It then filed a VAT return for 02/14 declaring VAT due in the sum of £33,766. £4,000 was paid on 15 April 2014 and £5,000 was paid on 2 June 2014. No returns were received for 05/14 or 08/14 and central assessments were issued in the sums of £36,027 and £36,949 respectively. Crow is the only purchaser that can be identified during any of these periods. The £9,000 payment was set against the earliest debt owed, being the 02/14 period. However, none of the £9,000 payment was allocated by HMRC to output tax represented by sales to Crow. Officer Kinman said in cross-examination that this was on a best judgment basis as HMRC did not have any documentation relating to the 02/14 return and so could not know what the payments or declared figures related to.

92. Mr Urmanski and Mr Czyzewski were also directors of DUC Limited ("DUC"). DUC repeatedly attempted to apply for the flat rate scheme but was ineligible as its taxable turnover was expected to exceed £150,000. HMRC also refused the application upon the basis that VAT returns had not been filed for the periods 12/11, 03/12, or 06/12. DUC submitted a VAT return for the period 09/12 with net tax due of £21,004 (which was not paid) but did not submit any returns for 12/12 or 03/13. Central assessments were raised for a total tax due for these periods of £41,755. HMRC visited DUC's principal pace of business on 1 May 2013 but could not make contact with DUC. A letter was left at the premises informing DUC that if HMRC was not contacted within 7 days DUC would be de-registered. DUC did not make any contact and so was de-registered with effect from 2 May 2013. On 29 August 2013, DUC submitted a nil return for the period from 1 April 2013 to 2 May 2013, notwithstanding that there were £23,792 of sales to Crow from 21 March 2013 to 21 May 2013. DUC was dissolved on 13 January 2015.

Submissions and Discussion

93. Miss King submitted that the evidence established that there was a fraudulent tax loss.

94. Mr Lall submitted that CUD was not fraudulent as it had made payments in respect of its VAT returns. He also submitted that the £9,000 payment should be allocated to the supplies to Crow.

95. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. CUD failed to declare its sales to Crow (or, indeed, to file any returns) for the periods 05/14 or 08/14 and did not pay or appeal the central assessments. Although CUD filed a return for 02/14, it only paid £9,000 of £33,766 due. We do not accept that the payment of £9,000 should be allocated as payments relating to Crow's purchases. There is no evidence that the £9,000 payment was allocated by CUD to any particular outputs within the period (even assuming such allocation by a taxpayer is possible) and so all this payment does is to reduce the amount of the overall tax loss. Given that the tax loss for the relevant period still exceeds the amount of output tax which was due on the supplies to Crow, there is still a tax loss to which Crow's supplies are connected. We note in this regard the principles set out in *Blue Sphere* at [46] (and as cited above), which require that tax losses are used only once but do not require them to be allocated in any particular way.

96. Further, the defaults started in the period from 1 December 2013 to 28 February 2014 (being CUD's 02/14 period). The earliest of the Deals with Crow which are the subject of these appeals was 1 December 2013. As such, we do not accept that the payment in full of previous returns precludes any fraud in respect of the relevant transactions. In any event, we find that on the balance of probabilities CUD was at least from 1 December 2013 continuing the fraudulent activity of DUC before it. We reach this conclusion for the following reasons: DUC had failed to file tax returns, pay central assessments or appeal those assessments; DUC

was a missing trader; DUC continued to trade (in fact, with Crow) after it was de-registered for not contacting HMRC in response to a letter saying that it would be de-registered if contact was not received within seven days; DUC was connected to CUD through its directors; CUD was incorporated less than a month after DUC was de-registered; CUD did not file VAT returns for 05/14 or 08/14 despite the sales to Crow; CUD did not pay central assessments or appeal those assessments; and CUD was itself a missing trader. We note that that the connection to DUC through the common directors and CUD's incorporation so soon after DUC's de-registration would not be significant in their own right but are when taken alongside these other matters.

CAM

Findings of Fact

97. We make the following findings of fact upon the basis of the documents and witness evidence before us, including the evidence of Officer King and Officer Kinman.

98. CAM was incorporated on 10 August 2012. Its director was Mr Eric Donaldson. According to CAM's VAT1, its main business activity was "Agents involved in the sale of fuels, ores, metals and industrial chemicals." According to Companies House, its main business activity was "Collection of hazardous waste."

99. On various occasions between 25 July 2013 and 15 October 2015, HMRC sought information and records from CAM but were not given everything sought and only given meaningful records for the 04/14 period. On 14 August 2014, HMRC collected business records. On 6 May 2015, an HMRC officer, Officer Gazsi, spoke to CAM's agent to go through some suggested due diligence checks, who said that Mr Donaldson could not read or write which would make it difficult for him to do so. On 14 October 2015, Officer Gazsi telephoned CAM's accountant and was told that Mr Donaldson was going to hospital for a pre-arranged appointment but that she would try to get CAM VAT's records. On 15 October 2015, Officer Gazsi rang CAM's accountants again and was told that nobody was available to speak to him. On 16 October 2015, Office Gazsi spoke to Mr Donaldson and explained that full company records had not been provided, no returns had been submitted since 2014, and that the company would be de-registered. CAM was de-registered on 16 October 2015. CAM and Mr Donaldson continued to be unresponsive after de-registration, ultimately resulting in post (being in particular two notices of assessment) being returned by the Post Office on 8 February 2016 marked "addressee has gone away".

100. CAM submitted VAT returns for all periods between 10/13 and 04/15 other than 07/14. Central assessments were raised for periods 07/14, 07/15 and the final period to 17 October 2015.

101. On 5 March 2015, CAM's accountant informed Officer Gazsi that CAM's purchases were, "off the public, the vast majority with no VAT." However, CAM's VAT returns reveal that input tax was claimed in respect of 87% to 95% of CAM's purchases which is wholly inconsistent with the vast majority of purchases being from the public. It appears from the records obtained for the 04/14 period that all purchases by CAM were from three companies trading as William Christian Specialist Metals, Paul Casson Reclamation and Collins & Marriot ("the CAM Suppliers"). However, the VAT numbers for the CAM Suppliers were invalid and the companies did not exist.

102. HMRC duly denied all the input tax for CAM's purchases in 04/14 and then, on a best judgment basis given that no further records had been provided, also denied all input tax for the VAT periods 10/14, 01/14 and 04/15. This resulted in the following assessments: £37,050.54 in respect of period 04/14; £40,215 in respect of period 07/14; £45,421 in respect of period 10/14; £27,379 in respect of period 01/15; £22,809 in respect of period 04/15;

£22,751 in respect of period 07/15; and £23,210 in respect of the period to 17 October 2015. These were followed by penalty assessments being issued to CAM and a personal liability notice being issued to Mr Donaldson. None of these assessments have been paid, appealed or otherwise challenged.

Submissions and Discussion

103. Miss King submitted that the evidence established that there was a fraudulent tax loss.

104. Mr Lall submitted that the filing of later returns does not indicate that the failure to file the 07/14 return was fraudulent. He also submitted that there was no evidence that CAM was involved in fraudulent activity as opposed to being a victim of fraud by the CAM Suppliers. Further, he submitted that there were potential explanations for CAM and Mr Donaldson's non-cooperation such as his health.

105. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. The failure to file the 07/14 is only one aspect of CAM's default. The most significant feature is that the only purchases in 04/14 were from the CAM Suppliers, who were themselves fraudulent (as established by the fact that the VAT numbers were invalid and the companies did not exist). On any view, this means that CAM's input tax claims were connected to the fraudulent evasion of VAT. We also find that on the balance of probabilities CAM should have known of this because they should have realised from basic investigations that the VAT numbers were not genuine and that the companies did not exist. This would be enough in itself for there to be a fraudulent tax loss. However, we find that CAM directly participated in this fraud because CAM (through its accountant) had said that the majority of CAM's purchases were from the public when this was not the case. Whilst Mr Donaldson's health difficulties and other issues with the availability of Mr Donaldson and his accountants may explain why answers and documents could not be provided to HMRC immediately, this does not explain why no documents were provided in due course other than for 04/14. We therefore find that on the balance of probabilities, CAM was either withholding those documents or that no such records were in their possession. When taken with the other features above, we find on the balance of probabilities that such withholding or absence was because they were involved in the fraudulent evasion of tax. For the same reasons, and in the absence of any evidence to the contrary, we find that 04/14 was typical of the periods in question.

Trent Skip

Findings of Fact

106. We make the following findings of fact upon the basis of the documents and witness evidence before us, including the evidence of Officer Launder and Officer Kinman.

107. Trent Skip was incorporated on 21 September 2001. At the times relevant to these appeals, the directors were Mr Matthew Clowey (from 25 November 2013 until 28 April 2014) and Mr Jose Carvallo-Quintana (from 4 April 2014). The registered office was changed on 25 July 2014 from an address in Newark, Nottinghamshire to an address in Rayleigh, Essex ("the Rayleigh Address"). The VAT1 received by HMRC on 16 December 2010 provided for a principal place of business in Newark ("the Newark Address"), which was different to the address which had been the original registered office.

