[2018] UKFTT 0474 (TC)

TC06652

Appeal number: TC/2014/03253

VALUE ADDED TAX – denial of zero-rating on car sales to the Republic of Ireland on the basis that the sales were connected with fraudulent evasion leading to a loss of tax and the appellant knew or should have known that the sales were so connected- appeal dismissed- denial of zero-rating on the basis of failure to provide sufficient evidence of removal as required- VAT Notice 725- appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TAYLORS SERVICE CENTRES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE THOMAS SCOTT
MS REBECCA NEWNS

Sitting in public at Taylor House, Rosebery Avenue, London on 25 to 29 September and 2 October 2017

Tim Brown of Counsel for the Appellant

James Puzey of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The Appellant, Taylors Service Centres Ltd ("Taylors"), appeals against two decisions of HMRC to refuse zero rating for VAT purposes on the supply by Taylors of certain motor vehicles to the Republic of Ireland. The sales took place in the periods 10/12 and 01/13 and in the periods 07/12 and 04/13. The amounts denied are £266,730 and £ 166,245 respectively.

2. HMRC deny the zero rating on two grounds. First, they contend that the transactions were connected with a tax fraud, and Taylors did not take all reasonable steps to prevent its own participation in the fraud and knew or should have known that the transactions were part of a tax fraud. Secondly, HMRC deny the zero rating on the basis that Taylors failed to obtain and/or provide sufficient evidence to establish that the supplies satisfied the conditions for zero rating.

3. These two grounds are respectively referred to in this judgment as the "Mecsek denial" and the "Lack of Evidence denial". The former is a reference to the decision of the Court of Justice of the European Union (the "CJEU") in *Mecsek-Gabona Kft v Nemzeti Ado Foigazgatosaga* (Case C-273/11) [2013] STC 171 ("*Mecsek-Gabona*").

Applications to admit new evidence

4. At the beginning of the hearing, we were asked to determine as a preliminary issue three applications by HMRC seeking the permission of the Tribunal to rely on additional evidence. The additional evidence had not been served in accordance with the time limits specified in various Tribunal directions.

Jurisdiction

5. The Tribunal has jurisdiction to hear and determine such an application under the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"). Rule 5(2) of the Tribunal Rules permits the Tribunal to give a direction in relation to the conduct or disposal of proceedings at any time, including a direction amending, suspending or setting aside an earlier direction. In particular, under Rule 5(3) (a) the Tribunal may extend the time for complying with a direction.

6. Rule 15 of the Tribunal Rules provides that, without restriction on the general case management powers in Rule 5, the Tribunal may give directions on a wide variety of matters relating to evidence including its admission or exclusion.

The applications

7. We considered three Notices of Application from HMRC, supported by a skeleton argument of 23 pages. We also considered a Notice of Opposition from Mr Brown, supported by a "witness statement" from Matheu Smith of Taylors' advisers,

Keystone Law. Since Mr Smith was not a witness in the proceedings his evidence was not a witness statement, but we decided to treat it as part of Mr Brown's submissions on admission. We heard arguments from both Mr Puzey and Mr Brown, and questioned both of them before reaching our decision.

8. By Notice dated 4 August 2017, as amended, HMRC sought permission to rely on the following additional witness evidence (collectively "the Defaulting Trader Evidence"):

(1) Witness evidence of Officer David Ball of HMRC in respect of Paul Sava (trading as Sava Autos) who, alleged HMRC, was a fraudulent defaulting trader in respect of transactions giving rise to the tax fraud in this appeal ("the Ball Evidence").

(2) Witness evidence of Officer Bernadette O'Neill in relation to Benjamin Nugent (trading as Altmore Motors), also alleged by HMRC to be a fraudulent defaulting trader in respect of such transactions ("the O'Neill Evidence").

(3) An additional witness statement from Officer Adam Smith, the HMRC decision-making officer, exhibiting documents relating to certain other traders regarding some of the motor cars which are the subject of this appeal ("the Additional Smith Evidence").

9. By Notice dated 20 September 2017 HMRC sought permission to rely on an exchange of information request and related reply between HMRC and the tax authorities in the Republic of Ireland relating to David McMahon (trading as DM Cars), also alleged by HMRC to be a fraudulent defaulting trader in respect of such transactions. By the time of the hearing this evidence extended to certain other individuals relevant to the appeal (collectively "the Exchange of Information Evidence").

10. By Notice dated 22 September 2017 HMRC sought permission to rely on a summary of MTIC [Missing Trader Intra-Community] Assurance Activity in respect of David Corr Haulage, who HMRC alleged transported various motor cars which were part of a fraudulent chain relevant to this appeal. The summary related to a visit by tax officers in Northern Ireland to Mr Corr's premises in March 2013 ("the Corr Haulage Evidence").

11. At the start of the hearing Mr Brown withdrew his opposition to the Exchange of Information Evidence, which, given its relevance, we admitted as evidence.

12. We refer to the various items of evidence other than the Exchange of Information Evidence collectively as "the Additional Evidence".

HMRC arguments

13. Mr Puzey made the following submissions in respect of HMRC's application:

(1) He accepted that the Additional Evidence had not been served in accordance with earlier Tribunal directions, but in each case there was a valid reason for this.

(2) The primary test for admissibility was relevance, and the Additional Evidence was all of material relevance to matters in the appeal.

(3) Taylors should have been aware from HMRC's statement of case and previous evidence that the alleged fraudulent traders in question were relevant to HMRC's case.

(4) The matters on which Taylors might in principle have wished to challenge aspects of the Additional Evidence were in fact outside its knowledge on its own pleadings.

(5) Missing traders would be unlikely in any event to co-operate with requests to give evidence.

(6) Taylors would not be prejudiced by allowing HMRC to rely on the Additional Evidence, particularly given that the volume of such evidence was modest.

Taylors' arguments

14. Mr Brown opposed the application on the following grounds:

(1) The appeal had been running for several years, and one of the objectives of earlier Tribunal directions had been to ensure that Taylors fully understood HMRC's case, and was able to prepare its evidence accordingly, by the dates specified in those directions.

(2) If the Additional Evidence was admitted, Taylors and its advisers would be denied a proper opportunity to consider and respond to that evidence.

(3) HMRC could have served the Additional Evidence some time ago.

(4) The Additional Evidence was not relevant to HMRC's pleaded case, and should therefore be excluded.

(5) Admitting the evidence would disrupt the hearing of the appeal, and create a real risk that it would not finish within its allotted time.

(6) The alternative option of postponing the hearing would be highly undesirable for both parties and for the Tribunal.

Our approach to the Applications

15. In considering whether or not to admit the Additional Evidence we adopted the same approach in relation to each item of evidence. We considered all the facts and circumstances, and were mindful of the overriding objective in the Tribunal Rules. We took as our starting point an assessment of the relevance of the evidence. If the evidence was relevant, it should be submitted unless there were compelling reasons to the contrary. In particular, we weighed and balanced the prejudice to each party of admitting or not admitting the evidence.

16. This approach is in accordance with the guidance in *Mobile Export 365 Limited v HMRC* [2007] EWHC 3664 (Admin) and the judgment of the Court of Appeal in *Atlantic Electronics Ltd v HMRC* [2013] EWCA Civ 651.

The Corr Haulage Evidence

17. One of the buyers of the vehicles concerned in the appeal was David McMahon, trading as DM Cars. One of the hauliers of vehicles, according to HMRC's served case, was David Corr Haulage. In March 2013 tax officers in Northern Ireland visited Mr Corr's premises, and at that visit Mr Corr claimed to have no knowledge of Mr McMahon. However, on being shown an invoice for a delivery to Mr McMahon, which Mr Corr had been shown at a previous meeting with the tax officers, he said that in fact he recognised the name.

18. The Corr Haulage Evidence was a record of that previous meeting. The relevant point was covered in the note in two lines. HMRC had not previously served it as evidence because it had been overlooked.

19. This evidence was pertinent to transactions between Taylors and Mr McMahon which were significant in the appeal. It was therefore clearly relevant. It caused no conceivable prejudice to Taylors to admit it; in fact, as Mr Brown appeared to acknowledge, it was mildly helpful to Taylors' case, because it contributed to a more complete picture regarding Mr Corr's knowledge of Mr McMahon.

20. We therefore had no hesitation in allowing this evidence to be admitted.

The Defaulting Trader Evidence

21. The primary relevance of the Defaulting Trader Evidence was to the existence of a fraud in relation to the transactions concerned in the appeal. It was also potentially relevant, to a lesser degree, to knowledge of fraud. The Ball Evidence also had some relevance to the Lack of Evidence denial.

22. Why was this evidence not served by HMRC in accordance with the time limits set by earlier directions of the Tribunal? The answer is that Taylors had specifically challenged the existence of a fraud only at a very late stage, obliging HMRC to produce more extensive evidence in relation to that issue. For some reason, there had been no "Fairford" directions in preparation for the appeal, intended to clarify in good time the precise issues contested by the appellant (so called following the Upper Tribunal decision in *HMRC v Fairford Group plc* [2015] STC 156). It was only in their skeleton argument, filed approximately two weeks before the hearing, that Taylors specifically challenged the existence of a fraud.

23. The application by HMRC to rely on the Defaulting Trader Evidence had in fact been made by HMRC some seven weeks before the hearing, correctly anticipating that there was a risk that further evidence as to fraud might be necessary or prudent from HMRC's perspective. By explicitly putting HMRC to proof of fraud in their

skeleton argument, Taylors placed that issue firmly in play in terms of the matters to be considered by this Tribunal.

24. We considered the potential prejudice to Taylors of admitting the Defaulting Trader Evidence. We were not persuaded by Mr Brown's argument that the evidence did not relate to HMRC's previously pleaded case. The potential relevance of the individuals who were the subject of the Defaulting Trader Evidence had been referred to in HMRC's statement of case and skeleton argument. These were not new issues. Mr Brown sought to argue that the evidence related to a different fraud to that previously pleaded by HMRC, namely a fraud in Northern Ireland rather than the Republic of Ireland. We were not persuaded that that was the case, but in any event HMRC's position in relation to fraud was not that there were separate frauds, but rather, in Mr Puzey's words, "one big fraud", so Mr Brown's attempted distinction did not prove prejudice in a procedural sense.

25. Mr Brown argued that Taylors would be prejudiced by admission of the Defaulting Trader Evidence because they would have insufficient time to challenge it and carry out enquiries in relation to it. However, that is not a prejudice which is to be weighed in a vacuum, but taking account of all the facts and circumstances. In this case, there was no suggestion that any investigation or action in relation to the evidence had been commenced by Taylors in the seven weeks between the HMRC application and the date of the hearing. Further, given that that evidence related to missing or defaulting traders, it was not readily apparent how Taylors might locate, let alone question, such traders. The witnesses producing that evidence would also be available during the hearing for cross-examination by Mr Brown.

26. Having applied the approach set out in *Mobile Export* and *Atlantic Electronics*, and taking account of the overriding objective, we concluded that the material relevance of the Defaulting Trader Evidence, particularly to the existence of fraud, which had been challenged by Taylors, outweighed any prejudice to Taylors, and we admitted it as evidence.

Summary chronology

27. The following facts were not in dispute.

28. The sole director and shareholder of Taylors is currently Jeremy Taylor. Mr Taylor began trading in 1987, although Taylors was not incorporated until 2003. At the time of the periods under appeal Mr Taylor's wife was also a director and secretary of Taylors.

29. Taylors traded from its registered address in Essex. Its primary trade was that of an approved motor vehicle service and repair centre. Taylors occasionally bought and sold cars in response to customer requests, but it began to sell cars to the Republic of Ireland only in late 2011.

30. On 12 December 2012 Officer Grace of HMRC visited Taylors' premises to conduct a "pre-repayment credibility check". That visit indicated that in addition to its

main business of service and repair work Taylors had begun to sell motor vehicles to the Republic of Ireland. Officer Grace raised questions regarding the evidence obtained by Taylors in relation to proof of dispatch of those vehicles.

31. Following a further visit by HMRC on 2 January 2013, HMRC issued Mr Taylor with VAT Notices 725 and 703, relating to proof of removal from the UK to another Member State.

32. On 4 January 2013 HMRC received some information regarding evidence of dispatch from Taylors' VAT adviser, Allison Broadey. HMRC raised concerns as to that evidence, and decided to withhold the VAT repayment claimed by Taylors pending further review.

33. On 7 February 2013 HMRC emailed Ms Broadey, stating as follows:

> "Our investigations, so far, would appear to indicate that in the period of time that your client states that he has been selling vehicles to Ireland, three of his customers have been deregistered by the Irish authorities. This raises serious concerns for HMRC, it is important for us to have a clear understanding of the checks and due diligence carried out by your client and the business practices which have been adopted…I have received information from other HMRC colleagues that some of the vehicles your client is claiming to have purchased from UK suppliers and sold to customers in Eire have appeared in supply chains elsewhere; that is to say that other UK VAT registered businesses are also claiming input tax and applying zero rating on the same vehicles within a relatively short period of time."

34. On 7 February 2013 HMRC submitted a request for administrative assistance to the Irish tax authorities concerning David McMahon, trading as DM Cars, who was Taylors' main customer for the period 10/12. On 22 February 2013 the Irish authorities confirmed that Mr McMahon was a missing trader.

