[2018] UKFTT 662 (TC)

TC06810

Appeal number: TC/2012/05878

VAT – Whether fraudulent tax loss – Whether appellant's transactions connected to such loss – Whether appellant knew or should have known of any such connection – No - Appeal allowed

VAT – Misdeclaration penalty – Whether understatement of liability to VAT in returns – No – Appeal allowed

FIRST-TIER TRIBUNAL
TAX CHAMBER

VALE EUROPE LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN BROOKS
MOHAMMED FAROOQ

Sitting in public at Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 25 – 29 June, 2 – 6, 9, 12 and 13 July 2018

David Scorey QC and Adam Woolnough, instructed by Ernst & Young LLP, for the Appellant

John McGuinness QC and Christopher Kerr, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. Vale Europe Limited ("Vale") appeals against three decisions of HM Revenue and Customs ("HMRC").

2. The first, contained in a letter dated 19 December 2011 and upheld on 27 April 2012 following a review, denied Vale the right to deduct input tax in the total sum of £8,025,878.13 that it had claimed in its 01/08, 02/08, 03/08, 04/08, 09/08, 11/08, 12/08, 01/09 and 03/09 VAT accounting periods. The second decision, notified by letter of 27 March 2012 and upheld on 13 July 2012 following a review, denied Vale the right to recover input tax claimed in the sum of £851,427.79 during its 04/09, 07/09, 08/09, 12/09, 01/10, 02/10, 03/10 and 04/10 VAT accounting periods.

3. Both decisions relate to input tax claimed on the purchase of precious metal (platinum and palladium). HMRC's primary case in relation to these decisions, as stated in the decision letters, was that the transactions concerned were "connected with a fraudulent evasion of VAT" and that Vale, "knew or should have known that this was the case". An additional, alternative, case advanced by HMRC at the hearing was that Vale knew or should have known that the transactions were not consistent with a genuine commercial market and were therefore connected to fraud in general.

4. HMRC's third decision, notified to Vale by letter dated 29 May 2012, was a notice of an assessment of a Misdeclaration Penalty in the sum of £329,294 imposed under s 63 of the Value Added Tax Act 1994 ("VATA") for an alleged overstatement of its input tax credit in its VAT return for the period 02/08.

5. Although Vale had appealed against each of the three decisions separately, on 25 May 2012, 10 August 2012 and 28 June 2012 respectively, the three appeals were consolidated by directions issued by the Tribunal on 20 July 2012 and 28 June 2013.

6. Vale was represented by David Scorey QC and Adam Woolnough. John McGuiness QC and Christopher Kerr appeared for HMRC.

Disputed Transactions and Deal Chains

7. The transactions or deals with which this appeal is concerned relate to the purchase of precious metals by Vale from four suppliers:

(1) Opera Trading Limited ("Opera") from which Vale purchased platinum and palladium worth over £43.8 million claiming input tax of over £7,680,000 (deals 1 – 27);

(2) Capella Manufacturing Limited ("Capella") from which Valet purchased approximately £2.6 million worth of platinum between 12 September 2008 and 7 July 2009 and which generated a claim for input tax in the region of £437,000 (deals 28 – 49A);

(3) Star Alloy Limited ("Star") from which Vale purchased approximately £3,471,000 worth of platinum between 14 July and 24 August 2009 generating an input tax claim of around £607,000 (deals 49B – 58); and

(4) GC Metals Limited ("GC") from which Vale purchased approximately £897,000 worth of platinum between 11 December 2009 and 8 April 2010 claiming around £153,000 in input tax (deals 59 – 66).

8. It not disputed that Vale made the purchases from the four suppliers as stated above, that the metals physically existed and were supplied to Vale at market price, refined by Vale and that the resulting sponge (see below) was sold at market price. Neither is it disputed that Vale incurred the input tax it seeks to recover.

9. However, HMRC contend that not only was Opera a fraudulent entity engaged in the evasion of VAT at the time these supplies were made but that its suppliers Quavis Corporation Limited ("Quavis"), Commerce Craft Limited ("Commerce Craft"), Otisaxe Trading Limited ("Otisaxe") a Cypriot company and Blue Mountain Consultant Limited ("Blue Mountain") were fraudulent defaulters. HMRC also contend that the purchases by Vale from Capella, Star and GC can be traced back to fraudulent defaulters.

10. We have set out in an appendix to this decision, in tables 1 – 4, the deal chains on which HMRC rely.

Law

11. The Right to deduct input tax arises from Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 (previously Article 17 of the Directive 1977/388/EEC, the Sixth Directive) which provides:

> [167] A right of deduction shall arise at the time the deductible tax becomes charged.
>
> [168] Insofar as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay: The VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person.

12. This right has been implemented into UK domestic law by ss 24 – 26 VATA and Regulation 29 of the VAT Regulations 1995. However, although a trader is entitled as of right to claim a deduction of input tax there is an exception to this principle which was identified by the European Court of Justice ("ECJ"), as the Court of Justice of the European Union ("CJEU) was then known, in its judgment, dated 6 July 2006, in the joint cases of *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL* (C-439/04 and C-440/04) [2006] ECR 1 – 6161 ("*Kittel*") where it stated:

> "[51] … traders who take every precaution which could reasonably be required of them to ensure that their transactions are not connected

with fraud, be it the fraudulent evasion of VAT or other fraud, must be able to rely on the legality of those transactions without the risk of losing the right to deduct the input VAT.

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

…

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

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

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

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

…

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

13. The decision of the ECJ in *Kittel* was considered in *Mobilx Ltd (in Administration) v HMRC; HMRC v Blue Sphere Global Ltd ("BSG"); Calltel Telecom Ltd and another v HMRC* [2010] STC 1436 ("*Mobilx*") in which Moses LJ, giving the judgment of the Court of Appeal, said:

> "[59] The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they

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

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

14. It is clear, from the approach taken by Christopher Clarke J, as he then was, in *Red12 v HMRC* [2010] STC 589, and adopted by Moses LJ in *Mobilx* that the Tribunal should not unduly focus on whether a trader has acted with due diligence but consider the totality of the evidence.

15. As Moses LJ said In *Mobilx*, at [83]:

"… I can do no better than repeat the words of Christopher Clarke J in *Red12 v HMRC* [2009] EWHC 2563:

[109] "Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.

[110] To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain of transactions all of which have identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could

> legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.
>
> [111] Further in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them.""

16. Also, it is not necessary for the trader to know the specific details of the fraud with which his transaction is connected to deprive it of the right to deduct input tax. In *Megtian Ltd v HMRC* [2010] STC 840 Briggs J, as he then was, said at [38]:

> "… I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be, demonstrated precisely which aspects of a sophisticated multifaceted fraud he would have discovered, had he made reasonable inquiries."

Roth J, at [52] in *POWA (Jersey) Ltd v HMRC* [2012] STC 1476 expressly agreed with what Briggs J had said in *Megtian*.

17. In *Fonecomp Limited v HMRC* [2015] STC 2254 it was argued that the words "should have known" used by Moses LJ in *Mobilx* meant "has any means of knowing" (per Moses LJ at [51]) and that Fonecomp could not have found out about the fraud even if it made inquiries because the fraud did not relate to the chain of transactions with which it was concerned. Arden LJ (with whom McFarlane and Burnett LJJ agreed) said, at [51]:

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

18. It is not disputed that the burden of proof in this appeal is on HMRC and that the civil standard of proof, the balance of probabilities, applies. As Moses LJ said, in *Mobilx* at [81]:

> "It is plain that if HMRC wishes to assert that a trader's state of knowledge was such that his purchase is outwith the scope of the right to deduct it must prove that assertion."

19. Although the standard of proof was not considered in *Mobilx* it is accepted that the civil standard, the balance of probabilities, applies (see *Re B* [2009] 1 AC 1). As Lady Hale, giving the judgment of the Supreme Court in *Re S-B (Children)* [2010] 1 AC 678, said at [34]:

> "… there is no necessary connection between the seriousness of an allegation and the improbability that it has taken place. The test is the balance of probabilities, nothing more and nothing less."

20. With regard to the misdeclaration penalty, s 63 VATA, as applicable at the material time provided:

> **63 Penalty for misdeclaration or neglect resulting in VAT loss for one accounting period equalling or exceeding certain amounts**
>
> (1) In any case where, for a prescribed accounting period—
>
> (a) a return is made which understates a person's liability to VAT or overstates his entitlement to a VAT credit, or
>
> (b) an assessment is made which understates a person's liability to VAT and, at the end of the period of 30 days beginning on the date of the assessment, he has not taken all such steps as are reasonable to draw the understatement to the attention of the Commissioners,
>
> and the circumstances are as set out in subsection (2) below, the person concerned shall be liable, subject to subsections (10) and (11) below, to a penalty equal to 15 per cent of the VAT which would have been lost if the inaccuracy had not been discovered.
>
> (2) The circumstances referred to in subsection (1) above are that the VAT for the period concerned which would have been lost if the inaccuracy had not been discovered equals or exceeds whichever is the lesser of £1,000,000 and 30 per cent of the relevant amount for that period.
>
> (3) Any reference in this section to the VAT for a prescribed accounting period which would have been lost if an inaccuracy had not been discovered is a reference to the amount of the understatement of liability or, as the case may be, overstatement of entitlement referred to, in relation to that period, in subsection (1) above.
>
> (4) In this section "the relevant amount", in relation to a prescribed accounting period, means—
>
> (a) for the purposes of a case falling within subsection (1)(a) above, the gross amount of VAT for that period; and
>
> (b) for the purposes of a case falling within subsection (1)(b) above, the true amount of VAT for that period.

(5) In this section "the gross amount of tax", in relation to a prescribed accounting period, means the aggregate of the following amounts, that is to say—

(a) the amount of credit for input tax which (subject to subsection (8) below) should have been stated on the return for that period, and

(b) the amount of output tax which (subject to that subsection) should have been so stated.

(6) In relation to any return which, in accordance with prescribed requirements, includes a single amount as the aggregate for the prescribed accounting period to which the return relates of—

(a) the amount representing credit for input tax, and

(b) any other amounts representing refunds or repayments of VAT to which there is an entitlement,

references in this section to the amount of credit for input tax shall have effect (so far as they would not so have effect by virtue of subsection (9) below) as references to the amount of that aggregate.

(7) In this section "the true amount of VAT", in relation to a prescribed accounting period, means the amount of VAT which was due from the person concerned for that period or, as the case may be, the amount of the VAT credit (if any) to which he was entitled for that period.

(8) Where—

(a) a return for any prescribed accounting period overstates or understates to any extent a person's liability to VAT or his entitlement to a VAT credit, and

(b) that return is corrected, in such circumstances and in accordance with such conditions as may be prescribed, by a return for a later such period which understates or overstates, to the corresponding extent, that liability or entitlement,

it shall be assumed for the purposes of this section that the statements made by each of those returns (so far as they are not inaccurate in any other respect) are correct statements for the accounting period to which it relates.

(9) This section shall have effect in relation to a body which is registered and to which section 33 applies as if—

(a) any reference to a VAT credit included a reference to a refund under that section, and

(b) any reference to credit for input tax included a reference to VAT chargeable on supplies, acquisitions or importations which were not for the purposes of any business carried on by the body.

(9A) This section shall have effect in relation to a body which is registered and to which section 33A applies as if—

(a) any reference to a VAT credit included a reference to a refund under that section, and

(b) any reference to credit for input tax included a reference to VAT chargeable on supplies, acquisitions or importations which were attributable to the provision by the body of free rights of admission to a museum or gallery that in relation to the body was a relevant museum or gallery for the purposes of section 33A.

(10) Conduct falling within subsection (1) above shall not give rise to liability to a penalty under this section if—

(a) the person concerned satisfies the Commissioners or, on appeal, a tribunal that there is a reasonable excuse for the conduct, or

(b) at a time when he had no reason to believe that enquiries were being made by the Commissioners into his affairs, so far as they relate to VAT, the person concerned furnished to the Commissioners full information with respect to the inaccuracy concerned.

(11) Where, by reason of conduct falling within subsection (1) above—

(a) a person is convicted of an offence (whether under this Act or otherwise), or

(b) a person is assessed to a penalty under section 60,

that conduct shall not also give rise to liability to a penalty under this section.

Evidence

21. In addition to the extensive documentary evidence, which included correspondence between the parties, reports of visits by HMRC officers, deal sheets etc, we heard from the following witnesses on behalf of HMRC:

(1) Patricia Wilson, who before her retirement from HMRC in 2016, had from 2009 been the allocated officer for Vale in which capacity she had undertaken visits to the company and met with its senior employees;

(2) Robert Payne, a Higher Officer of HMRC and a member of the Missing Trader Intra-Community ("MTIC") Fraud Team whose evidence concerned Par Three Limited ("Par Three"); and

(3) Richard Lowish, an expert witness who before he retired in 2010 was the General Manager and Director of Englehard Metals Limited, a precious metals trading company established in 1983, where he was responsible for all its dealing and commercial activities, including precious metal market making and the soliciting of professional as well as customer/supplier business.

Mr Lowish organised and was responsible for Englehard Metals Limited, Moscow, a representative office of the company that procured precious metal supplies originating in what was the Soviet Union. Between 1997 and 1999 he was Vice Chairman of the London Platinum and Palladium Market ("LPPM") becoming its Chairman from 1999 to 2003. From 2004 until 2010 he was Director of the London Platinum and Palladium Fixing Company Limited.

Mr Lowish had previously been Vice President in charge of forward trading and funding metals at the London branch of the First National Bank of Boston and Vice President for precious metals marketing and client trading at the London branch of Chase Manhattan Bank. In evidence he accepted that between 2008 and 2010 the LPPM did not issue any guidelines to the market as to what steps to take in terms of proper due diligence in the Platinum Group Metals ("PGM") market.