108. Officer Launder attempted to contact Trent Skip on the telephone number on HMRC's records. However, this was unsuccessful as the telephone number was disconnected. Officer Launder tried to, but was unable to find, alternative contact details. On 6 October 2014, Officer Launder visited the Newark Address but found that the site was empty and the gates were locked. There was also a notice on the gates which provided details for a company

trading as RWR Commercials which was the controlling group of Trent Skip. Officer Launder contacted RWR Commercials and was informed of the change of director and of the Rayleigh Address. A visit to the Rayleigh Address took place on 10 October 2014 but there was no sign of any presence by Trent Skip. No correspondence was received by HMRC from Trent Skip after 1 March 2014. Trent Skip was subsequently de-registered for VAT.

109. Trent Skip's VAT returns from 02/12 to 02/14 reveal average outputs of £65,376 per quarter. These returns were submitted, and the VAT paid, on time. However, the 05/14 return only showed sales of £6,529. This represented an under-declaration as the sales to Crow during that period had been in the net sum of £168,589.70. As the 08/14 return had not been submitted, a central assessment was issued for £1,269. In fact, the net sales to Crow during that period had been in the net sum of £264,549.15. This resulted in assessments for the periods 05/14 and 08/14 in the total sum of £85,359. Neither these assessments nor the original sums due for the 05/14 return and the 08/14 central assessment have been paid save for the sum of £1,201.69 for 05/14 and the sum of £1,201.69 for 08/14 on 7 August 2014 as a result of Trent Skip's direct debits still being operative. There have been no appeals or challenges against these assessments.

Submissions and Discussion

110. Miss King submitted that the evidence established that there was a fraudulent tax loss.

111. Mr Lall submitted that there was insufficient evidence to establish fraud.

112. We find on the balance of probabilities that there were tax losses as alleged by HMRC and that these were fraudulent. Trent Skip was a missing trader who had no contact at all with HMRC after 1 March 2014, Trent Skip had no presence at all at the Rayleigh Address in October 2014 despite HMRC being directed there by RWR Commercials and the Rayleigh Address being the new registered address, and the sales to Crow were either under-declared or not declared at all.

Bexleyheath

Findings of Fact

113. We make the following findings of fact upon the basis of the documents and witness evidence before us, including the evidence of Officer Emery and Officer Kinman.

114. Bexleyheath was incorporated on 17 August 2011 and was registered for VAT on 1 November 2012. Its directors were Mr Jordan Johnson and Mr Oliver Johnson, who are twin brothers. The major shareholder was their father, Mr Ronald Johnson, who dealt with all contact with or from HMRC ("Mr Johnson").

115. Bexleyheath did not submit any VAT returns from the period 07/14 to the period 07/15. On 2 October 2014, Officers McComiskey and Clark visited Bexleyheath and met with Mr Jordan Johnson. Mr Jordan Johnson informed the officers that Bexleyheath never purchased from metal dealers and only purchased from plumbers, builders and electricians. On 21 September 2015, an HMRC officer, Officer Limpkin, visited Bexleyheath's premises and served a Regulation 25 Notice with the effect of shortening the VAT return period to the day on which the notice was given. A nil return was provided. Mr Johnson informed Officer Limpkin in the course of this visit that Bexleyheath had ceased trading about the end of June 2015. He also stated that no primary business records were available at the premises and that they were held by Bexleyheath's liquidator. Mr Johnson did provide a SAGE report which provided for a debt to HMRC of £151,499.63 for the periods from 07/14 to 07/15. Central assessments for these periods had already been issued and so on 14 January 2016 Officer Limpkin issued a further assessment in the sum of £54,622. Neither the central assessments

not nor the additional assessments have been paid. Bexleyheath was de-registered for VAT on 22 September 2015.

116. At a further visit on 22 September 2015, Mr Johnson provided further documentation including due diligence on a supplier, Argentum Metals Ltd ("Argentum"). By a letter dated 30 September 2015, Officer Limpkin wrote to Bexleyheath and confirmed that it had been de-registered. A further visit took place on 2 October 2014 By a letter dated 20 October 2015, Officer Limpkin asked for details from the directors as to why VAT returns had not been submitted and by a letter dated 21 October 2015 he requested copies of sales invoices to Crow and another purchaser. On 29 October 2015, Officer Limpkin informed Bexleyheath that seven purchases from Argentum from December 2013 to February 2014 were connected to a tax loss. By a letter dated 3 December 2015, Mr Jordan Johnson stated that the reason for the non-submission of VAT returns was because of a communication error between him and the staff member with responsibility for making the returns.

117. Bexleyheath submitted a return for the period 01/14, declaring output tax of £53,429.01, input tax in the sum of £36,782.17 and net tax due in the sum of £16,646.84. Bexleyheath submitted a return for the period 04/14, declaring output tax in the sum of £41,938.45, input tax in the sum of £25,078.64 and net tax due in the sum of £16,859.81. The input tax in these periods related to purchases from Argentum, Emperor Homes Limited ("Emperor") and a company carrying on business as Tuxedo.

118. Argentum was registered for VAT from 1 October 2013 and stated that its business was a silversmith and antiques trader. HMRC visited Argentum on 18 November 2014 but there was no answer and a letter was left at the premises threatening de-registration in seven days in the absence of contact. There was no response and so Argentum was duly de-registered. Argentum went into liquidation on 28 November 2014. There was no evidence within the liquidator's report of Argentum having traded in metals other than silver. Argentum did not submit any VAT returns at all. Assessments were raised against Argentum in the sum of £344,585, which has not been paid. Penalties were also raised which have not been paid. There have been no appeals or other challenges to these assessments.

119. Emperor shared Bexleyheath's premises and was also run by Mr Johnson. Bexleyheath made payments of £124,200 to Emperor from November 2013 to March 2015. Emperor submitted VAT returns for all such periods with total outputs of £442,462. However, nil returns were submitted by Emperor for February 2014 and March 2014, notwithstanding that Bexleyheath maintained that it had paid Emperor the sums of £4,500 in February 2014 and £2,000 in March 2014.

120. Bexleyheath made payments to Tuxedo of £71,500 from 3 January 2014 to 1 August 2014. However, HMRC have been unable to trace any information about Tuxedo and have not been provided any information by Bexleyheath as to what these payments represented. We note that it was Mr Reynolds' evidence on behalf of Crow that Tuxedo was a payment provider operating a system similar to the Bread card which also featured in these appeals. However, this does not assist in explaining what the Tuxedo payment related to.

121. The input tax denied to Crow is based upon Bexleyheath's failure to make any payments after 1 May 2014 and the denial of Bexleyheath's input tax for its periods 01/14 and 04/14. As regards Bexleyheath's periods 01/14 and 04/14, Officer Kinman analysed the input tax to be denied to Crow by reference to the percentage of input tax to be denied to Bexleyheath in January 2014, February 2014, March 2014 and April 2014.

122. Bexleyheath's inputs for 01/14 were £285,922. Officer Kinman divided these by three to produce an average monthly figure of £95,307. Bexleyheath's bank statements show payments to Argentum of £61,260 in January 2014 and £31,157 unidentified payments were

also made which HMRC have assumed were largely further payments to Argentum. These payments to Argentum and unidentified payments together constitute almost 100% of Bexleyheath's purchases and so the whole of Crow's input tax has been disallowed.

123. Bexleyheath's inputs for 04/14 were £222,876. Officer Kinman divided these by three to produce an average monthly figure of £74,292. In February 2014, Bexleyheath paid £29,520 to Argentum, £9,500 to Tuxedo and £4,500 to Emperor. £10,522 of unidentified payments were also made. These payments together constitute 73% of Bexleyheath's purchases and so 73% of Crow's input tax has been disallowed. Bexleyheath's bank statements do not show payments to Argentum in March 2014. However, £23,474 of unidentified payments were found together with £10,000 to Tuxedo and £2,000 to Emperor. These payments together constitute 48% of Bexleyheath's purchases and so 48% of Crow's input tax has been disallowed. Bexleyheath's bank statements do not show payments to Argentum in April 2014. However £35,609 of unidentified payments were found together with £8,500 to Tuxedo. These payments together constitute 59% of Bexleyheath's purchases and so 59% of Crow's input tax has been disallowed.

Submissions and Discussion

124. Miss King submitted that the evidence established that there was a fraudulent tax loss.

125. Mr Lall submitted that there was insufficient evidence to establish fraud.

126. We find on the balance of probabilities that (subject to the rider set out below) there were tax losses as alleged by HMRC and that these were fraudulent. Bexleyheath did not cease trading at the end of June 2015 as maintained by Mr Johnson, as further supplies were made to Crow until July 2015. Further, it was not the case that Bexleyheath only purchased from metal dealers as maintained by Bexleyheath's accountant. Importantly, Bexleyheath did not file VAT returns from 07/14 onwards. We do not accept that this was simply a miscommunication as Mr Johnson ought to have realised that VAT payments were not being made.