35. On 28 February 2013 Officer Smith of HMRC visited Taylors' premises and left there a letter to Taylors' directors informing them of Mr McMahon's missing trader status and that checks were ongoing. The letter enclosed VAT Notice 726 ("Joint and several liability for unpaid VAT"). Mr Taylor telephoned Officer Smith that day to confirm receipt.

36. Following further correspondence and discussions, on 7 March 2013 HMRC suspended the VAT repayment for period 01/13. On 13 March 2013 HMRC submitted requests for interventions to the Irish tax authorities in relation to David McMahon, and to two other customers of Taylors in the Republic of Ireland, Tracey Simpson (trading as M3 Car Sales) and Zoe Brown (trading as NS Cars). On 14 March 2013 HMRC notified Taylors that its VAT returns for periods 10/12 and 01/13 had been selected for verification of the VAT repayment claims.

37. On 25 March 2013 HMRC issued Taylors with an "MTIC awareness" letter. We discuss MTIC fraud further below. On 9 April 2013 HMRC provided information to

Mr Kempster, who was selling the cars to the Republic of Ireland on behalf of Taylors.

38. On 23 April 2013 an application for VAT registration was submitted by a newly incorporated company established by Mr and Mrs Taylor. On 30 July 2013 HMRC refused the registration, for the reasons discussed below.

39. On 15 May 2014 HMRC wrote to Taylors denying zero rating in respect of the dispatch of 38 vehicles to the Republic of Ireland in VAT period 10/12, and 40 motor vehicles in period 01/13. HMRC issued an assessment to VAT for £320,077, later reduced to £266,730.

40. On 29 July 2014 HMRC wrote to Taylors denying zero rating in respect of the dispatch to the Republic of Ireland of 27 motor vehicles in period 07/12, and 22 motor vehicles in period 04/13. A further assessment to VAT was issued, of £199,495, later reduced to £166,245.

41. Taylors appealed against both assessments, which denied zero rating on the basis of the Mecsek denial and the Lack of Evidence denial. The appeals were consolidated and form the subject of this appeal.

Evidence

42. We considered eleven lever arch files of documents, including correspondence between the parties, reports compiled by HMRC officers, and copy documents and invoices relating to the vehicles in the appeal. We also considered the additional evidence described above and a number of supplemental documents produced during the hearing.

43. In relation to witness evidence, we received a witness statement from Officer David Ball, a member of HMRC's MTIC team, regarding the VAT affairs of Mr Paul Sava, alleged by HMRC to be a missing trader. Since Officer Ball did not have any involvement with Mr Sava at the time of the relevant events (the responsible HMRC officer since having retired), it was agreed that his evidence was hearsay, and would be admitted on that basis. Officer Ball was not called as a witness.

44. We received witness statements from the following individuals, who were examined and cross-examined, and who we had the opportunity to question:

(1) Adam Smith, the HMRC decision-making officer and a member of HMRC's MTIC team.

(2) Officer Bernadette O'Neill, a member of HMRC's MTIC team based in Belfast, who gave evidence relating to various traders involved in the purchase and/or transport of the vehicles in the appeal.

(3) Mr Taylor.

(4) Mr Lawrence Kempster, who bought and sold cars for Taylors, including the vehicles in the appeal.

(5) Mr Michael Fay, who worked for Alan Simpson in buying vehicles from Taylors and who dealt with Mr Kempster.

(6) Ms Tracey Harvey, who was employed as the Accounts Manager at Taylors, and who was responsible for dealing with necessary paperwork and formalities, including the filing of VAT returns, in relation to the vehicles in the appeal.

(7) Ms Allison Broadey, an external adviser who gave advice in relation to VAT compliance to Taylors in the periods under appeal.

45. We comment below on our evaluation of the evidence given by the various witnesses in relation to our findings of fact.

The Mecsek denial—the law

46. We consider first the Mecsek denial, setting out the relevant legislation and case law, our approach to the various criteria which must be established and our findings of fact. We then consider in light of our findings of fact the competing submissions of the parties in relation to those criteria, on which HMRC bears the burden of proof, in order to establish whether zero rating was validly denied for the transactions in this appeal in accordance with *Mecsek-Gabona*.

Legislation

47. In relation to the dispatch of goods to another Member State, the relevant provisions of Council Directive 2006/112/EC of 23 November 2006 on the common system of VAT ("the Principal VAT Directive") state as follows:

> Article 2
>
> 1. The following transactions shall be subject to VAT:
>
> […]
>
> (b) the intra-Community acquisition of goods for consideration within the territory of a Member State by:
>
> (i) a taxable person acting as such, or a non-taxable legal person, where the vendor is a taxable person acting as such…
>
> Article 131
>
> The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse.
>
> Article 138

1.Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.

48. Turning to the domestic legislation, so far as relevant section 30 of the Value Added Tax Act 1994 ("VATA 1994") provides as follows:

(1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section-

(a) no VAT shall be charged on the supply: but

(b) it shall in all other respects be treated as a taxable supply;

and accordingly the rate at which VAT is treated as charged on the supply shall be nil.

[…]

(8) Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where-

(a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member States or that the supply in question involves both-

(i) the removal of the goods from the United Kingdom; and

(ii) their acquisition in another member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that member State corresponding, in relation to that member State, to the provisions of section 10; and

(b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled.

[…]

(10) Where the supply of any goods has been zero-rated by virtue of subsection (6) above or in pursuance of regulations made under subsection (8), (8A) or (9) above and-

(a) the goods are found in the United Kingdom after the date on which they were alleged to have been or were to be exported or shipped or otherwise removed from the United Kingdom; or

(b) any condition specified in the relevant regulations under subsection (6), (8), (8A) or (9) above or imposed by the Commissioners is not complied with,

and the presence of the goods in the United Kingdom after that date or the non-observance of the condition has not been authorised for the purposes of this subsection by the Commissioners, the goods shall be liable to forfeiture under the Management Act and the VAT that would have been chargeable on the supply but for the zero-rating shall become payable forthwith by the person to whom the goods were

> supplied or by any person in whose possession the goods are found in the United Kingdom; but the Commissioners may, if they think fit, waive payment of the whole or part of that VAT.

49. The Value Added Tax Regulations 1995 ("the 1995 Regulations"), enacted in pursuance of the powers conferred by, amongst other provisions, section 30(8) VATA 1994, provide as follows:

> 134.
>
> Where the Commissioners are satisfied that-
>
> (a) a supply of goods by a taxable person involves their removal from the United Kingdom,
>
> (b) the supply is to a person in another member State,
>
> (c) the goods have been removed to another member State, and
>
> (d) the goods are not goods in relation to whose supply the taxable person has opted, pursuant to section 50A of the Act, for VAT to be charged by reference to the profit margin on the supply,
>
> The supply, subject to such conditions as they may impose, shall be zero-rated.

Case law- the principle of restriction

50. The principle that a right existing for VAT purposes may be restricted in the context of fraudulent evasion of VAT is most commonly understood by reference to the right to deduct input tax. The key principles are derived from *Axel Kittel v Belgium; Belgium v Recolta Recycling* (C-439/04 and C/440-04) [2006] ECR 1-6161 and the Court of Appeal decision in *Mobilx Ltd (in administration) v The Commissioners for HMRC* [2010] EWCA Civ 517. As explained in *Mobilx* (at [49]) there is no relevant distinction in this regard between domestic and Community law. The right to deduct must be refused:

> "… 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'." (*Kittel* at [59]).

51. The principle applies also in relation to a right to exemption from VAT. In *Mecsek-Gabona*, the CJEU stated as follows:

> "54. If the referring court were to reach the conclusion that the taxable person concerned knew or should have known that the transaction which it had carried out was part of a tax fraud committed by the purchaser and that the taxable person had not taken every step which could reasonably be asked of it to prevent that fraud from being committed, there would be no entitlement to exemption from VAT.

> 55. In light of all the foregoing considerations, the answer to Questions 1 and 2 is that art 138(1) of Directive 2006/112 is to be interpreted as not precluding, in circumstances such as those of the case before the referring court, refusal to grant a vendor the right to the VAT exemption for an intra-Community supply, provided that it has been established, in the light of objective evidence, that the vendor has failed to fulfil its obligations as regards evidence, or that it knew or should have known that the transaction which it carried out was part of a tax fraud committed by the purchaser, and that it had not taken every reasonable step within its power to prevent its own participation in that fraud."

52. The CJEU subsequently approved the principle set out in paragraph 54 of *Mecsek-Gabona* in *Staatssecretaris van Financien v Schoenimport 'Italmoda' Mariano Previti vof and other cases* (C-131/13, C-163/13, C-164/13) ("*Italmoda*"), at paragraph 45. The Court stated:

> "49. In the light of the foregoing considerations, it is, in principle, the responsibility of the national authorities and courts to refuse the benefit of the rights laid down by the Sixth Directive when they are claimed fraudulently or abusively, irrespective of whether those rights are rights to a deduction, to an exemption or to a VAT refund in respect of intra-Community supplies, as at issue in the case in the main proceedings.
>
> 50. It must further be noted that, according to settled case-law, that is the position not only where tax evasion has been carried out by the taxable person itself but also where a taxable person knew, or should have known, that, by the transaction concerned, it was participating in a transaction involving evasion of VAT carried out by the supplier or by another trader acting upstream or downstream in the supply chain (see to that effect, inter alia, judgments in *Kittel and Recolta Recycling*, EU:C:2006:446, paragraphs 45, 46, 56 and 60, and *Bonik*, EU:C:2012: 774, paragraphs 38 to 40)."

53. The Court confirmed the breadth of the principle in *Italmoda* as follows:

> "69…the Sixth Directive must be interpreted as meaning that a taxable person who knew, or should have known, that, by the transaction relied on as a basis for rights to deduction of, exemption from or refund of VAT, that person was participating in evasion of VAT committed in the context of a chain of supplies, may be refused the benefit of those rights, notwithstanding the fact that the evasion was carried out in a Member State other than that in which the benefit of those rights has been sought and that taxable person has, in the latter Member State, complied with the formal requirements laid down by national legislation for the purpose of benefitting from those rights".

The test in detail

54. A number of decisions have considered in detail how the courts should apply this principle. In particular, it is clear that four issues arise in relation to a *Mecsek* denial, as in relation to any *Kettel/Mobilx* restriction, namely:

(1) Was there a tax loss?

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

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

(4) If so, did the appellant know, or should it have known, that the transactions were so connected?

55. As explained above in relation to the applications to admit evidence, there were, unhelpfully in our view, no "Fairford" directions in this case which might have narrowed the issues in dispute. Taylors did not accept that HMRC had proved their case on any of the four issues, and accordingly we deal with each in detail below.

56. The burden of proof on the four issues rests with HMRC, as the parties agreed. The standard of proof is the ordinary civil standard, namely the balance of probabilities.

57. In relation to the "should have known" limb of the denial, Mr Brown submitted that this required the Tribunal to determine whether the facts "would have led a reasonable person to conclude that the only reason for the transactions was that they were connected to fraud". The framing of the *Kittel/Mobilx* test as an "only reasonable explanation" test finds its origin in a passage of the judgment of Moses LJ in *Mobilx*, where he stated as follows:

> "[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 fraudulent purchase took place was that it was a transaction connected with such fraudulent evasion."

58. One might have thought it reasonably clear that in this passage Moses LJ was giving an example of how the "should have known" test might apply, rather than reformulating the test itself. That was certainly the interpretation of the Upper Tribunal in *GSM Export (UK) Ltd v Revenue and Customs* [2014] UKUT 529(TC), at [19]. However, in *Davis and Dann Ltd v Revenue and Customs Commissioners* [2016] STC 1236, relied on by Mr Brown, the Court of Appeal proceeded on the basis that the "only reasonable explanation" test was appropriate in relation to the standard of knowledge required by *Mobilx*. It was common ground in the case that what

HMRC needed to show was that the only reasonable explanation for the transactions was that they were connected to a VAT fraud: see paragraph 4 of the decision, citing paragraph [59] of *Mobilx*.

59. In *AC (Wholesale) Limited v The Commissioners for Revenue & Customs* [2017] UKUT 191 (TCC), Mr Brown sought to argue that the effect of *Davis and Dann* and Moses LJ's judgment in *Mobilx* was that HMRC must demonstrate to the satisfaction of the Tribunal that one can discount all other reasonable conclusions and possibilities than a connection to fraud in order to prove that the "only reasonable explanation" was a connection to fraud: see paragraph 23. The Upper Tribunal firmly rejected that approach. It determined that the "only reasonable explanation" formulation was simply one way of showing that a person should have known that the transaction was connected to fraud: see paragraphs 19 and 27. It is important to take into account that the meaning of the formulation was not an issue in *Davis and Dann*; the critical issue before the Court of Appeal in that case was whether the Upper Tribunal had erred in failing properly to consider the *cumulative* effect of the circumstances known to the trader.