22. In addition, as they were not disputed, the witness statements of the following HMRC officers was admitted in evidence:

(1) Margaret Brown, a Higher Officer who had been employed by HMRC and its predecessor, HM Customs and Excise ("HMCE"), from 1993. Since 2005 she had been concerned with the detection and prevention of MTIC fraud. Her evidence was in relation to Baio Trading Limited ("Baio");

(2) Timothy Cook, a Higher Officer and part of the MTIC Fraud Team based in Cardiff who has been employed by HMRC and previously by HMCE since 2004. His evidence concerned East 2 West (UK) Limited ("East2West");

(3) Judith Elmer, an officer of HMRC and HMCE from 1988. Since 2002 she has been involved in the verification of VAT returns filed by traders in high risk areas such as mobile phones, computer processing units and metals. Her evidence was in respect of S & G Metals Limited ("S&G"); and

(4) Joanne Keeley, an officer of HMRC and its predecessor the Inland Revenue since 2003 and currently a member of an MTIC Team which is part of the Fraud Investigation Service based in Bootle, Liverpool. Her evidence was in relation to Star Alloy Limited ("Star").

23. We were somewhat disappointed that comment and submissions on the conclusions to be drawn from the evidence have yet again crept into the witness statements of HMRC officers in this case. However, adopting the approach of Proudman J in *HMRC v Sunico* [2013] EWHC 941 (Ch) at [29] and the Tribunal in various case such as *Megantic Services Ltd v HMRC* [2013] at [15], *CF Booth v HMRC* [2017] UKFTT 813 at [10] and *Elbrook Cash and Carry v HMRC* [2018] UKFTT 252 at [24], we have ignored such expressions of opinion and submissions.

24. The following witnesses gave evidence on behalf of Vale:

(1) Denuta Kenwright, who has been employed by Vale for over 31 years and since 1999 has been its Sales Manager reporting to David Maynard (see below). Her role includes checking the market prices of platinum and palladium on a daily basis, reviewing the quantities of metal bought and sold by Vale, assessing the market conditions that may affect the price of platinum and palladium by obtaining information from various sources eg economic indicators in the news, speaking to customers, suppliers and consumers and analysis of competitors. She is also responsible for drafting reports on the secondary toll refining business as requested by the Marketing Manager, speaking to customers about refining opportunities and negotiating contractual terms with customers, suppliers and consumers/traders;

(2) Samuel Rhodes, although no longer employed by Vale was its Refinery Accountant between July 2007 and August 2009, a role in which he was responsible for the operation of Vale's Acton Refinery. From April 2009 Mr Rhodes became Vale's Business Manager and was promoted to its Finance Manager in 2014 a role he held until he ceased employment with the company in November 2017;

(3) James Wills, an employee of Vale for over 30 years with the last 15 years being in the production department. His evidence concerned the refining process. He explained how scrap is sampled and tested before entering the production process for refining. He also dealt with the types of materials refined and the materials received at the refinery during the period with which the appeal is concerned;

(4) David Maynard who, when he retired in 2008, had worked for Vale for 28 years. For his final nine years at Vale he was its Marketing Director;

(5) David Sherwood, the Metal Accounting Section Leader at Vale who has been employed by the company for around 27 years. His evidence outlined the operation of Vale's customer and supplier metal accounts and how metal is allocated and deducted from a customer or supplier account by Vale as well as how information received by Metal Accounting is used and verified;

(6) Kenneth Williams, who before he retired in October 2017 was the Marketing Director of Vale succeeding Mr Maynard in 2008 having joined the company in 2003. From 2009, Mr Williams was involved in the reviewing of Vale's due diligence;

(7) Jeremy Coombes, a precious metals consultant who advises various clients, including the International Platinum Groups Metals Association about the PGM industry, gave expert evidence on the trading of metal products within the PGM trader market. He was previously employed (from 1987 to 2014) by Johnson Matthey plc becoming its general manger for marketing and publications where his role included promoting new applications and growing demand in existing applications for PGMs and providing information about PGMs to industry stakeholder. He gave expert evidence on market trends and supply and demand for PGM products globally; and

(8) Philip Clewes-Garner, of Metal Recruiting Consulting Limited and PCG Commodity Consultants Limited an independent consultancy focussing on all precious metal products, gave expert evidence on the trading of precious metal products within the PGM trader market. He was previously employed by HSBC as an Associate Director with responsibility for physical precious metal business. Before that he was employed as the Precious Metals Sales and Marketing Manager with global responsibility for rebuilding market share at the BSI Inspectorate (part of the British Standards Institute ("BSI")).

Mr Clewes-Garner was Chairman of the LPPM from 1994 to 1996 and in 2008 becoming the only person to have taken this role on two occasions.

Facts

25. Before setting out our findings of fact, it is convenient to first define and describe some of the less familiar (to us at least) terms and processes used in the refining industry:

Assay: an involved test of a metal to determine its properties which involves the extraction and analysis of a sample.

Fix price: the LPPM (see below) platinum and palladium quotation price which is published twice daily at 09:45 and 14:00, the AM and PM fix prices.

Good Delivery or Good Delivery Status: platinum and palladium listed on the London and Zurich Good Delivery ("GLZD") lists to be accepted in settlement of transactions. To meet the necessary specification for inclusion on the GLZD refiners and producers have to satisfy the LPPM Management Committee that their bars meet the stringent requirements set by the LPPM under which the metal must be in the form of a plate or ingot and have a purity of at least 99.95% platinum or palladium, bear the producer's mark, the letters P or PD (depending on whether it is platinum or palladium), bear an individual number or mark, indicate the year of manufacture and be of good appearance, smooth with no sharp edges and free from cavities and easy to handle.

The market trade in platinum or palladium is generally settled across metal accounts, similar to bank accounts, in which the metal is held in the vault of a recognised LPPM dealer. An ingot or plate that is no longer in the vaults of a recognised LPPM clearer may no longer be of Good Delivery status.

When a member of the LPPM sells a Good Delivery plate or ingot to a non-market member and the metal leaves a good delivery vault it is generally treated as scrap (albeit of high purity) as LPPM members will not be willing to purchase, as Good Delivery, metal that has been stored other than in an authorised vault as there can be no certainty of the metal content or Good Delivery status. Although the metal content could be confirmed through assay, this is a physically intrusive process that would be likely to remove its Good Delivery status.

LPPM: the London Platinum and Palladium Market is a trade association that acts as the co-ordinator for activities on behalf of its members and other participants in the London PGM market. A primary function of the LPPM is its involvement in the promotion of refining standards by maintenance of the LPPM Good Delivery List.

There are two categories of LPPM membership, full and associate. Full membership is open to those companies that are recognised by the LPPM Management Committee as being currently engaged in trading and dealing platinum and palladium and also as being providers of additional services in the PGM market such as market making, clearing services, refining or manufacturing. Associate membership is open to companies recognised by the Management Committee as being currently engaged in the platinum and palladium industry and having an appropriate level of experience and net assets but do not offer the full range of services provided by full members. Companies

which fail to meet the normal requirements of Full or Associate membership may, if recognised by the Management Committee as being involved with or offering support to the global platinum and palladium markets may be granted Affiliation status.

PGMs: platinum group metals, which are sometimes referred to as the platinum group elements (PGEs) comprise the rare metals platinum (Pt), palladium (Pd), rhodium (Rh), ruthenium (Ru), Indium (Ir) and osmium (Os). PGMs naturally occur in nickel, copper and iron sulphide seams. These metals are noble (metals that are resistant to corrosion and oxidation), chemically less reactive materials and can be found in nature as native alloys consisting mainly of platinum.

Scrap: not a pejorative term within the PGM industry but used to describe any item that is not in a form readily tradeable on the PGM dealer market. Scrap can include, but is not limited to, catalytic converters, jewellery scrap, dental alloy scrap, coins, bars and ingots and can include high purity ingots and plates that would have been Good Delivery status (see above) if they had not left an authorised vault.

Spot price: the market price of platinum or palladium at a particular time of day between the AM and PM fix prices as published by the LPPM.

XRF: a surface analytical technique, which is non-destructive, based on submitting samples of a given material to X-rays from a primary emissions fluorescence which are characteristic of the atoms contained within that material. Unlike a full assay it would not be possible to determine by an XRF alone, without drilling into the metal concerned, whether the piece of metal was plated with eg platinum or comprise entirely of that material.

Background

26. Vale is a wholly owned subsidiary of Vale S.A., a global diversified metals corporation and one of the world's largest mining companies with headquarters in Brazil. At the time with which the appeal is concerned Vale operated from two UK refining sites, Clydach in South Wales and Acton in West London.

27. The Clydach refinery produces around 40,000 tonnes of nickel products a year operating 24 hours a day 365 day a year. Its two main products are nickel pellet and powder which are sold in over 30 countries worldwide. The refinery at Clydach does not refine third party material but only materiel from Vale Canada (a wholly owned subsidiary of Vale S.A.) mining operations in Canada. However, it is the Acton refinery with which this appeal is concerned. It had its roots in the Mond Nickel Company which was incorporated in 1910. In 1919 having established the Clydach refinery it acquired premises in London to establish a laboratory and small refinery to refine PGMs from those process residues which resulted from refining nickel at Clydach. The PGM refinery then moved to Acton between 1924 and 1925. In 1929 the Mond Nickel Company merged with the International Nickel Company of Canada ("INCO") to become INCO Europe Limited and the Acton refinery expanded to handle the additional capacity of the precious metal residues of INCO's Canadian nickel and copper refining operations.

28. During the 1980s the Acton refinery was enlarged and expanded to be able to produce a million troy ounces per annum, double its previous capacity. To take advantage of this increased production capacity it was decided to pursue secondary feed materials from third parties to supplement the regular INCO concentrates.

29. On 4 October 2006 Vale S.A. acquired INCO, including its subsidiary INCO Europe Limited which first changed its name to Vale Inco Europe Limited before changing it to its current name of Vale Europe Limited on 6 August 2010.

30. During the period with which this appeal is concerned the Acton refinery refined a range of precious metals and produced platinum, palladium, rhodium, ruthenium, and iridium from precious metal residues and also produced small quantities of gold and silver. The final products produced were in the form of a powdered "sponge". Platinum and palladium sponge is used in a number of manufacturing industries including automotive (to produce catalytic converters) jewellery, chemical and electrical. Vale produced high purity and highly regulated sponge product suitable for use in such manufacturing processes. In addition to being used in manufacturing the sponge may also be held for investment purposes and can readily be traded at prices close to the spot price or "fix" price.

31. Approximately 50% of the products refined during this period was platinum and pallidum ore from Vale Canada's mines in Canada with the remaining 50% coming from third parties, known as "customers" in the industry even though they might be more accurately be considered suppliers. In some cases, Vale purchases the material from these customers and in other it refines the material in return for a fee. Although some of the customers/suppliers are scrap metal dealers, others are larger commercial dealers, eg Glencore, a Swiss mining company and commodities trader, the quality of the material provided can vary from scrap metal with low purity of platinum and palladium to very high purity platinum and palladium.

32. A customer/supplier who wished to sell would send Vale the metal for it (Vale) to perform an XRF test and an assay with the price Vale paid being determined on the purity of the metal as metal with a higher level of platinum or palladium is not only worth more but costs less to refine than that with a lower purity level. Customers/suppliers typically sold precious metal residues to Vale on the basis of the anticipated quantity of platinum or palladium sponge it would produce using the LPPM fix price or occasionally at the spot price as the basis subject to various deductions to enable Vale to make a profit. These deductions comprise:

> (1) Vale agreeing to return less than the full amount of platinum and palladium derived from the assay to take account of potential losses in the refining process. Vale's refining process was highly efficient and permitted an extremely high recover such that there was more sponge produced from the quantity on the basis of which the price was set.
>
> (2) Any finance charge of Vale paid the supplier for the metal prior to refining.

(3) If PGM sponge was selling at a lower price than investment quality or Good Delivery platinum and palladium bars Vale would apply a discount to take account of the difference in the LPPM price for Good Delivery metal and the market price for sponge.

(4) Vale also reduced the price paid by up to US $2 per troy ounce of platinum and up to US $1 per troy ounce of palladium as an administration fee for conducting the transaction.

33. The standard payment terms for suppliers/customers that sold precious metal residues to Vale was two days after Vale had accepted an offer to sell. Suppliers/customers were able to choose whether to wait until completion of the refining process before payment or be paid before the process had been completed in which case they were charged a finance charge over 28 days, the usual time taken for high purity metal to be refined. A supplier could either agree to sell its metal at a price based on the levels of platinum and palladium as established by the XRF or wait for a full assay to be completed. Where the sale was based on the XRF Vale would pay for the majority of the metal, withholding approximately 5% - 10% (which was usually sufficient to take account of any inaccuracies in the XRF analysis) until completion of the full assay when a balancing payment would be made. The amount paid (and withheld) would be decided by the Vale employee responsible for making the deal. This would depend on the purity of the metal and trading history with the supplier concerned.

34. Once a price had been agreed with a customer/supplier Vale would immediately sell the equivalent metal from its vaults to manufacturers or banks at the fix price to ensure its income was not affected. Such practice, which is common in the refining industry is referred to as back to back selling.

VAT Registration

35. Vale has been registered for VAT since the VAT system was introduced on 1 April 1973, originally as part of the INCO Europe Limited VAT group. However, following the acquisition of INCO by Vale S.A. the INCO Europe VAT group disbanded and Vale applied for VAT registration in its own account on 30 August 2001.

36. Vale accounts for VAT on a monthly basis. As is standard in the industry it operates self-billing for most of its third-party suppliers.