127. The rider, however, is that we find that HMRC has failed to establish on the balance of probabilities that the input tax claimed by Bexleyheath in its 01/14 and 04/14 returns was fraudulent. There is no evidence that Bexleyheath participated in, or knew or should have known of any fraud by Argentum. There is no evidence that the payments to Emperor were fraudulent, as HMRC is effectively just relying upon the connection between Emperor and Bexleyheath for the denial. Further, there is no evidence at all as regards the supplies to Tuxedo. We also note that there is no evidence that the supplies made by Argentum (or Emperor or Tuxedo) were the same goods sold to Crow.

128. It follows that we find that there were fraudulent tax losses but that these were only from 1 May 2015 onwards.

CONNECTION TO FRAUD

129. Mr Lall submitted that an absence of sufficient evidence of the suppliers having an intention fraudulently to evade VAT when Crow purchased the goods means that there cannot be any connection to fraud. As set out above, we do not accept the need for any such intention or plan at the time of the purchases.

130. Crow does not take any issue with the tracing of the supply chain and has not argued that the goods purchased are different to the goods which are the subject of the assessments against the suppliers. All of the Deals involved purchasing the goods directly from suppliers who fraudulent evaded VAT in respect of those goods. We have also set out above the way in which Crow's purchases are traced to the tax losses. It follows that we find that HMRC has established the connection between Crow's purchases from its suppliers and the fraudulent

evasion of VAT, with the limited exception (for the reasons set out above) of Crow's purchases from Bexleyheath prior to 1 May 2015.

WHETHER OR NOT CROW SHOULD HAVE KNOWN

Our Approach

131. We deal with the question of whether or not Crow should have known that its transactions were connected with the fraudulent evasion of VAT by first considering a number of recurring features relied upon by the parties and then relating those features to Crow's dealings with each of its suppliers.

Awareness of Fraud

Findings of Fact

132. We find (and, indeed, Crow accepted) that Crow had an awareness of fraud in the industry. Crow had been given repeated warnings about the incidence of missing trader fraud in the metal trade sector and had been notified of transactions leading to a tax loss in respect of suppliers other than the suppliers in the Deals which are the subject of these appeals. Examples of these include Fyfield Metals Limited, Park Metals Limited and Charlie Macs Limited. Indeed, Crow received 26 veto letters of which 18 related to traders who had supplied Crow as well as 24 failed VRN check notifications between 23 February 2012 and 1 March 2016.

133. Mr Wakefield Senior accepted in oral evidence that he was aware of fraud in the industry, although not to the extent that he now understands. He said that he would be wary of suppliers who had just started and gone into business and generally had to be wary about whom Crow purchased from. Mr Wakefield also accepted in oral evidence that he was told by Mrs Kinman before and at the time of the Deals that VAT fraud was a problem in the industry. Although Mr Wakefield suggested in his witness statement that the warnings largely related to metals that Crow did not deal with or related to metal that came from abroad, the general tenor of his evidence was nevertheless an acceptance of Crow having a general awareness of fraud in the industry. Indeed, he made the comment in his witness statement that Crow was generally sceptical as a result of the advice from Officer Kinman, stating as follows by reference to a potential supplier trading as Vulcanis:

> "… By this time Mary had us worried sick, we did not know who to trust or trade with, we were sceptical of everyone."

134. Mrs Kinman's evidence was that Crow had been placed on the Trader Monitoring Programme, which was a programme for the three hundred companies considered to be at the highest risk of missing trader fraud in all sectors. We find that Crow did not know about the significance of being on this programme, but that this does not detract from Crow's level of understanding generally that it needed to be cautious to avoid dealing with a defaulting trader.

Submissions and Discussion

135. Miss King submits that despite the warnings given by HMRC and Crow's general awareness of fraud in the industry, Crow nevertheless dealt with defaulting traders giving rise to 403 Deals traced to a fraudulent tax loss between 1 October 2013 and 30 June 2015 and which are the subject of these appeals.

136. Mr Lall submits that awareness of fraud in the industry is insufficient. He also makes the point that Crow's caution as a result of that awareness should not be used against it; the fact that Crow was cautious as result of the warnings should not be taken as an indicator that Crow should have known of the connection of the Deals to fraudulent tax losses.

137. We find that Crow's awareness of fraud in the industry is not enough on its own to mean that Crow should have known that the Deals were connected to fraud. However, it is part of the context within which Crow's dealings with its suppliers should be seen. Similarly, the fact that Crow was (on its evidence) acting cautiously does not itself mean that Crow should have known of the fraud but instead has a bearing upon how Crow viewed the Deals and how it viewed or alternatively should have viewed the information that was available or should have been available in respect of its suppliers.

Commercial Checks and Due Diligence

Findings of Fact

138. We find that Crow did in principle have mechanisms in place for carrying out due diligence upon its suppliers (by which term we mean commercial checks and due diligence) but on numerous occasions failed to carry out those checks prior to commencing dealing with them or, as HMRC put it, generally took a casual approach to its due diligence. This finding is based upon the following evidence.

139. In January 2012, Crow realised from discussions and meetings with HMRC that it needed to carry out due diligence on its trading partners. Mr Wakefield's evidence, which we accept, was that he understood that Crow could obtain an online VAT certificate, certificate of incorporation and a letter of introduction from the supplier to check the validity of the VAT number from HMRC's office in Wigan ("Wigan Validations"). Beyond this, Crow relied upon advice from its Chartered Accountants, Haslers, to provide advice and assistance as to what due diligence should be carried out.

140. The evidence of Lee Ervin of Haslers was that he assisted Mr John Mintikkis (his colleague at Haslers) in preparing various checklists for use by Crow in carrying out its due diligence. Copies of this checklist were provided as exhibits to Officer Kinman's evidence.

141. One such checklist was a document entitled "Director/Owner/Partner/Shareholder and sub-titled "Crow Metals Limited Due Diligence Procedures Checklist" constituted a pro forma with the following headings alongside which there was space for Crow either to write the necessary information or to tick a box if the relevant document was provided. The first section was "New Supplier Name". The second section was "Directors Details #1" and then listed the following: name, address, telephone number, email, passport/driving licence, utility bill, rates bill. This list was repeated in sections with the headings "Directors Details #2", "Owner/Partner/Shareholder Details #1", and "Owner/Partner/Shareholder Details 2".

142. A further checklist was a document entitled "Companies" and subtitled "Crow Metals Limited Due Diligence Procedures Checklist New Supplier details for Limited Companies." This was again a pro forma with the following headings alongside which there was space for Crow either to write the necessary information or to tick a box if the relevant document was provided: company name, trading name if different, address, telephone number, e-mail, contact name, accountant details (company name), contact person, address, telephone number, email. There was also a section entitled "Documents to Attach" which listed the following documents and tick boxes: VAT registration certificate, certificate of incorporation, annual return, copy of last accounts, director details, shareholders details, utility bills.

143. A further document was also adduced in evidence entitled "Crow Metals Limited Due Diligence Procedures for New and Existing Suppliers". This provided as follows:

> "Up to date copies of the following documents
>
> - VAT registration certificate of Company/Individual
> - Certificate of incorporation (for Companies only)

- Annual return with full details of all directors and shareholders of company
- For all directors and shareholders of companies and individuals/partners, need copies
  - Passport or driving licence
  - Utility bills verifying name and address
- Trading address of company and all contact details
- Utility bills for the company
- Site visit required
- Names and Address of Accountant. Reference to be requested confirming
  - Name of company supplying Crow Metals
  - Length accountant has acted
  - VAT returns are up to date and all VAT due has been paid"

144. These checklists were modestly updated from time to time by Haslers, who acted for Crow throughout the periods to which the Deals relate. Haslers stopped providing assistance for due diligence (with the exception of overseas transactions) on 31 December 2015.

145. Mr Wakefield's evidence, which we accept, was that Crow would be responsible for collecting all the information on the checklists and, if there was anything suspicious, they would consult with Haslers. Haslers would also carry out the Wigan Validation check.

146. In June 2014, Crow also began to carry out Experian credit checks on its trading partners. This was carried out by a new employee, Kelly Reader.

147. Mr Evans said in his witness statement that he was aware that not all of the due diligence checklists were completed for the defaulting traders. He also noted that there were occasions when Crow did not use the checklist, such as where Crow had an existing relationship with a trader.

148. Crow accepted that although Haslers assisted with due diligence, the decision as to whether or not to trade with any individual supplier was taken by Crow. We find that Crow was therefore responsible for the due diligence and the commercial decision whether or not to trade and so cannot stand behind the fact the they were advised by Haslers.

149. For the reasons set out in our findings of fact in respect of each of the individual suppliers, Crow's due diligence processes were not followed in their entirety in respect of any of the suppliers for the Deals.

Submissions and Discussion

150. Miss King submitted that the due diligence carried out on the suppliers relating to the Deals was inadequate and that trade continued despite negative indicators arising from the documents or circumstances involved.