60. We would follow the analysis of the Upper Tribunal in *AC (Wholesale)* even if we were not bound by it, which we are, and in particular we endorse the following passage from the decision:

> "29. In our view, Mr Brown's submissions place a weight on the words used by Moses LJ in *Mobilx* that they cannot bear. Moses LJ was clear that the test in *Kittel* was a simple one that should not be over refined. It is, to us, inconceivable that Moses LJ's example of an application of part of that test, the 'no other reasonable explanation', would lead to the test becoming more complicated and more difficult to apply in practice. That, in our view, would be the consequence of applying the interpretation urged upon us by Mr Brown. In effect, HMRC would be required to devote time and resources to considering what possible reasonable explanations, other than a connection with fraud, might be put forward by an appellant and then adduce evidence and argument to counter them even where the appellant has not sought to rely on such explanations. That would be an unreasonable and unjustified evidential burden on HMRC. Accordingly, we do not consider that HMRC are required to eliminate all possible reasonable explanations other than fraud before the FTT is entitled to conclude that the appellant should have known that the transactions were connected to fraud.
>
> 30. Of course, we accept (as, we understand, does HMRC) that where the appellant asserts that there is an explanation (or several explanations) for the circumstances of a transaction other than a connection with fraud then it may be necessary for HMRC to show that the only reasonable explanation was fraud. As is clear from *Davis & Dann*, the FTT's task in such a case is to have regard to all the circumstances, both individually and cumulatively, and then decide whether HMRC have proved that the appellant should have known of the connection with fraud. In assessing the overall picture, the FTT may consider whether the only reasonable conclusion was that the purchases were connected with fraud. Whether the circumstances of

> the transactions can reasonably be regarded as having an explanation other than a connection with fraud or the existence of such a connection is the only reasonable explanation is a question of fact and evaluation that must be decided on the evidence in the particular case. It does not make the elimination of all possible explanations the test which remains, simply, did the person claiming the right to deduct input tax know that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT or should he have known of such a connection."

61. We have also found useful guidance in the following judicial pronouncements, which we have taken into account in reaching our decision in relation to the "should have known" issue:

(1) It is necessary to consider individual transactions in their context, including drawing inferences from a pattern of transactions, and 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": *Red 12 Trading Ltd v Revenue & Customs* [2010] STC 589, at [109] to [111].

(2) In effect as a facet of the guidance given in *Red 12*, it is necessary to guard against over-compartmentalisation of relevant factors, and to stand back and consider the totality of the evidence: *Davis and Dann*, and *CCA Distribution Ltd v Revenue and Customs* [2017] EWCA Civ 1899.

(3) The Tribunal should take account of but not focus unduly on the question of whether the trader has acted with due diligence: Moses LJ in *Mobilx*, at [82]. We note, however, that in relation to a denial of zero rating, the formulation in point is that in *Mecsek-Gabona*, which refers clearly (at [54] and [55] of the judgment, set out above) in addition to actual or constructive knowledge to the trader failing to take all reasonable steps in its power to prevent the fraud or its own participation in that fraud.

(4) As stated by Briggs J in *Megtian Ltd v HMRC* [2010] EWHC 18(Ch), and approved by Lady Justice Arden in *Fonecomp Limited v HMRC* [2015] EWCA Civ 39:

> "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."

(5) In other words, the trader need not know the details of the fraud or of the connection between its transactions and the fraudulent evasion of VAT: *Fonecomp*.

(6) The Tribunal is entitled to rely on inferences drawn from the primary facts: *Mobile Export 365 v Revenue and Customs* [2007] EWHC 1737 Ch, at [20].

Transactions in the appeal

62. The Mecsek denial relates to 38 vehicles sold in VAT period 10/12; 40 in 01/13; 27 in 07/12, and 22 in 04/13.

63. The tables below show the following information for the vehicles in question:

(1) Sales invoice date

(2) Sales invoice number

(3) Customer name

(4) Model

(5) Registration number

(6) Sales price

Period 10/12

Sales invoice date	Sales invoice number	Customer name	Make and model	Reg no	Sales price (£)
30/04/12	7084	NS Cars	Range Rover Sport	HA11 EUN	35,700
07/08/12	7109	DM Cars	BMW F10	YB12 YJF	25,400
15/08/12	7110	DM Cars	Audi A4	FY61 YJO	15,350
15/08/12	7110	DM Cars	Audi A4	FY61 YKO	15,350
15/08/12	7110	DM Cars	Audi A4	FV61 RLX	15,350
22/08/12	7111	DM Cars	MercBenz E Class	YP12 HBJ	37,060
22/08/12	7112	DM Cars	BMW E70	RF12 PPX	44,000
31/08/12	7113	DM Cars	BMW F11	YB12 ZHV	25,500
31/08/12	7114	DM Cars	Evoque	AP12 FPT	37,500
04/09/12	7116	DM Cars	BMW 520	NL12 NWT	22,000

07/09/12	7117	DM Cars	Audi A4	FY61 TUP	15,350
07/09/12	7118	DM Cars	Audi A4	FY61 YJZ	15,350
07/09/12	7119	DM Cars	Audi A4	FY61 PXD	15,350
07/09/12	7120	DM Cars	Audi A4	FY61 YJA	15,350
12/09/12	7121	DM Cars	Audi A3	YY10 LLJ	10,800
12/09/12	7122	DM Cars	Toyota Yaris	RJ58 TUY	6,000
12/09/12	7123	DM Cars	Audi A5	BT09 GWL	17,375
13/09/12	7124	DM Cars	BMW F11	WF12 PZT	23,600
28/09/12	7125	DM Cars	Ford S-Max	FP10 KFU	10,650
28/09/12	7126	DM Cars	Volvo XC90	AJ11 HPC	21,550
28/09/12	7127	DM Cars	Audi A6	DA09 ZFB	11,200
28/09/12	7128	DM Cars	Ford Focus	BG11 XFN	7,600
28/09/12	7129	DM Cars	BMW F10	YK12 ULS	24,000
28/09/12	7130	DM Cars	Audi Q7	MK62 CZT	41,800
28/09/12	7131	DM Cars	BMW F11	PN12 XTR	24,550
28/09/12	7132	DM Cars	BMW E70	YC61 TXT	31,400
28/09/12	7133	DM Cars	BMW E70	SM12 HTJ	36,000
02/10/12	7134	DM Cars	Audi A4	FY61 YKC	15,200
02/10/12	7135	DM Cars	BMW 520	YK12 ONP	24,350
03/10/12	7137	DM Cars	Audi A6	AK12 EWG	21,800
11/10/12	7140	DM Cars	Audi A4	FY61 YLK	15,200
11/10/12	7141	DM Cars	Audi A4	FY61 YJU	15,200
11/10/12	7142	DM Cars	BMW 520	EJ11 ZZF	21,700
16/10/12	7143	DM Cars	BMW F11	YH61 XBG	23,850

24/10/12	7144	DM Cars	BMW F11	BV12 WPA	25,500
26/10/12	7145	DM Cars	BMW F11	BV12 GYU	26,250
26/10/12	7146	DM Cars	BMW F10	MK12XHN	25,800
31/10/12	7147	DM Cars	Seat Leon	MA59 HLX	6,400

Period 01/13

Sales invoice date	Sales invoice number	Customer name	Make and model	Reg no	Sales price (£)
02/11/12	7148	DM Cars	Audi A4	FY61 TLJ	15,200
09/11/12	7150	DM Cars	RR Evoque	DV62 ORG	38,500
09/11/12	7151	DM Cars	Audi A4	FT61 VTL	15,200
09/11/12	7152	DM Cars	Passat 1.6	WR61 XYS	12,700
09/11/12	7153	DM Cars	Passat	FR61 XYS	12,700
20/11/12	7156	DM Cars	BMW 520	RJ11 HDZ	22,000
20/11/12	7157	DM Cars	BMW F10	SD12 GTU	23,100
23/11/12	7158	DM Cars	Audi A4	FV12 CTO	16,300
23/11/12	7158	DM Cars	Audi A4	FV12 CTY	16,300
23/11/12	7158	DM Cars	Audi A4	FV12 CSU	16,300
23/11/12	7158	DM Cars	Audi A4	FV12 CTK	16,300
29/11/12	7159	DM Cars	BMW X5	YG12 JFZ	35,000
04/12/12	7160	DM Cars	VolvoXC90	AJ11 MMF	22,000
04/12/12	7161	DM Cars	Audi A4	FV12 UZW	18,100
04/12/12	7161	DM Cars	Audi A4	FT12 HYF	18,100
04/12/12	7162	DM Cars	BMW E70	YH12 XRR	37,300
14/12/12	7165	DM Cars	Merc E200	EO12 OTS	20,000

14/12/12	7166	DM Cars	Audi A4	FV12 DSU	16,400
14/12/12	7167	DM Cars	Citroen Picasso	MF60 YNK	8,400
14/12/12	7168	DM Cars	VW Passat	FR61 FXV	12,500
14/12/12	7169	DM Cars	VW Passat	FR61 FYC	12,600
19/12/12	7170	DM Cars	Audi A4	FV12 CVK	16,400
19/12/12	7171	DM Cars	BMW F10	FG12 PZD	25,400
21/12/12	7173	DM Cars	BMW 520	YE11 XLL	20,000
07/01/13	7174	DM Cars	Audi A6	AK12 BDV	20,600
15/01/13	7177	DM Cars	RR Evoque	SY62 YKC	41,800
15/01/13	7178	DM Cars	RR Evoque	YF62 VLU	39,600
15/01/13	7179	DM Cars	Merc S350	KN11 OBY	34,600
15/01/13	7180	DM Cars	Toyota Hilux	LP62 JRX	19,900
15/01/13	7181	DM Cars	Toyota Hilux	LP62 JSV	19,900
15/01/13	7182	DM Cars	BMW 520	LS62 SNY	27,800
21/01/13	7184	DM Cars	Golf 1.6	BT10 MVM	8,600
21/01/13	7185	DM Cars	Seat Leon	BN59 WNX	7,200
21/01/13	7187	DM Cars	Vauxhall Insignia	KU10 XRD	8,100
21/01/13	7189	DM Cars	BMW 520	SW10 LRO	15,200
23/01/13	7190	DM Cars	Ford S-Max	BD11 CXV	12,000
23/01/13	7191	DM Cars	Passat 1.6	FV12 XAM	12,500
23/01/13	7192	DM Cars	Passat 1.6	FV12 XAJ	12,500
23/01/13	7193	M3 Car	Vauxhall	HN60 YHD	8,400

		Sales	Insignia		
31/01/13	7196	DM Cars	Audi A4	EN62 TYT	22,500

Period 07/12

Sales invoice date	Sales invoice number	Customer name	Make and model	Reg no	Sales price (£)
02/05/12	7082	NS Cars	BMW 320	FY11 EPE	17,875
10/05/12	7083	NS Cars	Ford Galaxy	FN61 XHX	15,800
22/05/12	7085	NS Cars	BMW 520 x 70892	YK61 RUH YK61 SKD	21,400
24/05/12	7086	NS Cars	Land Rover Evoque	CE12 USF	40,125
24/05/12	7087	NS Cars	Range Rover Sport	YE12 KFV	45,00
24/05/12	7088	NS Cars	BMW 520	KR61 JJK	25,600
24/05/12	7089	NS Cars	BMW 520	YY61 OAM	24,900
01/06/12	7090	NS Cars	BMW 520	TD61 YTZ	22,800
08/06/12	7092	NS Cars	Citroen C5	WD59 ECN	7,480
08/06/12	7093	NS Cars	BMW 520	YS61 UJV	24,550
12/06/12	7094	NS Cars	Toyota Avensis	FE10 AEU	8,450
12/06/12	7095	NS Cars	BMW 520	YY61 OXB	24,350
14/06/12	7096	DM Cars	BMW 520	PK61 BZH	26,000
14/06/12	7097	DM Cars	Audi Q5	GY09 RKK	17,300
19/06/12	7098	DM Cars	BMW 320	YS61 BWX	22,650

22/06/12	7099	DM Cars	BMW 5	YS61 YXK	22,700
26/06/12	7100	DM Cars	Citroen C5	YY09 FEJ	6,895
28/06/12	7101	DM Cars	Toyota Avensis	FE10 AFJ	8,200
29/06/12	7102	DM Cars	BMW 520	RK12 WAJ	29,200
29/06/12	7103	DM Cars	BMW 520	WN61 5ZT	21,425
04/07/12	7104	DM Cars	Merc CLS	ML12 DZS	44,900
10/07/12	7105	DM Cars	Audi A6	OV11 OJS	18,000
10/07/12	7106	DM Cars	Merc E250	DA12 NGV	31,400
18/07/12	7107	DM Cars	Ford Focus	FE11 PXH	18,000
18/07/12	7107	DM Cars	Ford Focus	FE11 RFL	9,000
18/07/12	7107	DM Cars	Ford Focus	EX11 EHY	9,000
27/07/12	7108	DM Cars	BMW 520	VE61 FYJ	23,375

Period 04/13

Sales invoice date	Sales invoice number	Customer name	Make and model	Reg no	Sales price (£)
01/02/13	7197	DM Cars	Audi A4	FV12 CVG	16,350
01/02/13	7198	DM Cars	Audi A4	FV12 CXA	16,350
07/02/13	7199	DM Cars	BMW 520	EK12 BVD	25,000
28/01/13	7200	DM Cars	BMW F10	NL12 VKO	24,500
19/02/13	7201	Mrs T Simpson T/A M3 Cars*	BMW 520	YD61 YLZ	21,000
19/02/13	7202	M3 Cars	Audi Q7	EU62 DVK	38,750

18/01/13	7203	M3 Cars	Ford Focus	LD58 LXE	4,200
28/01/13	7204	M3 Cars	Ford Galaxy	FD11 PGF	13,000
08/01/13	7205	M3 Cars	Ford Focus	EA11 YFO	7,400
05/12/12	7206	M3 Cars	BMW 520	YE11 XHK	20,000
08/01/13	7207	M3 Cars	Toyota Hilux	FG62 THV	20,100
08/01/13	7207	M3 Cars	Toyota Hilux	FG62 TJU	20,450
08/01/13	7207	M3 Cars	Toyota Hilux	FG62 THK	20,100
10/01/13	7207	M3 Cars	Toyota Hilux	FG62 THU	20,450
22/02/13	7208	M3 Cars	BMW 520	ET12 JDU	26,000
09/02/13	7208	M3 Cars	BMW 520	FG62 CXB	26,000
25/01/13	7212	M3 Cars	Audi A4	FT60 WEK	13,500
02/02/13	7213	M3 Cars	Hyundai 140	RE62 CFX	12,250
12/02/13	7214	M3 Cars	Hyundai 140	RE62 BDZ	12,250
24/01/13	7215	M3 Cars	VW Passat	DV61 DKX	11,350
25/01/13	7216	M3 Cars	Audi A4	FT12 LVA	17,200
28/02/13	7217	M3 Cars	BMW 520	ET12 FDV	24,900

* References to M3 Cars are to Mrs T Simpson T/A M3 Cars

Mecsek-Gabona—the arguments of the parties

64. The arguments advanced by each party did not always distinguish between those relevant to the Mecsek denial and those relevant to the Lack of Evidence denial. However, we now summarise the submissions of the parties which relate to the Mecsek denial.