Disputed transactions in context

37. Before setting out details of the contact between Vale and HMRC, the due diligence it undertook and its application to the particular businesses with which it traded and some details of those businesses, it is useful, having heard expert evidence on the subject, to describe the nature of the market Vale operated in at the time it entered into the transactions with which we are concerned so as to put the disputed deals in context.

38. Between 2004 to 2009, in addition to the disputed deals with Opera, Capella, Star and GC, Vale purchased high-grade products from other suppliers for which its claim to input tax has not been disputed. This consisted of purchases of high-grade platinum from 96 different suppliers and high-grade palladium from 82 different suppliers.

39. Mr James Wills, Mr Kenneth Williams and Mr Jeremy Coombes all explained that the metals trade is a volatile market driven by market conditions. It is subject to radical changes occurring over short periods of time. A major influence on this volatility being changes in the regulatory position in countries that have a central role in the PGM industry such as, eg the repeated disruption of the export of palladium by Russia in late 1999 caused by the delay of the Russian Federation to grant export quotas to the entities concerned. This caused panic in the market and drove the price of palladium to an all-time high of $1,100 a troy ounce in January 2001 (from $575 a troy ounce in June 2000).

40. The Report of the Directors in Vale's Annual Report and Accounts for the year ended 31 December 2005 describes the PGM market at that time in the following terms:

> "Global consumption of platinum fell slightly in 2005 to just over 7.5m ozs as increased demand for diesel autocatalysts did not compensate for losses in the jewellery industry, particularly in China. The market remained in very small deficit of around 50 ozs as supply increased by 4% to just under 7.5 ozs. Platinum started the year at $844/oz trading up during the first seven months before breaking $900 on 1st August. Continued investment buying moved the price up levels not seen for 25 years, reaching a high of $1,012/oz on 12th December before weakening to end the year at $958/oz. …
>
> The palladium market remained in structural oversupply although investment buying on the back of the platinum price rally helped to move the price form $180/oz at the beginning of the year to a high of $295/oz in early December."

41. The Directors, in their Report in the accounts for the year ended 31 December 2006, observed that the price for platinum which rose 14% during the year to $1,117/oz, down from an all-time high of £1,335/oz in May 2006, was "historically high and volatile" and that the price of palladium had also increased from $261/oz at the beginning of the year to $324/oz at its end notwithstanding a decrease in global consumption.

42. The Directors Report in Vale's accounts for the year ended 31 December 2007 refers to a 35% increase in the price of platinum in 2007 where at the end of the year it reached a price of $1,530/oz. There was also a 9% increase in the price of palladium during 2007 to $363/oz by 31 December 2007.

43. Vale's 31 December 2008 accounts record that:

> "PGM prices reached unprecedented levels in 2008 with Platinum rallying to a record high of $2,276 per troy ounce in March, only to

> retract to $756 in October, as a direct result of the shrinking global economy and declining demand in the automotive industry. …
>
> Despite the struggling world economy, Palladium demand increased in 2008 whilst global supplies decreased. The Palladium price mirrored Platinum price movements for most of the year, reaching a peak of $588 a troy ounce in March but slipping down to a low of $164 in December as concerns over the state of the auto industry arose.
>
> Platinum and Palladium ended the year at $899 and $183 respectively."

44. New channels for metal appeared as entities sought to exploit the dramatic nature of the changes in price for PGMs and, although not mentioned in the reports of the directors in Vale' s accounts, over the period concerned there was an influx of Russian PGM products into the market. Mr Williams explained that there had been no reference to the Russian PGMs in the accounts as Vale's secondary toll business, although high in dollar value turnover, contributes little to its profitability and even less to the profitability of its parent, Vale S.A. He said that it was also necessary to appreciate that because of the extremely competitive nature of the toll business the comments, for which he was responsible, in the accounts did not go into any great amount of detail in relation to that part of the business.

45. The competitiveness and secrecy of the PGM industry was confirmed by Mr Wills, Mr Coombes and Mrs Kenwright who said that is was "common" to receive delivery documentation with materials from suppliers where third-party information had been in some way redacted.

46. Mr Williams explained Russia, which with South Africa accounts for over 90% of the world's production of platinum and related metals, had aggressively stockpiled PGMs during the 1970s and 1980s but following the collapse of the Soviet Union in the 1990s had begun to sell some its stockpiles to obtain foreign exchange. However, even after this time stockpiles remained high and, as platinum and palladium were considered "strategic metals", were tightly controlled with exporters subject to strict quota restrictions and limited to a few companies. Because such restrictions had an adverse effect on Russia gaining membership of the World Trade Organisation, in January 2007 a decree was signed by President Putin allowing unlimited export on all Russian PGM exports. However, an export licence was still required from the state-owned Russian diamond market, Almazyuelieexport, for PGMs to leave the country in any form.

47. Despite the abolition of quotas, from 23 December 2008 certain forms of PGMs attracted export duty, in particular between 2008 and 2010 (the period with which this appeal is concerned) there was such duty at a rate of 6.5% on finished platinum bars and plates, unwrought or semi-finished platinum and palladium ingots (including bars) of 99.95% purity or greater and platinum and palladium sponge of 99.95% purity or greater. Additionally, the Russian state had the option of purchasing these products as an alternative to their being exported. However, before 2015 the export duty did not apply to anodes or liquid PGM salts/solutions.

48. In his evidence Mr Williams explained that ingots or plates produced in Russia originally of a Good Delivery status could be transformed into non-Good Delivery form by chemical transformation (dissolving in acid to produce liquid PGM slats) or by using the platinum of palladium to produce industrial anodes thereby avoiding the export duty. He understood that this may have happened in the case of PGMs acquired by Vale during this period.

49. Mr Coombes explained that he considered it unlikely that Russian anodes exported to outside markets in any reasonable quantity would have been used directly or indirectly for industrial purposes. He did not know of any end-use market in the UK for such high purity Russian anodes which in order to obtain full value would require refining and considered the transformation of such anodes by Vale to be consistent with normal commercial practice within the refining industry. Mr Coombes also explained that despite being labelled as a manufactured product in Russia once these enter the UK they are properly categorised as scrap as there is no longer a market for them and they will need to be refabricated for sale.

50. As recognised in the Report of the Directors in Vale's accounts for the year ended 31 December 2008 (see paragraph 43, above) there was a decline in the PGM market due to the global recession which Mr Williams described as, "unexpected and very sudden". He said that it was "very likely" that traders in PGMs could have lost "considerable" sums of money in this period possibly leading to their collapse particularly if, unlike Vale, they did not have adequate price hedging strategies in place.

51. Officer Wilson accepted in evidence that it was not unusual for new suppliers to enter the market especially during the period in which the price of PGMs reached unprecedented levels. Mr Lowish agreed that the lack of any previous experience would not prohibit such companies from becoming involved in the industry adopting various trading methods taking greater risks in the hope of achieving greater returns but that being newly established is not, on its own, indicative of fraud. He also agreed that Russian producers might be more inclined to trade with a "buccaneer" type of entrepreneur who was more likely to take risks and his report explains that there were many such traders who were under-capitalised and had little experience in hedging or managing price risk which exposed the business to capital losses.

52. The Report of the Directors to Vale's accounts for the year ended 31 December 2009 refers to the fact that "PGM markets remained volatile during 2009, impacted negatively by the shrinking of the global economy affected by the deepening recession." However, Directors Report continues stating:

> "Looking ahead to 2010, the analysts believe that the current economic indicators will support the PGM industry. The expectation is that, in terms of supply v demand, Platinum will stay closer to balance in 2010 with demand strengthening in the automotive sector but weakening in the jewellery market. Analysts estimations are between US$1,400-US$1,900 for the remainder of 2010."

53. The market trends described above were reflected in Vale's trading during the period between January 2008 and April 2010, eg in the first nine months of 2008 Vale averaged 36 deals a month claiming input tax of approximately £1.609 million, but between October 2008 and April 2010, following the fall in the price of platinum and palladium described in the 31 December 2008 accounts, the monthly average number of deals fell to 19 and the input tax claimed fell to an average of £341,000 per month. These market trends are also apparent in that 87% of the value of the input tax in dispute in this case had been incurred by Vale by September 2008.

Contact with HMRC

54. On 14 January 2008 HMRC wrote to Vale to explain that it was:

> "… still experiencing certain problems with businesses that wholesale commodities involved in Missing Trader Intra-Community (MTIC) VAT fraud. MTIC fraud may involve all types of VAT standard rated goods and services including high value, low volume electrical products."

A copy of VAT Notice 726 was enclosed with the letter which also advised that requests for verification of the VAT status of potential suppliers or customers be made to HMRC's Redhill office.

55. Mr Rhodes was unable to say when he became aware of this letter which, as it was not addressed to any specific person at Vale, he assumed had would have been seen by Vale's then Finance Director, Andrew Matheson. Similarly, Mrs Kenwright and Mr Sherwood were unable to say when they had seen the letter but confirmed that it was unlikely to have been when it was first received. In Mrs Kenwright's case this she said that was in preparation for this litigation.

56. HMRC Officer Manvir Sagoo contacted Vale by email on 3 March 2008 in relation to transactions it had undertaken with Sai Creations Limited ("Sai") with a request to see the checks that had been carried out. Officer Sagoo visited Vale's Acton refinery on 11 March 2008. Her report notes that the purpose of the visit was "to carry out a [sic] educational visit to trader to make them aware of due diligence" and records that:

> "New customers and suppliers are mainly on referral from those in the trade or from trader conferences. [Vale] do not actively go out looking for customers/suppliers because of the nature of the business. Any new customers/supplier has to fill in a form that includes contact details, bank details, invoice arrangements – if self-billing is requested the supplier must confirm this request in writing. A copy of the certificate of incorporation and VAT registration is provided. Most of their customers are regulars hat trade on the market."

57. After describing the arrangements for transport of the goods and noting that a sample of all meta entering the refinery is analysed to check its quality and weight Officer Sagoo's report states:

> "Trader made aware of due diligence and copy of VAT notice 726 provided.
>
> Trader contends that they were not aware that any metal purchased was tainted by MTIC fraud and request reassurance that they were carrying out required checks."

58. A further visit to Vale by Officer Sagoo and three of her colleagues took place on 2 April 2008 where they met with the then Business Manager, Sandra Small and David Sherwood of Vale. The report of the visit records that its purpose was to inform Vale of the "fraudulent activity in the precious metal market" and for HMRC to "to be informed of how the precious metal market operates."

59. The visit report states (with emphasis as in stated in the report):

> "[Vale] informed how missing trader VAT fraud operates, [Vale] are familiar with this from the gold fraud of the 1980s. [Vale] have been informed that since the verification in the mobile/computer trade sectors and/or the derogation applying to these goods it seems that this fraud is now active in the precious metal trade sector. [Vale] has offered HMRC full co-operation in tackling this problem."

The report then describes the refinery and its "extremely stringent" security measures and continues:

> "As stated previously [Vale's] refining customers approach them for their services. [Vale] obtain name, address, bank details, companies house details and request references. There is no risk to [Vale] as they only pay their "customers" after the refining process is completed. There are different return rates for different metals. [Vale] will "return" 99%, there is a 0.5% loss in the processing and 0.5% loss known as the [Vale] "windfall". The price paid by [Vale] for the metal it has refined is based on the daily rate as determined by the London Metal Exchange (which can fluctuate significantly). Payment is based on the amount of metal (troy ounces) less a refining charge and a discount. Payment is made by telegraphic transfer from either [Vale's] sterling or US dollar account. [Vale] make payment 2 days after completion of processing."

60. The report notes that the officers requested sight of self-billing invoices for Sai and Opera and although they were unable to advise Vale on whether it should stop trading with either company, they explained that Vale would be informed of tax losses that had been identified. The report also notes that a further copy of Notice 726 was issued.

61. The title of Notice 726, which was provided to Vale on more than one occasion, is, *joint and several liability in the supply of specified goods* with "specified goods" defined in paragraph 1.4 as "computers [and related equipment] and telephones [and related equipment]". The Notice continues, explaining, at paragraph 2.3 that the joint and several liability measure has been introduced [by s 77A VATA] to complement HMRC's existing fraud strategy and is designed to tackle MTIC fraud which:

> "… relies heavily on the ability of fraudulent businesses to undertake trade in goods with other businesses that may be either complicit in the fraud, turn a blind eye or are not sufficiently circumspect about their trading connections"

The Notice continues, at paragraph 4.5, by advising traders to carry out checks to establish the legitimacy of its supplier to avoid being caught in a chain where VAT would go unpaid although HMRC do not expect a trader "to go beyond what is reasonable". Section 8 of the Notice gives of checks. At paragraph 8.1 it states:

> "**8.1 Checks you can undertake to help ensure the integrity of your supply chain**
>
> The following are examples of checks you may wish to undertake to establish the integrity of you supply chain:
>
> 1) Undertaking reasonable commercial checks to consider the legitimacy of customers or suppliers. For example:
>
> - what is your customer's/supplier's history in the trade?
> - Are normal commercial arrangements in place of the financing of the goods?
> - Are the goods adequately insured?
> - What recourse is there if the goods are not as described?
>
> …
>
> **8.2 Checks carried out by existing businesses**
>
> The following are example of specific checks carried out by existing businesses. These may also help you decide what checks you should carry out, but this list is not exhaustive and you should decide what checks you need to carry out before dealing with a supplier or customer:
>
> - obtain copies of Certificates of Incorporation and VAT registration certificates;
> - obtain copies of Certificates of Incorporation and VAT registration certificates;
> - verify VAT registration details with Customs and Excise;
> - obtain letters of introduction on headed paper;
> - obtain some form of trade reference, either written or verbal;
> - obtain credit checks or other background checks from an independent third party;
> - insist on personal contact with a senior officer of the prospective supplier, making an initial visit to their premises wherever possible;
> - obtain the prospective supplier's bank details, to check whether:
>
>   (a) payments would be made by a third party; and

(b) that in the case of import, the supplier and their bank shared the same country of residence.

- check details provided against other sources, eg website, letterheads, BT landline records

62. Mr Rhodes was unable to recall when he first became aware of Notice 726 but confirmed that he would, at some stage, have read it. Mr Sherwood also confirmed that he had read Notice 726 and had been aware of previous versions of the Notice but said that it was likely that this would have been after he had attended meetings with HMRC officers.

63. In April 2009 verification of Vale's VAT returns for 04/09 and 07/08 to 12/08 was allocated to HMRC Officer Wilson who, in May 2009, was requested by her manager to amend the verification to include all VAT returns from 01/08.

64. HMRC wrote to Vale on 19 August 2008 and 30 September 2008, describing Vale in both letters as, "a trader who deals in the buying and selling of Mobile Phones, Computer Processing Units or Other Goods from the European Community and from with the United Kingdom." These letters advised that two of its suppliers had been deregistered for VAT and that any input tax claimed in relation to transaction involving those suppliers may be subject to verification.

65. On 12 November 2008, following receipt of its 10/08 VAT return, HMRC wrote to Vale stating that the return had been selected for verification. The letter explained HMRC concerns regarding MTIC fraud and that verification was a necessary and proportionate response to the threat of organisations "wittingly" continuing to trade in transaction chains commencing with a significant tax loss caused by traders that have not intention or means of paying the outstanding VAT.

66. Vale responded to the notice of verification letter (of 12 November 2008) with an email from Mr Matheson, which was followed by telephone conversations between him and Officer Wilson. A note of such a conversation which took place on 3 December 2008, produced by Officer Wilson, records that she:

> "Rang Mr Matheson regarding [his] email. Confirmed that repayment had been made and that investigations were ongoing and that it was hopes [sic] that a visit to company would be made shortly to discuss activities and check records. Mr Matheson asked if there were any suppliers he should be concerned about or anything he should be doing. I explained that HMRC are currently looking at the supplier list previously supplied and that he should continue to carry out due diligence as per the advice given by the previous MTIC officers. I also asked for the company to contact me if any new suppliers approach them, Mr Matheson stated he would arrange for this to be done. Mr Matheson also agreed to send me the November sales and purchases listing for November 2008 asap."

67. During a subsequent telephone conversation between Mr Matheson and Officer Wilson a visit to Vale was arranged for 28 May 2009. However, on 7 May 2009

HMRC issued Vale with a "Post Repayment Verification of VAT Repayment Claims" letter which stated that Vale:

> "… has submitted VAT repayment returns for the periods ended 07/08, 08/08, 09/08, 10/08, 11/08 and 12/08. In order to assist you I am writing to you at this stage to explain why this claim has been selected for verification, how long this process might take, what you should expect from HM Revenue & Customs (HMRC), and what HMRC expects from you whilst this verification is taking place."

The letter continues by explaining that the claim was selected because of the risk to UK revenue posed by MTIC fraud and that such verification is part of HMRC's "continuing strategy to tackle this fraud."

68. As arranged HMRC Officers Wilson, Braley and McCulloch visited Vale on 28 May 2009 and met with Mr Matheson, Mr Rhodes who was at that time Business Manager, Mr Sherwood and Mr Robert Kent described on the report as "Vale Controller", together with two of Vale's advisers from Ernst & Young. A further copy of Notice 726 was provided to Vale. This was queried as Vale did not trade in the goods specified in the Notice. However, Officer Wilson explained that any business found to have known or should have known that their deals were tainted by VAT fraud may be liable for unpaid VAT and that this was explained in the Notice.

69. The report of the visit records that:

> "PW [Officer Wilson] explained that tax losses have been identified within some of the traced deal chains involving Vale in 2008 with net losses of £100 million, this is to be confirmed shortly via tax loss letters. Due to ongoing concerns HMRC have regarding this trade Vale's 04/09 repayment claim has been withheld subject to an extended verification."

When asked in evidence Mr Rhodes agreed that the losses of £100 million came as a shock to him saying "that's a big number". Similarly, in evidence, Mr Sherwood said that he recalled the figure of £100 million, describing its size as a "wow factor".

70. The report of the 28 May 2009 visit also records the following due diligence process undertaken by Vale in relation to its suppliers:

> "Suppliers come to Vale. Vale do not source suppliers (Vale term their suppliers as customers).
>
> There are only a handful of refineries in the world who specialise more in specific products eg gold could be of a high spec at another refinery.
>
> When a new supplier approach Vale,
>
> Vale issues their terms first and if agreed the registration process is started.
>
> All material is physically received. Vale claimed that 100% of the external feeds are refined.

> Larger customers may request for their goods (eg refined platinum) to be stored in Vale's vault – Vale do not charge a fee to their larger suppliers for this service as these suppliers bring a lot of business into Vale.
>
> First point of contact = "Commercial department"
>
> Headed up by: Donuta Kenwright – Sales Manager
> Frances McKiernan – Assistant sales manager
> Nesha Kaur – Rep.
>
> Controls in place re purchasing, opening accounts for new supplier's values, etc = full control listing to be provided.
>
> Supplier is set-up on Vale's system (following checks) prior to arrival of goods = usually 1 – 2 weeks to setup account.
>
> Each supplier/customer has an individual account at Vale with a separate running total/balance.
>
> New supplier: Star Alloys – Vale are trying to verify this company though HMRC.
>
> …
>
> *SR [Mr Rhodes] explained that is little risk to Vale as Vale holds the suppliers product.
>
> *Commercial department – no restrictions on the team when dealing with purchases."

Mr Rhodes explained that, in the case of a new supplier, although the steps described in the visit report were carried out, there was not a specific written policy and that due diligence was, at the time, "very much a work in process".

71. There was subsequently further correspondence between Vale and HMRC regarding the provision of information by Vale and its concerns with the ongoing verification process. On 10 August 2009 HMRC issue Vale with a "tax loss" letter concerning its supplier Force Distribution Limited stating that there had been a loss of revenue exceeding £143,127.22. Officer Wilson confirmed, in evidence, that this was the first such letter that had been sent to Vale and was the first time that any tax losses had been identified to Vale.

72. On 15 September 2009 HMRC wrote to Vale to advise that Star had been deregistered for VAT with effect from 21 August 2009. A tax loss letter for transactions involving Star was sent to Vale on 9 November 2009 informing it of losses in excess of £612,807 and stating that MTIC fraud was:

> "… not a victimless crime. It is robbing the honest taxpayer of monies that could be used to fund essential public services"

73. On 10 November 2009 HMRC issued two tax loss letters to Vale regarding Excel Imports and Exports Limited (losses exceeding £533,000) and Opera (losses exceeding £4.2 million). A further tax loss letter was issued in relation to Specialist Metal Services Limited (losses exceeding £1.5 million) on 19 November 2009. Additionally, as part of the ongoing verification process a visit to Vale's Acton

refinery was arranged and took place on 9 December 2009 at which Vale provided HMRC with records that had been requested.

74. At a subsequent meeting, on 17 February 2010, Vale informed HMRC that it had reviewed its due diligence procedure for checking and registering new commercial customers/suppliers of refining material and that this was as provided to Officer Wilson on 11 December 2009. This was discussed at that visit as were tax loss notifications. On 25 March 2010 HMRC wrote to Vale to clarify a number of issues that had been raised during the visit.

75. Mr Rhodes telephoned Officer Wilson on 15 April 2010 to inform her that Vale had taken delivery of a consignment of eight "Japanese Bars" from GC. The note of the conversation taken by Officer Wilson records that the bars were:

> "… each of 500 grams with a value of around £130K – this had not been purchased yet. He [Mr Rhodes] advised that they are happy with their due diligence checks on their supplier but following HMRC's visit in February have some concerns over trading in platinum bars. They have asked their supplier GC Metals Limited for confirmation that they have carried out due diligence on their supply chain and are happy with the response."

76. Officer Wilson explained that she could not disclose information about GC to Mr Rhodes other than confirm that, like all other participants within a deal chain, it had been visited. She also told Mr Rhodes that the decision whether to trade was a commercial decision for Vale and not something on which HMRC could advise. However, Officer Wilson agreed to call Mr Rhodes back once she had seen the documents relating to the bars.

77. Mr Rhodes attached the documents to an email sent to Officer Wilson on 15 April 2010. These documents included photographs of the bars showing drill holes in them, a letter from GC to Mrs Kenwright dated 14 April 2010 which explains that the bars had been drilled by GC "in order to assay them and ensure they are not plated" as an XRF scan can only scan the surface of the metal and could not detect if they were fakes. GC also explains that it sent the bars for refining as it has no outlet for platinum metal as a finished product.

78. Having considered the documents Officer Wilson, as promised, called Mr Rhodes. Her note of the telephone conversation records that she asked on what basis Vale currently held the consignment and was told by Mr Rhodes:

> "… that this was a problem for them [Vale] because GC had just turned up with the consignment, they had not notified them of any intention to deliver a consignment. I asked if Vale had agreed to buy the stock – Mr Rhodes said that they hadn't. I asked about risk that the company (GC) were taking – how could they be so sure they could achieve a profit if the metal had been delivered on 12/04/10 and they had not agreed a 'fix' then potentially they could make a loss I explained that these were the sort of questions we [HMRC] would be asking if the transactions lead back to tax losses and if Vale were not

> able to provide a satisfactory response then they could be denied input tax in relation to such a transaction."

79. On 19 April 2010 HMRC (Officer Wilson) wrote to Vale requesting all records in relation to transactions with GC including delivery information, purchase invoices, self-billing documentation, analysis reports, transaction report, payment information and details of any forward supply for transactions within Vale's 01/08 to 03/10 VAT periods. Vale provided a breakdown of third party metal purchases and VAT claimed on those transactions for the period for January 2008 to March 2009.

80. On 16 July 2010 Vale requested a meeting with HMRC which was arranged for 24 and 25 August 2010. This was attended by HMRC Officers Wilson and Jennifer Jackson who met with Vale employees Robert Kent (VAT Controller), Mr Rhodes, Mr Sherwood, Richard Ellis (Production Manager), Frances Mckiernan (Commercial Team) and two representatives from Ernst & Young which had been instructed by Vale.

81. The note of the meeting refers to a discussion about Trade Events and how it was explained on behalf of Vale that these were not used for meeting new contacts. Due diligence was also discussed in respect of several companies including Opera, Star, GC and Capella. In relation to these companies the visit report states:

> "**Opera Trading Limited**
> FM [Francis Mckiernan] advised that Opera Trading Limited had been trading with Vale since July 2006. PW [Officer Wilson] queried how contact had been established with this company. FM said she was unsure, it would probably have been by phone or email and they were a Central London company. …
>
> PW asked what the trading activity of Opera Trading Limited was. There was no immediate response. FM reviewed SR's [Mr Rhodes] paperwork and then stated they could not provide a definitive response but assume it was precious metals. PW reviewed papers held which included Opera's Memorandum of Association. PW then queried how a company who appeared to erect/construct roads could change to trading on precious metals. RK [Robert Kent] said that a Radio Advertising Agency started out trading in pans and DS [Mr Sherwood] said "didn't Nokia originally trade in timber". PW said this still begs the question how Opera became such a high value precious metal trader and stated in early 2008 they traded to the value of around £50 million. RK responded saying he wasn't sure.
>
> The Customer profile confirmed that no trade references had been obtained. FM confirmed that these were never pursued. PW asked how consignments were delivered to Vale from Opera – FM said Brinks or Via Mat secure transport.
>
> PW asked what the provenance of the consignments was. DS said it was Platinum Solutions and FM said it was Anodes or salts advising that these were a by-product – DS left [the] room to ask advice from Vale's technical adviser, Richard Ellis. PW agreed to revisit queries regarding the Solutions/Salts later.

Star Alloys Limited

Vale's contact at Star Alloys was a Vincent Vincenzo, they were unsure of his status within the business. FM could not recall exactly how Star Alloys initially contacted them, probably through a phone call or by email. FM said the company were validated through Wigan and this was confirmed by DS. PW referred to the paperwork held by Vale for Star Alloys and referred to the bank account details on the customer profile document with only one sterling account listed. PW stated that in a very short period of time however Vale made payments to several different accounts and queried why this was? SR said that the form was the old one and there are now new due diligence procedures. Both DS and SR said there are usually two accounts for $ and £ transactions. RK said Vale have five different accounts so there is nothing unusual about a company having numerous accounts.

PW asked if anything else was known or held about Star Alloys Limited eg: did they know anything about their experience within the trade? FM advised no. PW said given HMRC had been out on a number of occasions to discuss concerns and warn Vale about the risks involved in not carrying out suitable checks the due diligence undertaken was extremely limited. SR advised that he will look at the file again to see if there is anything else. SR said there was a problem getting confirmation/validation from HMRC regarding this supplier. PW explained that this was a very new company that HMRC would also need to undertake time consuming checks on before providing any validation. FM queried why it is necessary to resubmit all of the same documents again when retrying the Wigan process. PW explained that amongst other reasons Due Diligence should be considered on a transaction by transaction basis so HMRC would expect forms to be submitted in that manner.

PW once again advised that the paperwork Vale provided demonstrated very different deal chains with the initial deals being a relatively low value eg £7K VAT originating from Switzerland, and then later deals, with a much higher value originating from another EC Country. FM said she thought the transaction was domestic. PW queried why Star Alloy was involved in the deals chains as the goods appeared to have been delivered direct to Vale from Overseas Companies who would therefore have known the onward sale was to Vale. RK and FM explained that a number of their suppliers are brokers/agents only and that is just the way things are, it is an understanding between the parties involved. … FM said it is about customer relationships and loyalty; you wouldn't go behind a trader's back. SR advised that what was received from Star Alloy was not a marketable product even though it was Platinum of a high grade.

GC Metals Limited

FM advised that Vale have traded with GC Metals since at least August 1999. Their contacts at GC are Maurice Godley, who she thinks is the owner/director and his son Benji. FM said this is a family business and it was run by Maurice's father before this.

FM advised that GC Metals carry out their own deliveries. PW asked about the provenance of GC Metals goods. FM responded by saying generally it is low grade platinum, palladium scraps and residue. PW questioned why they had traded in pure bars. SR stated that there could be reasons why a company might need to have a bar refined and cited the bars in the April transactions previously discussed for example as they had a rather obscure stamp on them, Japanese he thought. FM said Sponge is more valuable and marketable product than a bar. SR advised the new procedures in place would mean questions would be asked why a bar would be refined. PW asked why would a company that is registered as a dealer come to be trading in bars. FM suggested that someone may have sold them to GC Metals as scrap. PW contested that if someone had investment bars to cash in they surely wouldn't approach a scrappy they would go to someone like a cash for golf company who specialise more in this sort of product. FM said perhaps there was already a trading relationship between GC Metals and their supplier.

SR advised that the bars from GC Metals had been accepted in April 2010 and stored. After discussions with PW and AF it was decided not to go ahead with the deal and the customer, GC Metals, came and collected them back. PW asked what was traded in May then. FM was unsure but advised Rhodium and copper wiring is normally traded. PW expressed alarm as evidence suggested that pure bars had been traded in an earlier month. RK, FM and SR all denied that this was the case. PW explained that the bars traded earlier originated from the same source and appeared to have the preceding numbered markings to the bars sent to them by GC Metals Limited in April 2010. PW advised that the tax loss letters in regards to some of the transactions involving GC Metals Limited will be issued shortly because they can be traced to a defaulter. SR and FM said there is not a lot of trading with GC Metals Limited. PW acknowledged this but advised historically that was not the case as throughput from GC Metals has increased significantly from December 2009 and similarly what was traded at the time had changed significantly to a high grade product.

Capella Manufacturing Limited

Vale has been trading with Capella Manufacturing Limited since April 2008. The contact they have at the company is Kevin Bloor. SR advised that they are currently reviewing their due diligence because of a period of inactivity. PW asked if they had ever been to visit Capella Manufacturing Limited. SR confirmed Specialist Metal Services Limited is the only company visited but suggested that the commercial guys may have visited Capella. He advised that previously there were four sales staff who were in effect the commercial team but the team now consists of two permanent staff and one temp. FM said she did not know of any visit by the commercial team to Capella. She also explained that Capella's account was opened by a commercial team member who had since been made redundant.

FM advised that they [Capella] trade in high grade platinum scrap.

> PW advised that in late 2008 what appeared to be traded in was platinum bars. FM asked how we would know that. PW responded from the supply chain paperwork. SR queried when this would have been and PW advised around September – November 2008. SR advised that was before he took up his current role. FM advised that no questions would have been asked at this is before SR wrote the new procedures.
>
> PW queried the bank accounts that were used to make payments to indicating that several accounts were used. She asked why this would be the case if the customer profile only listed one account. FM stated she wouldn't know about any payments and advised when the form refers to £ this relates to refining charges. PW again asked if the seat notes would trigger that further checks be undertaken if for example monetary values or out of the norm trading activity was identified on delivery. There was no response.
>
> RK asked if Capella were still trading. FM advised they were and that they had recently emailed Vale with regards to potential trading but to date FM had not responded.
>
> PW advised that a tax loss for some of Capella's transaction chains would be issued shortly. FM stated that these letters should be issued to them more promptly, they need to know. PW advised that HMRC have to be fully sure of a tax loss before a letter can be issued and the reason for any default need to be taken into consideration."

82. A tax loss letter, referring to losses exceeding £470,308, for transactions involving Capella was issued to Vale by HMRC on 16 February 2011. On 28 February 2011 during a telephone conversation with Mr Robert Kent of Vale, Officer Wilson confirmed that HMRC would visit Vale to discuss its enhanced due diligence procedures and also transactions involving GC and Capella. The arranged visit to Vale by Officers Wilson and Dermot Collins took place on 16 March 2011 when they met with Mr Kent and Mr Rhodes of Vale and two of its advisers from Ernst & Young.

83. In addition to the new due diligence processes (which we describe below) which was uplifted by HMRC at the meeting, there was discussion in relation to suppliers and potential suppliers as well as the eight platinum bars from GC that had been notified to HMRC by Vale (see paragraph 75, above) which Vale said had been returned to GC.

84. The note of the meeting records that:

> "PW [Officer Wilson] queried whether Vale had been able to demonstrate that the consignment of eight bars had been returned to the supplier. SR [Mr Rhodes] claimed that there probably wasn't a handover ticket. PW advised that looking at the transaction as a whole evidence suggests that a payment for these bars had been made by Vale and that following this payment for the 'quantity of platinum' went down the chain. The same bar numbers as per the photograph provided to PW by ST feature on the invoices within the chain.

> AF [of Ernst & Young] asked for the date and PW responded 08/04/10 and stated we would need evidence to show that the Platinum was returned and any evidence would be considered. SR claims he knows that Platinum was returned because the very same Platinum, resurfaced with a different supplier, being Capella Manufacturing Limited."

85. However, when cross-examined Mr Rhodes said that his reference to Capella was a "speculative comment" as "It wasn't definitive we knew they were coming back with Capella although there had been an offer of bars from Capella which appeared to Mr Rhodes to meet the description of the Japanese bars. The note of the meeting continues:

> "AF asked for clarification in the link in the transactions. PW advised that it followed exactly the same pattern for an earlier transaction of bars with preceding serial numbers and that payment for roughly 128 Troy Ounces which is roughly 4000 grams (8 bars at 500 grams each as per picture provided) and the transaction checks show that payment from Vale, went down the chain ie the supplier then paid their supplier etc. SR claimed that there could have been two supplies of bars. PW referred to the bar numbers and the photos asking for confirmation that Vale took the photo and that this was the consignment returned. SR confirmed these points."

86. On 15 December 2011 HMRC wrote to Vale to provide an update on the verification of its VAT returns for periods 01/08 – 04/10. The letter explained that HMRC would "shortly be in a position to issue decision letters in respect of the input tax claimed" in these periods. It also warned Vale that if input tax was denied that it could also be liable to a penalty. Information on Vale's rights under the Human Rights Act 1998 and HMRC fact sheets on compliance checks "What happens when we find something wrong" and "penalties for errors in returns or documents" were enclosed with the letter.

87. As previously stated, the first decision letter was issued by HMRC on 19 December 2011 denying Vale's right to recovery of input tax in relation to transactions with Opera and Capella. The letter states that in making the decision HMRC have taken into account:

> "… the features of the trade evident from reviewing the transactions and activities of [Vale]:
>
> 1. The transactions have all been traced back to identified fraudulent tax losses in the appropriate VAT periods.
>
> 2. Starting in January 2008, and prior to the transactions under consideration taking place, [Vale]
>
> - was issued with a letter detailing MTIC fraud and suggesting ways to ensure the integrity of the supply chain;
> - was given a copy of Notice 726 – Joint and Several Liability;
> - received visits from HMRC at which MTIC was discussed.

> [Vale] can therefore be shown to have had a general awareness of VAT fraud prior to entering the transactions under consideration, including the need to take reasonable steps to establish the credibility and legitimacy of its customers, suppliers and suppliers.
>
> 3. The way these transactions were undertaken were in a different way to the bulk of [Vale's] trade. For example:
>
> - they involve platinum bars/manufactured platinum or palladium anodes instead of general scrap;
> - the bars/manufactured anodes are purchased below market price.
>
> 4. [Vale] was advised to undertake due diligence prior to undertaking transactions. [Vale] undertook the following steps to establish the credibility and legitimacy of its suppliers and supplies:
>
> - Obtained Certificate of Incorporation and Memorandum of Association on one of the suppliers under consideration (ie Opera Trading Limited)
> - Obtained bank details
> - Obtained VAT registration number but no VAT registration certificate
>
> The above could not have provided it with adequate assurance that its transactions were not connected with fraudulent evasion of VAT. All the documents do is confirm that, at the time they were issued/received, the suppliers existed. [Vale] did nothing to confirm, via third party checks and reports, that its [sic] most of its suppliers were credible solvent businesses that would honour their trading commitments. It is apparent that for the transactions under consideration [Vale] have not taken action, following the advice provided by HMRC and did not take reasonable steps to establish the integrity of the supply chains."

88. An extension of time to request a review was agreed and by letter dated 17 February 2012 Ernst & Young, on behalf of Vale, requested a review of the decision to deny Vale its input tax. That letter explains that:

> "In broad terms my client [Vale] accepts that it was aware of the general risk of MTIC in its sector from January 2008. However, it is material to note that the majority of the transactions covered by the letter of 19 December took place in the very early months of 2008 and therefore at a time when my client's knowledge, and that of the precious metals refining industry as a whole, of the risks of MTIC in their sector was limited."

In evidence Mr Rhodes agreed that this was an accurate statement made on behalf of Vale notwithstanding that in 2008 he had not been appointed to a role in the company in which he was concerned with VAT matters.

89. On 27 March 2012 HMRC issued the second decision letter which denied Vale recovery of input tax in relation to transactions involving Capella, Star and GC which,

like the first decision letter, relied on the transactions being different from the "bulk" of Vale's trade:

> "For example
>
> - they involve platinum bars/manufactured platinum or palladium anodes instead of general scrap;
> - the bars/manufactured anodes are purchased below market price. Whilst it may be accepted that these transactions were not priced any different to that from other suppliers ie similar terns, the issue is that supplies were of good delivery status and what appear to be certified anodes that were sold to Vale under similar terms and that makes the transactions lack credibility. The transactions do not make commercial sense."

90. A review of this decision was requested on 25 May 2012. HMRC wrote to Vale on 27 April 2012 to confirm that the first decision had been upheld following a review. A letter confirming the second decision had also been upheld following a review was sent to Vale by HMRC on 13 July 2012.

91. In the meantime, on 29 May 2012, the third decision letter, a misdeclaration penalty notice had been issued to Vale by HMRC.

Due diligence

92. Although there has already been some reference to due diligence in the notes of visits, meetings and correspondence with HMRC, in this section of the decision we set out, in general, the due diligence undertaken by Vale and its evolution during the period with which the appeal is concerned. The due diligence undertaken on each supplier is considered in greater detail below in the section dealing with the participants in the transactions.

93. The due diligence undertaken by Vale in 2008, which consisted of the completion, by a potential supplier, of a New Customer Profile Form, was described by Officer Wilson as "minimal and inadequate to provide any reassurance to be able to make a judgement on the integrity of supply chains" but regarded by Vale, as Mr Rhodes said, to be "appropriate due diligence to protect its commercial position" as prior to HMRC investigations (described above) Vale had no reason to be concerned that any of its transactions might have been connected with the fraudulent evasion of VAT.

94. The New Customer Profile Form recorded the an "Introduction Date" and an explanation of how a potential customer/suppler had heard about Vale. A correspondence and delivery address (if different) were also required in addition to the customer/supplier contact details, eg telephone number, fax, email address, together with the names of contacts in the sale, analysis and accounts departments of the prospective customer/supplier, its bank account details and details of the transaction such as whether Vale was to purchase metal from contract and whether self-billing was to be requested by the customer/supplier.

95. Credit checks were not undertaken before Vale became aware of MTIC fraud because, as was explained, it was always in possession of the palladium or platinum from the customer/supplier and therefore there was never any credit risk.

96. However, having been alerted to the potential for fraud, from November 2009, Vale introduced a revised "Procedure for Checking and Registering New Commercial Customers/Suppliers of Refining Material" that it had developed in conjunction with its advisers, Ernst & Young. This revised due diligence included the application of the following "seven step procedure":

> "**Procedure**
>
> 1. Once the Commercial Department receives a new enquiry for refining material from a supplier or for the purchase of finished goods from a customer the relevant terms are issued from the commercial office.
> 2. Upon acceptance of the relevant terms the information outlined below needs to be obtained and form CD002 (new customer profile) must be completed.
> 3. Form CD003 needs to be signed by either the Assistant Sales Manager or the Sales Manager and passed onto the Accounting Department along with **all** the information obtained about the customer as detailed below (in essential information required).
> 4. The Accounting Department will review all the information provided by the Commercial Department and will satisfy itself that all the relevant details have been obtained using form CD004 as a guide. If any details are not supplied the Accounting Department will return the details to Commercial requesting the relevant details are provided.
> 5. The Accounting Department may wish to carry out further checks on any customer as detailed below, and will not open any account until it is satisfied that the appropriate due diligence has been carried out.
> 6. Only when the Accounting Department is satisfied will the form be approved by the Section Leader of Metal Accounts or in his absence the Business Manager. The Metal Accounts Clerk is then able to allocate a new customer number and enter the relevant details on the CHORUS system. Until the account is approved on the system the only contact with the customer or supplier should be via the Commercial Department.
> 7. The final authority regarding whether to set up or reject a customer or supplier is with the Accounting/Finance Department. Specifically the Section Leader Metals Accounting or the Business Manager, and will be based on the relevant due diligence checks detailed below. However, if the due diligence appears to have been satisfied but there is doubt or reservation about any aspect of the company or information that cannot be proven, then the Business Manager may elect to forward the information to individuals of higher authority - external to the immediate Acton Business. Notably the Vale Europe Ltd Marketing Director who will discuss and take a view on the

> new customer/supplier and will indicate his acceptance or rejection of the customer which will be attached to the file."

97. Under the subheading "Essential Information Required", to which point 3 of the above procedure refers, the following is required from all customer/suppliers:

(1) All supplier details as outlined in form CD002 section 1.

(2) Bank account details and bank reference from relevant bank account as outline in CD002 section 3.

(3) Details of the nature of the goods as outlined in form CD002 section 4 (applicable to refining customers only).

(4) Elaboration to sections 5 on form CD002 of any of the answers supplied are negative.

(5) Headed Letter/Letter of Introduction requesting an account to be opened.

(6) Trade reference.

(7) Proof of company address.

98. The due diligence to be carried out on customers under the procedure includes a "Dun and Bradsheet check" with an additional Dun and Bradsheet investigation if considered necessary and internet searches for the company, banks, trade references to verify details together with any follow up checks as considered necessary to be undertaken.

99. The forms mentioned are designed to provide specific information. Form CD002, a "New Customer Profile" provides space for the inclusion of the name, address of a company and of its directors together with contact details (section 1). A new customers VAT, company registration numbers (section 2) and bank details (section 3) are also to be recorded as are the type of goods (section 4). Form CD003 is the Commercial Department form and "sign off" following the completion of a check list. Form CD004 sets out a check list for a metal accounting review and signature form for the Section Leader Metal Accounting or Business Manager to complete to confirm that either a new account has been approved and opened or, if not approved the giving the reasons for it which are to be attached to the file.

100. In answer to a question from the Tribunal, Officer Wilson confirmed that, "there weren't significant differences", between Vale's due diligence on the four suppliers in issue and other traders from which it had purchased metals and had not been denied recovery of input tax. She said that:

> "For some of them there were extra things like trade references, but not all of them … but other than that, there was wasn't a significant amount of difference."

Participants in transaction and deal chains

101. In deals 1 – 27 Vale purchased platinum or palladium from Opera (see table 1 in the appendix).

102. Opera, which was based in Wembley, was incorporated on 22 February 2006. Its directors, until their resignations on 28 May 2008, were Dr Alberto Valmori, who Mrs Kenwright thought was principally concerned with a translation consultancy business, and Mr Aldo Depaoli who was also its company secretary and sole shareholder. Opera's business activity recorded at Companies House was "agents involved in the sale of machinery, industrial equipment, ships and aircraft". Its balance sheet, as at 28 February 2008 indicated that its total assets less liabilities was minus £91,141. Opera submitted its accounts on a 'small companies' basis and was described in a credit report as being "high risk". A liquidator was appointed on 9 April 2009.

103. Opera was registered for VAT with effect from 25 June 2007 and was deregistered on 18 March 2009. In its application for registration (on form VAT1) Opera estimated an annual turnover of £8 million and declared its business activity as "import of raw material solutions of palladium and platinum". It commenced its supplies to Vale immediately after becoming registered for VAT.

104. Mr Depaoli was also, from 9 March 2005 to 30 May 2006, a director of Fine and Noble Metals Limited ("Fine and Noble"). Dr Valmori was company secretary of this company having been appointed on 16 May 2006. Fine and Noble had supplied palladium to Vale in 2006 which it had acquired from Amgate Trading Limited, a company which had failed to declare the associated output tax on these transactions. Mrs Kenwright explained that Vale had known Dr Valmori and Mr Depaoli from their involvement with Fine and Noble with which Vale had previously traded and their visits to Vale's Acton refinery. The supplies from Opera were regarded by Vale as a continuation of the supplies from Fine and Noble.

105. The due diligence undertaken by Vale on Opera, which HMRC contend was far below what would be expected of a reasonable trader in a genuine market with knowledge of the risk that its deals might be connected with fraud, consisted of it obtaining a copy of Opera's Memorandum and Articles of Association, certificate of incorporation and a customer profile form which, although incomplete, did include a business address, contact details and details of its US Dollar and pounds sterling bank accounts with Barclays Bank together with confirmation that refining invoices were to be deducted from payments made by Vale.

106. It is common ground that Opera did not submit a VAT return for its 05/08 accounting period or pay the VAT shown on it. It is also accepted that Vale was aware that the metals acquired from Opera originated from a Russian company, either Evrohim or Драгветмет, transliterated as Dragsvetmet LLC ("Dragsvetmet") and, although of high purity, the metal was described in the deal documents as "scrap". Additionally, the purity of the metal supplied was lower in 90% of the assays undertaken by Opera compared to that shown by the Vale assay. However, in all cases it was the Opera assay on which the price was based, something described by Mr Maynard as good commercial practice to keep the customer happy by accepting its assay when the difference was small. The supplies from Opera were transported directly to Vale from Heathrow Airport by Via Mat or Brink's secure delivery.

107. During a visit to Opera on 8 April 2008 HMRC Officers were told by Dr Valmori that the platinum and pallidum which Opera supplied to Vale had been purchased from one of four suppliers, Quavis, Commerce Craft, Otisaxe or Blue Mountain. Dr Valmori also told the Officers that he was a business consultant who ran Valmori Consulting LLP, which had a large Italian customer base, assisting clients with various business requirements in the UK and that his involvement with Opera was limited to its accounting as its owner, Mr Depaoli, who dealt with purchasing of metals, spent most of his time in Italy. He also explained that Opera's Sales Logistics Manager was a Mr Andrea Mulluni who also worked from Italy.

108. Dr Valmori confirmed an awareness of MTIC fraud and explained that Opera would only purchase goods that required processing with the raw materials coming from either South Africa or Russia.

109. Of the four suppliers to Opera, Quavis was a company that commenced trading in plutonium in April 2007. It was deregistered for VAT with effect from 16 January 2008 stating that it had ceased to trade and had declared no output tax after its 12/07 VAT accounting period. Commerce Craft was never VAT registered and was dissolved on 26 August 2008. However, Opera had claimed input tax of £11.4 million on supplies from Commerce Craft in VAT periods 05/07 to 11/07. This input tax was denied and remains unpaid. During this this period Commerce Craft had been supplied by another of Opera's suppliers Blue Mountain. Blue Mountain had commenced trading in metals from April 2007. It was deregistered on 29 January 2008 after failing to provide evidence of trading activity. It submitted no VAT returns after its 11/07 VAT accounting period and an assessment issued for the final period, in the sum of £3,366,752, was not paid. Otisaxe, as noted above, was a Cypriot trader and, as such, any goods supplied to Opera would have been zero-rated for VAT purposes.

110. Deals 28 – 49A (see Table 2 in the Appendix) were purchases of platinum by Vale from Capella. Capella was incorporated in 1997 but appears to have been dormant until 2008. Its declared business consisted of manufacturing and had little, if any, history in the metals market. In October 2010 its increase in turnover was explained to HMRC by its director as the result of its concentration on gold, the price of which had dramatically increased. The metals supplied to Vale appear not to have been delivered by Capella but in a private car belonging to the son of the director of Heritage Silver Limited (Capella's supplier, see below).

111. The due diligence on Capella, which was conducted in April 2008 at an early stage of Vale's awareness of fraud in the industry, was consistent with its usual practice at that time. A customer profile form was completed which included the correspondence address of Capella, its contact telephone and fax numbers and email address, its VAT number and name of its sales and accounts contacts. It also provided details of its account with Barclays Bank and details of the type of material it would be supplying, platinum and rhodium, and confirmed that refining invoices were to be deducted from payments made by Vale.

112. In deals 28, 29 and 30 – 36, Capella acquired platinum from Heritage Silver Limited ("Heritage") which had purchased the metal from Par Three. The director of Heritage explained that although its principal business was the repair of jewellery and watches the company had undertaken trade in platinum to boost its turnover and give it the appearance of a larger enterprise. While there was no evidence that there was any insurance in place to cover the platinum he also explained that the company's suppliers, Par Three and Baio (in deal 29) did not press for payment but were content to wait until Heritage had received payment from Capella.

113. It is accepted that Biao is a fraudulent defaulter. However, that is not the case with Par Three which was registered for VAT in March 2008 advising HMRC that its intended business was to be the supply of golfing equipment. Although HMRC contend that when it was acquired by David Moore in the summer of 2008 it did not inform HMRC of any change in its business activities, address or make any VAT returns, in evidence Officer Payne, when shown a letter from Par Three's accountants, Anderson & Co, advising of the company's new ownership and address, accepted that this was not the case. Indeed there is no evidence that HMRC attempted to contact the company at its new address or responded to the letter from its accountants. Although Par Three commenced trading in platinum in 2008 at a time when the market was particularly buoyant, as we have noted above, this was just before the dramatic fall in the market and, as such, its failure is more likely to be explained by a commercial collapse rather than a fraudulent default.

114. In deals 37 – 44 Cappella was supplied by S&G which it is accepted was a fraudulent defaulter.

115. Capella's supplier in deals 45 – 48 and deal 49A was Gemini Technology Limited ("Gemini"). Gemini supplied Capella with almost £1 million worth of platinum in these deals which took place in March and July 2009. However, Gemini's declared turnover during these years was £20-£40,00 per annum. The company was dormant in 2006 and in 2008 appears to have been trading in consumer electronics. In 2008 the director intimated to HMRC that it was planning to trade in wholesale foods. It was denied that deal 49A had taken place and it was claimed that Gemini had ceased trading platinum in April 2010. Gemini acquired the metal which it sold to Cappella from East2West which is accepted to be a fraudulent defaulter.

116. Vale's supplier in deals 49B, 50 and 54 – 58 was Star (see Table 3 in the appendix) which supplied Vale with large quantities of platinum anodes of very high purity.

117. Star was incorporated in October 2008 and registered for VAT in December that year. In June 2009 its director told HMRC that he was a nominee and played no part in the day to day business of the company. He explained that Star was owned by an Italian national who conducted all of its business from Italy. Although the director agreed to provide HMRC with a monthly transaction list no reference was made to supplies received from the Lithuanian trader, UAB Fincrex in July and August 2009. Although Star was required by HMRC to file a VAT return for the period to 18 August 2009 there was nobody present at its premises to receive service of the notice.

118. The director subsequently claimed that he was unable to supply records as not only did he not have the contact number of the owner but that he could not speak Italian. Despite further requests for documents and a meeting these were not forthcoming and when visited by HMRC on 5 October 2009 the premises were unattended. It is accepted that Star, which was wound up in December 2009, was a fraudulent defaulter.

119. Due diligence on Star was undertaken by Vale in April 2009 shortly before trading commenced. It consisted of a Companies House check which returned no irregularities and showed that it had been incorporated in October 2008 as Cheminet Limited and had changed its name in addition to a copy of the Certificate of Incorporation, VAT registration Certificate and the customer profile form completed by Vale's contact at Star, a Mr Vincenzo Covelli, said to be a student undertaking part-time work. This provided Star's contact details, and HSBC account details. A Europa check confirmed its VAT registration was valid.

120. Vale also obtained an extract from a contract between Star and Noble metals (the Swiss agent for Group of Companies Precious Metals of Urals) which indicated that Star had secured a contract for the supply of platinum and palladium anodes from Russia. A quality certificate and delivery note were also obtained from Star. These indicated that it was being supplied by Noble Metals and that Evrohim was the shipper of the metal from Moscow to London., its VAT number showed that its first contact with Vale was in April 2009,

121. GC was the supplier of platinum to Vale in deals 59 – 66 (see Table 4 of the appendix). In each of these deals GC obtained platinum from Fabulous Trading Limited ("Fabulous"). Fabulous had acquired the platinum from Gemini (see above) which had bought the metal from Safeguard which is accepted is a fraudulent defaulter.

122. GC was established in 1971 and had been trading with Vale since the 1980s. Prior to 2010 and the transactions with which this appeal is concerned there had never been any issue regarding transactions between the two companies. GC's business was essentially that of a scrap metal dealer. Although HMRC contend that the trade in high purity platinum bars was to be inconsistent with the type of trading previously conducted with Vale, there had, between 2004 and 2009, been sales of platinum by GC to Vale of between 90.70% and 99.89% purity.

123. In February 2010 the director of GC told HMRC that its business consisted of the buying and recovering of precious metals from a variety of different materials, such as gold coins, to low grade items, such as circuit boards. In April 2010 GC's director said that supplies of circuit boards and wiring were obtained from long established customers. Although he was unable to state the origin of the bars supplied to GC by Fabulous he had assumed that they had come from investors who were cashing in on their investments.

124. It was also in April 2010 that Vale received the Japanese Bars with the drilled holes to which we have previously referred (in paragraphs 75 – 78, 79 and 84, above).

Having raised its concerns over these with HMRC, Vale made the decision to return the bars to GC which collected them from Vale on 24 May 2010.

125. As with the metals from Capella the deliveries to Vale by GC were by private vehicle rather than secure transport. Although he did not consider it wise Mr Lowish accepted that delivery by private vehicle did occur in the market. Mr Maynard explained that some suppliers took the view that they did not wish to incur the expense of secure delivery and considered it satisfactory to transport the material by car. He confirmed that private delivery of consignments valued in six or seven figures was relatively common and was a legitimate commercial choice for those deciding to take the risk.

126. Because it had traded with GC since the 1980s Vale did not undertake any specific due diligence on GC when it entered into the transactions with which we are concerned. However, following the enhancement of its due diligence procedures in December 2009 Vale obtained the GC's Certificate of Incorporation, VAT Registration Certificate showing it had been registered for VAT from 4 January 1977 and an electricity bill confirming its address. In addition, Vale undertook a Europa website check which confirmed the validity of GC's VAT number and performed a check with Companies House which showed that the nature of the business was that of "other non-ferrous metal production" and that the latest set of accounts filed had been on a total exemption basis for a small company. A Creditsafe UK report, dated 23 December 2009, indicated GC had a very good credit rating with a limit of £23,500 and no irregularities.

127. Fabulous was registered for VAT in January 2008 with its business being declared as wholesale and retail sales of clothing. It was not until July 2010 that it notified HMRC of another activity which it described as other wholesale. Its principal place of business was an accommodation address and the director had told HMRC that he delivered platinum in his car directly to GC's premises. Fabulous was deregistered in September 2010 after failing to provide HMRC with any evidence of its trade continuing.

Issues and areas of dispute

128. The following issues, to which Sir Andrew Morritt C referred at [29] in *Blue Sphere Global Limited v HMRC* [2009] STC 2239, arise in this case:

(1) Was there a tax loss;

(2) If so, did this loss result from a fraudulent evasion of VAT;

(3) If there was a fraudulent evasion of VAT, were the appellant's transactions which were the subject of this appeal connected with that evasion; and

(4) If such a connection was established, did the appellant know or should it have known that its transactions were connected with a fraudulent evasion of VAT.

129. It is accepted that there was a tax loss in all deals and it is therefore not necessary for us to consider this issue further.

130. It is also accepted that losses connected with Biao, S&G and East2West (in deals 29 and 37 – 48), which were traced by HMRC to the supplies from Capella to Vale, were connected to fraud as are the losses connected to the transactions with Star (deals 49B – 58). Vale also accepts that losses connected with Safeguard Payroll Services Limited ("Safeguard") which HMRC have traced to supplies by GC (deals 59 – 66) are connected to the fraudulent evasion of VAT.

131. However, Vale does not accept that the tax losses identified in its transactions with Opera (deals 1 – 27) or Capella (deals 28, and 30 – 36) were attributable to fraud. It also contends that HMRC have failed to identify which of the four potential suppliers (and defaulters) to Opera are alleged to have supplied metals to Opera which were then supplied to Vale. Additionally, Vale does not accept that the failure by Opera or Par Three to account for VAT was due to fraud as opposed to a commercial failure.

132. Insofar as a tax loss was caused by the failure of Opera and Star to declare sales or file a VAT return (deals 15A – 27, Opera and deals 49B, 50 and 50 – 58 Star), Vale accepts its transactions were connected with that specific tax loss. However, it makes no admission as to any part of the transaction chains for these deals in relation to any supplies made to Opera or Star or further along the transaction chains. Vale also does not accept the deal chains linking tax losses with in its transactions with Opera (in deals 1 – 14), Capella (deals 28 – 49A) and GC (deals 59 – 66).

133. Vale denies it knew or should have known that any of the transactions with which this appeal is concerned were connected with the fraudulent evasion of VAT or with fraud in general.

Discussion

134. We should first state that, although carefully considered, we have not found it necessary to address or refer to every argument advanced by or on behalf of the parties in arriving at our conclusions.

135. As stated above, there are issues between the parties as to whether the tax losses (which are accepted in relation to all of the deals) resulted from a fraudulent evasion of VAT and/or were connected with Vale's transactions with which we are concerned.

136. However, as Vale will succeed in its appeal even if its transactions were connected to a loss caused by the fraudulent evasion of VAT if HMRC are not able to establish that Vale knew or should have known that this was the case, we first consider the issue of knowledge and means of knowledge and do so on the basis that, although not accepted by Vale, the loss was the result of fraudulent of VAT and the transactions in question were connected to that loss. This raises the following issues:

(1) The attribution of knowledge;

(2) The extent of Vale's awareness of fraud; and

(3) Whether Vale knew or should have known of the connection to fraud.

Attribution

137. Mr Scorey contends that HMRC have failed to indicate who at Vale is alleged to have known of the connection to VAT fraud. He refers to the comment of Warren J, then President of the Tax and Chancery Chamber of the Upper Tribunal, in *HMRC v Greener Solutions Limited* [2012] STC 1056, at [11] that:

> "… It has not been suggested that EU law requires attribution of knowledge to a company for the purposes of VAT in a manner different from the attribution that domestic law provides. This is surely one of those areas where it is for the national court to ascertain how knowledge of an individual is to be attributed to a company."

138. Mr Scorey also relies on the observations on the doctrine the "directing mind and will" of a company by Nourse LJ in *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER at 695-6 that:

> "This doctrine, sometimes known as the alter ego doctrine, has been developed, with no divergence of approach, in both criminal and civil jurisdictions, the authorities in each being cited indifferently in the other. A company having no mind or will of its own, the need for it arises because the criminal law often requires mens rea as a constituent of the crime, and the civil law intention or knowledge as an ingredient of the cause of action or defence. In the oft-quoted words of Viscount Haldane LC in *Lennards Carrying Co Ltd v Asiatic Petroleum Co Ltd* [1915] AC 705 at 713, [1914–15] All ER Rep 280 at 283:
>
> > 'My Lords, a corporation is an abstraction. It has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the very ego and centre of the personality of the corporation.'
>
> The doctrine attributes to the company the mind and will of the natural person or persons who manage and control its actions. At that point, in the words of Millett J ([1993] 3 All ER 717 at 740): 'Their minds are its mind; their intention its intention; their knowledge its knowledge.' It is important to emphasise that management and control is not something to be considered generally or in the round. It is necessary to identify the natural person or persons having management and control in relation to the act or omission in point. This was well put by Eveleigh J in delivering the judgment of the Criminal Division of this court in *R v Andrews Weatherfoil Ltd* [1972] 1 All ER 65 at 70, [1972] 1 WLR 118 at 124:
>
> > 'It is necessary to establish whether the natural person or persons in question have the status and authority which in law makes their acts in the matter under consideration the

> acts of the company so that the natural person is to be treated as the company itself.'"

139. However, in *Citibank NA v HMRC* [2014] UKFTT 1063 (TC) Judge Mosedale, with whom we respectfully agree, observed that:

> "84. [Counsel for HMRC] accepted in the hearing that to prove actual knowledge against Citibank would require them to prove actual knowledge against an individual whose knowledge could be vicariously attributed to the bank. Yet they do not (so far) seek to prove actual knowledge against any *named* individual. Would the individual whose (alleged) knowledge they seek to vicariously attribute to the bank have to be identified by them to make good the allegation of knowledge by the bank? Because if so, HMRC should not make that allegation against the appellant without identifying such an individual.
>
> 85. But I do not think identification would be required: otherwise a corporate entity could avoid allegations of actual knowledge by simply refusing to cooperate with HMRC's enquiry or call any witnesses, making it impossible to identify which particular person had actual knowledge. If the circumstantial evidence was sufficient to justify it, I think a Tribunal could draw the inference that at least one person, albeit unidentified, acting on behalf of the bank had actual knowledge."

She continued, at [86]:

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

140. It is therefore not necessary for HMRC in making an allegation of knowledge or means of knowledge against Vale to attribute that knowledge to an identified individual or individuals. As Mr McGuiness recognised, because it remains necessary for HMRC to establish, on the balance of probabilities, that the connection to a fraudulent loss of VAT was either known or should have been known, there is protection for an appellant such as Vale even in the absence of an allegation against an identified natural person.

Awareness of fraud

141. It is clear from the letter sent by Ernst & Young to HMRC on 17 February 2012, which Mr Rhodes confirmed accurately reflected Vale's position, that Vale was aware of the "general risk" of MTIC fraud in its trade sector from January 2008 (see paragraphs 88, above). This is perhaps not surprising given HMRC's letter of 14 January 2008 which enclosed a copy of Notice 726 and warned Vale of the risk of MTIC fraud (see paragraph 54, above).

142. In our view although HMRC's letter of 14 January 2008 had referred to "high value, low volume electrical products" and Notice 726 to "the supply of specified goods" which were not the type of products in which Vale dealt, it is clear from the matters referred to in Notice 726 (see paragraph 61, above) that it was nevertheless still applicable to Vale.

143. It is also apparent from the evidence that Vale's awareness of the extent and prevalence of the existence and nature of the fraud within its trade sector developed over time as a result of the visits by HMRC Officers to its Acton refinery and correspondence it has with HMRC, as set out above. This culminated in the visit of 28 May 2009 when the Officers advised that tax losses had been identified within some of the traced deal chains involving Vale in 2008 with net losses of £100 million (see paragraph 69, above). However, by this time Vale had already completed all of its deals with Opera and most of its deals with Capella with which we are concerned.

Knew or should have known

144. In essence, Mr McGuiness, for HMRC, contends that the due diligence undertaken by Vale on Opera, Capella, Star and GC was so inadequate that it hardly fits the description and was clearly not effective other than to protect Vale's commercial interests with no consideration given to protecting the position of the public revenue. HMRC relies on what Mr McGuiness described as the failure by Vale "to carry out what are no more than common sense and prudent inquiries and checks." He cites the observation of the Tribunal (Judge Connell, Judge Mosedale and Mr Richard Thomas, as he then was) in *Global Corporation Trading Limited v HMRC* [2013] UKFTT 170 (TC):

> "… that when one is considering *means of knowledge* due diligence is only relevant to the extent that (a) actual answers were received which should have alerted the trader to a problem and (b) where obvious enquiries should have been made and if they had been made would have revealed problems or at least led to more questions. However, when one is considering *actual knowledge* the position is different. A failure to ask obvious questions or carry out obvious due diligence, irrespective of what answers might have been received, leads the Tribunal to consider *why* the question was not asked or the due diligence not undertaken."

145. In relation to supplies from Opera, Mr McGuiness says that these were not run of the mill and similar to other supplies received by Vale but were out of the ordinary in both the purity of the metal, which was above 99.95%, and its value which accounted for 71% of the VAT in all of the deals between January and April 2008, not just those in dispute. Additionally, Vale knew that the people behind Opera were Italian nationals with contacts in Russia and understood that the metal was sourced from either Evrohim or Dragsvetmet in Russia but did not question why the documents indicated that Opera did not have direct access to these companies. He also questioned, given the influx of high purity metals from Russia, why this was not mentioned in Vale's accounts.

146. Mr McGuiness also sought support from the minimal due diligence undertaken on Opera which despite being based in Wembley, a short distance from the Acton refinery, was not visited by anyone from Vale. He contends that had "basic enquiries" been conducted by Vale these would have confirmed that Opera was under-capitalised, that it made up its accounts on a small company basis and was "high risk" and its total assets less liabilities was minus £91,141. It would also have realised that Opera had minimal physical infrastructure in the UK and was trading from the home address of its director.

147. Similarly, with Star, Mr McGuiness contends that because it was new company Vale should have questioned its ability to exploit the market opportunities it did. Its deals with Star were subsequent to Vale being told of tax losses in its supply chains of £100 million and therefore its due diligence should have been much more thorough and ongoing rather than the minimal amount actually undertaken. Had such due diligence been carried out Vale would have discovered that it had no assets, it traded from Italy and had no contact with the metals that were shipped directly from Moscow to Vale. Indeed, as Mr McGuiness pointed out, Mr Rhodes accepted in evidence that had this information been available to Vale questions would have been raised and, with hindsight, he agreed that this may perhaps have been sufficient for Vale to have declined the business.

148. With regard to the supplies from Cappella and GC, had Vale undertaken thorough due diligence it would have known that Capella's website, which described it as a manufacturer and dealer in scrap, was at odds with its trading model of supplying high purity platinum for refining. It would also have asked how Capella sourced its supplies. With regards to GC which also supplied high purity, stamped platinum bars which was "out of kilter" with the normal trade of GC. There is also the delivery from both Capellan and GC by private vehicles, rather than secure transport, which was not questioned by Vale.

149. Mr McGuiness contends that, taking account of all the information available to Vale together with the information which it could and should have obtained had it undertaken thorough due diligence on its suppliers it is plain that Vale knew or should have known its transactions was connected to the fraudulent evasion of VAT or fraud in general.

150. However, Mr Scorey, for Vale, argues that the general and specific features replied upon by HMRC are insufficient to establish that Vale either had actual knowledge or means of knowledge of its transaction being connected to fraud. He refers to the allegation that the transactions were below market price, a reason given by HMRC for denying recovery of input tax, which is no longer relied on and contends that as Vale bought and sold the metal by reference to the LPPM fix price it was clearly consistent with market conditions and the sources of platinum and palladium known to exist in the market. As such there is nothing to suggest that the transactions had any connection to VAT or any other fraud.

151. The other ground on which HMRC relied in its decision letters, the purity of the metal concerned is, says Mr Scorey, not indicative of any connection to fraud but

supports Vale's position that it did not and could not have known of such a connection. He contends that this appears, to some extent, to have been premised on a misunderstanding by HMRC of the nature of Good Delivery status, as opposed to high purity, the nature of scrap and the reason a manufactured anode may be sent for refining, as for example the unchallenged explanation given by Mr Coombes in relation to the Russian anodes (see paragraph 49, above). As Mr Williams observed:

> "… there was no reason for anyone at Vale to consider an increase in supply from Opera, or indeed any of the other three suppliers as unusual. It was in accordance with the changes were knew to be going on in the industry at the time as a result of the liberation of the Russian PGMs market."

152. Insofar as Vale's due diligence is concerned, Mr Scorey emphasised that it was no different to that taken in relation to its other suppliers with whom it traded at the in transactions that are not in dispute. Indeed, Officer Wilson agreed that this was the case (see paragraph 100, above). She also accepted that there was no uniform approach to due diligence across the scrap refining industry.

153. Similarly, Mr Lowish agreed that between 2008 and 2010 the LPPM did not issue any guidelines in relation to the type of due diligence to be undertaken and, other than regulated companies and in regard to money laundering, there were no uniform rules that applied across the industry in respect of due diligence. We have already observed (at paragraph 125, above) that although he did not consider it wise Mr Lowish accepted that delivery of metals, of both high and low purity, by private vehicle did happen in the market.

154. Having regard to all of these matters, together with the evidence before us, we cannot be satisfied, on a balance of probabilities, that at the time it entered into them Vale had actual knowledge that its transactions with Opera, Capella, Star and GC were connected to fraud.

155. In our judgment HMRC's case puts too much emphasis on due diligence, something Moses LJ cautioned against in *Mobilx* at [82] when he said:

> "Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed in *Kittel*, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT."

156. Asking that essential question – whether Vale should have known by its purchases that it was taking part in transactions connected with the fraudulent evasion of VAT? – we have come to the conclusion, having carefully considered Vale's transactions and their surrounding circumstances together with all of the evidence, that, at best (assuming as we have in relation to knowledge and means of knowledge

that the transactions concerned are connected to the fraudulent evasion of VAT, see paragraph 136, above), HMRC have established that Vale should have realised that it was more likely than not that the transactions were connected to fraud.

157. However, as is clear from *Mobilx* this is not sufficient for Vale to be denied its input tax. As Moses LJ said at [60] of *Mobilx*:

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

We therefore find that HMRC has not established that Vale either knew or should have known that its transactions were connected to the fraudulent evasion of VAT.

158. In the circumstances it is not necessary for us to consider whether the losses in this case resulted from the fraudulent evasion of VAT or if the transactions concerned were connected to any fraudulent loss of VAT.

159. Additionally, as a result of our conclusion that HMRC has not established that Vale either knew or should have known that its transactions were connected to the fraudulent evasion of VAT, it follows that there has not been any overstatement by Vale of its input tax credit in its VAT return for the period 02/08 and as a result there can be no liability to a penalty under s 63 VATA.

Conclusion

160. For the above reasons the appeal is allowed.

Costs

161. This appeal was categorised as "complex" and Vale did not make any application for exclusion from the costs regime under rule 10(1)(c) of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. Therefore, the full costs-shifting regime is applicable. As a result, the Tribunal has a general discretion as to costs which were sought by Vale if successful, which it has been.

162. However, as we have not had any submissions on costs we direct that that, given our decision and if advised to do so, Vale may either file and serve written submissions in support of an application for costs on the Tribunal and HMRC (to which it may respond within 28 days of receipt and Vale reply within 14 days thereafter) within 28 days of release of this decision or alternatively make an application for an oral hearing within that time. In the absence of any application for an oral hearing and should Vale apply for its costs, we will decide the matter on the basis of written representations.

Appeal Rights

163. 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.

JOHN BROOKS
TRIBUNAL JUDGE

RELEASE DATE: 9 NOVEMBER 2018

Appendix

Table 1 – Vale purchases from Opera

Deal	Date	Goods	Net (£)	VAT (£)
1	04/01/08	Pt	119,424.77	20,899.33
2	24/01/08	Pt	2,421,123.33	423,696.59
3	24/0`/08	Pt	126,178.03	22,081.16
4	29/01/08	Pt	2,710,215.13	474,287.65
5	29/01/08	Pt	190,965.93	33,419.04
6	04/02/08	Pt	3,850,041.78	673,757.31
7	04/02/08	Pt	155,063.58	27,136.13
8	05/02/08	Pt	215,601.43	37,730.25
9	06/02/08	Pd	632,653.13	110,714.30
10	12/02/08	Pd	1,052,236.75	184,141.43
11	15/02/08	Pt	3,100,301.87	542,552.83
12	15/02/08	Pd	54,561.25	9,548.22
13	20/02/08	Pt	182,609.13	31,956.60
14	06/03/08	Pt	3,301,497.17	577,762.01
15A	06/03/08	Pd	853,315.89	149,330.28
15B	06/03/08	Pt	176,055.98	30,809.80
15C	06/03/08	Pd	19,587.21	3,427.76
16	10/03/08	Pt Pd	2,969,515.08	519,665.14
17	14/03/08	Pt Pd	5,555,052.56	972,134.20
18	19/03/08	Pt Pd	144,912.20	25,359.63
19	25/03/08	Pt Pd	3,933,614.60	688,382.56
20	28/03/08	Pt	1,522,552.59	266,446.70
21	31/03/08	Pt Pd	3,798,732.61	664,778.21
22	31/03/08	Pt Pd	1,757,688.75	307,595.53
23	07/04/08	Pt	1,493,712.54	261,399.69
24	14/04/08	Pt	86,691.23	15,170.96
25	04/04/08	Pt Pd	326,147.01	57,075.73
26	04/04/08	Pt Pd	2,973,100.63	520,292.61
27	10/04/08	Pt	162,854.63	28,499.50

Table 2 – Cappella Deal Chains

Invoice Date	Trader		Goods	Net £ (or $ where stated)	VAT £
	Source	**Destination**			
Deal 28					
12/09/08	Par Three	Heritage	Pt	212,673.00	37,217.78
29/09/08	Heritage	Capella	Pt	215,107.63	37,643.94
10/09/08	Capella	Vale	Pt	176,191.25	30,833.47
Deal 29					
07/10/08	Baio	Heritage	Pt	345,443.41	60,452.60
29/09/08	Heritage	Capella	Pt	350,506.20	61,338.59
25/09/08	Capella	Vale	Pt	295,168.50	51,654.49
Deal 30					
31/10/08	Par Three	Heritage	Pt	158,193.81	27,683.91
25/11/08	Heritage	Capella	Pt	159,364.22	27,888.74
04/11/08	Capella	Vale	Pt	124,038.60	21,706.75
Deal 31					
28/11/08	Par Three	Heritage	Pt	478,148.13	83,675.92
25/11/08	Heritage	Capella	Pt	482,500.56	84,437.60
05/11/08	Capella	Vale	Pt	409,013.42	71,577.35
Deal 32					
31/10/08	Par Three	Heritage	Pt	(as deal 30)	
25/11/08	Heritage	Capella	Pt	(as deal 30)	
06/11/08	Capella	Vale	Pt	5,579	976.43
Deal 33					
28/11/08	Par Three	Heritage	Pt	(as deal 31)	
25/11/08	Heritage	Capella	Pt	(as deal 31)	
06/11/08	Capella	Vale	Pt	74,278.08	12,998.66
Deal 34					
28/11/08	Par Three	Heritage	Pt	521,784.85	91,312.35
18/12/08	Heritage	Capella	Pt	311,856.77	46,778.52
28/11/08	Capella	Vale	Pt	282,766.82	49,484.19
Deal 35					
28/11/08	Par Three	Heritage	Pt	(as deal 34)	
18/12/08	Heritage	Capella	Pt	(as deal 34)	
02/12/08	Capella	Vale	Pt	18,004.80	2,700.72
Deal 36					
28/11/08	Par Three	Heritage	Pt	(as deal 34)	
18/12/08	Heritage	Capella	Pt	(as deal 34)	
21/01/09	Capella	Vale	Pt	19,902.09	2,985.31
Deal 37					
15/12/08	S&G	Capella	Pt	35,096.97	5,264.54
22/12/08	Capella	Vale	Pt	35,155.89	5,273.38
Deal 38					
15/12/08	S&G	Capella	Pt	(as deal 37)	
22/12/08	Capella	Vale	Pt	508.56	76.28
Deal 39					

16/12/08	S&G	Capella	Pt	17,510.82	2,626.62
22/12/08	Capella	Vale	Pt	17,298.93	2,594.84
Deal 40					
16/12/08	S&G	Capella	Pt	(as deal 39)	
06/01/09	Capella	Vale	Pt	546.01	81.90
Deal 41					
15/12/08	S&G	Capella	Pt	86,690.02	13,003.50
06/01/09	Capella	Vale	Pt	82,412.69	12,203.71
Deal 42					
15/12/08	S&G	Capella	Pt	(as deal 41)	
22/01/09	Capella	Vale	Pt	21,102.82	3,165.42
Deal 43					
09/01/09	S&G	Capella	Pt	60,146.39	9,021.96
13/01/09	Capella	Vale	Pt	51,456.80	7,718.52
Deal 44					
09/01/09	S&G	Capella	Pt	(as deal 43)	
22/01/09	Capella	Vale	Pt	6,180.25	927.04
Deal 45					
18/03/09	East2West	Gemini	Pt	$649,674.34	$97,451.15
18/03/09	Gemini	Capella	Pt	$651,629.06	$70,319.68
13/03/09	Capella	Vale	Pt	459,122.60	68,868.39
Deal 46					
18/03/09	East2West	Gemini	Pt	(as deal 45)	
18/03/09	Gemini	Capella	Pt	(as deal 45)	
03/04/09	Capella	Vale	Pt	23,094.01	3,464.10
Deal 47					
27/03/09	East2West	Gemini	Pt	$661,397.83	71,373.87
27/03/09	Gemini	Capella	Pt	$663,383.10	71,588.11
31/03/09	Capella	Vale	Pt	$645,255.80	68,208.86
Deal 48					
27/03/09	East2West	Gemini	Pt	(as deal 47)	
27/03/09	Gemini	Capella	Pt	(as deal 47)	
03/04/09	Capella	Vale	Pt	21,519.26	3,227.89
Deal 49A					
06/07/09	Gemini	Capella	Pt	112,833.64	16,925.05
07/07/09	Capella	Vale	Pt	106,909.50	16,036.43

Table 3 – Star Deal Chains

Invoice Date	**Trader**		**Goods**	**Net £ (or $ where stated)**	**VAT £**
	Source	**Destination**			
Deal 49B					
14/07/09	Chemical*	Fincrex	Pt	$913.353.38	
15/07/09	Fincrex	Star	Pt	$916,991.18	
21/07/09	Star	Vale	Pt	$836,250	77,021.68
Deal 50					
17/07/09	Chemical	Fincrex	Pt	$1,876,821.80	

18/07/09	Fincrex	Star	Pt	$1,884,276.42	
21/07/09	Star	Vale	Pt	$1,737,420	160,022.72
Deal 54					
17/07/09	Chemical	Fincrex	Pt	(as deal 50)	
18/07/09	Fincrex	Star	Pt	(as deal 50)	
21/07/09	Star	Vale	Pt	$97,439.71	8,974.55
Deal 55					
24/07/09	Chemical	Fincrex	Pt	$1,959,485.99	
25/07/09	Fincrex	Star	Pt	$1,967,277.58	
29/07/09	Star	Vale	Pt	$1,768,845.00	162,917.10
Deal 56					
24/07/09	Chemical	Fincrex	Pt	(as deal 55)	
25/07/09	Fincrex	Star	Pt	(as deal 55)	
31/07/09	Star	Vale	Pt	$146,380,69	13,482.20
Deal 57					
12/08/09	Chemical	Fincrex	Pt	$2,016,486.25	
13/08/09	Fincrex	Star	Pt	$2,023,794.65	
20/08/09	Star	Vale	Pt	$1,927,645.75	175,922.89
Deal 58					
12/08/09	Chemical	Fincrex	Pt	(as deal 57)	
13/08/09	Fincrex	Star	Pt	(as deal 57)	
24/08/09	Star	Vale	Pt	$99,767.93	9,105.13

* Chemical Maltese Limited (Malta)

Table 4 – GC Deal Chains

Invoice Date	**Trader**		**Goods**	**Net £**	**VAT £**
	Source	**Destination**			
Deal 59					
10/12/09	Safeguard	Gemini	Pt	106,247.62	15,937.14
09/12/09	Gemini	Fabulous	Pt	106,441.60	15,966.24
09/12/09	Fabulous	GC	Pt	109,525.17	16,428.78
11/12/09	GC	Vale	Pt	112,235.70	16,835.36
Deal 60					
05/01/10	Safeguard	Gemini	Pt	43,119.96	7,545.99
05/01/10	Gemini	Fabulous	Pt	43,185.13	7,557.40
05/01/10	Fabulous	GC	Pt	44,435.53	7,776.22
17/12/09	GC	Vale	Pt	47,196.71	7,079.51
Deal 61					
15/12/09	Safeguard	Gemini	Pt	133,763.20	20,064.48
15/12/09	Gemini	Fabulous	Pt	134,010.25	20,101.54
15/12/09	Fabulous	GC	Pt	137,887.52	20,683.13
07/01/10	GC	Vale	Pt	151,587.81	26,527.87
Deal 62					
26/01/10	Safeguard	Gemini	Pt	134,868.66	20,230.30
26/01/10	Gemini	Fabulous	Pt	135,117.71	23,645.60
26/01/10	Fabulous	GC	Pt	138,786.37	24,287.61
28/01/10	GC	Vale	Pt	143,894.74	25,181.58

Deal 63					
15/02/10	Safeguard	Gemini	Pt	82,690.01	12,403.50
16/02/10	Gemini	Fabulous	Pt	82,847.62	14,711.23
16/02/10	Fabulous	GC	Pt	85,248.39	14,918.47
18/02/10	GC	Vale	Pt	87,700.50	15,347.59
Deal 64					
25/02/10	Safeguard	Gemini	Pt	68,304.56	11,953.30
23/02/10	Gemini	Fabulous	Pt	68,448.01	11,978.40
23/02/10	Fabulous	GC	Pt	70,430.98	12,325.42
25/02/10	GC	Vale	Pt	73,538.25	12,869.19
Deal 65					
15/03/10	Safeguard	Gemini	Pt	128,822.33	22,543.91
15/03/10	Gemini	Fabulous	Pt	129,090.21	22,590.79
15/03/10	Fabulous	GC	Pt	132,828.53	23,244.99
17/03/10	GC	Vale	Pt	137,481.59	24,059.28
Deal 66					
06/04/10	Safeguard	Gemini	Pt	134,699.02	23,572.33
06/04/10	Gemini	Fabulous	Pt	134,990.89	23,623.41
06/04/10	Fabulous	GC	Pt	138,901.12	24,307.70
08/04/10	GC	Vale	Pt	143,964.63	25,193.81