151. Mr Lall submitted that the standard of due diligence required was for taxpayers to take sensible precautions (referring to HMRC's notice entitled "How to spot missing trader fraud") which required a trader to, "take sensible precautions") and, citing *Paper Consult SRL v Directia Regionalã a Finantelor Publice ClujNapoca, Administratia Judeteana a Finantelor Publice Bistrita-Nasaud,* (Case C-101/16) at [52] to "take every step which could reasonably be required of him to satisfy himself that the transaction which he is carrying out

does not result in his participation in tax evasion." He further submitted that it was apparent from Officer Kinman's evidence that she had required a higher standard, referring to the need for, "highly critical due diligence," the need for a, "very high standard, very critically and analytical," and "very high critical checks." Mr Lall also submitted that HMRC failed to set out what due diligence was necessary and could not say what the outcome of alternative due diligence would have been.

152. We do not find it helpful to prescribe any standard or level of due diligence for general application in such cases. Instead, the proper approach is to take into account all the circumstances of the transactions and to consider whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. As clarified by *Mobilx* at [82], we must not unduly focus upon due diligence. Crow must not ignore the circumstances even if it has asked questions by way of due diligence. Conversely, a failure to conduct or question due diligence does not of itself give rise to a finding that Crow should have known of the fraud if the circumstances are not such that the only reasonable explanation for them is that Crow's transactions have been or will be connected to fraud. We therefore have to take into account what was obtained from the due diligence, the conclusions which ought to have been taken from that due diligence, and what else Crow should have known about. Whilst it is not for HMRC to provide an exhaustive list of due diligence to traders or to establish what different due diligence steps would have uncovered, the overall circumstances do include taking into account information that should have been available if Crow had approached the transactions differently.

153. We deal below with the quality of the due diligence and its significance in the context of the circumstances of the transactions in respect of each supplier.

Bread Cards

Findings of Fact

154. A recurring feature in the Deals was the use of what are called "Bread Cards." We heard evidence from Mr Wakefield that a Bread Card is a brand name for a payment system called Bread4Scrap whereby a trader makes a payment into an account from which the recipient can then withdraw funds. This was explained to us as "loading up" the recipient's Bread Card. He also said that this was widely used in the scrap metal industry since the introduction of a prohibition on the use of cash for metal trading in December 2012. He accepted that large companies did not use Bread Cards and that there was a £5,000 per day limit. Officer Kinman's explanation of the Bread Card system was substantially similar. She referred to it as a pre-paid card system introduced when scrap metal dealers were no longer able to deal in cash. We therefore accept Mr Wakefield and Officer Kinman's evidence in this regard.

Submissions and Discussion

155. Miss King submitted that the use of Bread Cards would be a "red flag" where they effectively constituted a third-party payment.

156. Mr Lall submitted that Bread Cards were a legal method of payment and did not constitute third party payments. As such, their use should not have any bearing upon Crow's means of knowledge.

157. We do not take Miss King's submissions to be as stark as saying that the very fact of the use of Bread Cards is suspicious. We accept that Bread Cards are well used in the scrap metal industry and so this does not itself give rise to cause for concern. However, we accept the more nuanced point that the use of a Bread Card can in appropriate circumstances raise suspicion when the holder of the Bread Card (and so the recipient of the payment) is not

actually the supplier. To that extent, we agree that the use of a Bread Card is akin to a payment to a third party when the holder of the Bread Card is someone other than the supplier. Of course, the extent to which this has an impact upon whether or not Crow should have known that its transactions were or would be connected to fraud again depends upon all the circumstances as set out below in respect of each supplier.

VAT Deposits

Findings of Fact

158. A curious feature of the present case is that Crow would regularly withhold a proportion of the payment due to suppliers representing what they called a "VAT deposit". Mr Wakefield said that the VAT deposit was taken until the documents that Crow needed had been obtained. He said that in general the VAT deposit would be released once the Wigan Validation had been obtained and explained that his thinking was that HMRC must have made checks on traders before registering them for VAT. Mr Wakefield said in evidence that he saw this as being in order to protect HMRC's money.

159. We find as a fact that Crow operated the VAT deposit process as set out above and that in doing so Crow thought that it was acting cautiously.

Submissions and Discussion

160. Miss King submitted that it was not possible to have a VAT deposit in that any money paid will itself contain a VAT element. In any event, the VAT withheld was not paid to HMRC and so would itself constitute a tax loss. Further, she submitted that by taking such an approach Crow appreciated the risk of a tax loss and yet continued to enter into the transactions.

161. Mr Lall submitted that VAT deposits are possible because it is open to parties to a transaction to agree their terms. He also submitted that HMRC should not hold Crow's caution against it.

162. We find that it is not possible to withhold a VAT element of a debt. Any reduction to the amount payable would result in a lower, vat inclusive figure. Alternatively, the full price remains payable and the supplier must still account for the whole of the output tax irrespective of whether or not it is paid. We do accept, however, that a sum can be withheld that is equivalent to the output tax on the full invoice. This does not affect whether or not the supplier must account for the output tax. In any event, Mr Wakefieled accepted that Crow had not paid HMRC anybody else's VAT on any occasion. Indeed, we were not provided with any explanation of a mechanism which would allow one company to pay an unconnected company's VAT in such circumstances.

163. Again, the VAT deposits are part of the circumstances which are to be taken into account. We accept that the fact of taking the VAT deposits does not automatically mean that Crow should have known of fraud. However, the significance is twofold; first, whether or not the circumstances which gave rise to Crow wanting to take a VAT deposit for any individual supplier were sufficient to mean that Crow should have known of the fraud; and, secondly, if so, whether or not the circumstances which gave rise to Crow being prepared to pay the VAT deposit to the supplier were sufficient to override those circumstances.

Crow's View With Hindsight

Findings of Fact

164. In the course of cross-examination, Mr Wakefield conceded in respect of each of the suppliers that he would not have traded with them had he known at the time what he knows now. He also accepted that in his view each of the suppliers was fraudulent and that he had

not attempted to contact any of the suppliers to establish what had happened for the purposes of these proceedings.

Submissions and Discussion

165. Miss King noted these features in her closing submissions but did not make any specific submission as to the impact of these concessions.

166. Mr Lall submitted that these concessions were not determinative.

167. We find that these concessions merely set out Crow's understanding of the position now in view of the information that has emerged in the context of the HMRC's evidence in these appeals. We do not treat these an acceptance that Crow should have known at the time of the transactions that the suppliers were fraudulent.

168. Mr Wakefield's acceptance that the suppliers were fraudulent is somewhat at odds with Crow's legal team's formal position that this was not accepted. However, this is somewhat academic as, for the reasons set out above, we have found that each of the suppliers was acting fraudulently irrespective of Mr Wakefield's own view of the evidence now available. We do make the point, however, that the question as to whether or not the tax losses were in fact fraudulent is different to whether or not Crow should have known that their transactions were connected to fraudulent tax losses. Similarly, the fact that Crow did not contact any of the defaulters to establish what had happened is of no consequence given the findings that we have made as to the defaulters' fraud on the evidence available to us.

Additional Features

169. A number of additional features were raised in the course of evidence but which were not reflected in Miss King's or Mr Lall's closing submissions. Given that they have been raised in the course of the appeals, we therefore consider them below.

Trading with Defaulters

170. HMRC treat it as significant that input tax has been denied in 403 Deals and that the supplies were by seven fraudulent defaulters. We take it that HMRC treats this as constituting a high prevalence of defaults.

171. However, we do not accept that this has any significance in its own right. The task is to consider whether in respect of each individual supplier the circumstances are such that Crow should have known of the connection to the fraudulent evasion of VAT. Whilst a high prevalence of defaults is part of the circumstances to be considered, it is not in itself a sufficient one. In any event, Mr Reynolds' evidence (which we accept, and which was not challenged) is that this represented less than 2% of Crow's purchases during the relevant periods. As set out in *Mobilx* at [83], we must consider the totality of Crow's transactions.

The Absence of Written Contracts

172. HMRC's statement of case notes the absence of any formal written contracts. However, there was no evidence that this would be expected. Indeed, Mr Wakefield's evidence (which we accept) was that the Deals were all typical of the general trading carried out by Crow.

The Number of Veto Letters and De-Registrations

173. Miss King notes in her written opening submissions that Crow was notified in February 2012 that two of its suppliers were de-registered, and between March 2012 and November 2016 24 further de-registration letters were sent. Particular emphasis was given in the evidence and Miss King's submissions to three of these traders: Fyfield Metals Ltd, Park Metals Ltd and Charlie Macs Ltd. We agree that this is significant in that it added to Crow's awareness of defaults and the risk of fraud in the industry. However, this awareness is conceded by Crow in any event.

Mr Gallagher

Findings of Fact

174. Input tax has been denied in the sum of £7,818 in respect of six Deals with Mr Gallagher, all of which were in the period ending 12/13. The relevant supplies were from 14 November 2013 until 20 December 2013.

175. Mr Wakefield gave evidence as to Crow's trading with Mr Gallagher. He said (and we accept) that he understood that Mr Gallagher was a demolition contractor and so was not concerned that he did not operate a scrap yard. His understanding was that, as Mr Gallagher was a demolition contractor, he would work from site to site and so he would be mobile. Mr Gallagher was a new trader to Crow when the Deals commenced, and was recommended to Crow by a third party. However, Mr Wakefield did not recall who this third party was. Payments to Mr Gallagher were made by Bread Card. VAT deposits were also withheld until verification of the VAT registration number was obtained.