HMRC's arguments

65. HMRC submitted that the evidence clearly established that there had been substantial VAT losses as a result of the vehicles in the appeal being sold to a series of missing or defaulting traders in the Republic of Ireland. The evidence also showed that those losses resulted from fraud, including the presence of some of the vehicles in contemporaneous parallel supply chains. The necessary connection to that fraud was plain because Taylors sold the vehicles to the missing or defaulting traders.

66. Mr Puzey submitted that collectively Taylors had the necessary knowledge or means of knowledge to connect the sales to fraud, particularly the fraud perpetrated by Alan Simpson and those acting under his control or at his direction.

67. In particular, HMRC relied on the cumulative effect of the following factors as demonstrating means of knowledge:

(1) Selling cars to the EU was a completely new trade for Taylors, and not part of its long-established trade, yet despite Taylors' lack of relevant experience the business grew very rapidly, with little commercial risk to Taylors since its practice was to buy the vehicles only when a sale had been agreed.

(2) The customers were all new to Taylors. Contrary to initial assertions by Taylors that the onward buyers of the vehicles were large dealerships in the Republic of Ireland, there was no evidence to support this. The buyers from Taylors were in reality a series of puppets controlled by Alan Simpson.

(3) The rise in Taylors' turnover as a result of the sales to the Republic of Ireland was so large and so rapid that Taylors must or should have been on notice that something untoward might be occurring. As a result of the sales, the company's turnover doubled in 2012.

(4) The profit from each sale by Taylors was approximately £1,000, regardless of the purchase or sale price of the vehicle. Taylors said that this figure had been agreed with Alan Simpson. This was uncommercial, and also peculiar given that Alan Simpson would have had no direct knowledge of the price paid by Taylors for each vehicle.

(5) Every one of the sales in the appeal was to a series of missing traders in turn, with each nominal trader understood by Taylors to be acting at the direction of Alan Simpson.

(6) Taylors carried out no meaningful due diligence on any of its buyers, notwithstanding the high values of the goods being sold.

(7) Taylors knew that Alan Simpson lay behind all of the buyers of the vehicles in the appeal, and also knew he was a failed businessman. Yet they showed an almost complete lack of curiosity as to Mr Simpson and his business arrangements, and, for example, never thought to question why he apparently needed three VAT registered entities to carry on his business.

(8) Most of the sales were paid for not by the buyers from Taylors but by third parties. Taylors did not question why this should be, knew nothing material

about these third parties and carried out no meaningful enquiries in relation to them.

(9) The attempt by Mr and Mrs Taylor to register a new car sales company for VAT was made on the basis of invalid invoices and false information.

(10) Taylors continued to sell cars to missing traders even after HMRC had warned them of possible risks in relation to these traders.

(11) If the sales had not been zero rated but standard rated, Taylors would have made a loss on each vehicle. It was only VAT, and the VAT repayments from HMRC, which made the sales profitable.

(12) Taylors did not initially disclose this significant new business to HMRC. Nor did they advertise it on their website, although it quickly grew to half of their turnover.

(13) Taylors made no meaningful changes to their business practices in the face of warnings from HMRC.

(14) There were numerous irregularities and inconsistencies in the sale and transport documents for the sales.

Taylors' arguments

68. For Taylors, Mr Brown submitted that HMRC had not produced sufficiently clear evidence to prove the existence of any tax loss.

69. Mr Brown also argued that even if a tax loss were established, HMRC had not proved that it arose as a result of tax fraud. On the evidence, no fraud on the part of Alan Simpson or any of the traders who bought cars from Taylors had been established. It was plausible that there had been no intent on the part of Mr Simpson to evade VAT, but simply "a big mistake".

70. In relation to the parallel deal chains alleged to exist by HMRC, Mr Brown argued that any such chains could not in any event be connected to any fraud in the Republic of Ireland, and it was only a fraud in the Republic rather than Northern Ireland which had been pleaded by HMRC.

71. In respect of the connection between the transactions in the appeal and any tax fraud, Mr Brown accepted that if a tax loss was proved in the Republic of Ireland, the necessary connection would exist. Taylors did not, however, accept that their sales were connected with any VAT fraud in any other chains which might exist in relation to the vehicles.

72. In relation to knowledge or means of knowledge, Mr Brown emphasised that all of the witnesses for Taylors had denied any knowledge of fraud. As to means of knowledge, the accounts given by the witnesses amounted to "compelling evidence of commercial rationale and commercial transactions, and of dealings in the car business in the real world". In particular, the specific factors raised by HMRC did not establish actual or constructive knowledge for the following reasons:

(1) The sales carried real commercial risks for Taylors, as evidenced by the fact that Taylors was not paid for some of the sales.

(2) Taylors took professional advice (from Ms Broadey's firm) in relation to their VAT responsibilities, and this demonstrated the *bona fides* of the business.

(3) At the time of the periods under appeal there was nothing to alert a trader that MTIC fraud was prevalent in the car sales market, and HMRC accepted this.

(4) During the periods under appeal, HMRC had not alerted Taylors to MTIC fraud as a risk.

(5) The relevant test for constructive knowledge is a high hurdle, and it required HMRC to show that there was "no other reasonable explanation" than fraud.

(6) Due diligence by Taylors on its customers is not materially relevant. In any event, Mr Kempster knew Alan Simpson, and that Alan Simpson effectively controlled the buyers from Taylors, so there would have been "little point" in any further due diligence.

(7) The "consistent" level of profit per sale was in fact not consistent, and, in context, was not contrived or artificial.

(8) In relation to third party payments, not all of the cars sold were paid for by third parties. In any event, Taylors sought professional advice on this point, and Ms Broadey advised that such payments were acceptable for VAT purposes.

(9) Taylors supplied HMRC with voluminous "deal packs" for a period before those under appeal and HMRC verified the returns for that period and authorised a repayment of VAT. Taylors obviously took comfort and reassurance from this that all was in order.

(10) While Taylors' turnover may have risen as a result of the sales to the Republic of Ireland, financial tests other than turnover are relevant. The profit on those sales was less than 10% of Taylors' total profits.

(11) The attempt to register a new car sales company for VAT was made "on commercial grounds" and signified nothing underhand.

(12) Taylors had no legal obligation to inform HMRC of its new business, and its relevant business records hid nothing.

(13) Taylors did not "sell vehicles at a loss" as alleged by HMRC. It simply applied the appropriate VAT rules to its purchases and sales.

(14) Any irregularities in documentation were irrelevant.

Mecsek denial—findings of fact and discussion

73. Before considering the four elements of the Mecsek denial, on which HMRC bear the burden of proof, we record our observations in relation to the witnesses who gave evidence before us.

74. We found the evidence of the witnesses to be credible and reliable, subject to the following qualifications.

75. We found Mr Taylor's continued insistence that he left virtually all aspects of the car sales business to Mr Kempster and Ms Harvey to be highly surprising. At the time of the periods under appeal, Mr Taylor had built a sizeable and successful service and repair business. By any measure he was a successful and highly experienced businessman, and in his evidence he certainly did not present as naive or gullible. Yet his evidence was consistently that he relied on Mr Kempster in relation to all aspects of the purchase and sale of cars to the Republic of Ireland, and on Ms Harvey in relation to the associated tax compliance, documentation, and the monitoring and allocation of third party payments. At one point he stated that he "had not looked at a bank statement for many years".

76. While this did not lead us to conclude that Mr Taylor's evidence was unreliable, we did conclude that in relation to the car sales business he had generally buried his head in the sand or turned a blind eye, and this was reflected in his evidence. Given that this business came to represent half of the turnover of a company which was very much under his sole control and direction, this caused us real concern.

77. Mr Kempster was Mr Taylor's right-hand man in relation to all aspects of the business of buying cars and selling them to the Republic of Ireland. He was clearly a highly experienced operator in a very competitive business sector. He did not, however, evidence the recollection of detail which this would lead one to expect, on many occasions responding that he could not recall the position. Cumulatively we gained an impression of a witness determined not to respond with evidence unfavourable to Taylors. As a consequence, we were not altogether convinced that all of his evidence was entirely complete and reliable.

Tax loss

78. The first question to be determined is whether there was a tax loss. We make the findings of fact set out below. In doing so we have given no weight to expressions of opinion by HMRC officers.

79. HMRC allege that substantial losses, totalling over €2 million, have arisen in relation to the cars sold by Taylors in the appeal as a result of the buyers failing to account for VAT.

80. As can be seen from the tables set out at [62], the cars in the appeal were all sold to one of three buyers, namely DM Cars, Tracey Simpson (trading as M3 Cars) and NS Cars. NS Cars was not a company, but rather the trading name of Zoe Brown.

(a) DM Cars

81. DM Cars was by far Taylors' largest customer in the periods in the appeal. It bought 95 cars out of a total of 127. DM Cars was the trading name of David McMahon.

82. We considered various items of information in relation to DM Cars and Mr McMahon for the relevant periods obtained by HMRC from the tax authorities in the Republic of Ireland under exchange of information arrangements. The response received on 27 February 2013 stated:

> "There is no business activity carried out at the address given. The trader has gone missing. Per information this taxpayer now resides in Northern Ireland."

83. Officer Smith of HMRC stated that on 7 February 2014 he received from the Irish authorities a "Missing Trader Form" relating to Mr McMahon which stated as follows:

> "(1) Tax payer is no longer resident at the premises. There are new tenants residing there and when I called there was a large volume of un-opened mail for David McMahon. The current tenant had never heard of DM as he was not the owner of the property.
>
> (2) VAT assessments have been raised and issued against DM. He has not appealed or paid these and I am in the process of writing off this debt as it is unrecoverable.
>
> (3) DM has been de-registered for VAT as of 13/02/13. This was backdated to 01/06/12.
>
> (4) DM is not a company official of any other companies in Ireland per our records."

84. The reply which we admitted as additional evidence was sent on 14 September 2017 and stated as follows:

> "David McMahon trading as DM Cars registered for VAT on 02/06/12 and had VIES [VAT as shown on the European VAT Information Exchange System] of approximately €4.3 million declared to his VAT number before his VAT number was cancelled with effect from 30 April 2013.
>
> For the period that he was registered DM has not filed any VAT returns or made any payments in relation to his liabilities.
>
> Assessments for VAT were raised as follows:
>
> Period 1/5/2013 to 31/12/2012 VAT due €793,001
>
> Period 1/1/2013 to 30/4/13 VAT due €206,156
>
> The assessments were raised on 2 July 2013 and were never appealed.
>
> No payments were ever made against the assessments. The liabilities were referred to HMRC for collection under the Mutual Assistance Recovery Directive but their efforts were unsuccessful, and no payments have been received against these assessments."

(b) Zoe Brown

85. Zoe Brown, trading as NS Cars, bought vehicles from Taylors in periods 07/12 and 10/12. HMRC produced a Combined Report ("the Report") dated 6 August 2013

describing the results of various Mutual Assistance requests to the tax authorities in the Republic of Ireland in respect of Zoe Brown, Tracey Simpson and Alan Simpson.

86. In relation to Zoe Brown, the Report asserts that in reality Ms Brown was acting entirely at the direction and under the control of Alan Simpson. We consider this issue further below. Ms Brown's VAT registration number was cancelled on a backdated basis on 8 June 2012, following a call, purporting to be from Ms Brown, in which she said that she had never traded as NS Cars. The Report sets out HMRC's view that the registration number had been hijacked and was being used solely for MTIC fraud. That is of course an expression of opinion, and not fact.

87. The Report also sets out and explains HMRC's view that the VAT registrations for Zoe Brown, Tracey Simpson and Alan Simpson were all involved in VAT fraud, with an estimated tax loss of €2,367,620. It recorded that VAT assessments had recently been entered on all three registrations for that sum, for the years 2009 to 2013, with no appeals received as at 6 August 2013. The registrations had been effectively cancelled, even though the assessment years remained open.

88. A reply from the Republic of Ireland authorities dated 25 September 2017 indicated that the assessments against Zoe Brown had been vacated, and the VAT remained unpaid.