176. The relevant due diligence documents include the following:

(1) An undated note explaining that Crow began trading with Mr Gallagher as a result of a third party recommendation. There is no evidence as to who wrote the note but it is clear from its context that it was written by or on behalf of Crow. The note states as follows:

> "Robert approached us following a third party recommendation.
>
> He emailed our trader advising that he was a demolition firm and that they generated mixed non-ferrous grades. After talking over the phone and then meeting in our yard, our trader discovered that they also generated iron. Although at this time, the price we quoted him wasn't good enough to buy it. He was selling his iron to EMR (European Metal Recycling). Robert had explained in an email that the majority of his work was in the Essex area, and he was looking for a place that he could bring his scrap that was a bit nearer for him.
>
> Robert's scrap was delivered into our yard on a curtain side vehicle. As far as we were aware, this was not a third party haulier.
>
> The scrap bought into our yard was genuine demolition material consisting of Bright Wire from cabling, Tinned Wire from cabling, lead from roofs, Old Rolled Aluminium and Heavy Copper."

(2) A VAT certificate for Mr Gallagher printed on 4 December 2013. This was three weeks after Crow began trading with Mr Gallagher.

(3) Two driving licences.

(4) A bank statement showing a minimal balance with no money coming in and no money going out. A Metro statement was later provided in the name Robert Gallagher trading as Southeast and Herts Demolition showing total funds of £6,205.26. This bank statement was issued to an address which HMRC found was a mailbox accommodation address.

(5) A receipt dated 14 September 2013 for funds loaded onto a Bread Card in Mr Gallagher's name.

(6) Emails between Mr Gallagher and Crow.

(7) Crow sought to verify Mr Gallagher's VAT number and received a "pending" letter dated 10 December 2013, stating that the number could not be verified at that time and that a further application should be made after 24 December 2013. In fact, a

VAT certificate was obtained and printed off from HMRC's website on 4 December 2013.

(8) Nevertheless, a further validation request was made on 9 January 2014, resulting in an HMRC letter dated 13 January 2014 confirming that Mr Gallagher's VAT number had been cancelled with effect from 8 January 2014.

177. Utility bills for Mr Gallagher were not pursued. Further, no checks were made on the address which Mr Gallagher had given to Crow.

Submissions and Discussion

178. Miss King submitted that Crow showed a casual approach to due diligence. Crow was trading with Mr Gallagher before even making a validation request, continued to trade when told to reapply after 24 December 2013. Mr Gallagher did not have appropriate premises to receive goods. Payments were made by Bread Card. A VAT deposit was withheld.

179. Mr Lall submitted that Crow concluded that Mr Gallagher was involved in the demolition trade and there was no evidence to the contrary. He also submitted that there was nothing improper in making payment to Mr Gallagher by Bread Card, particularly as he was a sole trader and so there was nobody else a payment could be made to.

180. We find that, on the balance of probabilities, HMRC has failed to establish that Crow should have known that its purchases from Mr Gallagher were connected with a fraudulent evasion of VAT. Although Mr Gallagher was a new trader, both in the sense of being new to Crow and apparently new to the business, the manner in which the contact between Mr Gallagher and Crow came about was not itself unusual or suspicious. Crow reasonably reached the view that Mr Gallagher genuinely was a demolition contractor and that the materials which he was offering for sale were from demolition work. In such circumstances, it was not suspicious that he did not operate from a scrap yard or did not have premises to receive goods. Further, there was nothing unusual or suspicious in the use of a Bread Card as the payment was still being made to him. For the reasons set out above, the fact of taking a VAT deposit does not affect the position in its own right.

181. We agree that Crow had a casual approach to due diligence in that it traded with Mr Gallagher before obtaining confirmation that the VAT registration number was genuine. However, we note that the VAT registration number was in fact genuine and was valid until it was cancelled with effect from 8 January 2014. It was not obvious from the Metro statement that the address used was in fact a mailbox address as it simply read as a normal address. We also note that the café address which Mr Gallagher had given to HMRC was included on some of the due diligence documents. However, it was not apparent from this address that it was a café.

182. For the reasons set out above, the circumstances of the transaction (including the documents obtained from the due diligence obtained) do not establish on the balance of probabilities that the only reasonable explanation for the Deals with Mr Gallagher was that they were connected to fraud.

Scrap Safe

Findings of Fact

183. Input tax has been denied in the sum of £340,309 in respect of 48 Deals with Scrap Safe, 34 of which were in the period ending 12/13 and 14 of which were in the period ending 03/14. Scrap Safe was an established trader with Crow, although the denied supplies relate to a period when Mr Emandache took over as director. The relevant supplies were from 7 October 2013 until 17 February 2014.

184. Crow's contact had previously been Mr Dobson, who had sold him scrap cars, non-ferrous metals and catalytic converters. The first time Mr Wakefield had met Mr Emandache was when he was introduced to him to by Mr Dobson, saying that he had sold the business to him. His evidence (which we accept) was that Mr Dobson recommended Mr Emandache, who clearly had a good understanding and knowledge of the industry, explaining what grades of metal he wanted to buy. He spoke about prices and his plans for the business. He said that he could provide an increased level of business as he wanted to trade in significant volumes. Mr Dobson spoke highly of Mr Emandache and appeared to trust him. Nothing came across that struck Mr Wakefield as alerting him to any fraud.

185. Miss King put to Mr Wakefield that he should have been concerned about the significant increase in trading with Scrap Safe under Mr Emandache; by the end of 12/13 Crow had carried out deals with a VAT inclusive value of £1,200,000, rising to £2,000,000 by the end of the trading on 17 December 2014. He said, and we accept, that his understanding from what was said to him was that there was an increase in trade because Mr Emandache had stuck to his word and provided more business. The turnover was high because of the high value of the product, which was dictated by the market price. Mr Wakefield said, and we accept, that the scrap trading was the same business as before albeit at an increased volume; he had traded in scrap metal with Mr Dobson and also with Mr Emandache. The slight difference in nature of trade was that Crow did not purchase any scrap vehicles from Scrap Safe under Mr Emandache's directorship. However, this does not mean that Mr Emandache did not sell (or at least intend to sell) scrap cars to other dealers. We note that by an email dated 20 February 2014 Mr Emandache referred to Scrap Safe's scrap car operation and difficulties he had had with what could be stored on site.

186. Payments were made to Mr Emandache's personal bank account with Santander. Mr Wakefield did not realise that the account was a personal one, as the reference used was "Scrap Safe". Payments were subsequently changed to an account with Royal Bank of Scotland, but Mr Wakefield was unable to say when this happened or who provided the instruction to do so.

187. The relevant due diligence documents include the following:

(1) An email dated 17 October 2013, by which Mr Endamache emailed Crow using Mr Dobson's email address and provided bank details with Santander. These details did not include an account holder's name. The email included the following:

> "I recently purchased Scrap Safe Ltd and intend to carry on trading as a on [sic] going concern. I was informed by the previous owners that they have an account with yourselves and was wondering if you would be happy to continue trading with ourselves as you did the previous owners. We have new bank account details which I have provided below as well as change of trading address. If you require any further information then please contact me by return and I will send it straight back to you."

(2) Email exchanges requesting a passport and utility bill. Mrs Bowman chased these by an email dated 8 November 2013. A copy of Mr Emandache's passport and a letter from Mr Emandache's bank sending him a VISA card were provided but a utility bill and letter of introduction were not.

(3) An email dated 20 February 2014, in which Mr Emandache informed Crow that he had to close down Scrap Safe due to margins getting smaller and that he had struggled to make sufficient profit.

(4) A letter from HMRC 20 February 2014 stating that Scrap Safe's VAT registration number had been cancelled with effect from 18 February 2014.

Submissions and Discussion

188. Miss King submitted that Crow should have known of Scrap Safe's fraud because of the significant increase in the volume of trade upon Mr Emandache taking over as director, the slightly different nature of the trade, the payments to Mr Emandache's personal account, the payments to RBS without a revised payment instruction, the introductory email from Mr Emandache being ten days after trading commenced, and trading with Scrap Safe without a renewed verification of its VAT registration number.

189. Mr Lall submitted that there was nothing in HMRC's evidence about Mr Emandache's history that would give any cause for concern, Mr Wakefield was satisfied that he was genuine, and that Crow did not realise that its payments were being made into Mr Emandache's personal bank account.

190. We find that, on the balance of probabilities, HMRC has failed to establish that Crow should have known that its purchases from Scrap Safe were connected with a fraudulent evasion of VAT. Under Mr Dobson's directorship, Scrap Safe had been an established trader with Crow and there is no suggestion that there was anything untoward about previous transactions between them. We accept that Crow treated Mr Emandache as genuine and that, given the endorsement given by Mr Dobson and Mr Emandache's apparent industry knowledge, it was reasonable to do so. The substantial increase in trading was explained to Crow as being because Mr Emandache intended to increase the volume of sales to Scrap Safe as part of his plans for the business. We do not accept that there was a significant change in the nature (as distinct from volume) of Scrap Safe's business, as Scrap Safe dealt with non-ferrous metal as well as scrap vehicles under Mr Dobson and (although not sold to Crow) Mr Emandache's email dated 20 February 2014 reveals that a scrap vehicle element to the business was retained after the change of directorship.

191. Although we accept that Crow thought it was making payments to Scrap Safe, it was in fact making payment to a personal bank account. We agree that this is something which Crow should have known by checking the position with the bank or with Scrap Safe. However, even if Crow had known that it was making a personal payment, this would not be a sufficient concern to override the rest of the context set out above. There is no evidence as to who the account holder of the RBS account was and so this does not add anything. We agree with Mr Lall that there was no evidence that anything could or should have been revealed about Mr Emandache to change the position. Whilst it would have been wise for Crow to re-verify the VAT registration number upon the change of directorship, there is no suggestion that this would have revealed any problem.

192. For the reasons set out above, the circumstances of the transaction (including the documents obtained from the due diligence obtained) do not establish on the balance of probabilities that the only reasonable explanation for the Deals with Scrap Safe was that they were connected to fraud.

SMD

Findings of Fact

193. Input tax has been denied in the sum of £34,348 in respect of 59 Deals with SMD, six of which were in the period ending 12/13, 45 of which were in the period ending 03/14, seven of which were in the period ending 06/14, and one of which was in the period ending 09/14. SMD was a new trader to Crow. The relevant supplies were from 3 December 2013 until 14 July 2014.

194. Mr Carroll's main contact at SMD was Mr Mikolaj Sieminski, although he dealt with a driver on the occasions when Mr Sieminski was not available. Mr Carroll first got to know

Mr Sieminski through emails and phone calls whilst he was trying to set up an account with Crow. Mr Carroll was aware that SMD was a "start up" business, trading from a van rather than a scrap yard. He did not see this as suspicious as he considered it to be similar to the way other businesses started in the industry. However, he accepted in cross-examination that new companies do provide more of a risk. Mr Sieminski also appeared to be like other traders in that he wanted competitive prices, a quick turnaround and prompt payment. Mr Carroll believed that SMD was purchasing material from households, plumbers, electricians and builders. He reached this view from the scrap that was being delivered.

195. Payments were made by Bread Card to Mr Sieminski. Mr Carroll said in evidence (and we accept) that he did not treat this as a "red flag" for fraud but effectively said that with hindsight knowing what he knew now it would be. Neither he nor Mr Wakefield were able to say why this was paid to an individual rather than SMD. Payments were also made to an account which appears on an HSBC visa card with Mr Sieminski's name on it. Crow's evidence was that this was an SMD account as the details were given by SMD as its own account and it appears on payment instruction by Crow. However, we find that although Crow was led to believe (and did believe) that this was SMD's account, it was in fact Mr Sieminski's. We reach this conclusion because the VISA card makes no mention of SMD and the payment instruction is only evidence of the payee name which Crow placed on the instruction. A VAT deposit was held and subsequently paid.

196. The relevant due diligence documents include the following:

(1) A certificate of incorporation dated 13 June 2013.

(2) A VAT certificate for SMD effective from 13 June 2013.

(3) An email exchange requesting documents including a utility bill. No utility bill was provided. A driving licence and HSBC visa card were provided.

(4) An email exchange dated 18 and 20 December relating to the fact that the VAT registration number had not yet been validated.

(5) A letter from HMRC dated 20 December 2013 stating that the VAT registration number could not be validated. This was because, "the information provided by you concerning the trader detailed below differs from that held by HMRC." The failure related to the VAT certificate, but went on to provide details of the documents required to process the verification request.

(6) Email exchanges between Mr Carroll and Mr Sieminski on 6 January 2013 and 8 January 2014 raising concerns about the validation of the VAT registration number. Mr Sieminski asked, "Can you tell me what is the status of this certificate thing? It [illegible] takes a lot of time and I am a bit worried." Mr Carroll replied, "There's no need to worry. It's just our accountants are very cautious when paying VAT to new suppliers. If your VAT Number is fine then you've nothing to worry about."

(7) A letter from HMRC dated 8 January 2014 confirming that SMD's VAT registration number was valid.

Submissions and Discussion

197. Miss King submitted that Crow should have known of SMD's fraud because SMD was a new trader having only been incorporated in June 2013, the due diligence checks were minimal, the HSBC card was in the name of Mr Sieminski rather than SMD, SMD did not have premises to receive goods, and payments were made to Mr Sieminski (including by way of Bread Card) rather than SMD.

198. Mr Lall submitted that SMD was a mobile trader, which was common in the industry. He also noted that the VAT registration number was validated on 8 January 2014.

199. We find that, on the balance of probabilities, HMRC has failed to establish that Crow should have known that its purchases from SMD were connected with a fraudulent evasion of VAT. The fact that SMD was a new trader is consistent with the "start up" business that Mr Sieminski was presenting. Further, we accept that the fact that SMD was a mobile trader without premises was consistent with the goods Crow was purchasing and was not unusual in the industry. Whilst it would have been wise for Crow not to have traded until the VAT registration number was validated, this is overridden by the fact that it was validated on 8 January 2014. We agree that the concern should have been raised by the payments being made to an individual rather than SMD (whether through the Bread Card or because Crow should have realised that the payee bank account was the same as the HSBC visa card that only mentioned Mr Sieminski's name). However, given that SMD was effectively a one man company run by Mr Sieminski, we find that this is not on its own of sufficient concern to mean that Crow should have known of the fraud.

200. For the reasons set out above, the circumstances of the transaction (including the documents obtained from the due diligence obtained) do not establish on the balance of probabilities that the only reasonable explanation for the Deals with SMD was that they were connected to fraud.

CUD

Findings of Fact

201. Input tax has been denied in the sum of £46,187.48 in respect of 80 Deals with CUD, 25 of which were in the period ending 12/13, 17 of which were in the period ending 03/14, 26 of which were in the period ending 06/14, and 12 of which was in the period ending 09/14. The relevant supplies were from 6 December 2013 until 30 July 2014.

202. Mr Carroll's main contact at CUD was Mr Jan Kwiatkowski. Mr Carroll had first dealt with Mr Kwiatkowski when he worked for DUC and when Mr Carroll worked for a different scrap metal dealer. Mr Carroll's understanding was that CUD had a gate trade whereby they took delivery of goods. He also understood that they collected scrap from households, plumbers, electricians, builders and other trade sites. As set out above, Mr Carroll visited CUD's premises.

203. Crow dealt with DUC until 21 May 2013. By a letter dated 28 May 2013, HMRC informed Crow that DUC's VAT registration number had been cancelled with effect from 2 May 2013 (albeit wrongly referred to as DVC Ltd). No explanation was given for the cancellation.

204. Crow then commenced trading with CUD, purchasing in 98 transactions between June 2013 and November 2013. The input tax in respect of these 98 transactions has not been denied and there is no allegation that these were connected to the fraudulent evasion of VAT. These transactions were similar in size and nature to the supplies for which input tax has been denied, the earliest of which was on 6 December 2013. We note that this evidence was in Mr Reynolds' witness statement, was not challenged by HMRC and is supported by Crow's SAGE records.

205. Mr Wakefield and Mr Carroll accepted in evidence that they knew that DUC had been de-registered, that CUD had the same director, and that a decision was taken to continue to trade. Mr Carroll said (and we accept) that he did a lot of checks on CUD because of this.

206. The relevant due diligence documents include the following:

(1) A due diligence checklist. The only boxes ticked were the certificate of incorporation, a VAT certificate, a directors' passport, and a Wigan Validation. The boxes not ticked were utility bills, site visit, carrier licence, HMRC correspondence, company letter head with bank details on, a Companies House annual return, Experian and HMRC confirming UTR.

(2) A certificate of incorporation dated 31 May 2013.

(3) A Companies House report.

(4) An HMRC letter acknowledging VAT returns.

(5) A letter from HMRC dated 6 August 2013 stating that further verification was awaited and requesting that the request be re-submitted after 10 working days. A further request was made and the VAT registration number was verified on 5 September 2013. This was further confirmed by a letter from HMRC dated 12 December 2013.

(6) A letter dated 19 September 2013 from Megs Business Services confirming that CUD was a client and that accountancy services were provided.

(7) An email exchange which included an email from CUD's accountants to Haslers stating that, "I would like to confirm that 90% of VAT liability has already been paid by CUD Ltd". Mr Carroll said that he did not recall seeing this email. There was no evidence from Crow as to what consideration was given to this email.

(8) A VAT certificate effective from 15 June 2013 but printed out on 29 November 2013.

(9) A Polish ID card or passport from Mr Urmanski, a director of CUD, although it is not clear when this was obtained.

Submissions and Discussion

207. Miss King submitted that Crow should have known of CUD's fraud because CUD was a phoenix company for DUC, CUD was almost immediately incorporated and registered for VAT, two of the directors were the same, Crow had continued to trade with DUC after the deregistration, HMRC do not accept that the visit took place as alleged, CUD did not have appropriate premises to receive goods, VAT deposits were held, and CUD's accountant's letter stating that 90% of the VAT had been paid was not acted upon. Miss King also pointed to errors on some of CUD's paperwork, as CUD's sales invoice numbers 111 and 128 were both used twice. Further, CUD's invoice dated 13 December 2013 included a first line with a descriptor "79kg x £1.15 = £90.46" but did not form a part of the total for the invoice and was not included in Crow's advice note.