(c) Tracey Simpson

89. The Report records HMRC's view that Mrs Simpson's registration was part of an overall MTIC fraud orchestrated by Mr Simpson. Again, that is opinion rather than fact, but for the reasons explained below we have concluded that all three registrations were under the control of Alan Simpson.

90. We were given by Mr Puzey during the hearing an up to date response from the tax authorities in the Republic of Ireland which stated as follows:

> "On 24 July 2013 based on the value of VIES on record at the time assessments were raised on Tracey and Alan Simpson and letters were issued advising them accordingly. The assessments were raised as part of disruption tactics in this area and also as part of any potential criminal prosecution proceedings. These assessments were appealed but were not advanced to a hearing or a conclusion.
>
> It has been decided to take the following actions:
>
> -- vacate the assessments raised in each case
>
> --issue letters to both parties advising that the case has been closed and that VAT assessments originally raised have been vacated.
>
> --review recent/current information held with a view to opening a new intervention as necessary. The file is with our investigations and prosecutions division."

(d) Conclusions

91. Mr Brown sought to argue that the vacating of some of the assessments in particular meant that a tax loss had not been proved by HMRC. We disagree. We consider that taken as a whole the evidence establishes that on the balance of probabilities a tax loss arose.

92. As to the existence of a tax loss in a *Kittel* context, we respectfully agree with the approach of the FTT in *S&I Electronics v HMRC* [2009] UKFTT 108(TC), at [61], approved in *Aircall International & anor v HMRC* [2016] UKFTT 406 (TC), at [63]:

> "…The issue is whether there is, in the words of paragraph [59] of Kittel, 'fraudulent evasion of VAT'. It seems to us that this will be the case where, as a result of fraud, the State does not receive the VAT it ought to have received had the relevant legislation been complied with by the trader. The question of whether or not an assessment has been made is irrelevant."

93. All of the ostensible buyers from Taylors in the periods under appeal were and are defaulting traders. None has submitted a single VAT return for the periods under appeal. That was not challenged. The evidence of substantial tax losses in relation to David McMahon and DM Cars, who bought 75% of the cars in the appeal, is in our judgment clear—he made no VAT returns, made no VAT payments, made no appeals against the VAT assessments made, and has gone missing owing a substantial amount of VAT. It is hard to imagine what more might be available to evidence a tax loss in an MTIC context.

94. The evidence in respect of Zoe Brown and Tracey Simpson is less clear cut. In particular, the fact, which we accept, that Mr and Mrs Simpson appealed against the July 2103 assessments is of some assistance to Mr Brown's view. However, it is more than outweighed by the evidence of a tax loss in relation to all three buyers from Taylors. In addition, as we discuss below we find as a fact that all three of the ostensible buyers were acting at the direction and under the control of Alan Simpson, making it more likely than not in our judgment tax losses arose regardless of the nominal registration.

95. HMRC have for these reasons proved that on the balance of probabilities a tax loss arose.

Fraud

96. The second question is whether the tax loss resulted from fraudulent evasion. We make in this context the findings of fact referred to below, attaching no weight to expressions of opinion by HMRC officers.

97. The reasons we have given above for our conclusion that a tax loss arose themselves strongly support the conclusion that on the balance of probabilities the loss arose from fraudulent evasion. Particularly in relation to David McMahon, there

is no evidence that he was an honest but mistaken trader as opposed to a deliberate defaulter.

98. The facts which we have found and the facts which we find below point towards two possible frauds. The first is a relatively unsophisticated acquisition fraud, in which the vehicles were initially sold zero rated to a buyer registered in the Republic of Ireland under the control of Alan Simpson, and were sold on to Northern Ireland or elsewhere outside the Republic without VAT being accounted for.

99. In addition, however, as we discuss below there is evidence of a number of parallel deal chains, in which 32 of the vehicles in the appeal were or were purportedly sold in other transactions, indicating a wider fraud.

100. HMRC do not have to prove which deal chain was genuine: see the passage from *Megtian* approved in *Fonecomp* and set out at [61(4)] above.

101. As discussed below, we find that Alan Simpson effectively controlled all three registrations which led to a tax loss. The only evidence to suggest that Mr Simpson was not acting fraudulently is the hearsay evidence given by Mr Kempster that Mr Simpson had been incorrectly using the second-hand margin scheme for VAT purposes. In our judgment, even if that were the case, it does not prove absence of fraudulent motive, because we do not know why he was using an incorrect VAT treatment. The overwhelming weight of evidence supports the conclusion that HMRC have established on the balance of probabilities that the loss resulted from fraudulent evasion.

Connection

102. The third question is whether the transactions in the appeal were connected with the fraudulent tax loss.

103. Given that the central fraud in this case was acquisition fraud, it is self-evident that the sales by Taylors were connected with that fraud. Rightly in our view, Mr Brown accepted this.

104. In light of this it is not necessary for us to determine whether the transactions were also connected with fraud in any parallel deal chains.

Knew or should have known and failed to take all reasonable steps--discussion

105. We now turn to the final issue, namely whether Taylors knew or should have known that its sales were connected to a tax fraud.

106. It is worth reiterating that the relevant formulation in considering a denial of zero rating is not *Kittel* but *Mecsek-Gabona*. As set out at [51] above, there is no entitlement to zero rating if the Tribunal "reach the conclusion that [Taylors] knew or should have known that [the sale] was part of a tax fraud committed by the purchaser and that [Taylors] had not taken every step which could reasonably be asked of it to

prevent that fraud from being committed." Paragraph [55] of *Mecsek-Gabona* replaces the closing words of this passage with what in our judgment is a more appropriate test, namely "every reasonable step within its power to prevent its own participation in that fraud."

107. We have already set out, at [54] to [62] above, our approach to the application of this test and the case law principles which we have taken into account in considering the issue.

108. The summary chronology at [28] to [41] describes briefly the background to the assessments in this appeal.

109. HMRC justify the Mecsek denial by reference to the cumulative effect of a number of factors in relation to the sales. Mr Brown has raised other factors in arguing that HMRC were wrong. We consider each of these factors in turn, including the competing submissions of the parties. However, we have throughout kept in mind the need to consider the evidence as a whole and, in the words used in *Davis and Dann*, to stand back and consider the totality of the evidence. Where relevant we make the findings of fact set out blow, for the reasons given.

110. The application of the *Mecsek-Gabona* formulation to Taylors in this appeal in practice involves ascertaining the knowledge, means of knowledge, and steps taken by three individuals. They are Mr Taylor, Mr Kempster and Ms Harvey. Mr Taylor is the owner of Taylors and the controlling force behind it; it is his business. Mr Kempster acted with the full authority of Taylors in buying and selling each of the vehicles in the appeal, it was his familiarity with Alan Simpson on which Taylors relied in setting up and carrying on this new business, and he dealt with Mr Fay in relation to the sale and dispatch of the vehicles. Ms Harvey was responsible for the documentation and paperwork and detailed VAT compliance in respect of the sales. Mr Brown did not seek to challenge that it was the knowledge of these three individuals which was to be imputed to Taylors.

111. Before considering factors which Mr Brown submitted pointed against Taylors being properly denied zero rating in accordance with *Mecsek-Gabona*, we consider each of the main factors identified by HMRC as indicators that Taylors knew or should have known of the connection to fraud and failed to take all reasonable steps to prevent their participation. Those factors are as follows:

(1) Lack of knowledge and due diligence in relation to customers

(2) Rapid rise in turnover

(3) Profit per sale

(4) Third party payments

(5) Awareness of risk of fraud

(6) Attempted registration of sales company

(7) Absence of disclosure

(8) Significant errors and discrepancies in sales and dispatch documents

Lack of knowledge and due diligence in relation to customers

112. At the time of the periods under appeal, Mr Taylor had been carrying on the business of servicing and repairing cars since 1987. He described the company's business as follows:

> "The primary focus of my business has always been service and repair work, the routine servicing and maintenance of motor cars and repairing damaged ones… Taylors is an accredited and approved service and repair centre for Range Rover, Land Rover, Jaguar and Renault."

113. Mr Taylor explained that since 1987 he had occasionally bought and sold cars, based on any demand from customers of the main business. He stated that in 2008 Taylors entered into an informal, undocumented agreement with Mr Kempster, a business associate, whereby Mr Kempster would be financed by Taylors to buy and sell cars on a commission basis. Those occasional sales were to private customers and did not involve any exports of vehicles.

114. The opportunity to export cars to the Republic of Ireland arose through contacts of Mr Kempster. Mr Taylor stated that:

> "…the opportunity arose around August/September [2011] about three years after Taylors and Laurie [Kempster] had begun doing car sales together. I was told by Laurie that he had a contact, Mike Fay, who was working for someone called Alan Simpson, and they were looking to source cars in the UK for car dealers in Ireland. Laurie told me that he had known Mike Fay for many years and had sold some cars to him in the past."

115. In relation to the sales in this appeal, the cars were usually bought by Mr Kempster acting for Taylors from an authorised car dealer, trader or car auction. The 127 vehicles were then sold to one of three buyers, as follows:

(1) In period 07/12, 12 to Zoe Brown trading as NS Cars and 15 to David McMahon trading as DM Cars.

(2) In period 10/12, 37 to DM Cars and 1 to NS Cars.

(3) In period 01/13, 39 to DM Cars and 1 to M3 Cars.

(4) In period 04/13, 4 to DM Cars and 18 to M3 Cars.

116. As a matter of principle and absent other factors, a failure to carry out due diligence on a customer does not necessarily imply knowledge or means of knowledge that the customer is involved in fraudulent activity. As *Mobilx* makes clear, due diligence *per se* is not the issue. However, a trader who carries out no meaningful due diligence in respect of new customers may in practice be turning a blind eye to that risk. It depends on all the circumstances.

117. The first letter from HMRC to Taylors refusing zero rating was dated 15 May 2014 and contained the following passage:

> "From the evidence to support their repayment claims, Taylors provided the following information to form the basis of their due diligence checks:
>
> --A vehicle history check based on 27/78 vehicles that Taylors purchased & sold. From these 27 vehicles, all these checks were undertaken between 19-134 days **after** the vehicles were sold to their customers.
>
> David McMahon T/A DM Cars:
>
> -- Taylors provided HMRC David McMahon's drivers licence as a form of due diligence in 8/76 transactions involving the sale of vehicles to David McMahon T/A DM Cars.
>
> Zoe Brown T/A NS Cars:
>
> -- Taylors provided HMRC a VIES VAT Number Validation print taken from the European Commission VIES. This confirms the company's VAT number. The PPOB of the trader is confirmed as 62 Cord Rd, Drogheda, County Louth, Dated 15/05/2012, **However**
>
> --The Europa Site Validation Response sheet showed the PPOB based at The Glen, Trinity Gardens, Drogheda, County Louth, Dated 09/02/2012
>
> -- An email from NS Cars Dated 09/02/12 confirms NS Cars based at 11, The Glen, Trinity Gardens, Drogheda, Co Louth, which shows inconsistent results on the due diligence undertaken & Taylors did not seek clarification on.
>
> Tracey Simpson T/A M3 Car Sales:
>
> -- There is no evidence in Taylors business records to confirm any due diligence was carried out on this trader. However Taylors did verify Tracey Simpson T/A M3 Car Sales via the Wigan Verification Team on the 26/4/13, after the phone MTIC education to Jeremy Taylor dated 28/02/13 and after the hand delivered Public Notice 726 on Joint & Several liability for unpaid VAT."

118. We find as a fact that the only due diligence carried out by Taylors on the three buyers other than that referred to in this extract was that at some stage they obtained a copy of David McMahon's passport.

119. We find that such due diligence as was carried out was not meaningful, being either after the relevant event, of little relevance or without follow up in relation to any inconsistencies. The "hands off" approach of Mr Taylor is clear from the following passage from his witness statement:

> "Laurie got some information about these Irish dealers from his conversations with Mike Fay and Alan Simpson…Laurie would have told me some of that information at the time, for example I knew that Tracey Simpson was Alan Simpson's wife, but I would not have been

> chasing Laurie for every detail of what he was told by Mike Fay and Alan Simpson…"

120. It was a feature of the evidence for Taylors that the three individuals, Mr Taylor, Mr Kempster and Ms Harvey, would each at various stages pass the burden of responsibility for some aspect of the sales to one of the others. Mr Taylor's evidence in relation to the three buyers was that he left things entirely to Mr Kempster. Mr Kempster's evidence was that he did not recall meeting either David McMahon or Zoe Brown before or during the period of the sales, although he spoke with David McMahon on the telephone. He had no meaningful knowledge, and did not trouble to obtain any, in relation to their business experience, solvency or credit history.

121. Mr Fay's evidence was as follows:

> "David McMahon was a nephew of Alan Simpson. He lived in East Dublin. Alan Simpson told me that as a family favour he was trying to teach David McMahon the car sales business and set him up in it. He would be in the office at the Kells Road site sometimes, but he was a young guy and he did not seem to have much of a clue about the business."

122. As regards Zoe Brown, from the evidence of Mr Kempster and Mr Fay and the response given by the tax authorities in the Republic of Ireland to the information request, we find as a fact that at the time of the sales Zoe Brown was 19 years old and her father ran a car auction business, but she had no direct experience of the motor trade. There is evidence to suggest that she was pressurised into the VAT registration by Alan Simpson.

123. Stepping back and looking at the totality of the evidence, we find as a fact that all three VAT-registered buyers were acting under the control and at the direction of Alan Simpson. We rely in particular on the following evidence taken together, subject to the general caveat we make above regarding tax authority expressions of opinion:

(1) The tax authorities in the Republic of Ireland considered that all the evidence pointed to this. To take one example of their response:

> "… [NS, M3 and Alan Simpson] are totally connected and considered to be totally linked to highly suspect transactions involving the acquisition of second hand motor vehicles from the UK and onward sale to VAT Registered main motor dealers in this State and/or despatched again to the UK. It is considered that Alan Simpson is the orchestrator of these transactions."

(2) Mr Fay, who acted for Mr Simpson, gave evidence that Alan Simpson controlled and effectively ran the businesses of all three buyers. He stated as follows:

> "As far as I know Tracey Simpson, David McMahon and Zoe Brown were never involved in negotiating the purchases and sales of the cars. It seemed to me that Alan Simpson did all the bookkeeping that needed to be done for these businesses… Alan Simpson also handled all the money for M3 Car Sales, DM Car Sales and NS Cars. He had control

> of their business bank accounts. Each business had its own business bank account and Alan Simpson was able to access all the accounts via the internet…"

(3) Mr Taylor's evidence in cross-examination was that at the time of the sales Taylors knew that notwithstanding the ostensible buyers they were "selling to Alan Simpson". He stated that M3 Cars "was Alan Simpson" and that "Alan Simpson ran and controlled NS Cars".

(4) Mr Kempster's evidence in cross-examination was that Alan Simpson was "arranging the deals on behalf" of the three buyers. He described Zoe Brown as "under the direction of Alan Simpson" and said that when he was trading with DM Cars he knew he was trading with Alan Simpson.

124. Taylors sought to argue that the common control by Alan Simpson justified the absence of any meaningful due diligence in relation to the three buyers. What point would it have served, it was put to us, when the real buyer was Alan Simpson and Mr Kempster knew Alan Simpson?

125. In fact, Taylors did not carry out any due diligence in relation to Alan Simpson. Mr Kempster's evidence was that he had not met him before he started dealing with him. The extent of his knowledge was that "he was a failed businessman from the financial crash in Ireland from 2008 but he had been in the motor trade for many years". Mr Taylor's evidence in cross-examination was as follows:

> "Q. What did you know about Alan Simpson at this time, in the middle of 2012?
>
> A. He was a motor trader in the south of Ireland.
>
> Q. Anything else?
>
> A. No.
>
> Q. What was his background?
>
> A. His background, he was a failed businessman, as a lot of people were in Ireland at that time, and he was married to Tracey Simpson and he was trading under Tracey Simpson's name.
>
> Q. What checks did you do on him?
>
> A. Personally none.
>
> Q. What checks did you cause to be done on him?
>
> A. What checks…
>
> Q. This is a failed businessman who you are about to send a large amount of cars, prestige names, to him?
>
> A. Personally I didn't make any checks.
>
> Q. And you didn't ask anybody to do any on your behalf?
>
> A. I trust the people I employ.
>
> Q. Did you instruct them to check him out?
>
> A. No, I did not. I assumed they had.

Q. There was no contract with him, was there?

A. No sir, there was not.

Q. What were the terms of business?

A. Handshake."

126. In our judgment, far from justifying a lack of due diligence, the knowledge on the part of Taylors that all three buyers were controlled by "failed businessman" Alan Simpson should have rung a number of alarm bells, and prompted attempts to obtain information as to the risk that the sales might be connected to fraud. We consider this to be so for several reasons.

127. First, businessmen as experienced as Mr Taylor and Mr Kempster should have asked themselves, and then Mr Fay and Alan Simpson, why it was apparently necessary for Alan Simpson to operate through three separate VAT registrations. The witness statements from Mr Taylor and Mr Kempster provided no indication that this issue had either concerned them, or that they had thought it might have an innocent explanation. In cross-examination, each of them suggested that more than one registration might have been needed to keep the onward retail and business customers separate. In fact, there was no evidence, either then or at the hearing, that such a separation had occurred, and we suspect that this possible explanation occurred to both witnesses after the event. Put simply, what innocent explanation could there have been for Zoe Brown or David McMahon to have registered for VAT, when, as Taylors well knew, they were not negotiating the deals, keeping the records, or controlling their business finances?

128. Secondly, the risk that the three VAT registrations might have been used to facilitate evasion was increased by the fact that the vast majority of sales were made to the buyers in sequential blocks, as problems arose such as the withdrawal of the registration for NS Cars.

129. Thirdly, Taylors' awareness should have caused them to appreciate that any VAT-related problem with one buyer might imply problems with the others, as all three were controlled by the same puppet-master.

130. The importance of due diligence in relation to Alan Simpson was in our view further increased by other factors present in this case. The goods being sold were not mobile phones or iPods but vehicles each costing substantial sums of money, often tens of thousands of pounds. They were sold in volume over a relatively short period. Additionally, the sales were not transacted electronically, when it can be more difficult to know the customer, but by physical sale between identified individuals. We agree with the observation made by the FTT in relation to car sales in *Grange Road Car Sales v Revenue & Customs* [2017] UKFTT 205 (TC) at [129]:

> "129. GRCS was immediately proximate to missing traders in 16 transactions, and at one remove in the remaining two. Even accepting that proximity, in and of itself, is not conclusive of knowledge or means of knowledge, we are bound to note that GRCS and Mr Mullan seemed, at best, to be completely indifferent to the bona fides of the

> persons with whom GCRS was actually, or ostensibly, dealing. This is particularly important given that the dealing was not of 'dematerialised' assets, with counter-parties known only through email or online, but was ostensibly with physical assets, namely vehicles, which were being physically moved from place to place, through GRCS's hands, and by persons with whom Mr Mullan was coming into contact."

Rise in turnover

131. Taylors' long-standing business of servicing and repairing vehicles is described above. The sales in this appeal comprised a new business venture for Taylors. Although it had previously bought and sold cars on an occasional basis, those sales were to or for customers of the main business and involved no export of vehicles, either to the Republic of Ireland or elsewhere. We were shown no evidence as to the volume of such prior sales, although Mr Taylor referred in his witness statement to 4-5 sales to UK customers per month by the time of the periods under appeal.

132. The sales negotiated by Mr Kempster to the three buyers registered for VAT in the Republic of Ireland and acting under the directing mind of Alan Simpson caused Taylors' turnover to more than double. In relation to the periods in this appeal, in a period of a little over 10 months there were sales of some £2.5 million. For the 14 months between January 2012 and March 2013 the total sales were £3.4 million.

133. In short, measured by turnover in less than a year this became Taylors' largest business.

134. Mr Taylor had first-hand knowledge of how difficult it would be to build and sustain a new business. This business was a new market for Taylors, with new customers, in another Member State, in which Taylors had no established reputation. In all these circumstances, in our view Taylors should clearly have been concerned that the business might be contrived or artificial, or otherwise connected to fraud. Put simply, and whether viewed objectively or subjectively, it should have occurred to them that such an increase was too good to be true.

135. Taylors suggested that the increase was not as significant as it seemed, because the resultant increase in profitability was much smaller. We of course accept that turnover is not the only measure of a company's business. It is the measure most relevant to VAT, which is based not on profit but on the consideration for a supply. More importantly, the fact remains that more than doubling turnover in less than a year in a new market with no reputation should have alerted Taylors to the risk that the sales were not genuine.

Profit per sale

136. There were two aspects of the profits made by Taylors on the sales in this appeal which are potentially relevant to the issue of means of knowledge.

137. The first is that the profit for each sale in this appeal depended on the VAT treatment of the purchase and sale. Taylors recovered input tax on the cars which it bought, but zero rated each sale. This resulted in Taylors being in a VAT repayment position for a number of periods. If the sales had been standard rated, they would have made a loss on each sale.

138. Mr Kempster's evidence on this issue in cross-examination was as follows:

> "Q…You knew this trade would not work unless you were able to zero rate, didn't you?
>
> A. It wasn't that we were—we weren't relying on the VAT as a profit centre. We were invoicing the cars zero rated as we were obliged to do and we were basing our profit from the net price of the car.
>
> Q. If Taylors had to pay the VAT on these sales you would be out of pocket, wouldn't you?
>
> A. Well, of course.
>
> Q. You would be making a loss on each car?
>
> A. Well, we wouldn't have done that, clearly."

139. The second point was that Mr Kempster reached an agreement with Mr Fay/Alan Simpson that Taylors would make and only make a profit of around £1,000 per car, regardless of the price at which the car was bought. This was split between Taylors and (as commission) Mr Kempster.

140. We considered a schedule prepared by HMRC, and not challenged by Taylors, which showed the profit per sale for sales to all three buyers, including but not limited to the periods under appeal. This indicated that the profit was between £700 and £1,100 in over 80% of sales, with about 10% above that range and 10% below.

141. Mr Kempster confirmed in cross-examination that he had agreed the £1,000 figure with Alan Simpson. He said that this was the profit which Taylors decided was necessary to make it a viable business prospect, and they also agreed it because they were dealing with experienced motor traders who were "not going to allow us to stick on willy-nilly a massive margin on each car".

142. In our view, this agreement was peculiar in commercial terms for two reasons. First, profit is not normally the same regardless of the purchase or sale price. As we put it to Mr Taylor, £1,000 may be a decent profit on a car bought for £10,000, but one would expect to make more profit on a car bought for £40,000. No business ignores return on capital. As the table at [15] shows, 30 of the sales in the appeal were priced at over £25,000. Secondly, while Alan Simpson may have been experienced in the motor trade, he could not possibly have known precisely how much Taylors had paid for a particular car, and therefore what sale price would result in a profit of £1,000.

143. We asked Mr Taylor whether the private car sales previously carried out by Taylors had generated roughly the same profit regardless of their purchase or sale

price. Not surprisingly, they had not. He offered as an explanation for the difference the increased potential liability as to repairs and warranties for the vehicles sold in mainland United Kingdom. However, in our view that misses the point; it might arguably justify a lower mark-up for the vehicles sold to the Republic of Ireland, but it would not justify a consistent mark-up.

144. We consider that the combination of the dependency on the VAT treatment to avoid a loss and the flat agreed profit per sale should have rung alarm bells for Taylors. The risk was that this was "easy money" for trading which was not genuine and commercial, in a highly competitive business sector in which Taylors had no depth of experience or reputation.

Third party payments

145. Most of the cars sold in this appeal were paid for by third parties, and not the ostensible buyers.

146. Out of the 127 sales, we find from the evidence, including Taylors' bank statements, that approximately 95 were paid for either by a cheque from a third party, or by a bank deposit which was not allocated to a particular sale.

147. The third parties were Paul Sava/Savas Autos, David McMahon, Q Autos, and Benjamin Nugent/Altmore Cars.

148. Mr Taylor's evidence, which we accept in this respect, was that he first became aware that third party payments were being made when Ms Harvey alerted him to a payment from Altmore Cars. He telephoned Ms Broadey of Essential VAT Services, who was then advising Taylors as to evidence of removal of the cars for VAT purposes, to ask about the VAT aspects of the payment.

149. Ms Broadey's evidence, which we accept in this respect, was that during the telephone call she told Mr Taylor "that accepting third party payments was not illegal, that third party payments do arise in all sorts of industries…and therefore that it was fine to accept them". She accepted in cross-examination that she gave this advice without any information or knowledge about who the third parties were; without sight of any bank statements, and without giving any advice to Taylors as to further enquiries in relation to the third parties. She justified this by the fact that the focus of her advice to Taylors at that time was on satisfactory evidence of removal of the cars for VAT purposes.

150. Each of the witnesses for Taylors gave evidence that no checks were carried out on any of the third parties or their VAT position. To take only one example of many, the position was typified in this exchange during Mr Kempster's cross-examination:

> "Q. Who are Altmore Cars? Who did you think they were?
>
> A. I don't know, sir.
>
> Q. Why were they paying for DM's cars?

A. I cannot answer that question.

Q. Where were they based? Weren't you interested to know?

A. I was not.

Q. As far as you were concerned, DM Cars' onward customers were large Southern Irish car dealers called Meridian or Kingstown?

A. The great proportion of the onward sales. This isn't to say other sales weren't carried out elsewhere.

Q. There were no third party payments from Meridian or Kingstown, were there?

A. Not as far as I'm aware but I wouldn't have been aware of that."

151. Doubtless Taylors gained some reassurance from the telephone call with Ms Broadey. But that advice was not requested or given on the basis of any of the information necessary to evaluate the question properly. It could not reasonably have been taken by a trader as carte blanche to accept any and all third party payments. In our judgment, Taylors turned a blind eye to the risks in this area, taking into account these issues in particular:

(1) The third party payments were not occasional, but formed a considerable majority of the sales.

(2) None of the payers were the "large Southern Irish dealers" which Mr Taylor and Mr Kempster purported to understand to be Alan Simpson's typical onward customers.

(3) The payers comprised a small group, rather than reflecting a multitude of separate onward customers.

(4) Taylors had no knowledge (other than in relation to David McMahon in his capacity as DM Cars) of who any of these third parties were.

(5) On its own evidence it took no steps at all to remedy that, and indeed saw no need to.

(6) It accepted third party deposits which were not allocated to particular sales, leaving it to Mr Kempster or Alan Simpson to given instructions to Ms Harvey as to the allocation.

(7) Taylors did not query why vehicles being sold to three traders in the Republic of Ireland were being paid for by motor dealers in Northern Ireland.