208. Mr Lall submitted that Crow had an established trading relationship with CUD by way of the 98 transactions between June 2013 and November 2013. He also submitted that the table of CUD's defaults in Officer Rehman's witness statement establishes that the additional 10% of the VAT for the 08/13 return was in fact paid by CUD. He further submitted that a change of company may have a legitimate as well as an ulterior motive and so it was mere speculation to say that this was because of fraud.

209. We find that, on the balance of probabilities, HMRC has failed to establish that Crow should have known that its purchases from CUD were connected with a fraudulent evasion of VAT. At first sight, it is of substantial concern that DUC's VAT registration number was cancelled and CUD (with common directors) then appeared to take over its business, particularly as Crow had purchased metal from DUC between 2 May 2013 (being the effective date of cancellation) and 21 May 2013. However, we find that that this is not

sufficient to mean that the only reasonable explanation for the Deals with CUD was that they were connected to fraud. This is for the following reasons. First, and most importantly, Crow entered into 98 transactions with CUD between June 2013 and November 2013 which have not been challenged and which we therefore find to be legitimate. As set out above, the only evidence is that these were similar transactions in similar circumstances to the Deals for which input tax has been denied. It cannot be said that the only reasonable explanation for the 98 deals was that they were connected to fraud as they were in fact genuine. It follows from the similarity of transactions and similarity of circumstances that similarly genuine trading is an equally reasonable explanation for the Deals. Secondly, the letter from HMRC notifying Crow that DUC's VAT registration number had been cancelled did not explain why. This is in contrast to the veto letters which had been provided in respect of other traders. Thirdly, HMRC's letter was after the trading with DUC had ceased. We do bear in mind that one of the features establishing that the tax losses were fraudulent is that DUC carried on trading after de-registration. However, in the context of considering whether or not Crow should have known of the fraud it is important to note that there was no information available to Crow which would alert it to the fact that the reason for the cancellation was that DUC had not responded to a letter from HMRC threatening de-registration within seven days.

210. We agree that further due diligence was appropriate in the light of CUD being a successor to DUC and that Crow's own checklist was not carried out. We also agree that Crow began trading with CUD before the VAT certificate and validation had been obtained. However, we find that further due diligence would not have provided any further information that would change the position. Crow already knew that CUD was a new company, and the VAT registration number was ultimately verified. We also note that the remaining 10% of the VAT due was ultimately paid. Indeed, the fact that CUD had been frank enough to disclose that some of the VAT had not at that time been paid is a measure of openness that would have made it look even less obvious that there was a connection to fraud.

211. The errors on CUD's paperwork are of a minor and isolated nature given the volume of transactions and so do not change the position.

212. For the reasons set out above, the circumstances of the transactions (including the documents obtained from the due diligence obtained) do not establish on the balance of probabilities that the only reasonable explanation for the Deals with CUD was that they were connected to fraud.

CAM

Findings of Fact

213. Input tax has been denied in the sum of £70,120 in respect of 82 Deals with CAM, 22 of which were in the period ending 03/14, 21 of which were in the period ending 06/14, 18 of which were in the period ending 09/14, and 21 of which were in the period ending 12/14. Crow first traded with CAM in August 2013 and so was a relatively recently acquired contact by the beginning of the relevant supplies. The relevant supplies were from 7 January 2014 until 15 December 2014.

214. Mr Wakefield and Mr Carroll both dealt with CAM through its director, Mr Donaldson, although it was mainly Mr Carroll on a day to day basis. Mr Carroll's understanding as to how Mr Donaldson commenced trading with CAM was that Mr Donaldson had been told by one of Crow's other suppliers, TLM, that he should try Crow as Crow were efficient to deal with. CAM approached Crow and sold them a couple of items to try Crow out and the volume then increased. From August 2013 to December 2013, there were 21 trades with a total input claim of £15,758.96. This was a similar volume and nature of trade to the period

from 7 January 2014 to 15 December 2014. This input tax was not disallowed and there is no suggestion that these trades were connected to a fraudulent tax loss.

215. Mr Wakefield's evidence (which we accept in this regard) was that CAM was a conventional small merchant in that he was local, regular and was an owner driver. However, he had recently stepped up from just having a van to having a yard and was buying material from small scale suppliers and the door trade and had contacts in the demolition trade. Mr Donaldson was a traditional, hands on scrap merchant who knew his own material, stripped cable, argued about the price and advertised locally with boards and a sign written van. Crow had to work hard to obtain his metal rather than it being sold to Crow's competitors. Mr Donaldson was not easy to work with in that he pushed hard on price and on most occasions negotiated as to the appropriate grading of the metal. However, Mr Donaldson was polite and friendly in his dealings with Crow.

216. Mr Wakefield visited CAM on 16 October 2015. Crow's report of the visit was as follows:

> "I met with Eric at his yard at the end of the working day. He rents a small yard on a busy industrial site in Gray's Essex. On site there was scales, office payment window, forklift, bins, scrap metal for cleaning/processing, The yard was very well signed. Through chatting with Eric he said that he offered a collection service as well as having material delivered to the yard. I have known Eric for a few years and he used to sell to EMR/FJ Church/Benfleet Scrap."

217. Mr Wakefield was asked in cross-examination whether Mr Donaldson said anything during the meeting about the cancellation of CAM's VAT registration. He said that he was not told about this. We accept his evidence in this regard. He was also asked whether the visit was prompted by HMRC's letter to Crow dated 13 October 2015 requesting paperwork relating to CAM. He said that this was part of a review of due diligence checks. We find that the visit was prompted by HMRC's letter.

218. A further visit took place on 3 November 2015. Mr Donaldson told Mr Wakefield that he was ceasing trading as a result of tough marketing conditions, unfair legislation and concerns of ill health.

219. The relevant due diligence documents include the following:

(1) Crow's due diligence check lists. The boxes ticked were: certificate of incorporation, VAT certificate, director's passport, utility bills, site visit, carrier licence, company letter head with bank details on, Experian reports, self-bill, European validation and Companies House. However, it is not clear when these were carried out, save that a substantial amount of the checks were being carried out once the parties were already trading.

(2) Copies of the documents referred to in the checklist were included in the records.

(3) A letter and licence dated 22 April 2014 from Thurrock.gov for a scrap metal dealer site licence granted for an industrial unit in Grays. This address was different to the trading address. However, Crow did not seek further details about this or visit this address.

(4) The Experian check showed issued capital of £1. The risk scores reduced over the period of trading but this was only obtained 14 months after trade began.

(5) A VIES validation. However, this was obtained 16 months after trade began and was not the Wigan Validation Crow had been advised to obtain.

(6) A Companies House check. This was obtained 17 months after trade began and stated that the nature of the business was the collection of non-hazardous waste. This was not questioned by Crow, although Mr Wakefield (in our view rightly) said that the collection of non-hazardous waste was a fair description.

(7) A report for the site visit on 16 October 2015 referred to above with pictures of signs, history and "how to find us" documents.

(8) A site visit check sheet dated 3 November 2015.

220. Mr Wakefield accepted that there was a potential risk in dealing with new companies as opposed to established ones. However, he said that it felt right to trade with CAM at the time. Mr Wakefield was unable to explain why it had taken so long to check CAM's VAT number or why it was not validated through a Wigan Validation.

Submissions and Discussion

221. Miss King submitted that Crow should have known of CAM's fraud because the due diligence checks were largely only carried out from March 2015 long after the start of trading, deals in excess of £400,000 were carried out with CAM in 2014 despite CAM being a small merchant and no enquiries being made as to how this was funded, no explanation was given for checking the VAT number so long after trading started, and the visits were prompted by HMRC's investigations. Miss King also noted an inconsistency between CAM's paperwork and Crow's in that CAM's invoice 1073 dated 7 January 2014 did not include any description of the goods whereas Crow's advice note states that it was heavy copper.

222. Mr Lall submitted that Crow already had an established trading relationship with CAM prior to the disputed Deals and that the due diligence would not have resulted in any different outcome if it had been carried out earlier.

223. We find that, on the balance of probabilities, HMRC has failed to establish that Crow should have known that its purchases from CAM were connected with a fraudulent evasion of VAT. CAM, and Mr Donaldson, appeared to be genuine as a result of Mr Donaldson's history, trading practices and knowledge. The trading from August 2013 to December 2013 is not criticised but was of a very similar nature to the trading thereafter. We do not accept that CAM's size should have been a cause for concern as the individual trades were not high when compared with Deals with some of the other suppliers and explains why Mr Donaldson was keen to secure a good price and prompt payment.

224. We agree that Crow's due diligence was poor in that very little took place until March 2015 and was effectively prompted by HMRC's investigations. However, we find that earlier due diligence would not have provided any further information that would have changed the position. We also find that the inconsistency on the paperwork was a matter of detail and did not disclose any cause for concern.

225. For the reasons set out above, the circumstances of the transactions (including the documents obtained from the due diligence) do not establish on the balance of probabilities that the only reasonable explanation for the Deals with CAM was that they were connected to fraud.

Trent Skip

Findings of Fact

226. Input tax has been denied in the sum of £86,745 in respect of 5 Deals with Trent Skip, four of which were in the period ending 06/14 and one of which was in the period ending 09/14. Trent Skip was a new trader to Crow at the time of the relevant supplies. The relevant supplies were from 15 May 2014 until 21 July 2014.

227. Mr Wakefield and Mr Carroll both dealt with Trent Skip through its main contact, Mr Lee Tremain. Mr Tremain was an ex-employee of another trader, EMR. He was well known in the trade and was a professional who knew the trade. Trent Skip was at a well-known breakers yard and scrap site in Rayleigh, next door to a large iron yard. However, Trent Skip was itself new to the site, having moved to Essex from Nottinghamshire. Trent Skip had been supplying metal to one of Crow's competitors, Sims, but came to Crow because Sims were unable to accept its supplies due to having too much stock and being unable to get containers. Mr Wakefield visited Trent Skip's site (although he was unable to say when this was) and it appeared to be genuine, with scrap, skips, bins with Trent Skip's logo on, and staff identifying as employed by Trent Skip. We note that we have already found as a fact that by the time of HMRC's visit in October 2014 there was no sign of Trent Skip. We therefore find that Trent Skip left the site at some time after Mr Wakefield's visit but before HMRC's visit in October 2014.

228. Trent Skip's VAT1 form said that its business was renting other machinery equipment and goods, without any mention of scrap metal trading. Mr Wakefield said that he did not make any further enquiries about this because it was a classification which he thought went hand in hand with scrap trading. We accept that this is what Mr Wakefield thought.

229. The relevant due diligence documents include the following:

(1) A certificate of incorporation dated 21 September 2001.

(2) A certificate of VAT registration with effect from 1 November 2010 referring to a classification of "renting other machinery, equipment and goods" as referred to above.

(3) A copy of photo identification for Jose Antonio Carvallo Quintana.

(4) An email between Crow and Lee Tremaine referring to Mr Tremaine's visit to Crow. Mr Tremaine stated that no utility bill was available as Trent Skip was new to the site.

(5) A letter from HMRC dated 23 April 2014 verifying Trent Skip's VAT registration number.

(6) A letter from HMRC dated 23 October 2014 confirming that Trent Skip's VAT registration number had been de-registered.

Submissions and Discussion

230. Miss King submitted that Crow should have known of Trent Skip's fraud because Crow's due diligence was poor and there was no adequate response to reasons for concern such as an inconsistency with the main business activity, the name of the company does not suggest scrap metal trading, the principal place of business was in Nottingham rather than the one visited in Essex, it was odd that a scrap metal dealer would relocate to an entirely different part of the country leaving local contacts, and utility bills for the Essex address were not provided.

231. Mr Lall submitted that there was no basis to establish that Crow should have known of Trent Skip's fraud. He made the point that HMRC's VAT registration number verification itself confirmed to Crow that Trent Skip had a principal place of business in Essex.

232. We agree that Crow's due diligence was poor in that very little appears to have been carried out. We agree that it would on its face be a concern that the main business activity made no mention of scrap metal and that Trent Skip relocated from Nottingham. However, we balance against this the fact that Mr Tremaine appeared genuine, was well known in the industry, that it operated from a well-known site, that HMRC's VAT registration number verification referred to the Essex address and that what Mr Wakefield saw at the site visit was

consistent with Trent Skip genuinely being located at the Essex site. We find that these indicators of genuine trading outweigh the negative concerns to the extent that it could not be said that the only reasonable explanation for the Deals with Trent Skip was that they were connected to fraud.

Bexleyheath

Findings of Fact

233. Input tax has been denied in the sum of £54,930.76 in respect of 123 Deals with Bexleyheath, 12 of which were in the period ending 03/14, 12 of which were in the period ending 06/14, 26 of which were in the period ending 09/14, 26 of which were in the period ending 12/14, 27 of which were in the period ending 03/15 and 20 of which were in the period ending 06/15. Bexleyheath was a new trader to Crow at the time of the relevant supplies. The relevant supplies were from 6 January 2014 until 30 June 2014.

234. Mr Wakefield and Mr Carroll each dealt with Bexleyheath. Mr Wakefield's evidence (which we accept) was that Bexleyheath were recommended to Crow by Mr Billy Sartin at TLM (as was CAM). Mr Wakefield trusted Mr Sartin, who had become a friend as well as a supplier. Mr Sartin told Mr Wakefield that he should contact Bexleyheath, which was run by two brothers, Jordan and Oliver Johnson, having been set up in business by their father. Mr Wakefield asked Mr Carroll to visit Bexleyheath when he was in the area in order to see if Crow could purchase metal from them. Mr Carroll did so and won their business from other competitors such as EJ Church and EMR by being competitive on price, giving a quick turnaround and providing prompt payment. Mr Carroll said (and we accept) that Bexleyheath's trade was a busy door trade yard. Jordan Johnson also had a job with a Sky depot where he would buy waste electrical items and cables.

235. Bexleyheath was what Mr Wakefield termed a "feeder yard" in that they are smaller than Crow and so cannot accumulate quantities of material to sell on at higher prices in the way that Crow can.

236. The relevant due diligence documents include the following:

(1) Crow's due diligence checklist. The ticked boxes were certificate of incorporation, VAT certificate, director's passport, site visit, recent HMRC correspondence, utilities bill, carrier licence, Experian check, VIES validation and Companies House documents. It was unclear when this checklist was compiled, but it appears to be substantially after trading commenced.

(2) Bexleyheath's certificate of incorporation dated 17 August 2011.

(3) A certificate of VAT registration from 1 November 2012. This listed the trade classification as recovery of sorted materials.

(4) A UK passport for Jordan Johnson.

(5) A VIES validation, Companies House Check and an Experian check showing below average risk were obtained. However, this was after Officer Kinman had visited Crow on 24 November 2014 and was after Crow and Bexleyheath had been trading for 11 months.

(6) An Environment Agency certificate of registration.

(7) An HMRC debt management and banking letter advising that the sum of £2,492.17 was outstanding to HMRC.

(8) A handwritten, illegible utility bill.

237. Miss King asked Mr Wakefield in cross-examination why the VAT number check was through VIES rather than a Wigan Validation but was unable to give a reason. Miss King also asked Mr Wakefield in cross-examination why he was not concerned that the type of trade shown by the Companies House register was recovery of sorted materials rather than collection of non-hazardous waste. Mr Wakefield said that Bexleyheath sorted and processed materials at its yard. We accept this evidence. Miss King also put it to Mr Wakefield that he should have been concerned about the fact that £2,492.17 was owed to HMRC by Bexleyheath. Mr Wakefield said that he was not concerned about this because it was a small amount and he expected Bexleyheath to be able to pay it. We accept that this was his thought process.

238. Miss King also asked Mr Wakefield why the due diligence was not carried out until a year after trading had started. Mr Wakefield said that the guidance from HMRC had been drip fed over a period of time. We do not accept this answer as Crow was aware of the need for due diligence from the outset as this was the reason why Haslers were engaged. We find that as time went on, and particularly when prompted by HMRC, Crow increasingly realised that it had not been conforming to its own due diligence procedures.

Submissions and Discussion

239. Miss King submitted that Crow should have known of Bexleyheath's fraud because the due diligence was very minimal and 11 months after the trading commenced. There was no explanation as to why even the most basic of checks such as verifying the VAT registration number were not undertaken earlier. Further, the letter to Bexleyheath (but in Crow's possession as part of the due diligence) from HMRC dated 8 May 2015 relating to outstanding VAT in the sum of £2,492.17 should have given cause for concern but instead no enquiries were made.

240. Mr Lall submitted that there was no basis to establish that Crow should have known of Bexleyheath's fraud.

241. We agree that Crow's due diligence was poor in that very little appears to have been carried out and it was 11 months after trading commenced. However, we find that there were no indicators to suggest that the only reasonable explanation for the Deals with Bexleyheath was that they were connected to fraud. The outstanding VAT was in a modest sum and the fact that this was disclosed to Crow would in its context reasonably be seen as Bexleyheath being frank and open rather than fraudulent. On the face of it, the recovery of sorted materials was not a misleading trade description and not one which would put Crow on notice of fraud. The trading also began as a result of Crow approaching Bexleyheath rather than the other way round, and was as a result of a recommendation from a trusted source in the form of TLM.

Summary

242. Drawing all these matters together, we find that HMRC is unable to satisfy the burden of proof in establishing in respect of each of the suppliers that Crow should have known that its transactions were connected with the fraudulent evasion of VAT. We note that the central thrust of HMRC's submissions in respect of each of Crow's suppliers was that the due diligence was poor or late. Whilst Crow can be criticised for this, in the context and circumstances of the present case this is not enough to establish that the only reasonable explanation for the transactions is that they were connected to the fraudulent evasion of VAT.

DISPOSITION

243. It follows that we allow the appeals.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

244. 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: 23 OCTOBER 2020