Awareness of risk of fraud

152. To what extent was Taylors aware of the risk of VAT fraud in relation to the sales or should it have been so aware? We have considered in particular in this context the nature and extent of any relevant warnings given by HMRC to Taylors; evidence as to Taylors' actual knowledge, and evidence as to the prevalence of VAT fraud in this sector at the time of the sales.

153. In relation to what HMRC communicated to Taylors, the summary chronology in this appeal is set out at [28] to [41]. The periods under appeal, it should be borne in mind, occurred between 07/12 and 04/13. The first indication from HMRC of any risk in relation to VAT fraud was contained in an email from HMRC to Ms Broadey, acting on behalf of Taylors, on 7 February 2013. This raised two potentially relevant concerns, namely that the three buyers had been deregistered for VAT by the tax authorities in the Republic of Ireland, and that there was evidence to suggest that some of the cars sold by Taylors were also appearing in parallel deal chains. On 28 February 2013 HMRC informed Taylors that Mr McMahon was a missing trader and gave them VAT Notice 726 ("Joint and several liability for unpaid VAT"). HMRC suspended the VAT repayment for period 01/13 on 7 March 2013. On 25 March 2013 HMRC issued Taylors with an "MTIC awareness" letter containing information in relation to MTIC fraud.

154. In relation to actual knowledge on the part of Taylors, we find as a fact that, following receipt of the HMRC latter of 28 February 2013 referred to above, Mr Taylor telephoned HMRC later that day, and during the call said in response to a question that although he had not heard of missing trader fraud, he had heard of carousel fraud. There was no other evidence to suggest Taylors were aware of MTIC fraud before 28 February 2013.

155. Turning next to the presence of MTIC fraud in the relevant business sector, we see no reason to gainsay the evidence of Officer O'Neill, who works for the HMRC MTIC team, in this respect. In cross-examination by Mr Brown she responded as follows:

> "Q. So when did you become aware that fraudsters were using high value cars as a commodity in which to commit MTIC fraud?
>
> A. Well, from [27 September 2017] probably about 3 years ago."

156. Taking all this into account, we have reached the following conclusions:

(1) Taylors cannot be taken to have been aware of MTIC fraud generally in the car sale sector at the time of the sales.

(2) Taylors was made aware of the risk of connection to fraud by HMRC, but only from 7 February 2013. Only 5 of the sales in the appeal occurred after that date. That said, at the time when the 04/13 was due to be submitted, Taylors had received from HMRC in addition to the 28 February 2013 information the MTIC assurance letter of 25 March 2013, yet still submitted the return claiming zero rating.

(3) Mr Taylor's statement regarding carousel fraud is on its face puzzling, since carousel fraud is similar to missing trader fraud. It shows some awareness that VAT fraud exists in business, but little more than that can be safely inferred.

Attempted registration of sales company

157. As discussed above at [35] to [37] during February and March 2013 HMRC significantly increased its focus on the sales in this appeal, suspending the repayment claim for 01/13 and subjecting periods 10/12 and 01/13 to detailed verification. On 23 April 2013 Mr and Mrs Taylor applied for a VAT registration for a new company, Taylors (Sales) limited ("TSL"). This company had been incorporated on 15 April 2013 with the same directorship as Taylors.

158. TSL's application stated that its main business activity was "vehicle sales". It indicated that it expected to exceed the taxable turnover threshold, and would buy cars in the United Kingdom and sell them to other EU Member States. The estimated value of sales within the forthcoming 12 months was stated to be £750,000.

159. Following a request for evidence from HMRC, on 4 June 2103 TSL supplied HMRC with details of three cars which it expected to sell imminently. HMRC established that in fact two of those cars had been sold before TSL's date of incorporation, and accounted for in Taylors' 04/13 return.

160. HMRC refused TSL's application to register, on the basis that it considered that the registration would be used exclusively or primarily to facilitate fraud.

161. TSL appealed that decision, but withdrew its appeal on 20 November 2013.

162. Mr Taylor's witness statement stated as follows:

> "Despite the problems that had occurred Taylors intended to remain in the business of selling cars. After how complicated the situation had become I took the view it would be better to set up a separate company to handle that side of the business. Taylors (Sales) Limited was incorporated on 16 April 2013 and a VAT1 application was submitted to register it for VAT. At that point, the full extent of the VAT problems with car sales that had been made to Ireland was far from clear and so I thought selling cars to customers in Ireland would still be an opportunity the business would actively pursue. However, as it became apparent that nothing Taylors said or did was going to change HMRC's mind, it was going to attack Taylors regardless, and the seriousness of HMRC's allegations grew, those plans were abandoned.
>
> After HMRC's refusal to register Taylors (Sales) Limited for VAT I did contemplate challenging that decision, but it was not worth spending time and money on that. Taylors just carried on selling cars in collaboration with Laurie in the same way it had been doing since 2008 and still does to this day."

163. Mr Taylor's statement does not address the main issue, which is why the application by TLS was justified by reference to the pending sale of two cars which had been sold by Taylors months previously. While Mr Brown stated that Taylors vigorously denied any attempt to mislead, we saw no evidence to support that assertion.

164. We reach two conclusions. First, the attempt to persuade HMRC to approve the registration was made on the basis of false information, but we cannot establish on the evidence whether that was deliberate or mistaken. Secondly, in any event this issue is of no material relevance to the question of knowledge or means of knowledge, since that must be assessed as at the times of the sales in the appeal.

Absence of disclosure

165. In their first decision letter refusing zero rating, dated 15 May 2014, HMRC included the following statement:

> "Taylors did not take every reasonable step to prevent their company being involved in this tax fraud. This is evident by the fact that:
>
> --Taylors effectively "hid" their new main business activity from HMRC for nearly a year & It was only when a VAT officer opened an intervention into their repayment claim that this was discovered. Taylors therefore proceeded to trade under the HMRC radar in this high risk market area, & as a result without the benefit of education/advice/warnings on tax fraud…
>
> -- There was no sign of Taylors promoting vehicle sales as an activity on their website considering this business activity was effectively their main business activity making up 56% of their turnover in 10/12 and 59% of their turnover in 01/13."

166. We find as facts that Taylors did not inform HMRC of the car sales to the Republic of Ireland other than by including them in its VAT returns, and that the activity was not promoted on Taylors' website. However, we do not consider that it can prudently be inferred from either or both of these facts that they indicate knowledge or the means of knowledge on the part of Taylors at the relevant time. Taylors did not fail to meet any statutory obligations as to disclosure in its returns or business records (in our view Regulation 5(2) of The VAT Regulations 1995 was not in point), and there may have been a number of reasons for the omission of the business from Taylors' website.

167. In terms of the detailed *Mecsek* formulation, HMRC have a somewhat stronger argument that in failing to raise and discuss the new activity with HMRC Taylors may have failed to take "every reasonable step within its power" to prevent their participation in fraud, but even that argument is relatively weak on the facts, and we have afforded it little weight in reaching our conclusions.

Significant errors and discrepancies in sales and dispatch documents

168. Any significant errors or omissions in the documentation relating to the sales and dispatch of the cars in the appeal would clearly be highly relevant to the Lack of Evidence denial. However, they could also be of relevance to the knowledge/reasonable steps test in *Mecsek*.

169. We analyse this area in detail below in relation to the Lack of Evidence denial, and there is little purpose in repeating it here. To a degree, Taylors' failure to follow

up the various errors, omissions and inconsistencies which we refer to below was an aspect of its lack of knowledge and due diligence. However, in our judgment certain of the issues which we discuss below relating to evidence of dispatch and delivery should in themselves have alerted Taylors to the risk of connection to VAT fraud.

Arguments raised by Taylors

170. For Taylors, Mr Brown disagreed that any or all of the factors above supported the Mecsek denial. He also raised a number of additional issues, which we now discuss.

171. First, argued Mr Brown, there was nothing "contrived" or "artificial" about the sales, and this was evidenced by the fact that Taylors was not paid for some of them. This demonstrated clearly the commercial risk attached to the business.

172. We heard in evidence that Taylors' commercial risk was initially very limited, because it received payment for each car before dispatching it. We accept Mr Taylor's evidence that from late summer 2012 this practice changed. Mr Taylor stated that payments began to be delayed, so that by 25 February 2013 Taylors was owed over £300,000 for 17 cars. Over time that debt was reduced to about £100,000, which remained uncollected.

173. We accept that the sales clearly involved time and effort on the part of Mr Kempster in locating and acquiring cars to meet the requirements of Alan Simpson. However, the fact that Taylors may not have been paid for all the sales did not in our view lessen in any meaningful sense the degree to which the business was contrived or artificial. Indeed, it should arguably have prompted Taylors to question more vigorously and at an earlier stage whether Alan Simpson was an honest trader who met his business obligations.

174. Secondly, Mr Brown pointed out that Taylors was sensible and prudent in seeking professional advice in relation to VAT, from Ms Broadey. We have commented at [148] to [151] on the advice given by Ms Broadey in relation to third party payments. We were not shown evidence of any other advice sought or given relating to the risk of fraud. We agree that Taylors did take steps to verify its obligations in relation to third party payments by seeking advice from Ms Broadey.

175. Thirdly, Mr Brown pointed out that HMRC had subjected Taylors' 04/12 repayment return to verification, and, on the basis of a considerable amount of information and documentation collated by Ms Harvey, had approved it for repayment. That operated, he submitted, to reassure Taylors that there were no VAT problems in the business.

176. We agree that it is likely that Taylors gained some reassurance from the verification of the 04/12 return. We note that this return included zero rated sales to NS Cars and M3 Cars. However, the return preceded those in this appeal, so the comfort it may have offered was in that respect limited, both in legal terms and as a practical matter.

Knew or should have known and failure to take all reasonable steps- conclusions

177. Taking into account the relevant case law and the principles derived from it, as set out at [50] to [61], we have considered, stepping back to look at all the facts and circumstances, whether Taylors knew or should have known that the sales were connected to fraud and failed to take all reasonable steps to prevent their participation in that fraud.

178. Taylors' position was that they trusted Alan Simpson, knew nothing of any fraud, and had no way of knowing of any fraud. Indeed, neither Mr Taylor nor Mr Kempster accepted that Alan Simpson or any of the registered buyers had been involved in any VAT fraud. They say that in addition all the factors taken by HMRC as indicators to the contrary ignore the fact that these were, in Mr Kempster's words, "real world" deals, and entirely commercial.

179. We agree that in the abstract there is nothing inherently uncommercial about selling cars to the Republic of Ireland that have been bought in the United Kingdom. The question is not, however, to be considered in the abstract, but by reference to the sales and buyers and circumstances in this appeal.

180. We have reached the following conclusions.

181. First, we have given very little weight for the reasons given above to the attempted registration of the sales company or to the absence of disclosure.

182. Secondly, we have taken into account that in relation to awareness of fraud, MTIC fraud was not prevalent or generally known about in this sector until after the time of the sales in this appeal.

183. Thirdly, our conclusions in relation to the additional points raised by Mr Brown are set out at [171] to [176], and, to the extent there set out, those points provide some support for Taylors' position.

184. However, these three conclusions are in our judgment significantly outweighed by our cumulative findings in relation to the other factors in assessing the picture as a whole. As a result, we have concluded that on the balance of probabilities Taylors should have known that the sales were connected to fraud, and it failed to take all reasonable steps in its power to prevent its own participation in that fraud.

185. We have taken account of all the facts and circumstances, but have in reaching this conclusion placed particular weight on our findings in relation to the following factors as set out above:

(1) Lack of knowledge and due diligence: see [115] to [130].

(2) Rapid rise in turnover: see [131] to [135].

(3) Profit per sale: see [136] to [144].

(4) Third party payments: see [145] to [151].

(5) Awareness of risk of fraud: see [152] to [154], and [156].

(6) Errors and discrepancies: [see [169].

186. While none of these factors taken in isolation might justify a denial based on *Mecsek-Gabona*, we consider that taken together they outweigh any indicators to the contrary and mean that on the balance of probabilities HMRC has proved its case. Overall, we consider that in this case Taylors effectively turned a blind eye to the risks.

Lack of Evidence denial

187. HMRC also deny zero rating for the sales in this appeal on the basis that Taylors failed to obtain and/or provide sufficient evidence to prove the dispatch of the vehicles to the Republic of Ireland and that the sales satisfied the conditions for zero rating.

The law

188. The relevant primary and secondary legislation is set out at [47] to [49].

189. Tertiary legislation in relation to zero-rating of dispatches is in the form of Public Notice 725 (parts of which have force of law). Paragraphs 4.3, 5.1, 5.2 and 5.5 of the that Notice (from the version in force at the time of the sales) provide as follows:

> 4.3 **When can a supply of goods be zero-rated?**
>
> **The text in this box has the force of law.**
>
> A supply from the UK to a customer in another EC Member State is liable to the zero-rate where:
>
> You obtain and show on your VAT sales invoice your Customer's EC VAT registration number, including the 2-letter country prefix code, and
>
> The goods are sent or transported out of the UK to a destination in another EC state, and
>
> You obtain and keep valid commercial evidence that the goods have been removed from the UK within the time limits set out at paragraph 4.4
>
> …
>
> **5.1 Evidence of removal**
>
> A combination of these documents must be used to provide clear evidence that a supply has taken place, and the goods have been removed from the UK:
>
> - the customer's order (including customer's name, VAT number and delivery address for the goods)
> - inter-company correspondence

- copy sales invoice (including a description of the goods, an invoice number and customer's EC VAT number etc)
- advice note
- packing list
- commercial transport document(s) from the carrier responsible for removing the goods from the UK, for example an International Consignment Note (CMR) fully completed by the consignor, the haulier and signed by receiving consignee
- details of insurance or freight charges
- bank statements as evidence of payment
- receipted copy of the consignment note as evidence of receipt of goods abroad
- any other documents relevant to the removal of the goods in question which you would normally obtain in the course of your intra-EC business
- Photocopy certificates of shipment or other transport documents are not normally acceptable as evidence of removal unless authenticated with an original stamp and dated by an authorised official of the issuing office.

5.2 What must be shown on documents used as proof of removal

The text in this box has the force of law

The documents you use as proof of removal must clearly identify the following:

- the supplier
- the consignor (where different from the supplier)
- the customer
- the goods
- an accurate value
- the mode of transport and route of movement of the goods, and
- the EC destination

Vague descriptions of goods, quantities or values are not acceptable. For instance, 'various electrical goods' must not be used when the correct description is '2000 mobile phones (Make ABC and Model Number XYZ2000)'. An accurate value, for example, £50,000 must be shown and not excluded or replaced by a lower or higher amount.

If the evidence is found to be unsatisfactory you as the supplier could become liable for the VAT due.

…

5.5 What if my customer collects the goods or arranges for their collection and removal from the UK?

> If your VAT registered EC customer is arranging removal of the goods from the UK it can be difficult for you as the supplier to obtain adequate proof of removal as the carrier is contracted to your EC customer. For this type of transaction the standard of evidence required to substantiate VAT zero-rating is high.
>
> Before zero-rating the supply you must ascertain what evidence of removal of the goods from the UK will be provided. You should consider taking a deposit equivalent to the amount of VAT you would have to account for if you do not hold satisfactory evidence of the removal of the goods from the UK. The deposit can be refunded when you obtain evidence that proves the goods were removed within the appropriate time limits.
>
> Evidence must show that the goods you supplied have left the UK. Copies of transport documents alone will not be sufficient. Information held must identify the date and route of the movement of goods and the mode of transport involved. It should include the following:
>
> Item Description
>
> 1 Written order from your customer which shows their name, address and EC VAT number and the address where the goods are to be delivered.
>
> 2 Copy sales invoice showing customer's name, EC VAT number, a description of the goods and an invoice number.
>
> 3 Date of departure of goods from your premises and from the UK.
>
> 4 Name and address of the haulier collecting the goods.
>
> 5 Registration number of the vehicle collecting the goods and the name and signature of the driver and, where the goods are to be taken out of the UK by a different haulier or vehicle, the name and address of that haulier, that vehicle registration number and a signature for the goods.
>
> 6 Route, for example, Channel Tunnel, port of exit.
>
> 7 Copy of travel tickets.
>
> 8 Name of ferry or shipping company and date of sailing or airway number and airport.
>
> 9 Trailer number (if applicable).
>
> 10 Full container number (if applicable).
>
> 11 Name and address for consolidation, groupage, or processing (if applicable).

190. The force of law of the statements identified as having the force of law comes from Article 28C(A) of the Sixth VAT Directive (77/388/EEC), now replaced by Article 131 of the Principal VAT Directive, and implemented into domestic law by sections 30(8) and (10) of VATA 1994 and Regulation 134.

191. Mr Brown raised an argument relating to the legal requirements for zero rating which we have considered. The argument was based on the decision of the CJEU in

Straben & another v Finanzamt Plauen Case C-578/10 [2013] STC 198 ("VSTR"). Mr Brown relied on the following passage from that judgment:

> "29. As regards the conditions under which a transaction may be classified as an intra-Community supply within the meaning of the first subparagraph of art 28c(A)(a) of the Sixth Directive, it is clear from the case law that supplies of goods dispatched or transported by or on behalf of the vendor or the person acquiring the goods out of the territory of a member state but within the Community, effected for another taxable person or a non-taxable legal person acting as such in a member state other than that of the departure of the dispatch or transport of the goods, are covered by the term 'intra-Community supply' and are thus exempt from VAT (see, inter alia, [*Teleos*]) para 40).
>
> 30. Apart from those requirements, relating to the capacity of the taxable person, to the transfer of the right to dispose of goods as owner and to the physical movement of the goods from one member state to another, no other conditions can be placed on the classification of a transaction as an intra-Community supply or acquisition of goods (see *Teleos* (para 70)), bearing in mind that the meanings of 'intra-Community supply' and 'intra-Community acquisition' are objective in nature and apply without regard to the purpose or results of the transactions concerned (see, inter alia, *Teleos* (para 38)).

192. Mr Brown argued that the effect of this passage was that the only conditions which could be imposed by HMRC in order for the sales to be zero rated was that they were supplied to a taxable person in another Member State, that the right to dispose was transferred, and that there was physical movement from the Member State of departure.

193. In so far as Mr Brown's argument seeks to establish that one or more requirements of the primary, secondary and tertiary legislation set out above are incompatible, we have no hesitation in rejecting this. *VSTR* is a case concerned with the problems created by successive supplies, and its facts are far removed from this appeal. In our judgment, this passage (in a section of the judgment headed "Preliminary observations") is doing no more than restating the underlying *Teleos* principle in relation to failure to satisfy legislative formalities where a trader has acted in good faith and taken all reasonable steps. It is not stating or implying that, for example, passages of Notice 725 (dealing with with evidence rather than the classification of a supply per se) which have the force of law are incompatible.

Arguments of the parties

194. Mr Brown made the following submissions in addition to the argument relating to *VSTR*:

(1) The question was solely whether the conditions for zero rating (per *VSTR*) were met, not whether the Commissioners were satisfied they were met.

(2) All supplies were made to a taxable person.

(3) For sales where the cars were collected by the customers, the right to dispose as owner was transferred on collection.

(4) For cars which were transported by Taylors, the right to dispose as owner was transferred when the cars were delivered outside the United Kingdom.

(5) In relation to whether the cars left the United Kingdom, contrary to HMRC's assertions it was irrelevant who paid for them.

(6) The documents relating to transport by MVT were valid commercial documents.

(7) Evidence that the cars left the United Kingdom included evidence of registration of the cars in the Republic of Ireland subsequent to dispatch; the fact that the customers buying the cars had been assessed for VAT by the tax authorities in the Republic of Ireland; the absence of challenge to transport companies used by Taylors other than MVT and David Corr Haulage, and the fact that for collections by ferry each ferry ticket showed the vehicle registration number, it being irrelevant who booked the ticket or the name of the driver.

195. For HMRC, Mr Puzey made the following points:

(1) There was virtually no evidence of receipt in respect of any of the sales.

(2) It was unclear in most cases who had bought the car, and in most cases the sales were paid for by third parties.

(3) Registration of the vehicles in the Republic of Ireland subsequent to sales by Taylors was not evidence of a zero rated sale by Taylors.

(4) There were numerous problems with and inconsistencies in the documentation used by the various hauliers, in particular MVT and David Corr.

(5) There were inconsistencies and anomalies in the documentation relating to ferry bookings.

(6) The dispatch evidence presented to HMRC by Taylors was materially deficient.

(7) In many cases the intended destination and place of delivery were unclear. In general, the evidence of delivery was highly unsatisfactory.

Discussion

196. The passages of Notice 725 which have the force of law require amongst other things the following of relevance to the sales in this appeal:

(1) Taylors must have obtained an invoice showing the customer's VAT registration number.

(2) The cars must have been "sent or transported out of the UK to a destination in another EC state".

(3) Taylors must have obtained and kept "valid commercial evidence" of removal of the cars from the United Kingdom.

(4) As proof of removal, the documents must have clearly identified the customer; the mode of transport; the route of movement, and the EC destination.

197. In terms of the application of Notice 725 to car sales, we agree with the observations made in *Grange Road Car Sales v Revenue & Customs* [2017] UKFTT 193(TC), which, unlike this appeal, concerned evidence relating to cars transported across the Irish border:

> "93. VAT Notice 725 provides that valid commercial evidence that goods have been removed must be obtained and kept in order to zero-rate a supply of goods. That is a mandatory provision ('must'). The evidence must be 'clear'.
>
> 94. Notice 725 repeatedly refers to evidence showing that the vehicle 'has' been removed. This is suggestive that evidence that the vehicle 'is going' to leave is not, in and of itself, sufficient evidence of export.
>
> 95. Section 5.1 [which does not have the force of law] says that 'a combination' of documents is called for. No single document is sufficient. The purpose of this is clear—the integrity of any individual document can be more readily, reliably, and effectively tested when it is part of a suite of documents.
>
> 96. We acknowledge that some of the items mentioned in VAT Notice 725 are not applicable to motor vehicles. But that does not affect the purpose of the items of evidence referred to in VAT Notice 725 which are so applicable.
>
> …
>
> 99. The overarching aim of VAT Notice 725 is so that a paper trail can be created which gives 'clear' evidence that the goods (or, as in this case, the vehicle) have indeed left the UK and hence the sale can be validly treated as zero-rated. The conditions are laid down to ensure the correct and straightforward application of zero-rated exemptions, and to prevent evasion, avoidance or abuse."

198. We turn now to the facts as we find them in relation to this issue. Many of the facts we have found in relation to the Mecsek denial are also relevant in this context.

199. On this issue, unlike the Mecsek denial, Taylors bears the burden of proof, to the normal civil standard.

200. During the hearing, we were taken in some detail by both Counsel and the witnesses through a large number of specific sales, with a view to demonstrating whether the detailed documentary evidence for that sale was or was not sufficient to justify the Lack of Evidence denial. However, we have concluded after careful consideration that while this was of assistance, this ground of appeal cannot be fairly determined or only determined by a consideration of those examples, for the following reasons:

(1) We did not have the benefit of this process of presentation and witness examination for all of the sales, so it is not possible properly to determine, or infer, what the outcome of that process would have been for the sales not chosen

by Counsel. It is, of course, to be expected that each Counsel would select for consideration by the tribunal as examples those sales which supported their respective positions.

(2) The evidence in respect of some sales was more robust than others, yet the appeal relates to all the sales.

(3) Some of the sales chosen as examples took place in periods other than those in this appeal.

201. However, having considered all the available evidence, including the detailed information we have for each sale, we have been able to determine the issue in respect of all the sales in the appeal. Our conclusion is that Taylors failed to obtain the evidence necessary to establish that the sales qualified for zero rating. We reach this conclusion for the following reasons.

202. We agree with Mr Puzey that the central issue is whether Taylors has shown that it was selling, dispatching and delivering each of the cars to the taxable person named on its invoice. The evidence taken as a whole produces an unclear picture of who the customer was in each case and, in many cases, the place and time of delivery. As such, it fails to satisfy the requirements of Notice 725 having the force of law and summarised at [196].

203. Notice 725 refers to documents which "clearly identify" the customer. In this case, while the ostensible customers were the three buyers, we have found as a fact that these entities were all ciphers of and acting under the direction of Alan Simpson. As Mr Taylor and Mr Kempster expressed it in cross-examination, Taylors knew all along that it was "selling to Alan Simpson". Mr Brown raised a number of ingenious arguments to establish that if Alan Simpson was the customer, then he was nevertheless a "taxable person". However, the issue in relation to Notice 725 is not whether the supply is to a taxable person, but who the customer is. In this respect, while we agree with Mr Brown that the fact that the great majority of the cars were paid for by third parties did not, in and of itself, mean that Notice 725 was not complied with, that fact did add to the confusion and uncertainty as to who Taylors' customers really were.

204. As to dispatch and delivery, we conclude that on the balance of probabilities all or most of the cars did arrive at some stage in the Republic of Ireland. However, we do not agree with Mr Brown that that is enough to satisfy the legislative requirements, for two reasons.

205. First, looking at the primary, secondary and tertiary legislation as a whole, we consider that it must be the supply by the taxpayer which results in the goods arriving in another Member State in order for zero rating to be available. It is not enough if they end up in the Republic of Ireland at some point after the sale by Taylors, by whatever means.

206. Secondly, Mr Brown submitted that all that was required for zero rating was that the cars should arrive somewhere in another Member State. It did not matter whether that arrival point was the same as the customer's address or delivery

destination on the documents held by Taylors. Indeed, he said, it did not matter if the cars arrived in the Republic of Ireland at all as long as they arrived in a Member State other than the United Kingdom. We do not agree. The certainty and clarity which is the purpose of Notice 725 would be entirely eroded by Mr Brown's argument. In any event, we consider that on the wording of the Notice itself the argument is wrong; it talks of "a destination in another EC state", and this is clearly a reference to a specific address or location. If not, the words "a destination in" would be redundant.

207. In this case, the evidence obtained by Taylors as to dispatch, delivery and receipt was simply inadequate. We considered variously documents where the delivery address bore no relation to the buyer; where there was no address on the delivery note; where there was no delivery note at all, or an unsigned note, or a note signed illegibly. We also saw in some cases troubling evidence of delivery before dispatch or of multiple deliveries.

208. The burden of proof on this issue lies with Taylors, and we have concluded that they have not discharged that burden. As a result the appeal against the Lack of Evidence denial is dismissed.

Disposition

209. The appeal against both the Mecsek denial and the Lack of Evidence denial is dismissed.

210. 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.

THOMAS SCOTT
TRIBUNAL JUDGE

RELEASE DATE: