TC07731

VAT – denial of credit for input tax on basis that Appellant knew or should have known that its transactions were connected with the fraudulent evasion of VAT – sale of airtime – transaction chains involve both direct chains and contra trading – Appellant knew and should have known – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2015/07209

BETWEEN

ASKARIS INFORMATION TECHNOLOGY LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE JEANETTE ZAMAN
IAN ABRAMS

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 4, 5, and 9 March 2020, with written submissions received on 20 March 2020 and 26 March 2020

Mr Nigel Sangster QC, counsel, instructed by Chivers Solicitors, for the Appellant

Mr Rory Keene and Mr Joshua Normanton, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

INTRODUCTION

1. On 27 August 2015 HMRC issued a decision denying Askaris Information Technology Limited ("Askaris") credit for input tax on the ground that Askaris knew or should have known that its transactions were connected with the fraudulent evasion of VAT.

2. The total amount denied is £809,610.02, which had been claimed in the following periods:

(1) £197,987.50 in 08/13 (quarterly return);

(2) £375,633.92 in 09/13 (monthly);

(3) £225,423.94 in 10/13 (monthly); and

(4) £10,564.66 in 11/13 (monthly).

3. The invoices in respect of which input tax is claimed are set out at Annex 1. The transactions to which Askaris was party include both direct tax loss chains (in which the defaulter is Blue Logic Europe Limited ("Blue Logic")) and contra chains (which trace back to Bartel Networks Limited ("Bartel"), a company which sits as a buffer in separate transaction chains tracing back to specified fraudulent defaulters).

PRELIMINARY ISSUES

4. By the end of the second day of the hearing we had finished hearing the evidence from both parties. At our direction, the parties provided us with their written closing submissions on 8 March 2020, and delivered their oral submissions in relation thereto on the third and final day of the hearing, 9 March 2020.

5. There were three witnesses for Askaris. We heard evidence from Sean Allison, a director of Askaris, and had the benefit of agreed witness statements from Enis Suleyman and Andrew Dunn. HMRC challenged the lack of evidence from two specified individuals, Benham Azadi and Richard Upshall - their written closing submissions included:

> "72. Benham Azadi is a crucial figure in the Appellant's case because, on the Appellant's account, he is able to explain all elements of the Appellant's operations. The Appellant's failure to call Mr Azadi can properly be seen as an attempt to evade scrutiny of the transactions and the Appellant's behaviour. Mr Azadi's absence might have been acceptable if the Appellant had kept a documentary record of its activities but it failed to do so at any time.
>
> 73. Further, no explanation was given for a failure to provide evidence from Mr Upshall. He could have provided information about the funding of the operation, among other matters."

6. In delivering his oral closing, Mr Keene referred to Mr Azadi as a somewhat "mythical figure", and separately referred to Mr Upshall as being the person who had been a director of Askaris until August 2013 (a date which is in the middle of the period in which the transactions took place), is now a director again of the company, had funded the loans which supported the trading and stood to benefit from what HMRC say was the attempted fraud.

7. In response, Mr Sangster submitted that if the Tribunal wanted to hear evidence from Mr Azadi or Mr Upshall we should adjourn the hearing part-heard in order that those individuals could be called as witnesses to give evidence at a resumed hearing at a later date. His position was that if we decided we needed to hear from Mr Azadi and Mr Upshall before deciding where the truth lies, then that had to be arranged – the Tribunal cannot decide this case and should not decide the case on the basis of the "cynical fantasy" that HMRC had come up with. He framed

this submission as it being important that we hear from these individuals if we decide we are going to reject everything that Mr Allison had said.

8. Mr Keene opposed this application – Askaris had had plenty of opportunity to consider and prepare its case and decide which witnesses and evidence to bring before the Tribunal. HMRC were entitled to invite the Tribunal to draw inferences from the absence of individuals who, on Askaris' own account, conducted the discussions with counterparties and made decisions as to funding.

9. We adjourned the hearing briefly during that morning to consider whether to adjourn part-heard in order to summons and hear from these two additional witnesses, or to continue and conclude the hearing that day (as the only matters remaining by that stage were to hear Mr Sangster's closing submissions and Mr Keene's reply thereto).

10. We considered carefully rules 2 and 15 of The Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 (the "Tribunal Rules"), namely the overriding objective and the rules relating to evidence. We decided not to grant Mr Sangster's application and we announced our decision (giving brief reasons) at the resumed hearing, which then proceeded to its conclusion. The reasons for our decision on this point are set out below.

11. Rule 2 of the Tribunal Rules states that the "overriding objective" of the Tribunal Rules is to enable the Tribunal to deal with cases fairly and justly, and this includes dealing with the case in ways which are proportionate to the importance of the case, complexity, costs and resources, avoiding unnecessary formality and seeking flexibility in proceedings, ensuring that the parties are able to participate fully in the proceedings and avoiding delay.

12. Rule 15(2) provides that the Tribunal may admit evidence whether or not it would be admissible in a civil trial, and may exclude evidence that would otherwise be admissible where it was not provided within the time allowed by a direction or it would otherwise be unfair to admit the evidence. We were mindful of the principle set out concisely by Lightman J in *Mobile Export 365 Ltd v HMRC* [2007] EWHC1737 (Ch) at [20] that "The presumption must be that all relevant evidence should be admitted unless there is a compelling reason to the contrary."

13. As we had heard all of the evidence by the time this application was made (and had read all of the agreed witness statements), it was readily apparent to us that evidence from Mr Azadi would be relevant. His involvement in the business of Askaris and transactions under appeal is referred to throughout this decision and described at [250] below. The position of evidence from Mr Upshall was less clear. However, he had been a director of Askaris at the time of some of the earlier transactions under appeal, and given that the funding of Askaris was relied upon by HMRC as a factor indicating knowledge or means of knowledge (and Askaris' position was that the cost of this funding had indirectly been borne by him), we proceeded to consider the matter on the basis that evidence from Mr Upshall would also be relevant.

14. Our decision to refuse to adjourn to admit new evidence was based on the witness statements of Mr Azadi and Mr Upshall not having been provided by Askaris within the time allowed by a direction of the Tribunal and it being unfair to HMRC to admit this new evidence. (We were mindful that granting the adjournment would also result in a delay – however this was not a determining factor as, had we reached a different conclusion on the unfairness to the parties, we would have concluded that the delay was necessary.)

15. Looking at the progress of the appeal, the parties had both prepared their case (as to submissions and evidence) in line with Tribunal directions:

(1) During meetings with HMRC which took place before HMRC issued their decision to deny the input tax credits, Mr Allison stated that Mr Azadi had dealt with the airtime

trading (whilst Mr Allison dealt with contracting and data security) and that Mr Upshall was an investor in the business.

(2) Askaris' Grounds of Appeal dated 25 January 2016 referred to Mr Azadi as being the project manager of K-Roam, and he had drafted an explanation of that project which was included as an addendum to the grounds.

(3) In HMRC's Statement of Case (dated 25 April 2016) Mr Keene referred to the lack of action taken by Mr Allison and stated (under the heading of "Credibility of Appellant") that the factors they set out called into question the veracity and integrity of Askaris.

(4) Various directions from the Tribunal were agreed concerning disclosure and evidence (including witness statements) and extensions of time sought and granted at different times. Askaris had been due to serve their witness evidence on 21 September 2018 but did not do so; HMRC invited Askaris to apply for an extension of time, which application was made on 11 October 2018 (extending time to 21 December 2018). On 21 January 2019 HMRC applied for an "unless order" requiring that the evidence be served by 4 February 2019. Mr Sangster gave an undertaking to do so and in the light of that the Tribunal informed the parties on 29 January 2019 that it was considered inappropriate to make the order sought.

(5) On 4 February 2019 Askaris provided HMRC with witness statements from Mr Allison, Mr Dunn and Mr Suleyman.

(6) In their written opening submissions, dated 21 February 2020, HMRC stated that Mr Allison seemed to know very little about the operation of the business and could only really talk about the company's K-Roam project and he simply attributed responsibility for all trading in airtime to Mr Azadi, who was also said to be responsible for due diligence.

(7) Askaris' written opening submissions were served on 27 February 2020. Those submissions refer to Mr Azadi as the "primary mover" in the airtime trading and in sourcing the supplier and customer. Those submissions stated that he would have been a key witness but was no longer available to be called as there was a tragic accident in 2016 which resulted in the death of his daughter, he became unfit for work because of stress and anxiety and ultimately left Askaris and indeed the country, moving to the US. Mr Allison, Mr Dunn and Mr Suleyman "were cognisant of much of what he was doing and will attempt to explain the relevant history to the Tribunal".

(8) In his oral opening submissions Mr Keene made it clear that HMRC did not dispute the occurrence of the tragic death of Mr Azadi's daughter, but handed up a file of papers showing that Mr Azadi appeared to be based in or around Teesside, and had done since 2017.

(9) In his oral opening submissions Mr Sangster said:

> "I think, from discussions this morning, Mr Allison is going to say he's had one email from him since he went to America, a round-robin asking for crowd funding to publish his book about the stories his child had told him before she died. And he didn't reply to it and he has never seen or heard from him since.
>
> If he's available -- and I don't think HMRC could find him -- I don't know whether he would be willing to come and give evidence. It's a bit late in the day. But I think the evidence we have from Mr Allison and from Mr Suleyman, who sits behind, whose statement is accepted, and from Andy Dunn, they cover a lot of what Mr [Azadi] was doing. So I don't think we need to adjourn this case to see if we can try to get it. I think we can deal with

> what he was dong (sic). And when we look at the documents I think it's clear what he was doing: he was setting up this project and he was the one finding suppliers, Skynet and Jersey Telecom. So we'll do that in due course."

16. Whilst the language used by HMRC was undoubtedly more direct and strident in their written closing, and in Mr Keene's oral closing, the challenge to the integrity of Askaris was made at a general matter at a very early stage, and we consider it should have been apparent to Askaris that HMRC would seek to pursue a challenge as to the role of individuals who had not given witness statements, particularly given that Mr Allison's own evidence was often based on what he had been told by Mr Azadi and he had described Mr Azadi as the project manager in relation to K-Roam and was responsible for the airtime trading. This submission of HMRC was thus one which Askaris had the opportunity to address when considering ahead of the hearing the evidence it wished to put before the Tribunal, and the deadline for providing witness statements from its witnesses was effectively agreed to be 4 February 2019 (in view of the undertaking given by Mr Sangster).

17. We had submissions from Mr Sangster and evidence from Mr Allison as to the reasons for the absence of Mr Azadi, and submissions regarding Mr Upshall. We address those further when considering "Whether Appellant knew or should have known".

18. As set out at [101] to [104], there were a considerable number of witness statements from officers of HMRC, most of which were agreed, and Officer Chisman gave evidence at the hearing and was cross-examined by Mr Sangster in relation thereto. His evidence had been completed. Introducing new evidence (when neither party knew what that would be, albeit that we can infer that Askaris had an expectation of what Mr Azadi and Mr Upshall would say) would result in significant unfairness to HMRC, as although HMRC would have the ability to challenge this evidence in cross-examination, they would have been deprived of the opportunity to have any of their witnesses (most obviously Officer Chisman) address the matters put forward by the new evidence.

19. Furthermore, Mr Sangster had referred to the absence of Mr Azadi in opening, even after Mr Keene had handed up the file of evidence suggesting that Mr Azadi was in the UK, and stated that he didn't think it would be necessary to seek to find Mr Azadi and call him. If there were to be a (very late) application for an adjournment to seek to introduce new witness evidence, that would have been the time at which to make it. By the time of the final day of the hearing, although the hearing had been relatively short (at 2.5 days), both parties had presented their opening submissions, "live" witnesses had been cross-examined and the parties had both presented their written closings in the light of the evidence which we had heard. We considered that to adjourn part-heard at that stage would effectively enable one party, in this case Askaris, to re-visit its own case in the light of HMRC's evidence and have another go at presenting their evidence.

20. We considered that there was therefore the potential for significant unfairness to HMRC to grant an adjournment at that stage. We were particularly mindful that matters which were emphasised by HMRC that might have been subjects on which Mr Azadi and Mr Upshall could give evidence (dealings with counterparties, reasons for funding, whether repayments made) were issues which had been flagged throughout the verification process and in disclosure requests. HMRC's challenge on such matters at the hearing should not have been a surprise to Askaris such that we might consider that they could not reasonably have been expected to have evidence available on such matters.

21. We note that in making his submissions as to introducing new evidence from Mr Azadi and Mr Upshall, Mr Sangster had (in part) framed the matter as being a question of whether we, the Tribunal, would find it helpful to hear evidence from these two witnesses. We did not

consider that this was the right question to ask; as regards evidence of fact, it is for each party to consider and decide (in accordance with the Tribunal Rules) what evidence they wish to adduce and to make their case accordingly. Therefore our decision to refuse an adjournment should not be taken to mean that we had decided that the evidence of Mr Azadi or Mr Upshall would not be relevant to our decision. As noted above, we had proceeded to consider the matter on the basis that the evidence would be relevant.

22. In all the circumstances, we considered that the unfairness to HMRC was a compelling reason not to admit new evidence from new witnesses, and therefore refused to adjourn the hearing.

23. As a separate matter, we note that after the hearing HMRC provided written submissions on Askaris' written closing statement. Mr Sangster then provided a written response. In providing that response, Mr Sangster stated that he had taken instructions and Mr Allison had asked him if it would be permissible for him (Mr Allison) to respond in his own words. In sending this to us, Mr Sangster posed the rhetorical question that he didn't see why not. He attached the response (which comprised comments of Mr Allison annotated on HMRC's written submissions), asking that we take them into account and give them such weight as we deem appropriate. Following receipt of this, Mr Normanton confirmed on behalf of HMRC that they did not propose to respond further.

24. We have reviewed and considered both sets of further written submissions. We do, however, confirm that the written response submitted on behalf of Askaris, which we have been informed was drafted by Mr Allison, has been treated as further submissions on behalf of Askaris, not as evidence of Mr Allison (either new or confirming matters previously addressed). There was no suggestion from Mr Sangster that we should do otherwise, and HMRC have not offered a view; in the circumstances, we saw no need to seek submissions from either party and have taken the submissions into account in reaching our decision.

BACKGROUND

25. We have set out below:

(1) a description of the ownership and management of Askaris as well as other companies which, whilst not grouped or connected with Askaris (as defined in various parts of the tax legislation), are nevertheless associated with it by virtue of common ownership or management, or which are mentioned in the context of this appeal;

(2) an outline of the transactions it entered into; and

(3) a chronology of some of the contacts with HMRC.

26. We have made the findings of fact set out below. We have made additional findings of fact under "Whether Appellant knew or should have known". This includes matters relating to the experience of Mr Allison and the business model for Askaris.

27. The following companies were referred to in the evidence:

(1) Askaris Ltd – This was established by Mr Allison in 1999 and was sold to Onyx Group in 2005;

(2) Onyx Group – This was an internet service provider for whom Mr Suleyman worked from 2000 to 2012;

(3) OES Oilfield Services (UK) Limited – This was established in England and Wales in 2006. Richard Upshall is stated to be a person with significant control by virtue of his ownership of more than 25% but not more than 50% of the shares. We had no evidence as to the remaining share ownership. There have been a number of changes in the

directors since its incorporation. The initial director was Mr Upshall, but he resigned in October 2012, was re-appointed in July 2017 and resigned in September 2019. Mr Suleyman was appointed as a director in October 2012, resigned in March 2017 and was re-appointed in September 2019. He remains a director alongside Vishal Ranjan (and there have been other appointments and resignations);

(4) OES Equipment LLC – This was established in Dubai in 1996. Its shareholder is Mohammed Al Ghafli and its general manager is Mr Upshall;

(5) RU Licit Limited – This company was established in January 2015 by Mr Upshall and provided legal services. It had at one stage advised Askaris on this appeal. The initial director was Ben Houchen, who resigned on 1 June 2016. Mr Suleyman was appointed as a director on 20 July 2016. The company was dissolved in February 2019;

(6) Askaris Information Technology LLC ("Askaris UAE") – This was established in Dubai in 2008 or 2009. The shareholder is Mr Al Ghafli and Mr Allison was general manager. Askaris UAE provided various information technology services to OES within the UAE, and to OES in Singapore and elsewhere. It also provided support for network users, and services supporting their communications.

28. Mr Al Ghafli is a UAE citizen and the legal owner of any UAE businesses in which Mr Upshall has an interest, and has security for any funding he might provide for Mr Upshall's business interests.

29. The evidence of Askaris referred sometimes to OES Oilfield Services (UK) Limited and sometimes simply to OES. Where reference is made to "OES" it was often not clear whether that is a reference to OES Oilfield Services (UK) Limited or to OES Equipment LLC. Whilst these are different legal entities, incorporated in different countries, we do not consider that this lack of clarity has any bearing on the matters under appeal, and we also simply refer to OES.

30. Askaris itself (the appellant in this appeal) was incorporated on 11 November 2009. Its shareholders were Sean Allison (25%), Trojan Enterprises Limited (25%) and Moore Stephens Trust Company Limited (50%) (with Troy Holford, a silent partner, and Mr Upshall respectively being behind the latter two companies). Mr Upshall was appointed as director and Mr Allison as company secretary from its incorporation. At some point around 2013 Mr Upshall became the sole shareholder – Mr Allison said in a meeting with HMRC in March 2014 that he and Mr Holford had each given their stakes in the company to Mr Upshall's Moore Stephens Trust. Mr Upshall resigned as director on 23 August 2013, and Mr Allison was appointed director from that same date (and remains a director). Mr Upshall has since been re-appointed as a director (on 12 September 2019).

31. Askaris was dormant initially and on 24 October 2012 Mr Allison submitted an application to register the company for VAT. Mr Allison's address was stated as being in Dubai. The principal place of business was the office of its accountant, Ashdown Hurrey LLP ("Ashdown Hurrey"). The company was registered for VAT with effect from 1 November 2012 and it was placed on quarterly returns.

32. In June 2013 Askaris entered the market as a mobile airtime provider. To state what is now common knowledge, voice over internet protocol ("VOIP") is a voice message technology that enables telephone calls to be routed via the internet rather than fixed telephone lines. To enable traders in VOIP to route the calls from the user to the destination, calls have to be routed through a switch controlled by every seller. The switch must have a physical connection to a mains telecom network. Sellers of airtime generate what are known as call data records

("CDRs") which contain detailed information about the calls passing through that trader's switch.

33. It was agreed that the only supplier of airtime to Askaris was Skynet Corporation Ltd ("Skynet"). We did not have a copy of any contract between Askaris and Skynet, although we did have copy invoices submitted from Skynet to Askaris, the first of which was dated 11 June 2013. We accept that there was a written contract between Skynet and Askaris on the basis of the discussion at the meeting on 26 March 2014 (see [57(18)] below).

34. Askaris entered into the following contracts:

(1) a managed services agreement with Error Scope Limited ("Error Scope") dated 20 April 2013 (the "Error Scope Services Agreement") providing for Error Scope to rent a specified type of switch to Askaris for a set-up fee of £2,000 plus monthly rental fee of £5,000 per month;

(2) a loan agreement with Askaris UAE dated 20 June 2013 (the "UAE Loan") (see [217] below);

(3) a wholesale interconnection agreement with JT (Jersey) Limited ("Jersey Telecom") dated 10 July 2013 (the "JT Interconnection Agreement") – this agreement was signed by Mr Allison on behalf of Askaris and John Stonehouse, Head of Voice – Wholesale on behalf of Jersey Telecom. On 8 July 2013 Askaris gave notice of assignment of its rights under that agreement to Jersey Telecom – that notice referred to the JT Interconnection Agreement as having been concluded on 8 July 2013 and gave notice that on that date Askaris had assigned all its rights (present and future) under that agreement to VOIP Capital International ("VOIP Capital"), and required that Jersey Telecom pay all amounts invoiced under the contract to a bank account in Mauritius in the name of VOIP Capital unless they receive written notice to the contrary. That notice of assignment is signed by Mr Allison on behalf of Askaris. Receipt of that notice was acknowledged by John Diamond on behalf of Jersey Telecom, whose signature on 11 July 2013 was witnessed by John Stonehouse; and

(4) a factoring agreement with VOIP Capital dated 9 July 2013 (the "Factoring Agreement") – this agreement was signed by Mr Allison on behalf of Askaris on 8 July 2013 but we have described it as being dated 9 July 2013 as that is the date on which it was signed on behalf of VOIP Capital. There was also:

(a) a direct payment authority from Askaris to VOIP Capital dated 14 July 2013 instructing VOIP Capital to pay invoices from Skynet directly to Skynet (signed by Mr Allison),

(b) an escrow arrangement (in the form of a letter addressed to Mr Allison at Askaris) with VOIP Capital dated 18 July 2013 pursuant to which Askaris appointed VOIP Capital to act as its payment intermediary and escrow agent,

(c) a supplemental deed of amendment dated 4 September 2013 signed by Mr Allison, witnessed by Mr Azadi, and

(d) a second supplemental deed of amendment dated 13 September 2013.

35. There is clearly a discrepancy as regards the date of the JT Interconnection Agreement. There were at least two copies of that agreement in the hearing bundle, and not all copies showed signatures from both parties. However, they did all show a printed date on the agreement of 10 July 2013 and that Mr Allison had signed on 10 July (with Mr Allison being described as director of Askaris). Thus even if the agreement had been signed on an earlier

date on behalf of Jersey Telecom, the agreement could not have been dated prior to 10 July 2013.

36. Pursuant to these contractual arrangements, Askaris supplied airtime which it bought from Skynet to Jersey Telecom. Invoices from Skynet to Askaris were factored with VOIP Capital as regards the price excluding the amount in respect of VAT. Askaris drew down funds from the UAE Loan which were paid directly to VOIP Capital by Askaris UAE to cover the VAT element of these invoices. As a result of the assignment of its rights under the JT Interconnection Agreement, payments by Jersey Telecom were made to VOIP Capital, which then paid the Skynet invoices. Those invoices from Skynet to Askaris are dated from 11 June 2013 to 22 October 2013 as set out in Annex 1 hereto.

37. On 5 June 2013 Ashdown Hurrey had applied for Askaris to be moved on to monthly returns. On 10 June 2013 Officer Beach rejected that application stating that HMRC generally only permit monthly returns to be submitted by traders who are regularly in a VAT repayment position or who can forecast a repayment position covering several months (based eg on capital expenditure).

38. On 11 July 2013 Ashdown Hurrey asked that this rejection be reconsidered. That letter referred to a telephone conversation with HMRC and enclosed:

(1) the JT Interconnection Agreement; and

(2) copy invoice Askaris 004 from Skynet to Askaris.

39. On 26 July 2013 Officer Pickerill wrote to Ashdown Hurrey stating that the change from quarterly returns to monthly returns had been approved and it would be reviewed in three months' time.

40. Askaris submitted its VAT return for the (quarterly) period 08/13 on 2 September 2013.

41. Officers Piers Ginn and Steven Cowell of HMRC visited Askaris at the offices of Ashdown Hurrey on 19 September 2013. The visit report indicates that the meeting was a pre-credibility check and a response to a visit request from another trader (Skynet) in the continuous monitoring project. It was an unannounced visit and no-one from Askaris was present. HMRC met with Gemma Steer of Ashdown Hurrey. It lasted 20 minutes:

(1) Officer Ginn drew attention to the fact that the sample invoice from Skynet was invalid as the VAT element was shown in US dollars not sterling.

(2) Officer Ginn gave Ms Steer a copy of Notice 726 (joint and several liability) and referred her specifically to section 6. Officer Ginn explained that airtime and minutes had been identified as a commodity used in MTIC transactions. He was aware that tax losses involving these commodities had been identified by HMRC, clarifying that he was not saying that the transactions that Askaris had undertaken did involve tax losses because he had not looked at them because he did not have the information from the trader yet. He explained that due to the trade sector that Askaris was trading in the company may be subject to continuous monitoring that would require monthly visits to the company.

(3) Ms Steer informed Officer Ginn that she believed that Mr Allison would be returning to the UK for good by Christmas.

42. On 23 September 2013 Officer Ginn emailed Ms Steer a letter to Askaris for her to send on to Mr Allison. That letter stated that he would like to arrange a meeting to understand the business better and asked for certain documentary evidence and explanations.

43. On 24 September 2013 Officer Everett sent a letter headed "VAT Fraud Alert: Alternative Banking Platforms" to Askaris, noting HMRC had seen evidence that suggests MTIC fraudsters may be attempting to make use of alternative banking platforms ("ABPs") to facilitate fraud. By ABPs they mean financial institutions that provide the functionality of a traditional bank but without a bank's reporting or regulatory requirements. Characteristics of an ABP were said to include them being outside the jurisdiction of the supplier, not regulated by a recognised financial authority, and all transactions relying on web facilities. That letter included:

(1) as a one page Annex A, a brief description of MTIC fraud, with examples of indicators of fraud which should be taken into consideration when conducting Know Your Customer checks); and

(2) instructions on how to verify VAT numbers by email to HMRC in Wigan (or phone and fax numbers which can also be used). Those instructions, Annex B, recommend that traders repeat the process for each and every transaction to make sure the most up to date information is used. It also states:

> "Although the Commissioners may validate VAT registration details, it does not serve to guarantee the status of suppliers and purchasers. Nor does it absolve traders from undertaking their own enquiries in relation to proposed transactions. It has always remained a trader's own commercial decision whether to participate in transactions or not and transactions may still fall to be verified for VAT purposes."

44. On 26 September 2013 Officer Ginn wrote to Mr Allison informing him that fraudsters continue to pose a threat to public finances from MTIC VAT fraud, and that HMRC are concerned that Askaris could be at risk of involvement in supply chains that are connected with fraud. That letter reiterated how to verify VAT numbers and directed him to HMRC's website for more information on MTIC fraud (referring to the leaflet "How to spot VAT missing trader fraud" as well as Notice 726). This letter was emailed to Ms Steer for her to forward on to Mr Allison.

45. A repayment inhibit was placed on the VAT registration number of Askaris by Officer Hindmarsh on 30 September 2013.

46. Askaris filed its return for the period 09/13 on 2 October 2013.

47. On 4 October 2013 Ashdown Hurrey replied to HMRC's letter of 23 September 2013 on behalf of Askaris. The letter indicated that the questions relating to the switch should be directed to the switch provider, Error Scope.

48. On 4 October 2013 Officer Alan Blaney wrote to Askaris informing them that the repayment return for 09/13 had been selected for extended verification. The explanation of why the repayment claim had been selected for verification referred to the risks to the UK revenue posed by MTIC VAT fraud.

49. On 10 October 2013 Officer Ginn wrote to Mr Allison (still using the address of Ashdown Hurrey) noting that he had been told by Ann Grant of Ashdown Hurrey that Mr Allison was now back in the UK and asking for the address of Askaris' principal place of business and certain other information. Officer Ginn expressed surprise that he had been directed to go to the switch provider for information relating to the switch as it should be held by Askaris in the contracts between them and the switch provider.

50. On 16 October 2013 Askaris authorised its agent Gabelle LLP ("Gabelle") to deal with HMRC (and subsequent email correspondence from Kevin Hall of Gabelle indicated that they were advising on the extended verification issues only). That authorisation is stamped as

having been received by HMRC on 4 October 2013; although nothing turns on this, we find this is incorrect on the basis of the date of Mr Allison's signature on the form.

51. Askaris filed its return for the period 10/13 on 21 November 2013 and on 25 November 2013 Officer Blaney wrote to Askaris informing them that this return had been selected for extended verification.

52. On 6 December 2013 Officers Mark Chisman and Stefan Tosta visited Mr Allison and Mr Hall. This was an extended verification visit in respect of the returns filed for the periods 08/13, 09/13 and 10/13. This was the first visit made by Officer Chisman, who gave evidence at the hearing, and the visit report includes:

(1) Mr Allison stated that the company is an IT business which provides information security solutions and VOIP services. He had set up the company to provide low cost phone calls for displaced oil and gas workers. He referred to the K-Roam business plan and stated that his plan was to reduce the cost of calls for oil and gas workers. He would be able to do this by offering calls to these workers at local call rates.

(2) Officer Chisman explained that a number of invoices in respect of which Askaris had claimed input tax were invalid as they contained no VAT amount in sterling. Going through the records which Mr Hall had with him Mr Hall accepted this was the case and said that he would contact Skynet to ask for valid invoices.

(3) Officer Chisman stated that he had been asked to look at the supply chain of the goods.

(4) Mr Hall repeatedly asked about repayment of the input tax, initially for it to be authorised that same day (and Officer Chisman said there was no way this could happen), then if repayment could be negotiated, or paid on a without prejudice basis, or if security could be provided. Officer Chisman explained that HMRC may decide to make the repayment to Askaris if adequate security could be provided.

(5) On being asked about the sale of VOIP, Mr Hall stated that the supplies were being made to Jersey Telecom, which was Askaris' only customer, and that they used VOIP Capital to factor the deals. Mr Hall said that Skynet had been the only supplier. Officer Chisman asked Mr Allison if he knew if VOIP Capital were still in operation (as he understood that they had ceased trading). Mr Allison said he had heard nothing of this, but Askaris had ceased trading in VOIP because of the delay in repaying the VAT. He said he would ask "Ben" to find out whether VOIP Capital were currently in operation, and left the office. When Mr Allison returned he stated that Askaris would have to find a new customer for VOIP as Jersey Telecom were now receiving airtime from other suppliers.

(6) On employees, Mr Allison stated he was in charge of data security and Ben heads up the VOIP supplies. Officer Chisman asked if he knew of or employed a person called Nick Beer. Both Mr Allison and Mr Hall stated that they had not heard of Nick Beer.

(7) Mr Allison explained that Mr Azadi had identified Skynet as a supplier and had found out about the company through LinkedIn. He had approached Mr Allison about the idea of providing VOIP services to oil workers and had needed funding to start the business off. To start the company off they had begun buying VOIP from Skynet and selling it to Jersey Telecom.

(8) On being asked about due diligence, Mr Allison stated that Mr Azadi had carried out the due diligence on Skynet and that he (Mr Allison) had done some of his own research on Skynet to see if they could deliver what he had wanted.

(9) Mr Allison stated that Jersey Telecom wanted call routes to Gambia for Gambian nationals in Jersey. Mr Azadi had telephoned Jersey Telecom and stated that they could supply Gambian VOIP minutes. Mr Allison could not fund the initial supply so Jersey Telecom recommended that Askaris use VOIP Capital to factor the deals.

(10) Mr Allison stated that he could produce CDRs on request.

(11) Officer Chisman asked if Askaris owned their switch. Mr Allison stated that he did not know much about the technical side of VOIP supply but that they purchased a switch in the last 10 days. At the time of the deals they had rented a switch from Error Scope. Mr Hall stated that they had printed the rental agreement with Error Scope so Officer Chisman could take it away with them.

(12) Mr Allison acknowledged he knew that it was a possibility that there could be a defaulting UK trader in his supply chain.

(13) Being asked about the price of airtime, Mr Allison stated that he worked out the price based on the cost of the supply and the cost of factoring by VOIP Capital. Asked about how he negotiated the price with Skynet, Mr Allison stated that he just took the quoted price from Skynet which seemed reasonable and that he had chosen Skynet because they could provide the types of airtime he wanted and were reliable. He had looked into one other supplier but thought they were dodgy so he hadn't used them.

(14) Mr Allison stated that the mark up and prices for airtime sold to Jersey Telecom were very variable and there was no set mark up.

53. An email from Officer Chisman to Mr Hall after that meeting asked about "Ben" – his surname and previous business experience in the supply of VOIP airtime. In an email of 16 December 2013 Mr Hall responded to this and other information requests stating:

> "The manager's name at Askaris is Ben Azadi. Askaris is bringing to market a new product (the K-Roam SIM) which will allow those working in foreign countries to telephone home (or elsewhere) from their mobiles but at local call rates using internet-based airtime. You have copies of the business plan for this new project, which has been developed over the course of the year, and part of the project is to ensure the airtime costs are minimised. Askaris has not previously had experience of trading in internet airtime and it has therefore been necessary to review and assimilate information about the industry and the cost effectiveness of airtime transactions in order to minimise the costs associated with the K-Roam SIM."

54. Askaris filed its return for 11/13 on 2 January 2014 and on 6 January Officer Angela McCalmon wrote to Askaris stating that the return had been selected for extended verification.

55. HMRC's investigations continued and Gabelle continued to press for repayment, challenging the continued delays. Gabelle sent a pre-action letter to HMRC on 10 January 2014 asking that HMRC confirm the input tax would now be paid to Askaris forthwith, failing which they would pursue alternative courses of action which might include judicial review. This was followed-up with a letter from Gabelle to HMRC Solicitors Office on 5 March 2014. (A judicial review claim was later issued on behalf of Askaris, but that claim was dismissed by the High Court.)

56. On 19 March 2014 Officer Chisman sent a tax loss letter to Askaris stating that four transactions in the 08/13 return had been traced to transaction chains commencing with a VAT loss. (Further tax loss letters were sent:

(1) on 1 April 2015 - seven of the transactions in the 08/13 return commenced with a defaulting trader,

(2) on 29 May 2015 - one transaction in the 08/13 return commenced with a defaulting trader (such that all purchases of VOIP minutes in this period had been traced to fraudulent tax losses),

(3) on 29 May 2015 - one transaction in the 09/13 return commenced with a defaulting trader,

(4) 29 June 2015 – two transactions in the 09/13 return commenced with a defaulting trader,

(5) 17 July 2015 – four transactions in the 09/13 return commenced with a defaulting trader (such that all purchases of VOIP minutes in this period had been traced to fraudulent tax losses),

(6) 21 July 2015 – fifteen transactions in the 10/13 return commenced with a defaulting trader (such that all purchases of VOIP minutes in this period had been traced to fraudulent tax losses), and

(7) 21 July 2015 – one transaction in the 11/13 return commenced with a defaulting trader.)

57. On 26 March 2014 Officers Chisman and Tosta attended a meeting with Mr Allison and Mr Hall:

(1) The tax loss letter was discussed. Mr Hall stated he was concerned that Officer Chisman could not tell him which company had caused the tax loss. Officer Chisman stated that he could not disclose HMRC's dealings with other companies.

(2) Mr Hall stated that Askaris had contacted Skynet to ask who had supplied them but that Skynet had refused. Mr Hall stated it was Mr Azadi who had contacted Skynet on Askaris' behalf. Mr Hall asked Officer Chisman how he/Mr Allison could find out where the fraud was.

(3) Officer Chisman asked why Askaris had bought airtime supplies from Skynet. Mr Allison reiterated that Askaris had wanted Jersey Telecom to supply them with airtime for the K-Roam project and that Jersey Telecom stated that they would only do so if there was a reciprocal arrangement where Askaris sold Jersey Telecom the airtime they needed. Askaris therefore needed a supplier in the UK for airtime. Mr Allison asked Mr Azadi to look for suppliers and he looked on the internet for possible suppliers. Mr Azadi considered Skynet and another company, which Mr Allison said was linked to the person Officer Chisman had asked about at the last meeting called Nick Beer. Mr Allison had asked Mr Azadi further questions about why he had chosen Skynet after the last meeting and he had said he had considered another company which Mr Allison thought was Harjen. Being asked by Officer Chisman why they had chosen not to deal with Harjen, Mr Allison stated that Mr Azadi had decided they were too dodgy after looking up Nick Beer on the internet and that he had just presented Skynet as the only option as a supplier to Mr Allison.

(4) Officer Chisman referred to a K-Roam document he had been given at the last meeting, and that had said that due to the time taken for the VAT to be repaid Askaris had decided they would only sell offshore supply to offshore customers, and all UK supply would only be available to UK customers. He asked why Askaris had decided to trade in a way which was contrary to this. Mr Allison stated that they had decided to sell UK supplies of airtime abroad because they needed to supply Jersey Telecom because Jersey Telecom would only supply their K-Roam project if they gave Jersey Telecom the supplies they needed.

(5) Mr Allison stated that he had had a meeting with Mr Azadi sometime during May 2013 and they had both decided that the risk of selling airtime from Skynet to Jersey Telecom was low. There was no documentary evidence from that meeting.

(6) Mr Allison stated that Mr Azadi had contacted Simon Boulton at Skynet. Being asked how Mr Azadi had found Skynet and Harjen as potential suppliers, Mr Allison stated that Mr Azadi had carried out his research on suppliers using LinkedIn and message boards on the internet. He had made his choice based on how much airtime Skynet could provide.

(7) Mr Allison stated that he was not interested in the details but in making money on the airtime supplies. Credit safe checks had been carried out on Skynet by the company accountants and Mr Allison had confirmed that the company had been operating for some time.

(8) Mr Allison had not met Skynet, but Mr Azadi had visited them. Mr Allison had not visited them as he was dealing with other aspects of the business. He dealt with the contracting side of the business and Mr Azadi was more experienced in the airtime deals. Mr Azadi had seen that Skynet was a real business, that it had been established for some time and that it was a suitable partner to do business with.

(9) Being asked how he and Mr Azadi knew each other, Mr Allison stated that they were friends on Facebook and that initially Mr Azadi had approached him about a workman recommendation app which Mr Allison had rejected. They had then begun to work on the idea of the K-Roam project.

(10) Officer Chisman asked how they got CDR data from Error Scope. Mr Allison explained that they got the CDR data through an upload to a FTP server which they had access to which Askaris downloaded and checked against their invoices.

(11) Officer Chisman asked how they worked out their invoices if not from the CDR information. Mr Allison initially stated that Askaris worked out their invoices based on a statement from Jersey Telecom. He was asked to provide the statements from Jersey Telecom as Officer Chisman had not seen any corroborating evidence from them apart from the JT Interconnection Agreement. Mr Allison then stated that he based his invoices to Jersey Telecom on the invoices provided by Skynet and then checked this against the CDR information.

(12) Mr Allison agreed to provide the CDR information on some DVDs.

(13) On the mark-up for the supplies to Jersey Telecom, Mr Allison stated that Mr Azadi negotiated prices with Skynet on a deal by deal basis, dependent on the quality of the supply. There was generally a 7% mark-up.

(14) Officer Chisman showed a spreadsheet of deal margins for deals 5-11 over a month. The unit margin was absolutely static for deals 5 to 10; Officer Chisman asked why this was given that Mr Allison had said during the meeting in December that mark-up and prices for airtime sold to Jersey Telecom were very variable and there was no set mark-up. Mr Allison stated that Skynet had a commitment to supply airtime to Askaris and that he would expect the prices to be static.

(15) Mr Allison had not asked Mr Azadi to push Skynet for cheaper rates or to increase prices to Jersey Telecom as the supply of airtime was not the “End Game” but a way in of getting Jersey Telecom to supply airtime for the K-Roam project. He was happy the company was making money with a steady profit.

(16) Being asked if there were any price negotiations at all, Mr Allison stated that at the onset of trading there were price negotiations but there were no price negotiations with Jersey Telecom or Skynet after the initial contract was made. He knew he was making a profit on the deals so he was not concerned with negotiations on price.

(17) Askaris used Error Scope as their switch supplier as they had been recommended by Jersey Telecom. In terms of due diligence on Error Scope, Mr Allison had checked the company accounts and knew that they had done work for Jersey Telecom so they were a good choice. Officer Chisman asked to see the correspondence from Jersey Telecom recommending Error Scope, or any other correspondence from Jersey Telecom about the deals.

(18) Officer Chisman referred to a Reciprocal Telecommunications Services Agreement signed by Adrian Seadon for Skynet and Mr Allison for Askaris, noting that section 4 provides that each party shall make available to the other its CDRs upon request, and shall provide the CDRs for the billing period together with each periodic invoice. Mr Allison stated that he had not requested any CDRs from Skynet, nor had Skynet requested any CDRs from Askaris. He had not requested the CDR information from Skynet as the Skynet invoices matched the data Askaris had on their system so there was no need to request the information from Skynet.

(19) Askaris had not received any supplies from Jersey Telecom for the K-Roam project and instead they were using Cloud9 to supply airtime for the K-Roam SIMs. This was because Cloud9 were a cheaper and better company for the supplies for the K-Roam project.

(20) Being asked about Mr Upshall's role in the company, Mr Allison stated that Mr Upshall was an investor in the business and he currently resided in Dubai.

(21) Askaris could not afford to pay for their overheads so the investors in Dubai were currently paying these costs for the company.

58. Officers Chisman and Tosta met with Askaris again on 18 June 2014. That meeting was attended by Mr Allison, Mr Dunn (described as an adviser) and Mr Suleyman (described as a director of OES Oilfield Services (UK) Ltd and representative of Mr Al Ghafli). At that meeting:

(1) Mr Allison stated that Askaris was currently doing software development for oil and gas in extraction companies who work in hazardous environments. This software was being provided through OES Oilfield Services (UK) Ltd and it was safety software to protect against dropped objects. Mr Allison said there would be imminent sales of software in the new few months.

(2) Mr Allison stated that K-Roam had stalled due to issues with HMRC and the repayment but they had gone through testing and there was to be an imminent roll out of the project and SIM cards were nearly ready to be sold soon. The supplier of the SIM cards would be Cloud9.

(3) Mr Allison provided Officer Chisman with two DVDs which were said to have contain the CDRs for the periods under appeal which they had received from Jersey Telecom through a link to a FTP server.

(4) Officer Chisman asked if Mr Allison had any evidence of any written correspondence with Jersey Telecom to substantiate the contact between Askaris and Jersey Telecom. Mr Allison said no, as Mr Azadi had contacted Steve Barton at Jersey Telecom through Skype.

(5) Officer Chisman asked how Mr Allison had checked the records provided by Steve Barton. Mr Allison said he had checked the CDRs against the partial records he had received from Error Scope. These partial records had been included on the DVDs.

(6) In the conclusion/credibility section of the visit report, Officer Chisman recorded that he suspected the supplies to Jersey Telecom never took place and that this was a fraud on paper only transactions.

59. On 27 August 2015 Officer Chisman set out his decision denying Askaris the right to deduct input tax on the transactions on *Kittel* grounds.

60. On 4 September 2015 Mr Allison emailed Officer Chisman to "appeal" against that decision, responding to the factors relied upon in the decision letter. Officer Chisman sought clarification from Askaris as to whether this was a request for an independent review and, upon receiving such confirmation, that email was treated by HMRC as a request for an independent review. Officer Chisman's decision was upheld on review by Officer Mark Bates on 7 December 2015.

61. Askaris gave Notice of Appeal to the Tribunal on 17 December 2015. Such notice did not include any grounds of appeal, requesting 28 days for the grounds to be drafted. On 1 February 2016 Askaris submitted a Notice of Appeal to the Tribunal against the decision, enclosing grounds of appeal dated 25 January 2016.

62. The Grounds of Appeal set out why Askaris contend that the facts do not support the decision that they knew or should have known that the relevant transactions were connected with VAT fraud, and the points made are considered in the context of our discussion "Whether Appellant knew or should have known".

RELEVANT LEGISLATION

63. Articles 167 and 168 of Council Directive 2006/112/EC of 28 November 2006 on the common system of VAT (the "2006 Directive") provide as follows:

> "**Article 167**
>
> A right of deduction shall arise at the time the deductible tax becomes chargeable…
>
> **Article 168**
>
> In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT, which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person…"

64. Article 273 of the 2006 Directive provides that "Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers".

65. The above provisions are reflected in UK domestic legislation by ss24 to 26 of the Value Added Tax Act 1994 ("VATA 1994"), which provide as follows:

"**24 Input tax and output tax**

(1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say-

(a) VAT on the supply to him of any goods or services;…

being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him…

(2) Subject to the following provisions of this section, "output tax", in relation to a taxable person, means VAT on supplies which he makes…

(6) Regulations may provide-

(a) for VAT on the supply of goods or services to a taxable person… to be treated as his input tax only if and to the extent that the charge to VAT is evidenced and quantified by reference to such documents or other information as may be specified in the regulations or the Commissioners may direct either generally or in particular cases or classes of cases;…

25 Payment by reference to accounting periods and credit for input tax against output tax

(1) A taxable person shall-

(a) in respect of supplies made by him…

account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him.

26 Input tax allowable under section 25

(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies…) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business –
…

(b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom;…"

66. The regulations to which reference is made above are The Value Added Tax Regulations 1995 (SI 1995/2518) (the "VAT Regulations").

67. Regulation 13 of the VAT Regulations provides:

"13 Obligation to provide a VAT invoice

(1) Save as otherwise provided in these Regulations, where a registered person—

(a) makes a taxable supply in the United Kingdom to a taxable person…

he shall provide such persons as are mentioned above with a VAT invoice."

68. Regulation 29 of the VAT Regulations provides:

"**29 Claims for input tax**

(1) …save as the Commissioners may otherwise allow or direct either generally or specially, a person claiming deduction of input tax under section 25(2) of the Act shall do so on a return made by him for the prescribed accounting period in which the VAT became chargeable…

(2) At the time of claiming deduction of input tax in accordance with paragraph (1) above, a person shall, if the claim is in respect of-

(a) a supply from another taxable person, hold the document, which is required to be provided under regulation 13;…

provided that where the Commissioners so direct, either generally or in relation to particular cases or classes of cases, a claimant shall hold or provide such other documentary evidence of the charge to VAT as the Commissioners may direct."

CASE LAW

69. The European Court of Justice (the "CJEU"), in its judgment dated 6 July 2006 in the joined cases of *Axel Kittel v Belgium and Belgium v Recolta Recycling SPRL* (C-439/04 and C-440/04) [2008] STC 1537 ("*Kittel*"), confirmed that taxable persons who "knew or should have known" that the supplies in which input tax was incurred were connected with the fraudulent evasion of VAT would not be entitled to claim a credit in respect of that VAT input tax in the manner described above:

"44. The Court drew the conclusion, at paragraph 51 of *Optigen*, that transactions which are not themselves vitiated by VAT fraud constitute supplies of goods effected by a taxable person acting as such and an economic activity within the meaning of Article 2(1), Article 4 and Article 5(1) of the Sixth Directive where they fulfil the objective criteria on which the definitions of those terms are based, regardless of the intention of a trader other than the taxable person concerned involved in the same chain of supply and/or the possible fraudulent nature of another transaction in the chain, prior or subsequent to the transaction carried out by that taxable person, of which that taxable person had no knowledge and no means of knowledge.

45. The Court observed that the right to deduct input VAT of a taxable person who carries out such transactions likewise cannot be affected by the fact that, in the chain of supply of which those transactions form part, another prior or subsequent transaction is vitiated by VAT fraud, without that taxable person knowing or having any means of knowing (*Optigen*, paragraph 52).

46. The same conclusion applies where such transactions, without that taxable person knowing or having any means of knowing, are carried out in connection with fraud committed by the seller.

…

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.

…

55. Where the tax authorities find that the right to deduct has been exercised fraudulently, they are permitted to claim repayment of the deducted sums retroactively … It is a matter for the national court to refuse to allow the right to deduct where it is established, on the basis of objective evidence, that that right is being relied on for fraudulent ends…

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

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

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

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

60. It follows from the foregoing that the answer to the questions must be that where a recipient of a supply of goods is a taxable person who did not and could not know that the transaction concerned was connected with a fraud committed by the seller, 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.

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

70. In *Mahagében kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Foigazgatósága and Peter David v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Foigazgatósága* (C-80/11 and C-142/11) [2012] STC 1934 the CJEU gave additional guidance in its judgment which was dated 21 June 2012:

"53 According to the Court's case-law, 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 their right to deduct the input VAT (see *Kittel and Recolta Recycling*, paragraph 51).

54 On the other hand, it is not contrary to European Union law to require a trader to take every step which could reasonably be required of him to satisfy himself that the transaction which he is effecting does not result in his participation in tax evasion (see, to that effect, Case C-409/04 *Teleos and Others* [2007] ECR I-7797, paragraphs 65 and 68; *Netto Supermarkt*, paragraph 24; and Case C-499/10 *Vlaamse Oliemaatschappij* [2011] ECR I-0000, paragraph 25).

55 Moreover, in accordance with the first paragraph of Article 273 of Directive 2006/112, Member States may impose obligations, other than those provided for by that directive, if they consider such obligations necessary to ensure the correct levying and collection of VAT and to prevent evasion.

56 However, even though that provision gives the Member States a margin of discretion (see Case C-588/10 *Kraft Foods Polska* [2012] ECR I-0000, paragraph 23), that option may not be relied upon, according to the second paragraph of that article, in order to impose additional invoicing obligations over and above those laid down in Chapter 3, headed 'Invoicing', of Title XI, headed 'Obligations of taxable persons and certain non-taxable persons', of that directive and, in particular, Article 226 thereof.

57 Furthermore, the measures which the Member States may adopt under Article 273 of Directive 2006/112, in order to ensure the correct levying and collection of the tax and to prevent evasion, must not go further than is necessary to attain such objectives. Therefore, they cannot be used in such a way that they would have the effect of systematically undermining the right to deduct VAT and, consequently, the neutrality of VAT, which is a fundamental principle of the common system of VAT (see, to that effect, inter alia, *Gabalfrisa and Others*, paragraph 52; *Halifax and Others*, paragraph 92; Case C-385/09 *Nidera Handelscompagnie* [2010] ECR I-0000, paragraph 49; and *Dankowski*, paragraph 37).

58 As regards the national measures at issue in the case in the main proceedings, it must be noted that the Law on VAT does not prescribe specific obligations, but merely provides, in Paragraph 44(5), that the taxation rights of the taxable person indicated as the purchaser in the invoice may not be called into question, provided that that person has acted with due diligence in respect of the chargeable event, bearing in mind the circumstances under which the goods were supplied or the services performed.

59 In those circumstances, it follows from the case-law referred to in paragraphs 53 and 54 of the present judgment that determination of the measures which may, in a particular case, reasonably be required of a taxable person wishing to exercise the right to deduct VAT in order to satisfy himself that his transactions are not connected with fraud committed by a trader at an earlier stage of a transaction depends essentially on the circumstances of that particular case.

60 It is true that, when there are indications pointing to an infringement or fraud, a reasonable trader could, depending on the circumstances of the case, be obliged to make enquiries about another trader from whom he intends to purchase goods or services in order to ascertain the latter's trustworthiness.

61 However, the tax authority cannot, as a general rule, require the taxable person wishing to exercise the right to deduct VAT, first, to ensure that the issuer of the invoice relating to the goods and services in respect of which the

exercise of that right to deduct is sought has the capacity of a taxable person, that he was in possession of the goods at issue and was in a position to supply them and that he has satisfied his obligations as regards declaration and payment of VAT, in order to be satisfied that there are no irregularities or fraud at the level of the traders operating at an earlier stage of the transaction or, second, to be in possession of documents in that regard.

62 It is, in principle, for the tax authorities to carry out the necessary inspections of taxable persons in order to detect VAT irregularities and fraud as well as to impose penalties on the taxable person who has committed those irregularities or fraud.

63 According to the case-law of the Court, Member States are required to check taxable persons' returns, accounts and other relevant documents (see Case C-132/06 *Commission v Italy* [2008] ECR I-5457, paragraph 37, and Case C-188/09 *Profaktor Kulesza, Frankowski, Józwiak, Orlowski* [2010] ECR I-7639, paragraph 21).

64 To that end, Directive 2006/112 imposes, in particular in Article 242, an obligation on every taxable person to keep accounts in sufficient detail for VAT to be applied and its application checked by the tax authorities. In order to facilitate the performance of that task, Articles 245 and 249 of that directive provide for the right of the competent authorities to access the invoices which the taxable person is obliged to store under Article 244 of that directive.

65 It follows that, by imposing on taxable persons, in view of the risk that the right to deduct may be refused, the measures listed in paragraph 61 of the present judgment, the tax authority would, contrary to those provisions, be transferring its own investigative tasks to taxable persons."

71. The *Kittel* principle has been clarified by Moses LJ in *Mobilx Ltd (in administration) v HMRC* [2010] EWCA Civ 517 ("*Mobilx*") at [30]:

> "…the Court made clear that the reason why fraud vitiates a transaction is not because it makes the transaction unlawful but rather because where a person commits fraud he will not be able to establish that the objective criteria which determine the scope of VAT and the right to deduct have been met."

72. Considering further the extent of knowledge, Moses LJ stated:

> "55. If HMRC was right and it was sufficient to show that the trader should have known that he was running a risk that his purchase was connected with fraud, the principle of legal certainty would, in my view, be infringed. A trader who knows or could have known no more than that there was a risk of fraud will find it difficult to gauge the extent of the risk; nor will he be able to foresee whether the circumstances are such that it will be asserted against him that the risk of fraud was so great that he should not have entered into the transaction. In short, he will not be in a position to know before he enters into the transaction that, if he does so, he will not be entitled to deduct input VAT. The principle of legal certainty will be infringed.
>
> 56. It must be remembered that the approach of the court in *Kittel* was to enlarge the category of participants. A trader who should have known that he was running the risk that by his purchase he might be taking part in a transaction connected with fraudulent evasion of VAT, cannot be regarded as a participant in that fraud. The highest it could be put is that he was running the risk that he might be a participant. That is not the approach of the Court in *Kittel*, nor is it the language it used. In those circumstances, I am of the view that it must be established that the trader knew or should have known that by

his purchase he was taking part in such a transaction, as the Chancellor concluded in his judgment in *BSG*:—

"The relevant knowledge is that BSG ought to have known by its purchases it was participating in transactions which were connected with a fraudulent evasion of VAT; that such transactions might be so connected is not enough." (§ 52)

57. HMRC object that the principle should not be restricted to those cases where a trader has deliberately refrained from asking questions lest his suspicions should be confirmed. This has been described as a category of case which is so close to actual knowledge that the person is treated as having received the information which he deliberately sought to avoid (see Lord Scott in *Manifest Shipping Co Limited v Uni-Polaris Insurance Co Limited and Others* [2001] UKHL 1 and *White v White* [2001] 1 WLR 481 paragraphs 16 and 17, 486 E-G). HMRC seeks to rely upon the views of Lewison J in *Livewire and Olympia* [2009] EWHC 15 (Ch) (§ 85) and Burton J in *R (Just Fabulous) v HMRC* [2008] STC 2123 (§ 45) that:

"The principle of legal certainty must be trumped by the 'objective recognised and encouraged by the Sixth Directive'."

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

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

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

73. On questions of proof, Moses LJ stated:

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

82. But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant. As I indicated in relation to the BSG appeal, Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them

> is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed in *Kittel*, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was."

74. At [83] Moses LJ stated that he could do no better than repeat the words of Christopher Clarke J in *Red12 v HMRC [2009] EWHC 2563 (Ch)*:

> "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."

75. In *Fonecomp Limited v HMRC* [2015] EWCA Civ 39 it was submitted that the words "should have known" (per Moses LJ in *Mobilx*) meant "has any means of knowing" (at [51]) and that the Appellant 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 in the Court of Appeal (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."

76. In *Davis and Dann Ltd v HMRC* [2016] STC 126, the Court of Appeal approached the "should have known" test on the basis of Moses LJ's statement in *Mobilx* that it required that "the only reasonable explanation" for the transactions must have been connection to fraud. It was common ground in that case that what HMRC needed to show was that the only reasonable explanation for the transactions was that they were connected to a VAT fraud (at [4], citing *Mobilx* at [59]).

77. In *AC (Wholesale) Limited v HMRC* [2017] UKUT 191 (TCC) the Upper Tribunal concluded that the "only reasonable explanation" formulation was simply one way of showing that a person should have known that the transaction was connected to fraud:

> "29…Moses LJ was clear that the test in *Kittel* was a simple one that should not be over refined. It is, to us, inconceivable that Moses LJ's example of an application of part of that test, the 'no other reasonable explanation', would lead to the test becoming more complicated and more difficult to apply in practice. That, in our view, would be the consequence of applying the interpretation urged upon us by Mr Brown. In effect, HMRC would be required to devote time and resources to considering what possible reasonable explanations, other than a connection with fraud, might be put forward by an appellant and then adduce evidence and argument to counter them even where the appellant has not sought to rely on such explanations. That would be an unreasonable and unjustified evidential burden on HMRC. Accordingly, we do not consider that HMRC are required to eliminate all possible reasonable explanations other than fraud before the FTT is entitled to conclude that the appellant should have known that the transactions were connected to fraud.
>
> 30. Of course, we accept (as, we understand, does HMRC) that where the appellant asserts that there is an explanation (or several explanations) for the circumstances of a transaction other than a connection with fraud then it may be necessary for HMRC to show that the only reasonable explanation was fraud. As is clear from *Davis & Dann*, the FTT's task in such a case is to have regard to all the circumstances, both individually and cumulatively, and then decide whether HMRC have proved that the appellant should have known of the connection with fraud. In assessing the overall picture, the FTT may consider whether the only reasonable conclusion was that the purchases were connected with fraud. Whether the circumstances of the transactions can reasonably be regarded as having an explanation other than a connection with fraud or the existence of such a connection is the only reasonable explanation is a question of fact and evaluation that must be decided on the evidence in the particular case. It does not make the elimination of all possible explanations the test which remains, simply, did the person claiming the right to deduct input tax know that, by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT or should he have known of such a connection."

78. The case law also indicates that it is necessary to guard against over-compartmentalisation of relevant factors, and to stand back and consider the totality of the evidence (*Davis and Dann*, and *CCA Distribution v HMRC* [2017] EWCA Civ 1899).

79. Various authorities have considered how the test of whether the taxpayer should have known that its transactions were connected with the fraudulent evasion of VAT should be applied in circumstances where the taxpayer was party to a contra chain (including *Mobilx* and *Fonecomp* above).

80. In *HMRC v Livewire Telecom Ltd and HMRC v Olympia Technology Ltd* [2009] EWHC 15 (Ch) Lewison J considered the means of knowledge test in such cases:

> "102 In my judgment in a case of alleged contra trading, where the taxable person claiming repayment of input tax is not himself a dishonest co-conspirator, there are two potential frauds:
>
> i) the dishonest failure to account for VAT by the defaulter or missing trader in the dirty chain; and
>
> ii) the dishonest cover up of that fraud by the contra trader.
>
> 103 Thus it must be established that the taxable person knew or should have known of a connection between his own transaction and at least one of those frauds. I do not consider that it is necessary that he knew or should have known of a connection between his own transaction and both of these frauds. If he knows or should have known that the contra-trader is engaging in fraudulent conduct and deals with him, he takes the risk of participating in a fraud, the precise details of which he does not and cannot know. As Millett J put it in *Agip (Africa) Limited v Jackson* [1990] Ch 265, 295 (in the context of dishonest assistance in a breach of trust):
>
> "In my judgment, however, it is no answer for a man charged with having knowingly assisted in a fraudulent and dishonest scheme to say that he thought that it was 'only' a breach of exchange control or 'only' a case of tax evasion. It is not necessary that he should have been aware of the precise nature of the fraud or even of the identity of its victim. A man who consciously assists others by making arrangements which he knows are calculated to conceal what is happening from a third party, takes the risk that they are part of a fraud practised on that party."
>
> 104 This conclusion is, I think, consistent with what Burton J said in *Just Fabulous*…:
>
> "[24]…whether or not Evolution knew of the precise nature of the defaulter chain or of the goods purportedly dealt with in that chain or the identities of the participants in that chain, Evolution knew of the fraudulent aim of Blackstar in acquiring, through the off-set on the contra trading transaction, the opportunity to receive by such off-set, VAT which it would not be able to recover direct from the Revenue…"
>
> 105 In other words, if the taxable person knew of the fraudulent purpose of the contra trader, whether he had knowledge of the dirty chain does not matter.
>
> 106 However, if the contra-trader is not himself dishonest, then there will only have been one fraud, namely the dishonest failure to account for VAT by the defaulter in the dirty chain. In that situation, the taxable person will not, in my judgment, be deprived of his right to reclaim input tax unless he knew or should have known of that fraud. But if the taxable person knew or ought to have known of that fraud, then he will be deprived of his right to reclaim input tax, even if the contra-trader is wholly innocent (as, for instance, where the missing trader and the taxable person between them dishonestly orchestrate a sale to and purchase from an innocent intermediary…)."

81. The test has been further considered in *Calltel Telecom Limited v HMRC* [2009] EWHC 1081 (Ch). Floyd J considered the application of the *Kittel* test to allegations of contra trading:

> "79 The Tribunal relied on the judgment of Burton J in *R (Just Fabulous (UK) Limited and others v HMRC* [2007] EWHC 521 (Admin). In that case Burton J had to consider the position in relation to contra trading, a case where by definition the transaction in which the trader is involved is outside the

fraudulent chain altogether. At [43] having referred to the passages in *Kittel* which I have cited above, Burton J recorded the Revenue's submission that:

"the words which record these definitive statements are untrammelled by any reference to the need for establishing that the taxable person must be a member of a defaulter chain, or that he must be dealing in the same goods as had been the subject of a defaulter chain."

80 Burton J accepted those submissions without reservation at [50] to [53]. If the Revenue can justifiably refuse repayment of VAT, on the basis of the test in *Kittel*, in the case of contra trade, it seems to me that there is no obstacle to applying the same principle to successive members of the defaulter chain itself, provided always that the taxpayer in question satisfies the *Kittel* test. In the case of contra trading, the impugned transaction is necessarily one which can have no causative relationship with the importer's fraud. No causal connection of the kind suggested as being necessary by Mr Cordara is recognised by Burton J in *Just Fabulous* or by Lewison J in the course of his careful review of the authorities in *Livewire and Olympia*.

81 It will be recalled that the rationale in *Kittel* for refusing repayment where the purchaser knows that he was taking part in a transaction connected with fraudulent evasion of VAT was that he "aids the perpetrators of the fraud and becomes their accomplice". For my part I have no difficulty in seeing how the purchaser who is not in privity of contract with the importer aids the perpetrators of the fraud. He supplies liquidity into the supply chain, both rewarding the perpetrator of the fraud for the specific chain in question, and ensuring that the supply chains remain in place for future transactions. By being ready, despite knowledge of the evasion of VAT, to make purchases, the purchaser makes himself an accomplice in that evasion.

82 Accordingly, I would reject Calltel's and Opto's appeal on this basis."

82. In *Blue Sphere Global Ltd v HMRC* [2009] EWHC 1150 (Ch), Sir Andrew Morritt considered separately the issues of connection with fraud and knowledge. In respect of connection with fraud, he said:

"44 There is force in the argument of counsel for BSG but I do not accept it. The nature of any particular necessary connection depends on its context, for example electrical, familial, physical or logical. The relevant context in this case if the scheme for charging and recovering VAT in the member states of the EU. The process of off-setting inputs against outputs in a particular period and accounting for the difference to the relevant revenue authority can connect two or more transactions or chains of transaction in which there is one common party whether or not the commodity sold is the same. If there is a connection in that sense it matters not which transaction or chain came first. Such a connection is entirely consistent with the dicta in *Optigen* and *Kittel* because such connection does not alter the nature of the individual transactions. Nor does it offend against any principle of legal certainty, fiscal neutrality, proportionality or freedom of movement because, by itself, it has no effect.

45 Given that the clean and dirty chains can be regarded as connected with one another, by the same token the clean chain is connected with any fraudulent evasion of VAT in the dirty chain because, in a case of contra trading, the right to reclaim enjoyed by C (Infinity) in the dirty chain, which is the counterpart of the obligation of A to account for input tax paid by B, is transformed to E (BSG) in the clean chain. Such a transfer is apt, for the reasons given by the Tribunal in *Olympia* (paragraph 4 quoted in paragraph 4

above), to conceal the fraud committed by A in the dirty chain in its failure to account for the input tax received from B."

83. In that case, A was the defaulting trader in the dirty chain, B the first line buffer in the dirty chain, C the contra trader and E the broker in the clean chain. Sir Andrew Morritt addressed BSG's knowledge as follows:

> "48 As Lewison J pointed out in *Livewire* (see paragraph 26 above), in alleged contra trading cases there are, at least, two potential frauds (1) the dishonest failure to account for VAT by the defaulter or missing trader (A) in the dirty chain, namely, AS Genstar and Wade Tech and (2) the dishonest cover up of that fraud by the contra trader (C), namely Infinity. In this case, the Tribunal rejected the contention of HMRC that Infinity had itself been fraudulent even though it must have known or have had reason to suspect that within its transaction chains there were missing, hijacked or otherwise defaulting traders, see paragraph 141. Accordingly for the purpose of applying the *Kittel* test the only relevant fraud is that of AS Genstar and Wade Tech."

84. In that case, there was no suggestion that the appellant had actual knowledge of a connection with fraud, and the Tribunal had found that the alleged contra trader had only means of knowledge of the fraudulent defaults within its broker chains. Having recognised Lewison J's identification of two potential frauds, Sir Andrew Morritt went on to consider only the possibility of the appellant's means of knowledge of those fraudulent defaults. He concluded that if the alleged contra trader was not part of a scheme such that it had actual knowledge of the fraud in its chains when that fraud happened, then the appellant could not have known of the same. It could not therefore be said that it ought to have known:

> "55 In my view it is an inescapable consequence of contra trading that for HMRC to refuse a reclaim by E it must be in a position to prove that C was party to a conspiracy also involving A. Although the fact that C is party to both the clean chain with E and dirty chain with A constitutes a sufficient evasion of VAT involved in the subsequent dirty chain. At the time he entered into the clean chain there was no such dirty chain of which he could have known, nor was the occurrence of such dirty chain inevitable in the sense of being pre-planned."

85. In *Megtian Limited (in administration) v HMRC* [2010] EWHC 18 (Ch), Briggs J considered a submission on behalf of the appellant arising from Lewison J's identification of two potential frauds that it was necessary when seeking to disallow input tax claimed by a broker in the clean chain to establish that the broker knew or ought to have known specifically of one of other of those two aspects of the underlying fraud:

> "34 I disagree. I do not read Lewison J's analysis of the issue as to what must be shown that the broker knew or ought to have known in a contra trading case as amounting to a rigid prescription that, as a matter of law, such an analysis must be performed in every contra trading case, such that it will be defective unless it identifies one or other of the alternative frauds as being that which the broker knew or ought to have known.
>
> 35 In the first place, Lewison J was, as he made very clear, addressing the question what had to be demonstrated against an honest broker who was not a dishonest co-conspirator in the tax fraud. In the present case, the Tribunal's conclusion, after hearing oral evidence from and cross-examination of Mr Andreou, Megtian's shareholder and principal manager, was that Megtian knew that the transactions on which it based its claim were connected to fraud: see paragraph 112 of the Decision. Participation in a transaction which the broker knows is connected with a tax fraud is a dishonest participation in that fraud: see below.

> 36 Secondly, Lewison J acknowledged that in many if not most cases of contra trading, the clean chain and the dirty chain were likely to be part of a single overall scheme to defraud the Revenue. As he put it, at paragraph 109:
>
> "Indeed, it seems to me that the whole concept of contra trading (which is HMRC's own coinage) necessarily assumes that to be so."
>
> 37 In my judgment, there are likely to be many cases in which a participant in a sophisticated fraud is shown to have actual or blind eye knowledge that the transaction in which he is participating is connected with that fraud, without knowing, for example, whether his chain is a clean or dirty chain, whether contra trading is necessarily involved at all, or whether the fraud has at its heart merely a dishonest intention to abscond without paying tax, or that intention plus one or more multifarious means of achieving a cover-up while the absconding takes place.
>
> 38 Similarly, I consider that there are likely to be many cases in which facts about the transaction known to the broker are sufficient to enable it to be said that the broker ought to have known that his transaction was connected with a tax fraud, without it having to be, or even being possible for it to be, demonstrated precisely which aspects of a sophisticated multifaceted fraud he would have discovered, had he made reasonable enquiries. In my judgment, sophisticated frauds in the real world are not invariably susceptible, as a matter of law, to being carved up into self-contained boxes even though, on the facts of particular cases, including *Livewire*, that may be an appropriate basis for analysis."

86. In *Fonecomp* the Court of Appeal considered a submission on behalf of the appellant that "it only lost its right to claim a credit or repayment if it knows or ought to know that the default will occur in the same chain of supply as his purchase, but not if that default occurred in a different chain of supply." Fonecomp contended that in those circumstances the requisite connection and knowledge do not exist, even when the third party which orchestrates the scheme camouflages the plan to cause a default by a party liable to pay VAT by interweaving transactions in several chains of supply.

87. The Court of Appeal concluded that the CJEU case-law "neither demonstrates that the *Kittel* principle was limited in the way [Fonecomp] submits nor introduces some new qualification on the *Kittel* principle" ([22], per Arden LJ). The Court of Appeal provided the following reasoning for its conclusion:

> (1) the specific answer provided by the CJEU in *Bonik EOOD v Direktor na Direktsia "Obzhalvane i upravlenie na izpalnenieto"* (Case C-285/11) [2013] STC 773, on which Fonecomp relied, did not deal with the question of a connection outside the chain of supply in which the taxpayer's purchase took place ([23]);
>
> (2) none of the CJEU authorities relied upon by Fonecomp in support of its contention involved allegations of contra-trading, and so none of those cases could be considered authority on the position where there has been contra-trading ([24]);
>
> (3) there is nothing to suggest that, by referring to a chain of supply, the CJEU necessarily meant a chain that was purely linear. Chains can be intersecting or have branches, so there is no reason why the chain of supply should not be connected through a branch. It is the existence of the requisite connection between the transactions involved which makes the relationship between the transactions a chain ([28]); and
>
> (4) there is nothing to suggest that the CJEU intended to narrow the *Kittel* principle; to do so would have excluded the possibility of removing the right to repayment from those knowingly involved in contra-trading ([29]).

88. The Court of Appeal also considered the issue as to what constituted a connection between the fraud and the transaction for which the trader seeks to exercise his right to deduct. It considered the submission on behalf of Fonecomp to the effect that Fonecomp (or a trader in Fonecomp's position in the chain) had to know in terms what the connection was, and that a general understanding that a fraud had occurred was not enough. The Court considered the further submission that Fonecomp's purchases had to assist the fraud in some way, and would not do so unless they happened to be entered in the contra-trader's return at a time when it entered fraudulent transactions. Arden LJ concluded as follows:

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

89. The Court of Appeal went on to consider the degree of knowledge of the fraud which the trader must have in order to be liable as a participant in it. In reaching its conclusions, the Court relied upon the observations of Briggs J in *Megtian* at [37]. The Court of Appeal continued:

> "51….[The trader] 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."

ISSUES

90. The issues to be determined are as follows:

(1) was there a tax loss;

(2) if so, did the tax loss result from fraudulent evasion;

(3) if so, were Askaris' transactions which are the subject of appeal connected with that fraudulent evasion; and

(4) if so, did Askaris know or should it have known that its transactions were so connected.

91. The burden of proof rests with HMRC; per Moses LJ 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."

92. In *HMRC v Citibank NA, E Buyer UK Limited* [2017] EWCA 1416 (Civ) the Court of Appeal held that satisfying the burden of proof in respect of the allegation that Askaris knew or should have known that its transactions were connected with the fraudulent evasion of VAT does not require HMRC to prove that the taxpayer (or those acting on its behalf) was dishonest or fraudulent.

93. The standard of proof is the balance of probabilities.

94. The Statement of Issues dated 5 April 2019 filed by Mr Sangster confirms that Askaris does not challenge the findings of the HMRC officers in respect of the accuracy of each of the transaction chains, that there is a tax loss at the start of each of the chains or that such tax loss is attributable to the fraudulent evasion of VAT. The only question for us to determine is thus whether Askaris knew or should have known that its transactions were connected with the fraudulent evasion of VAT.

95. As to whose knowledge, we consider the actual knowledge and means of knowledge of the directors and employees of Askaris, and their knowledge is imputed to Askaris. The relevant individuals are:

(1) Sean Allison – He was appointed a director of Askaris on 23 August 2013, ie after the commencement of the transactions under appeal. He was acknowledged to be working for Askaris before that time – at a meeting with HMRC on 26 March 2014 he told Officers Chisman and Tosta that he had had a meeting with Mr Azadi sometime during May 2013 discussing the sale of airtime; he signed the JT Interconnection Agreement as a "director" on behalf of Askaris at the beginning of July 2013. That his knowledge and means of knowledge is to be imputed to Askaris for all of the transactions under appeal was common ground between the parties – and to the extent that there is a dispute we find in any event that he was either an employee or shadow director from at least May 2013 and therefore that his knowledge and means of knowledge is relevant to all of the transactions under appeal. We do not lose sight of the fact that Mr Allison had been company secretary of Askaris since its incorporation, and was as such an officer of the company throughout. We did not hear any argument on whether such a role should result in the knowledge of that person being attributed to Askaris and express no conclusions on such matter;

(2) Benham Azadi – Whilst Mr Azadi was initially engaged by OES as a consultant, we find that by the beginning of 2013 (at the latest) he was an employee of Askaris and remained an employee throughout this period; and

(3) Richard Upshall – He had been appointed as a director of Askaris upon its incorporation and resigned on 23 August 2013. His knowledge and means of knowledge are relevant only up to that date. Whilst he remains a relevant figure in the context of the funding of the transactions, and HMRC submitted that he stood to benefit from the attempted fraud, there was no submission by HMRC that he was a shadow director or employee of Askaris after the date of his resignation as director.

TRANSACTION CHAINS

96. As set out in Annex 1, there are 35 invoices from Skynet to Askaris in respect of which Askaris is claiming repayment of the input tax. (There are 48 transactions which HMRC detailed in their Statement of Case as having been traced back to the fraudulent evasion of VAT. The difference in numbers is as a result of the airtime supplied by Skynet to Askaris under some invoices having more than one indirect source in the transaction chains.)

97. There are two different types of chains, namely direct tax loss chains which trace back to the fraudulent defaulter Blue Logic, and "clean" chains which trace back to Bartel in

circumstances where Bartel was a contra trader in "dirty" chains. As noted above, these transaction chains are agreed.

98. The transactions in the direct tax loss chains (deals 1-5 and 7, invoices Askaris 001, 002, 003 and part 004) are all:

Blue Logic → Vital Phone → Skynet → Askaris → Jersey Telecom

99. The clean chains in the contra trading transactions are all:

Voizar FZ LLC or Force Majure → Bartel → Vital Phone → Skynet → Askaris → Jersey Telecom

100. In addition to Bartel's imports from Voizar FZ LLC and Force Majure in the clean chains, Bartel undertook back to back sales of airtime during the period 8 July 2013 to 4 November 2013. There were 94 transactions, which traced back to the fraudulent defaulters Green Tree Car Centre Limited (44 transactions), Deal Factory Limited (45), AT Supplemental Limited (2) and ZK Traders Limited (3). HMRC plead that Bartel was deliberately off-setting its output tax against input tax reclaimed in chains in which it acted as a broker (exporting) trader, those latter chains involving a defaulting trader. (The purpose of this is to shift some or the entire repayment claim from the contra trader to Askaris, whose transactions on their face are not directly connected with a fraudulent default. This is intended to reduce the chance of the repayment claim(s) being denied.) The witness statement of Officer Smith, the allocated officer for Bartel, dated 29 June 2018 which sets out the basis for HMRC's position that Bartel was dishonest is agreed.

EVIDENCE

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

(1) Officer Chisman – witness statement dated 19 March 2018. Officer Chisman became the officer responsible for day to day contact with Askaris on 3 December 2013; and

(2) Sean Allison, director of Askaris – witness statement dated 4 February 2019.

102. We also had witness statements from a number of individuals who were not required to attend the hearing. Their witness statements were agreed.

103. We had the following agreed witness statements on behalf of Askaris:

(1) Andrew Dunn, chartered accountant – witness statement dated 4 February 2019. Mr Dunn joined Onyx in 2007 as a management accountant and that is where he first met Mr Suleyman and Mr Allison. He met Mr Upshall in 2012 and joined OES in December 2012. His role included overseeing Mr Upshall's business ventures and offering advice; and

(2) Enis Suleyman – witness statement dated 4 February 2019. He has been in the IT industry since 2000 when he joined Onyx. Onyx bought Askaris Ltd in 2005, and he joined OES in 2012.

104. The agreed witness statements filed on behalf of HMRC are:

(1) Officer Kemi Aina - witness statement dated 16 March 2018. Officer Aina became the allocated officer for Vital Phone Limited, a buffer in both the direct tax loss chains and the clean chains, on 19 August 2013;

(2) Officer George Beaddie – witness statement dated 9 March 2018. Officer Beaddie was the visiting officer for Blue Logic, the fraudulent defaulter in the direct tax loss chains, from 26 July 2012 to 11 September 2013;

(3) Officer Ross Carter – witness statement dated 14 March 2018. Officer Carter's statement related to FR Global Traders Ltd, a buffer in the contra chain which had supplied Bartel;

(4) Officer George Edwards – witness statement dated 19 February 2018. Officer Edwards' statement related to AT Supplemental Ltd, a fraudulent defaulter in the contra chain;

(5) Officer Joanne Keeley – witness statement dated 12 March 2018. Officer Keeley's statement related to ZK Traders Limited, a fraudulent defaulter in the contra chain, which was the sole supplier to FR Global;

(6) Officer Michael Pye – witness statement dated 8 March 2018. Officer Pye was the responsible officer for Green Tree Car Centre Limited, a fraudulent defaulter in the contra chain;

(7) Officer Tiffany Renshaw – witness statement dated 8 March 2018. Officer Renshaw was the allocated officer for Dargill Management Ltd, a fraudulent defaulter in the contra chain;

(8) Officer Laurence Smith – witness statement dated 15 March 2018. Officer Smith was the allocated officer for Deal Factory Limited, a fraudulent defaulter in the contra chain;

(9) Officer Paul Tait – witness statement dated 19 March 2018. Officer Tait was the responsible case officer for Skynet, a buffer in the direct tax loss chains and clean chain and sole supplier of airtime to Askaris;

(10) Officer Neil Brownsword – witness statement dated 19 March 2018. Officer Brownsword was the responsible case officer for Winnington Networks Limited ("WNL") and Winnington Networks Communications Limited ("WNCL") from 2011 to 2014. WNL is a customer of Bartel in the contra chains, and is linked by common directors with WNCL;

(11) Officer Simon Chaplin – witness statement dated 15 March 2018. Officer Chaplin was the lead insolvency case holder involved in the winding up and appointment of provisional liquidators over WNL, WNCL and Bartel. We also had an affidavit of Officer Simon Chaplin, dated 15 March 2018, in relation to these three companies;

(12) Officer Alex Coulson – witness statement dated 14 March 2018. Officer Coulson is a data analyst within the Systems Evasion & Analysis Team at HMRC and he analysed the CDRs and electronic invoices provided by Askaris to ascertain whether those documents could be treated as evidence that Askaris bought airtime from Skynet and sold it to Jersey Telecom;

(13) Officer Ian Maxted – witness statement dated 13 March 2018. Officer Maxted is a data analyst and uses software to import electronic data in a range of formats and question the data. He had been asked by Officer Beaddie to review data on five CDs which had been uplifted from Blue Logic. He was also provided with further discs by other HMRC officers (including Officer Chisman);

(14) Officer Desmond English – witness statement dated 22 March 2018. Officer English deals with Harjen Limited, a former supplier to Skynet, but which does not appear in any of the deal chains with Askaris; and

(15) Officer Laurence Smith – witness statement dated 29 June 2018. (This is described as his first witness statement, although within it he does refer to his own earlier witness statement on Deal Factory Limited.) On 2 March 2018 he became the allocated officer for Bartel, the contra trader.

105. We have considered all the submissions and evidence to which we were referred. We have not referred to all of the material - that does not mean that the Tribunal has not given it due consideration.

WHETHER APPELLANT KNEW OR SHOULD HAVE KNOWN

106. HMRC contend that Askaris knew that its transactions were connected with the fraudulent evasion of VAT or, in the alternative, that in the absence of actual knowledge Askaris should have known of the connection of its transactions with VAT fraud. This knowledge can be that of any of the directors or employees of Askaris who undertook the transactions – Mr Allison, Mr Azadi or Mr Upshall. Their roles in the company are described at [95] above.

107. HMRC support this submission by reference to the cumulative effect of a number of factors in relation to the transactions, and draw attention to what they say is a pattern of inconsistencies in the explanations provided by Askaris. Mr Sangster has raised other factors in arguing that HMRC were wrong, and say the inconsistencies are irrelevant or understandable or they happened because over the years fresh information or more up-to-date information came about.

108. We consider each of these factors, including the competing submissions of the parties. However, we have throughout kept in mind the need to consider the evidence as a whole and to stand back and consider the totality of the evidence.

109. HMRC have set out their position in their Statement of Case, their opening submissions and their closing submissions. The main factors identified by HMRC therein as indicators (or that they submit are relevant) that Askaris knew or should have known of the connection to fraud are set out below:

(1) background, contact with HMRC and knowledge of missing trader fraud,

(2) proportion of transactions connected to fraud,

(3) move to monthly returns,

(4) structure of supply chains and circumstances of transactions,

(5) dealings with counterparties – including its supplier, customer, the switch operator and implications for CDRs and billing,

(6) due diligence,

(7) funding of the operations – the loan from Askaris UAE, factoring by VOIP Capital, and payment of overheads by another company,

(8) absence of documentary evidence, and

(9) absence of evidence from Benham Azadi and Richard Upshall.

110. In the Grounds of Appeal Mr Sangster drew attention to the difference between "typical" missing trader fraud, involving companies being bought off the shelf and beginning instant high turnover trade, the personnel having little or no background in the trade, the goods or

services potentially being non-existent or if they do exist being bought and sold in a circle. He contrasted that with the history of Askaris and Mr Allison's experience. The focus of Askaris was to deliver the K-Roam project. This was their goal, with the wholesale market being a prerequisite. That market itself was not where their business was focused. There were already two competitors who were active in the market, and the drive was to develop and launch the product.

111. The Grounds of Appeal include the following explanations on behalf of Askaris (which we have considered in the context of assessing the factors relied upon by HMRC):

(1) aside from Skynet, their direct supplier, and Jersey Telecom, their customer, Askaris had no knowledge of their ultimate suppliers;

(2) they exercised due diligence in that other suppliers were sought, but never used;

(3) price negotiations took place;

(4) its outsourcing practices led to an unfortunate lack of records, the responsibility for which lies with the business partner as opposed to Askaris;

(5) its gearing in relation to the loan from Askaris UAE is both logical and understandable;

(6) its operating in a "no commercial risk" environment is a sign of its being a well-run business as opposed to its being an indicator of fraud;

(7) the lack of reciprocity from Jersey Telecom in relation to the K-Roam project was not something that could have been expected in the three-month time frame concerned;

(8) Askaris' failure to reclaim input tax against expenses other than those for accountancy is explicable in that the profits were paid directly to the lender in Dubai; and

(9) in relation to the static price of airtime, Askaris' attentions were devoted elsewhere, particularly to the long-term prospect of the K-Roam project and it was making a profit and so wasn't overly concerned.

112. HMRC submit that, even if accepted as genuine, the above explanations fall a long way short of being logical or commercial, and that the level of due diligence, even if accepted to be truthful, was woefully inadequate.

113. Mr Sangster emphasised at the outset that much depends on our view of Mr Allison's credibility, whether we accept that Askaris was seeking to develop the K-Roam project, the time taken by HMRC to conduct its investigations and the costs which have been incurred in pursuing this appeal.

114. We have considered the submissions and evidence before us in respect of all of the above factors below. We have, however, addressed one of Mr Sangster's submissions first, namely the credibility of Mr Allison – he was the only witness who gave evidence for Askaris at the hearing, and in cross-examination gave evidence which addressed several of the factors relied upon by HMRC. Our conclusions on the truthfulness and reliability of his evidence pervade the findings of fact which we make throughout.

Credibility of Sean Allison

115. HMRC submit that the various factors they have identified cast doubt on the veracity and integrity of Askaris. They note that they are not required to specify which of the directors and employees knew or should have known of the connection to fraud, but part of their case involved challenging the knowledge and means of knowledge of Mr Allison.

116. Mr Allison's CV was included as an attachment to the Grounds of Appeal, and set out his 37 years in the IT industry, his business in network security consultancy and work for defence companies. In cross-examination Mr Keene challenged the absence of any documentary evidence of this work for the defence, research and financial industries.

117. Mr Allison's witness statement records that:

(1) He had established Askaris Ltd in 1999 with his then-wife. The company was set up to offer security solutions to high-risk business, and provided security solutions to UK government and List-X businesses, including BAE systems;

(2) He was Askaris Ltd's principal consultant and was one of the original CLAS consultants (a scheme instigated by the UK government and run by GCHQ to provide information security advice to government departments);

(3) The Onyx Group acquired Askaris Ltd in 2005 and he became the Group Technical Director of the Onyx Group for the next four years and was responsible for the development of technologies provided to their customers, especially telecommunications and information security;

(4) Mr Allison met Mr Upshall in 2008 and emigrated to the UAE in 2009. The intention was to provide similar services for Middle East clients as were being provided by Onyx in the UK;

(5) Two companies were set up in 2009 – Askaris UAE and Askaris;

(6) Askaris initially entered into a support agreement with OES Oilfield Services, an oil and gas services business. It assisted with the security of data within this business and also designed and installed the network systems between offices. It also designed and implemented a VOIP-based phone system which was deployed worldwide to support both OES' desk-based and field-based employees, allowing communications between Singapore, Brazil, UK, US and the UAE at affordable rates;

(7) OES had a high turnover of staff, and OES asked Askaris to investigate why that was the case. Mr Allison contracted Mr Azadi to assess why employees were leaving at such a high rate. Mr Azadi reported that the employees' biggest complaint was that they became homesick and struggled to stay in contact with family and friends. In some places mobile phone service was non-existent, and where it was available the cost was prohibitively high due to roaming charges. They set about trying to develop a way of reducing the costs of international phone calls;

(8) Askaris employed Mr Azadi and a team of technicians to come up with a solution. The solution revolved around the ability to provide very cheap call routing using their own SIM to provide a call back to the original caller; and

(9) To start the project, Askaris looked for suppliers who could supply them with SIM cards, airtime, route switching and billing platforms, referring to Jersey Telecom, Skynet and the decision not to trade with Harjen. They settled on Skynet to provide routed airtime. They were able to provide Askaris with the quality of routes they needed to supply to Jersey Telecom.

118. Mr Allison gave evidence as to the purchase and sale of airtime in the periods under appeal, setting out what he did, what he asked Mr Azadi to do and what he was told by Mr Azadi. The details of this are set out below in the context of the various indicators and factors relied upon by both parties. He accepted in cross-examination (see [146(6)] below) that Askaris had no capital but there was nevertheless a huge explosion in trade. He also accepted (see further [131] below) that from 19 September 2013 he was aware that something was

wrong, and that this prompted Askaris to ask questions of Skynet to try to find out the source of the problem.

119. We were concerned to establish how the relationship between Mr Allison and Mr Azadi had come about and the origin of the idea of the K-Roam project. We noted that during the meeting with HMRC on 26 March 2014 Mr Allison had stated that he had met Mr Azadi on Facebook, whereas Mr Suleyman's statement includes that Mr Azadi was a friend of his and Mr Allison's statement said that he had contracted Mr Azadi to assess why employees were leaving (without further explanation as to their introduction). We wanted to understand how these explanations fitted together.

120. Giving evidence, and in response to questions from the Tribunal, Mr Allison explained that he had known Mr Suleyman since around 2004 (before Onyx bought Askaris Ltd) and had worked with him in Dubai, and Mr Suleyman had introduced him to Mr Upshall. Just before he came back to the UK Mr Azadi was introduced to Mr Allison on Facebook by Mr Suleyman. Mr Suleyman had known Mr Azadi for some time and Mr Azadi had an idea for a Facebook app he was looking to develop. This was a workman recommendation app, and discussions about this between Mr Allison and Mr Azadi took place on Facebook. Mr Allison couldn't help him with this project as they were busy on other development work. They met in person about a month or so after that. Mr Azadi was engaged initially as a consultant to OES to investigate the retention issues, and it was then that Mr Azadi came up with the idea of K-Roam. Mr Azadi was later employed by Askaris.

121. This is supported by, and fits with, the agreed witness statement of Mr Suleyman, who states that having been concerned after joining OES about the large turnover of field staff he commissioned a friend, Mr Azadi, to head up a team to investigate why this was and what they could do to improve retention. Having identified that one of the major concerns the inspectors had was losing contact with family for sometimes up to six weeks at a time Mr Azadi started to work with Mr Allison to come up with a method of allowing cheap international calls using the OES network and VOIP infrastructure as a carrier. Mr Azadi then approached Mr Suleyman regarding a larger opportunity of developing a mobile phone SIM card which would allow free calls for the inspectors – this was the K-Roam project.

122. We found Mr Allison to be an honest, credible witness who was seeking to explain matters openly to the Tribunal. There were areas where his explanation was based not on his own actions but on what he had been told by others, notably Mr Azadi. He was open about this, and we accept that he was telling us what he understood to be the position. We accept his evidence as to his experience in the IT industry.

123. Mr Sangster submitted that if we accept that Mr Allison has, or may have, told the truth at the hearing then Askaris' appeal should be allowed.

124. We do not accept this submission - our acceptance of Mr Allison's evidence as credible and honest does not and cannot of itself determine the outcome of the appeals before us. There are two reasons for this – it is the knowledge or means of knowledge of Askaris which is in issue (and that can extend to other directors and employees, ie to both Mr Upshall and Mr Azadi) and, furthermore, whilst Mr Allison's credibility may lead us to or be a factor in the conclusion that he did not know that the transactions were connected to the fraudulent evasion of VAT, this would not preclude us from concluding, in the light of all of the evidence, that he (and thus Askaris) should have known of such connection.

Background, contact with HMRC and knowledge of MTIC fraud

125. HMRC submit that Askaris can have been in no doubt about the prevalence of VAT fraud in its trade sector, its scale and how it operated at the time of entering into the relevant transactions.

126. In his witness statement Mr Allison stated that:

(1) he was aware that caution needs to be taken with any new supplier and customer;

(2) he was aware that there were examples of fraud within the industry and he understood this could potentially be related to elements further along in the supply chain. Due diligence satisfied them that their suppliers and customers were legitimate businesses with trading history.

127. On the basis of this evidence, we consider it was agreed that Mr Allison and thus Askaris were aware of the risk of VAT fraud in its trade sector and the importance of due diligence. This does not of itself support HMRC's submission that Askaris was aware of the scale of the fraud nor how it operated at the outset.

128. We have considered the timing and content of contacts with HMRC in this regard (as well as Mr Allison's evidence in cross-examination, set out below), bearing in mind that the first invoice from Skynet to Askaris is dated 11 June 2013 and the final invoice is dated 22 October 2013:

(1) the first visit by HMRC to Askaris was by Officers Ginn and Cowell on 19 September 2013. This was an unannounced visit to the offices of Ashdown Hurrey, and Officer Ginn spoke to Ms Steer, an accountant who works for Ashdown Hurrey. Nobody from Askaris was present. Officer Ginn handed over Notice 726 which, at section 6, recommends checks that businesses carry out, and (although airtime is not mentioned in that notice) informed Ms Steer that airtime and minutes had been identified as a commodity that were used in MTIC transactions;

(2) on 24 September 2013 Officer Everett sent Askaris an MTIC Awareness Letter, which also included a warning about the use of ABPs;

(3) on 26 September 2013 Officer Ginn sent a letter to both Ashdown Hurrey and Askaris stating that HMRC were concerned that the business could be at risk of involvement in supply chains that are connected with fraud. That letter indicated that Officer Ginn would make arrangements to be given certain trading records on a monthly basis, provided details on how to verify whether new or potential customers or suppliers are currently VAT registered and directed them to further information on MTIC fraud on the HMRC website;

(4) on 4 October 2013 Officer Blaney wrote to inform Askaris that the 09/13 return had been selected for extended verification;

(5) Officers Chisman and Tosta visited Askaris on 6 December 2013, meeting with Mr Allison and Mr Hall; and

(6) the first tax loss letter was sent on 19 March 2014, informing Askaris that four transactions in the 08/13 return had been traced in transaction chains commencing with a VAT loss. (The remainder of the tax loss letters were sent in April to July 2015.)

129. It is readily apparent that, whilst the visits from Officer Chisman (described under Background) did make very clear references to the risks of fraud and indeed the factors which were of concern to HMRC (eg by questions regarding the switch, the difficulty of obtaining accurate CDRs, due diligence, concerns about single customer and supplier), by the time of

Officer Chisman's first visit to Askaris in December 2013 the sales of airtime had already ceased. The first tax loss letter was similarly sent "after the event".

130. We note that HMRC were monitoring Skynet throughout the period in which Askaris were trading with them, but there is no evidence that Askaris were informed of this. Officer Chisman confirmed at the hearing that Askaris would not have been told of this.

131. Mr Keene emphasised that it was not HMRC's submission that Askaris only had means of knowledge from the point that HMRC began to engage with Askaris in meetings in September 2013 – they submit that the factors relied upon demonstrate that Askaris did have the means of knowledge in relation to all transactions. However, he drew attention to the evidence from Mr Allison during cross-examination, in which Mr Allison accepted that he had a heavy suspicion something was amiss in the supply chain from 3 September 2013 although said he did not know if it was fraud. He later accepted that, as of shortly after 19 September 2013, he was aware something was wrong in the chains and there were concerns about MTIC fraud:

> "Q. [19 September 2013] is quite an important date because this is a date, as a minimum, from which you accept you've had constructive notice, in effect, of what's a possibility of something seriously going wrong in your chain?
>
> A. That was the date that I was aware something was wrong, yes.
>
> Q. Yes. So what takes place hereafter is quite important, isn't it, in terms of your conduct? It must be.
>
> A. Yes.
>
> […]
>
> Q. You'd have known pretty quickly after this meeting what it meant as well, wouldn't you?
>
> A. Yes.
>
> Q. It's concerns about missing trader intercommunity fraud, isn't it?
>
> A. It is.
>
> Q. And it basically encapsulates the authorities in this area in a guidance document to people concerning trades?
>
> A. Correct.
>
> Q. Yes. And you knew that very quickly thereafter?
>
> A. Correct."

132. Being asked about the enquiries that were made of Skynet:

> "Q. I'm not holding you to the exact words, but basically the enquiry is being made with Skynet, "Is there a fraud going on here?"
>
> A. Yes, essentially.
>
> Q. And that's what you were alert to very early on in September --
>
> A. Why are HMRC at our door? What's the problem? Is there a problem at your side?
>
> Q. Yet you carried on trading in exactly the same manner after that?
>
> A. While we found out what the problem was and where the problem was. Was there even a problem? Was this a red herring? Was it, you know, untrue?

> We had no way of knowing whether it was fraudulent or not. Nobody could tell us. Skynet couldn't tell us. Skynet wouldn't tell us."

133. Mr Keene drew attention to the fact that 20 more invoices representing transactions linked to fraud were sent after this point. He submitted that any businessperson with a modicum of prudence would have made the decision to halt the trading if they were not getting answers to enquiries made concerning possible fraud in the chain (which they had been informed about by HMRC). Mr Keene's submission was that in accepting that he was aware of the concerns expressed by HMRC and continuing to trade, Mr Allison effectively admitted the means of knowledge in respect of these 20 invoices in the course of his oral evidence.

134. Mr Allison clearly accepted in cross-examination that that, whilst he had not been present at the meeting on 19 September 2013, he had been informed of it shortly afterwards. He was also clear that he recognised that HMRC were stating that, as Mr Keene put it, there was a possibility of something seriously wrong. That is different from saying that at that point he knew there was something wrong or had the means of knowing something was wrong – HMRC had not at this stage traced any transactions back to fraudulent tax losses and therefore cannot be understood in this context of having informed Mr Allison (indirectly, via Ms Steer) that there was a connection to fraudulent tax losses in Askaris' transaction chains. He was being warned of the possibility of fraud. Of itself, we do not share Mr Keene's views as to the significance of this exchange.

135. Nevertheless, we do take account of Mr Allison's awareness of fraud in the industry from the beginning, the fact that from 19 September 2013 this risk had been emphasised to him (by the provision of Notice 726, the explanation that airtime was a commodity identified by HMRC as being used in MTIC transactions, and that there was a risk that Askaris' transactions were connected to fraud).

Proportion of transactions connected to fraud

136. HMRC submit, paraphrasing the final factor set out by Christopher Clarke J in *Red12*, that the Tribunal could legitimately think it unlikely that the fact that all 35 transactions in issue (and the only business Askaris carried out during 2013) can be traced to tax losses is a result of innocent coincidence. Askaris had only commenced trading in June 2013 and its trade increased exponentially during the periods in issue, notwithstanding that its director, Mr Allison, seemed to know very little about the operation of the airtime business.

137. HMRC note that, as stated in *HMRC v Brayfal Ltd* [2011] UKUT 99 (TCC), the totality of the deals must be regarded in the determination of what a taxpayer knew or ought to have known. HMRC submit that the totality of the deals in this case creates a powerful inference of knowledge of fraud. It is very difficult to see how anyone engaged in Askaris' business could reasonably engage in all of these deals unwittingly.

138. It was agreed that:

(1) 100% of the turnover for Askaris in the 08/13 and 09/13 VAT returns was traced back to fraudulent tax losses;

(2) 99.98% of the turnover for Askaris in the 10/13 VAT return was traced back to fraudulent tax losses – the balance was attributable to the sale by Askaris of some software, IT services and testing services to OES Oilfield Services (UK) Ltd in that period, with a total value of £17,122.80; and

(3) 100% of the turnover for Askaris in the 11/13 VAT return was traced back to fraudulent tax losses.

139. Essentially, Askaris traded with a single supplier and a single customer during the periods in issue. The most likely consequence of this would be that all transactions would be traced back to fraud, or that none of them would. In the context of this choice of business model, we do not place any emphasis on the mere fact of the proportion of transactions which trace back to fraud, but instead consider more carefully the circumstances which led to the choice of single supplier and customer, and assess the consideration given by Askaris to the risks (as well as benefits) that this approach posed.

Move to monthly returns

140. HMRC contend that a request to move to monthly returns, rather than quarterly returns, is an indication of knowing participation in a fraud because if HMRC deny a monthly reclaim, the fraudsters have less to lose than if they had traded and paid out VAT for three months.

141. Mr Sangster submitted that this may well be the case for fraudsters, but in this case, although Askaris were denied their very first re-claim for the first three trades (made on 11, 17 and 28 June 2013, returned in the 08/13 period) amounting to some £800 of VAT, they continued to trade for a further 12 weeks, paying out £809,000 in VAT. Had they knowingly been participating in a fraud, logic dictates that they could have pulled the plug after the first trades were questioned and lost a much smaller amount of money. He submits that the fact that they continued for thirteen weeks, putting at risk more and more money every week, is strong evidence that they were unwittingly caught up in fraudulent chains.

142. We agree with HMRC that, viewed in isolation, a request to move to monthly returns can be an indicator of knowing participation in a fraud for the reason they give. However, such a move can also be important for cashflows for traders whose business is not connected to fraud at all, as is acknowledged by the requirement that a move to monthly returns is only available for repayment traders. Keeping a keen eye on cashflows is not itself an indicator of fraud.

143. Applying to move to monthly returns did put the business on HMRC's radar –the letter from Ashdown Hurrey of 11 July 2013 had been preceded by a telephone conversation and Officer Chisman inferred from this that such conversation was likely to have involved an explanation of the business of Askaris. The letter then enclosed the JT Interconnection Agreement and an invoice from Skynet, thus showing HMRC the supplier and customer of Askaris (albeit there was no suggestion that at this stage it would have been apparent to HMRC that these would be the only supplier and customer).

144. We note that the return for 08/13 was submitted on 2 September 2013 (which was the final quarterly return). The first action by HMRC following the making of this return was not the making of a payment but an unannounced visit on 19 September 2013. Mr Allison was informed of this visit and accepted he knew that HMRC were concerned about the possibility of fraud. Whilst trading did not cease immediately, it only continued for a further month. In total there was a relatively short period of trading, and by the end of October 2013 Askaris had decided not to put more money at risk. HMRC criticise Askaris for this further trading; but in any event we consider that it does not support the more positive picture which Mr Sangster sought to paint.

145. Overall, we are not persuaded that Askaris' application to move to monthly returns should be seen as supporting either parties' arguments, and we do not place any weight on this factor.

Structure of the supply chains and circumstances of the transactions

146. HMRC submit that the structure and consistency of the supply chains is indicative of the transactions being part of an overall scheme to defraud HMRC:

(1) traders appear to have consistently occupied the same position in the supply chains – this fact is accepted by Askaris, although Mr Allison states he did not have visibility of this at the time of the transactions;

(2) there was a limited number of traders involved – this is inconsistent with the participants acting as free agents in a diverse and competitive market place;

(3) the length of the supply chains, speed at which the goods were sold and the fact that the goods passed through a consistent series of traders who added no value to the goods and a small mark-up suggests that the transactions were contrived;

(4) no member of the relevant supply chains ever made a loss in any of the deals;

(5) none of the supply chains can be traced to a point of origin for the airtime services; and

(6) the supply always seemed to have matched the demand precisely – there was no need to source the airtime from more than one supplier, or to split the supply between more than one customer.

147. When Mr Allison was cross-examined he confirmed that the other features referred to in *Red12* characterised his business model:

> "Q. Now, your involvement with Skynet, can I just go through and see if you agree with these suggestions, please. Would you agree that there are fairly compelling similarities between the transactions, one onto the next, with Skynet over the period of time that you, Askaris, were dealing with them? […] Would you agree that those chains are remarkably similar? The positions, for example, of all persons involved, all companies involved, remain the same?
>
> A. After seeing the evidence that was provided to us from HMRC, I can see the deal chains that were in place.
>
> Q. Well, your customer and your buyer remain the same throughout that period, don't they?
>
> A. Correct, and that's what I had --
>
> Q. And you're well aware of that?
>
> A. So that's what I had visibility of, yes.
>
> Q. And the prices on that product remain remarkably consistent. I think there was a variation – three minor variations within the whole period?
>
> A. Correct.
>
> Q. The percentage markups are very similar?
>
> A. Yes, correct.
>
> Q. And you as a trader had no capital at all?
>
> A. That's correct as well.
>
> Q. And it was a huge explosion in trade?
>
> A. That's correct.
>
> Q. And you were left with no stock after this? Every point you were supplied was met by demand?
>
> A. Absolutely, yes. That's the business model."

148. It is notable that HMRC did not contend that Askaris did not receive or make supplies of airtime (albeit that it is evident from the visit reports that this had been a concern identified by

Officer Chisman earlier in the verification process). HMRC have, however, established the limited number of traders in the consistent supply chains (this being accepted by Askaris), that each trader applied a mark-up to the supply, there was no evidence of any value being added by any of these suppliers and that, for Askaris, the supply matched the demand.

149. We note at the outset that in the context of supplies of airtime we do not see any significance in the supply meeting demand. It may well be that this is unusual for supplies of physical stock, but in the present context, unless the demand by Jersey Telecom had turned out to be vastly in excess of what had been anticipated at the outset then we have no difficulty with the matching that occurred. Mr Allison compared this to the supply of electricity and in the present context we accept this is an apt comparison.

150. However, when we focus on the consistent state of the supply chains (at least in the sales by Blue Logic and Bartel onwards), we accept that this should raise red flags, as should the ability of a number of companies to apply a mark-up to the supply of the same service without adding value. However, HMRC have not established that Askaris knew of the identity of any suppliers to Skynet, nor their pricing.

151. We have also considered HMRC's submission that, if there was risk to Askaris in trading in airtime, it was very low and could be characterised as risk of a customer defaulting on payment rather than any risk specific to the market in which Askaris was trading. This absence of risk had been identified by Mr Allison:

(1) Mr Allison stated in an email to Officer Chisman on 1 April 2015:

> "The way in which the deal was structured, there was no risk to us. We were prepaying the VAT directly to VOIP Capital and whilst we were offered no credit, there were no other companies likely to give us credit."; and

(2) in a subsequent email on 12 May 2015 he stated:

> "If Jersey Telecom had not paid VOIP Capital, then Skynet would not have been paid by VOIP Capital and Askaris would have been liable for the balance."

152. HMRC submit that it would have been obvious to Mr Allison and all who engaged in this business that this was far from a normal business model. If they were not knowingly engaged in the fraud, then the highly irregular nature of the business model creates a powerful inference that they chose to ignore the obvious explanation as to why they were presented with the opportunity to reap a large and predictable reward over a short space of time.

153. Whilst mitigating risk is good business practice, this submission by HMRC does draw attention to a question which arises from various of the factors identified, and that is how and why Askaris became involved in any of the transaction chains. The circumstances of Askaris making contact with Skynet and Jersey Telecom are considered further below, but given the ease with which contact was made with others in the market (noting for this purpose that contact with Skynet was initially made via social media rather than being based on any previous personal relationships or long-standing contacts), and a company which had no history in the trade was able to set itself up to buy and sell airtime with a fairly consistent mark-up, despite not adding value, this should have raised a question as to why their customer, Jersey Telecom, needed to deal with Askaris to buy airtime. Given that Skynet (and others) were operating in this wholesale market, why is it that by advertising for supplies the eventual customer was not put in contact with suppliers earlier in the supply chain, thus cutting out several layers of mark-ups. There may well have been answers to this, but the apparent failure to have posed this question at the time of the transactions does raise concern.

154. We therefore accept HMRC's submission that the factors identified above can all be indicators of fraud. The difficulty is that many of these factors only become relevant to the question before us if it is established that Askaris knew or had means of knowledge of these factors. Factors that would have been apparent to Askaris (irrespective of its knowledge or means of knowledge) would have been its own level of mark-ups, its ability to enter the market, the commercial risk and supply meeting demand (albeit that as explained we place no weight on the latter). We assess these in the context of our overall conclusions.

Dealings with counterparties, including its supplier and customer

155. HMRC submit that an analysis of Askaris' dealings with its only supplier and its only customer serves to compound the powerful inference that Askaris knew that this operation was fraudulent or at the very least should have known. They also draw attention to what they say is the minimal or non-existent due diligence and the absence of documentary evidence.

156. Askaris emphasise that there was nothing unusual in the manner of its dealings with supplier and customer, or in how it took decisions internally – as a small company, matters could be decided following discussions without meeting notes being made, and, when agreeing the sales of airtime, long and/or frequent meetings were not necessary – if the price was satisfactory, Askaris would do business at that price.

Supplier - Skynet

157. HMRC submit that characteristics of Askaris' dealings with Skynet are highly irregular and that it is difficult to conceive how they permitted the operation of normal, legitimate business.

158. Mr Allison stated that Skynet could provide the quality of airtime that was required by Jersey Telecom, and that he had checked that they had trading history. Mr Sangster drew attention to Skynet's trading before and after the transactions with Askaris – this was not a company whose existence was solely attributable to its trading with Askaris. We accept that this is demonstrated by Officer Tait's agreed statement:

> (1) HMRC (Officers Alan Ruler and Jayne Meek) had visited Skynet on 1 August 2011, and in the discussion on trading activities it was stated that Skynet's source of Apple products (which they were previously wholesaling) had dried up so they were moving in to business to business communication systems. During the meeting on 23 October 2012 (with Officers Val Bigham and Lee Bell) Skynet stated that it was dealing solely in Apple products (wholesaling). At a meeting on 15 May 2013 (Officers Bell and Meek) Skynet said that they had begun to buy and sell airtime – they had one supplier (Harjen Ltd) and one customer (Tata Communications Ltd).
>
> (2) Skynet had filed VAT returns for the period 04/11 to 05/14, and it had significant sales in periods before its trading with Askaris – by way of example, it had declared sales (net of VAT) of £443,381 in 05/11, £488,066 in 06/11 and £950,647 in 04/13.
>
> (3) Skynet sold airtime to Askaris between June 2013 and October 2013, which it bought from Vital Phone Ltd. Officer Tait states that he visited Skynet (with Officer Val Smithies) on 6 August 2013. His statement records that following his visit of 18 June Mr Seadon had undertaken more checks on Skynet's VOIP supplier, Harjen. The individual Skynet usually dealt with at Harjen was Nick Beer, who had recently left. Mr Seadon discovered that the directors of Harjen had a background in nightclubs, and Harjen had also failed to respond to correspondence. Skynet had therefore stopped dealing with them, which had resulted in their customer, Tata, ceasing to deal with Skynet. Skynet had recently found a new supplier, Vital Phone – Vital Phone had come to Skynet's attention when they received a blanket email from them. Skynet spoke to

Vital Phone and got a good rate for the Egypt route. Consequently, trading had resumed with Tata. Vital Phone were billing Skynet on a daily basis. Skynet were still going to use VoIP Capital to factor the invoices from Tata as Skynet would be unable to handle the daily bills of Vital Phone as Tata only settle weekly and take a further seven days to pay.

(4) On 29 January 2014 Officer Tait visited Skynet with Officer Meek and was told they were not currently doing any VOIP deals. This remained the case in June 2014.

159. It was not the case that Skynet only "popped up" to trade in airtime with Askaris; however, it was the case that it ceased this trade once it stopped dealing with Askaris.

160. We have considered the evidence in relation to the relationship between Askaris and Skynet, and note as follows:

(1) There is no written evidence demonstrating how Askaris and Skynet came to enter business together. There were no emails between Askaris and Skynet, or screenshots of chats from social media sites.

(2) We did not have a copy of any contract between Skynet and Askaris for the supply of airtime. Such an agreement was referred to by Officer Chisman in the meeting of 24 March 2014 (see [57(18)]) in terms which suggested he had received a copy of the signed agreement – he quoted from a particular clause, and referred to the signatories for each party – yet after the hearing we were not able to locate a copy of this agreement in the core bundle, or in the evidence exhibited by Officers Chisman or Tait, or in the disclosure supplied by Askaris. We do not know the reason for this, but we do accept that such a contract was entered into.

(3) Explanations as to how the relationship came about have varied:

(a) on 4 October 2013 Ashdown Hurrey responded to questions from Officer Ginn stating that Mr Allison knew the supplier Skynet through his network of business contacts and Skynet made first contact with Askaris;

(b) at the meeting on 6 December 2013 Mr Allison stated that Mr Azadi had identified and made contact with Skynet; and

(c) on 26 March 2014 Mr Allison stated that Mr Azadi had found Skynet as a possible supplier on the internet. Mr Azadi had considered both Harjen and Skynet, but decided not to deal with Harjen and had presented Skynet as the only option as a supplier to Mr Allison.

(4) Differing accounts have been given by Askaris to whether there were price negotiations at various times:

(a) at the meeting with Officer Chisman on 6 December 2013 Mr Allison had stated that Askaris worked out the price of airtime based on the costs of the supply and factoring, and that Askaris had taken the quoted price from Skynet which seemed reasonable;

(b) at the meeting on 26 March 2014 Mr Allison told Officer Chisman that Mr Azadi had negotiated prices with Skynet on a deal-by-deal basis, dependent on the quality of the supply;

(c) in his email of 4 September 2015 Mr Allison stated that price negotiations had taken place between Mr Azadi and representatives of Skynet (and Jersey Telecom), but that these were verbal discussions;

(d) Mr Allison said in his witness statement that he was aware that price negotiations took place between Mr Azadi and representatives of both the supplier and the customer. Negotiations to obtain the best possible prices took place in face to face meetings; and

(e) in his answers to questions at the hearing, Mr Allison said:

"Jersey Telecom apparently gave us a target price. We went to Skynet with a target price. You know, "What's your price? Will it fit in with this? Does it allow us to make a profit?"

However, there is no documentary evidence demonstrating the existence of any type of negotiation. Nor, however, were we taken to any documentary evidence showing a quoted price list from Skynet.

(5) There is no record of the parties discussing day-to-day operations – eg Askaris providing Skynet with technical details of the switch provided by Error Scope through which the supply would be routed, the required quality of the supply, the likely amounts of the airtime required or jurisdictions which were of interest. On Askaris' account all technical aspects and all matters relating to continuous supply and demand were dealt with by telephone calls which were not recorded in any way. We agree with HMRC's submission that it is not realistic that Askaris' business, involving the supply of millions of pounds of airtime using technical equipment, did not generate one piece of correspondence with its supplier.

161. We do not doubt (and find as a fact) that Skynet did supply airtime to Askaris – we have seen invoices from Skynet to Askaris, Skynet have confirmed (to Officer Tait) that they supplied airtime to Askaris, Jersey Telecom has confirmed that it received a supply of airtime from Askaris thus confirming that the invoices were not for a non-existent supply. However, there are matters of concern:

(1) Although HMRC sought to emphasise the differences in the explanations of how the relationship came about, we consider that since 6 December 2013 the explanation has been broadly consistent, with additional information being added as Mr Allison has asked further questions of Mr Azadi. We do note that these explanations on behalf of Askaris differ from the explanation given by Skynet to Officer Tait - Skynet told Officer Tait that Askaris had been recommended to them as a customer by Nick Beer, a former employee of Harjen. There was no evidence that Askaris had been told of this recommendation by Skynet. The developing explanation is one illustration of how Mr Allison was not familiar with the airtime supplies during (or even immediately after) the transactions and needed to obtain information from Mr Azadi in order to respond to questions from HMRC.

(2) The lack of documentary evidence of communications between Askaris and Skynet is striking – the hearing bundle contained only the invoices, and we accept that there was a contract. But there was no written evidence (letters, emails or social media chats) showing, eg, the initial introduction, arranging Mr Azadi's visit to Skynet's offices, communication of prices and payment terms, explanations of types and quantities of airtime that Askaris was interested in, or requests for valid invoices in sterling. Mr Allison stated that he was perhaps naïve in not having matters written down, but we do not consider that this alone explains the complete absence of correspondence. We accept that some decisions may have been taken and agreed over the phone, or at the meeting with Skynet – but we would still expect to see some written correspondence between the parties to confirm matters, even if this was not complete. We are not convinced that the

absence can be explained by the passage of time - Askaris were on notice from a very early stage that HMRC were seeking to verify the returns and it should have been obvious that effort would need to be made to retrieve and preserve documentation (hard copy or electronic) relating to dealings with both the supplier and customer. If there was no documentation then this is significant from the perspective of risk, as Askaris would have been commercially exposed to disputes over pricing, quality of supply and timing of payment.

(3) The explanations as to how the pricing was agreed between Skynet and Askaris was vague. We do not consider that the changes in the explanation are attributable to deceipt on the part of Mr Allison – instead, they reveal that Mr Allison was completely dependant upon information which he received piecemeal from Mr Azadi. Nevertheless, the lack of any written record of the agreed pricing is startling – to check invoices received from Skynet, we would expect that Askaris needs to know how much airtime was supplied and the price per minute. As set out below, there are issues with both components.

162. Addressing HMRC's criticism that Askaris only bought from one supplier, Mr Allison states that as the business matured and developed, further suppliers and price negotiations would have been sought. Askaris were only trading for approximately three months, and so relationships were still developing. Furthermore, it was submitted by Mr Sangster that Askaris were concerned with developing a retail product (K-Roam) which they could market as quickly as possible.

163. Given the relatively short period of trading, we do not read anything into Askaris' decision to deal with only one supplier. However, the evidence as to the dealings between Askaris and Skynet illustrates an absence of documentation recording the correspondence between the parties, a lack of focus on pricing to ensure the potential for profit was actively maximised, Mr Allison's lack of knowledge of the relationship and commercial terms during the period in which the transactions occurred and Mr Allison's dependence on Mr Azadi for finding out what had happened (which explanation may well have changed or was given piecemeal).

Customer – Jersey Telecom

164. HMRC submit that the characteristics of Askaris' dealings with Jersey Telecom are also highly irregular and inconsistent with normal business practices, drawing attention to the way in which the dealings are similar to those with Skynet. On their submission, Jersey Telecom is just an outlet for the fraud.

165. Askaris submit that Jersey Telecom were first approached in the context of the K-Roam project, and that the trading in airtime emerged out of this.

166. Askaris' position in relation to the link between Jersey Telecom and K-Roam has changed. There is throughout an insistence that Askaris' desire to develop the K-Roam project led to their discussions with Jersey Telecom. We have looked at the explanations given chronologically:

(1) In the HMRC meeting on 6 December 2013, Mr Allison had said:

> "SA stated the Jersey Telecom wanted specific call routes to Gambia for Gambian nationals in Jersey. SA stated that Ben had telephoned Jersey Telecom up and offered them provided them (sic) with the company portfolio and stated that they could supply Gambian VOIP minutes."

(2) The visit report from the meeting on 26 March 2014 includes:

> "…initially Askaris had wanted Jersey Telecom to supply them with airtime minutes for their K-Roam project and that Jersey Telecom stated that they would only do so if there was a reciprocal arrangement where Askaris sold JT the airtime they needed. Askaris therefore needed a supplier in the UK for airtime"

(3) Mr Suleyman's evidence was that an acquaintance of his introduced him and Mr Azadi to Jersey Telecom as a potential provider of a SIM service that they could use for K-Roam. They established that Jersey Telecom were looking to buy VOIP airtime which Askaris had the potential to facilitate. Mr Azadi approached Mr Suleyman to discuss a potential supplemental revenue stream to the business, which would also support the K-Roam project. Mr Azadi had established a potential supplier he could use and Askaris could earn revenue from this which would help fund the K-Roam development. This also had the advantage that because Jersey Telecom were one of the companies they were looking at in the supply of SIM cards they could offset the revenue against the liabilities. A reciprocal agreement was signed to allow them to do this.

(4) Mr Allison's evidence (in his witness statement) was:

(a) the first potential supplier of SIM cards for the K-Roam project was Jersey Telecom;

(b) during discussions with Jersey Telecom Askaris became aware that Jersey Telecom bought airtime. This was something that would ultimately be a major part of the K-Roam project;

(c) to start early the flow of revenue, Askaris started trading airtime on specific routes. Jersey Telecom informed Askaris of the routes that they needed supply for (Gambia being one example). Askaris then researched forums and chat rooms (eg LinkedIn); and

(d) Askaris researched a number of potential providers. They looked at Harjen, but eventually settled on Skynet to provide routed airtime.

(5) At the hearing Mr Allison stated that "if the K-Roam project didn't exist the trades with Jersey Telecom and Skynet wouldn't have existed either." Being asked about the reason for trading with Jersey Telecom, he stated that they entered that trade because they wanted the ability to trade in the other direction as well.

167. Whilst, therefore, there was no reference to Jersey Telecom's interest in K-Roam in the meeting of 6 December 2013, in March 2014 it was explained that Jersey Telecom insisted that there be a reciprocal supply. The witness statements fall short of evidencing this - rather they paint a picture of the airtime trading being a source of profits for Askaris which could fund the development of K-Roam.

168. We have considered whether there is any additional evidence to corroborate the explanation that Jersey Telecom had required that Askaris supply them with airtime in order that Jersey Telecom would support the K-Roam project.

(1) Whilst we did see an email confirmation that Steve Barton had attended Askaris' office and met with Mr Azadi, there were no emails (or other evidence from Jersey Telecom) demonstrating that they were aware of the K-Roam project or discussing what might be required. Furthermore, in view of the fact that Askaris was keen to develop this product and get it to market fast, we might have expected some form of confidentiality arrangement in circumstances where it was innovative and being discussed with potential competitors.

(2) The JT Interconnection Agreement neither mentions K-Roam by name nor requires Jersey Telecom to make any supplies to Askaris:

(a) The recitals include at (C) the "JT and [Askaris] desire to interconnect their respective telecommunications systems and provide telecommunication services to each other on the terms and conditions of this Agreement."

(b) Clause 4.2 provides that the agreement does not impose any minimum volume or capacity commitment or obligation on either of the parties.

(c) The agreement itself does not specify the rates chargeable for services, instead stating (in clause 9) that each party shall notify the other in writing of its peak and off-peak rate bands per destination, and each party may modify its rate bands (or any element thereof) by not less than seven days' written notice to the other party.

(d) The services to be provided under this agreement are set out in the Schedule thereto, and are essentially to provide call legs for voice calls using either private circuits or VOIP. There is no mention of other types of goods or services being provided, eg SIM cards. Mr Suleyman's statement evidences that Askaris had wanted Jersey Telecom to supply them with SIM cards for the K-Roam project. No such supply was even contemplated by the JT Interconnection Agreement.

(3) The JT Interconnection Agreement was the only contract for the supply of airtime in the evidence before us. We are not therefore able to assess by reference to other agreements whether it is market-standard or bespoke to the positions of Jersey Telecom and Askaris. We do, however, note that the contract between Askaris and Skynet was described by HMRC as the Reciprocal Telecommunications Services Agreement and infer from this that not only was that how the agreement was labelled on the cover page but also that it, too, provided for services to be supplied both ways. There was no evidence before us that Askaris had any intention of supplying airtime to Skynet. Any such provisions would simply not have been used. This does raise the possibility (and we express it no more strongly than that) that agreements for the supply of airtime sometimes provide for the supplies to be made in both directions, even if the parties are not expecting that this will in fact happen.

169. On the basis of the evidence before us, we are not satisfied that Jersey Telecom were aware of the K-Roam project and, as a necessary corollary of this, we are not satisfied that Jersey Telecom had required Askaris to supply them with airtime in order that Jersey Telecom would support the K-Roam project. We do not place any weight for this purpose on the fact that no reciprocal supply did materialise, accepting that this can be explained by the time frame. We consider it more likely that the sales of airtime to Jersey Telecom were made, not because this was required by Jersey Telecom, but to generate profits which could be invested in the development of K-Roam.

170. Having reviewed the evidence, we accept HMRC's submission that the manner of the dealings between the two companies was somewhat irregular. In particular, whilst Askaris have produced the contract with Jersey Telecom (the JT Interconnection Agreement) and the notice of assignment they gave thereunder (directing Jersey Telecom to make payments to VOIP Capital), there is no other documentary evidence before us. There was no documentary evidence in relation to, eg, Askaris' assignment of rights (Mr Barton may well have known that this was likely to occur but we would have expected that Jersey Telecom would have wanted an explanation on file as to why they were making sizeable payments to a company which was not supplying any services to them and with which they had no contractual relationship), the price of airtime (the JT Interconnection Agreement leaves details regarding any supplies (as to

territory, amount and price) to be agreed separately) – either negotiations or confirmation of the agreed pricing, practicalities around invoicing, or the instance in which Jersey Telecom questioned an invoice (see [183(3)] below).

171. This lack of documentary evidence is against the backdrop of just one meeting having taken place between the two companies – Steve Barton of Jersey Telecom had attended a meeting with Mr Azadi at Askaris' office. There is contemporaneous confirmation of such meeting, in an email from Steve Barton to Ben Azadi dated 9 October 2012 in which Mr Barton referred to having "finally" met on Friday and enclosing an agreement for approval. At the meeting on 18 June 2014 Mr Allison told Officer Chisman that the lack of documentary evidence was due to Mr Azadi having contacted Steve Barton through Skype. We are not persuaded that this explains such a complete lack of a paper trail, even of the electronic kind.

172. Furthermore, we note that the mark-ups for the airtime supplied are incredibly similar in respect of the transactions in airtime to Afghanistan Gambia and the Philippines. These mark-ups were almost static and there were minimal changes in price. The explanation by Mr Allison was that the focus was on K-Roam, and it was sufficient that the transactions were profitable.

173. The visit report from 18 June 2014 concludes by Officer Chisman recording that he suspected the supplies to Jersey Telecom never took place. We had the following additional evidence in this regard:

(1) On 13 January 2015 Tom Noel, the Head of Finance (Wholesale Division) of Jersey Telecom sent an email to Maitland Hyslop of OES in which he confirmed that:

(a) A contractual relationship existed as of 10 July 2013 for the sale and purchase of wholesale telecommunication services;

(b) Their financial system showed that Askaris invoiced Jersey Telecom US$6,857,761 (paid in full) and summarised CDR data showed US$6,840,657.98

(c) The CDR data ranges from 9 June 2013 to 21 October 2013; and

(d) Jersey Telecom is registered in Jersey and is outside the EU for VAT purposes.

(2) On 12 February 2015 the Comptroller of Taxes for the States of Jersey responded to an exchange of information request which had been made by HMRC and stated that Jersey Telecom had "confirmed that it received the services described on the invoices included in your request" and had also confirmed that it had paid for those services. The information provided to the Comptroller had also been provided by Tom Noel, and that email of 11 February 2015 was included therewith.

174. The email of 13 January 2015 is carefully worded – it refers to the existence of the contract, the invoices having been received and paid, and the CDRs. It does not itself confirm that airtime was supplied. However, Tom Noel was also the source of information provided to the Comptroller, and his email of 11 February 2015 does expressly confirm that Jersey Telecom had received the services described. Therefore, to the extent that we had reservations about the email of 13 January, these are resolved by the subsequent email.

175. On the basis of the evidence before us, we are thus satisfied that Askaris did supply airtime to Jersey Telecom. However, as with the dealings with Skynet, there was an absence of documentation between the parties and a lack of focus on pricing. Furthermore, the explanations given by Mr Allison not only reveal his lack of knowledge of the transactions themselves but also illustrate a failure to challenge the explanations he was given by others after the event or review the contract which he had signed. We do not regard it plausible that Jersey Telecom would insist that it receive a supply from Askaris before they would supply

airtime for the K-Roam project given that they could readily reach out to the wholesale market and find their own suppliers (which is what they did after Askaris ceased trading) and do not comprehend how such an explanation stood up to any scrutiny by Mr Allison, thus suggesting it was not scrutinised and that he was just passing on information as given to him.

Switch

176. To provide the airtime supplies Askaris needed to use a switch. Mr Allison explained that as a new business they were unable to provide the switch themselves as they lacked the technical skills. They therefore outsourced this to Error Scope to provide the service on their behalf. Askaris entered into the Error Scope Services Agreement on 20 April 2013, which provided for Error Scope to rent to Askaris the required switch for 12 months, with a set-up fee of £2,000 and a rental fee of £5,000 per month.

177. There are two aspects of potential concern arising out of this relationship between Askaris and Error Scope:

(1) Jersey Telecom had recommended Error Scope to Askaris; and

(2) Error Scope was run by the son of Steve Barton (of Jersey Telecom). We do not know if HMRC had obtained this information from their own investigations, but in any event this was known to Askaris – on 27 November 2014 Maitland Hyslop (CEO of OES Oilfield Services (UK) Limited) emailed Officer Chisman and said that Error Scope was run by the son of Steve Barton.

178. We would not typically expect a customer to be explaining to a potential supplier how to provide a service; and the personal connection, which we infer was known to Mr Azadi at the time of the recommendation, should have been a red flag as to the nature of the arrangements.

179. We also note the following:

(1) The JT Interconnection Agreement requires Askaris to keep a physical point of connection at its own address; however, such physical point of connection was provided by Error Scope and that was not based at the same premises as Askaris. Askaris was therefore in breach of its contractual obligation – but we infer that this would have been known to its counterparty, as Jersey Telecom knew that Askaris were not using their own switch.

(2) Mr Allison has stated that Error Scope were required to provide the CDRs, but explained that after Askaris ceased trading Error Scope went out of business and it transpired that Error Scope had some of the CDRs but they were incomplete. Mr Allison emphasised that this was out of Askaris' control.

180. Having reviewed the Error Scope Services Agreement it is not clear to us that Error Scope were required to provide the CDRs to Askaris. The obligations of Error Scope under that agreement are very limited – they are (pursuant to clause 1) to rent the Equipment described in Schedule A thereto and to provide "such ancillary services as outlined in Schedule A". The entirety of Schedule A is as follows:

"SCHEDULE A
EQUIPMENT

VPS Pro 40 with ports: 1200 SIP/H323 with full codec stack Includes Security, Media routing and NAT Traversal capability and dual redundancy in all aspects of service provision."

181. Whilst the Tribunal does not fully understand the exact meaning of this technical description, we do note that this is clearly headed "Equipment" whereas clause 1 indicates that any ancillary services agreed to be provided would be outlined in Schedule A. We infer from this that the description above is solely a description of the equipment. There is no separate reference in the Error Scope Services Agreement to CDRs or something similar and we conclude that Error Scope was not required to provide CDRs to Askaris. The main body of that agreement is only six pages long (plus Schedule A as copied above). Very little effort is required to check what Error Scope's obligations are (and we note that they were very limited, and even include in capitals in clause 8 that there is no warranty as to the fitness of the equipment for a particular purpose). Not having the right to CDRs does not necessarily preclude Askaris from asking for them or from being provided with them. But failing to ensure that Askaris had the ability to obtain CDRs from the one party which was neither its supplier not its customer indicates a lack of attention to commercial risks around billing.

CDRs and billing

182. Following on from this, HMRC submit that the basis on which Askaris were able to assess the level of supply they had received from Skynet and made to Jersey Telecom was and remains unclear. The evidence presented by Askaris is inconsistent and illogical. The reality is that Askaris were not engaging in a commercial approach at all. They were engaged in moving a set amount of product so as to further the overall VAT fraud.

183. Looking at the explanations given by Askaris as to how they invoiced Jersey Telecom:

(1) In the HMRC meeting on 26 March 2014 Mr Allison gave differing accounts of how Askaris worked out their invoices:

(a) Mr Allison initially stated that Askaris worked out their invoices based on a statement from Jersey Telecom; but

(b) he then stated that he based his invoices to Jersey Telecom on the invoices provided by Skynet and then checked this against the CDR information.

Mr Allison said at that same meeting that Askaris received the CDRs from Error Scope through an upload to a FTP server.

(2) During the meeting on 18 June 2014 Mr Allison provided Officer Chisman with two DVDs which were said to have contain the CDRs for the periods under appeal which he said that they had received from Jersey Telecom through a link to a FTP server.

(3) In answer to questions at the hearing, Mr Allison gave the following account as to billing:

> "Q. How did you check the Jersey Telecom invoices and how did you write and create your own invoices to make sure you got it right?
>
> A. So the invoice value to Jersey Telecom was derived from the incoming invoice from Skynet. It wasn't an exact science… So Skynet would invoice Askaris, and they would say, "Okay, you used 1,000 minutes". And we would then bill Jersey Telecom at 1,000 minutes. It was a little bit of an inexact science but, what would happen, if there was any discrepancies, Jersey Telecom would say, "We didn't buy that many minute's. What's going on?" Because -- they only said that once. […]
>
> Q. So again you're still just using the Skynet invoices as your source of information?
>
> A. That's right. And there was also a secondary check, if you like, with that, that because we were factoring these transactions, VoIP Capital also had like

> a check and balance against that to make sure that, you know, there wasn't a problem with the invoice, because obviously that would have delayed their receipt of payment from Jersey Telecom."

184. There was no further evidence to explain how Askaris obtained the CDR information to which Mr Allison referred in March 2014 – there was no evidence of the CDRs being downloaded from a server (and Mr Allison later said that Error Scope's information was incomplete anyway), and no evidence that they had requested the data from Skynet. Askaris only provided the CDRs to HMRC at the meeting on 18 June 2014. At that time it was stated that the information had been provided by Jersey Telecom - we infer from this that Askaris had not previously had any CDR information itself.

185. We find on the basis both of Mr Allison's oral evidence and Askaris' inability to provide the CDR information to HMRC until they had received it from Jersey Telecom that Askaris had not previously held such data (and that they had not received it during the periods under appeal from either Error Scope or Skynet). As regards Skynet this was confirmed by an email from Maitland Hyslop to Officer Chisman on 3 December 2014 in which he stated "our supplier was Skynet, but despite several requests we were unable to get CDRs from them". This created commercial risks for Askaris in circumstances where Askaris were paying and charging specific prices per minute for airtime and left it open to disputes with both the supplier and the customer.

186. The CDRs provided by Jersey Telecom were analysed by Officer Coulson. Officer Coulson's report is dated 1 August 2014 (the "2014 CDR Report"). In that report he describes the work done as follows:

> "From the call records I was able to isolate calls made to particular mobile carriers in various countries, using the country code followed by the allocated number prefix for each carrier…
>
> Looking at the JT call data and isolating numbers for each carrier as described, I was able to calculate the minutes accounted for by JT and then compare these results against the invoices from Askaris to JT and in turn to the invoices from Skynet to Askaris for the same period."

187. Having set out the results of some sampling and referring to the more detailed selection of results from this exercise and noting the discrepancies, the 2014 CDR Report goes on:

> "…although the figures do not match, they are broadly in the same area. Given the numbers of minutes involved, allowing for discrepancies due to rounding and potential differences in billing methods, I am satisfied that the call data and invoices are consistent with each other, and I have found no reason to doubt that they give a true account of call time sold by Skynet to Askaris and then onwards to Jersey Telecom."

188. The billing difference referred to is whether minutes are billed based on actual call time or data connection time, with Officer Coulson having noted that there were numerous call records where a call has been attempted but not connected.

189. This report was emailed to Officer Chisman by Peter Wood on 7 August 2014, and the cover email summarised this conclusion adding "Whilst we couldn't give absolute certainty that there's nothing amiss, I think we are as close as we can get to give assurance over consistency."

190. Officer Chisman then sent an email by way of update to Mr Allison on 21 August 2014, in which he referred to the results of the analysis of the CDR records stating that "this has proved to be inconclusive". In cross-examination Officer Chisman suggested he may have

been saying that the investigation hadn't concluded as a result of this, but did accept that the work Officer Coulson had done was fairly conclusive.

191. The evidence of Officer Coulson in his agreed witness statement (from March 2018) is then as follows:

> "The minutes accounted for within the CDR did not match the minutes of any of the operators detailed on the sales invoices for the corresponding periods.
>
> In my original report I stated that the figures broadly align (i.e. the figures did not match, but were fairly close). This was a new area of work for me at the time of writing that report. However, due to subsequent work on similar cases and knowledge gained about VOIP processes from working with colleagues with significant experience in this particular field and their knowledge of the accuracy of switch technology, I see no reason why the records should not match the invoice totals exactly. Typically switch equipment records are capable of recording call times to an accuracy of within hundreds of milliseconds. Some slight difference between these records and the invoices may be experienced due to rounding etc. but not at the level encountered in this case.
>
> CONCLUSION
>
> I am therefore not satisfied that the CDR provided an *accurate* record of the company's trading activity for the period in question. The invoices and CDR together did suggest that some trading of airtime minutes between the two companies did occur, but the figures could not be reconciled."

192. Mr Sangster notes that Officer Coulson did not deal with why he now dismissed his original possible reasons for the discrepancies and Mr Allison was not challenged on the possible reasons for the discrepancies. Mr Keene emphasised that this witness statement of Officer Coulson was accepted, and that if Mr Sangster wished to challenge the conclusions set out therein he should have required Officer Coulson to attend the hearing and cross-examine him.

193. Officer Maxted had also been provided with two CDs from Officer Chisman. He stated that the discs were duplicates and notes that the disc contained records relating to two companies, Error Scope and Jersey Telecom:

(1) The Error Scope data is insufficient to agree an invoice as the details stored do not enable the duration of each call to be ascertained; and

(2) The Jersey Telecom data holds additional fields (including call duration). It does not include value information so looked at "a couple of date ranges" on invoices to see if there was sufficient call data to verify the invoice values. Officer Maxted stated that the data does not support the invoices tested on the information provided.

194. The 2014 CDR Report and the witness statements of Officers Coulson and Maxted all agree that the call data does not match the invoices, although the 2014 CDR Report does acknowledge that they were broadly in the same area. From this we conclude that the CDRs were not completely fabricated. Whilst given the submissions made by Mr Sangster we would have expected that Askaris would have required Officer Coulson to give evidence at the hearing in order to be cross-examined on his conclusions, we do bear in mind that what both parties are relying upon are opinions expressed by him at different times – in the 2014 CDR Report that allowing for discrepancies the records are consistent and a true account, and in his witness statement that he is not satisfied that they are an accurate record. Officer Coulson is a witness of fact, and was not put before us as an independent expert on whose opinion we should rely; instead, we have regard to the opinions expressed as submissions by the parties.

195. In the light of the evidence before us, we find that:

(1) the invoices submitted by Askaris to Jersey Telecom did not match exactly the information contained on the CDRs later provided to Askaris by Jersey Telecom; and

(2) the inaccuracies or discrepancies were not such as to lead us to the conclusion that no airtime had been supplied or that the CDRs were a fabrication;

196. It is clear that in the event of a dispute over billing with either its customer or supplier, Askaris was left with no access to its own source of information to seek to resolve matters. It had no right to obtain such information from Error Scope and in any event the level of records being maintained by Error Scope were inadequate for this purpose. Askaris was thus commercially exposed, and there is no evidence that it had considered the possibility of such a risk.

Due diligence

197. HMRC's primary submission was that, in accordance with the judgment in *Mobilx*, the Tribunal should not focus unduly on due diligence. This is a case in which the circumstances so obviously indicate fraud that even if Askaris "has asked appropriate questions, [it] is not entitled to ignore the circumstances in which [its] transactions take place if the only reasonable explanation for them is that [its] transactions have been or will be connected to fraud." However, their secondary submission was that the due diligence was faulty in any event. Askaris did not take basic steps to protect its commercial interests and to minimise the risk of its being involved in fraud. The checks carried out were below that to be expected of a reasonably prudent trader and would not have given a legitimate business the confidence that it was entering into commercial business transactions with bona fide trading partners. Askaris failed to note or record that a director at Skynet had been a previous director of 11 dissolved companies or companies in liquidation and it failed to act upon the evidence of Skynet's falling credit rating.

198. Mr Sangster submitted that Askaris carried out satisfactory due diligence, and drew attention to the fact that HMRC never told Askaris that they were monitoring Skynet (and had been since September 2010).

199. In relation to Skynet, Askaris produced the following documentary evidence of their due diligence:

(1) credit safe search conducted on 13 April 2013, which confirmed they had been in business since July 2010,

(2) copy driving licences of Simon Boulton and Adrian Seadon (directors and shareholders),

(3) copy of their VAT registration certificate,

(4) bank details for GBP, Euro and USD accounts on Skynet headed paper,

(5) a letter of introduction from Adrian Seadon of Skynet, and

(6) certificate of incorporation on change of name from Skynet Communications Ltd to Skynet Corporation Ltd dated 22 July 2011.

200. In addition, Mr Azadi visited them at their offices in Stoke in June 2013. Mr Allison also stated that Askaris conducted "ongoing" credit safe checks to verify their existence and stability. However, we infer that any such checks would have been carried out by Mr Azadi and the only evidence of this check having been repeated was a copy of a credit safe UK online credit report, the footer for which indicates that it was printed by Mr Azadi on 6 December 2013. We therefore find that no further credit safe checks were conducted during the period in

which they were trading with Skynet. Mr Allison also stated that he himself had checked that Skynet had been trading for some time, but there was no evidence as to additional checks performed for this purpose and we infer that this was a conclusion which he reached (correctly) from the credit safe search conducted on 13 April 2013.

201. The due diligence carried out on its customer was even more limited - Askaris identified by online searches that Jersey Telecom was owned by the States of Jersey and Mr Barton visited Mr Azadi at Askaris' office.

202. Viewed in isolation, this due diligence (for both Skynet and Jersey Telecom) appears somewhat cursory. There was no reference to the fact that, as would have been revealed by a search at Companies House, Mr Seadon (one of the directors of Skynet) had been the director of 11 dissolved companies or companies in liquidation since 2013. This is particularly striking in the context of Askaris being new to airtime trading, an industry in which they were aware that there was a risk of VAT fraud. We have, however, also considered the surrounding circumstances – both its decision not to trade with an alternative supplier, Harjen, and also the communications with HMRC.

203. The first potential supplier of airtime identified by Askaris was Harjen, but Askaris decided not to deal with them as they were "too dodgy" (according to Mr Allison in the meeting of 26 March 2014). This suggests that whatever due diligence had been conducted on Harjen (of which we did not have evidence) had been assessed critically with a view to deciding whether they were a suitable trading partner. Askaris' reasons for reaching this conclusion have differed:

(1) in the meeting of 26 March 2014 Mr Allison said that this was a conclusion that Mr Azadi had reached after looking into Nick Beer, a person linked to Harjen, on the internet;

(2) in his letter of 4 September 2015 Mr Allison emphasised that the decision not to deal with Harjen was neither based on their product nor their trading history, instead their concerns related to the company structure – there were many failed and active limited companies with a common young female director who appeared to be a relative of one of the shareholders. They found this alarming and did not feel that it would be safe or suitable to work with them;

(3) in his witness statement Mr Allison stated that an initial credit check was not favourable and one of their directors came up on the forums as having a poor reputation, as well as a position as director in many companies, very few of which were successful; and

(4) Mr Dunn stated in his agreed witness statement that Harjen came back with an adverse credit rating and he suggested alternative suppliers were sought.

204. This changing story is a factor which suggests to us that within Askaris information was not being fully and contemporaneously disclosed. Each of these reasons may well have been true. However, it was apparent that at the time at which the transactions began Mr Allison did not know why Harjen had been rejected (and may not even have known they had been considered). He asked questions of others at Askaris after the meeting with Officer Chisman in December 2013. There was a convenience to referring to Nick Beer as a reason not to trade with Harjen, as Officer Chisman had already asked Mr Allison if he employed or knew him. The concern relating to the director who held many directorships of failed companies was agreed by HMRC.

205. This rejection of Harjen as a potential supplier is thus both helpful and unhelpful to Askaris' argument – it shows that Askaris used the due diligence information to make a

decision as to suitability of potential suppliers, yet also illustrates the lack of involvement of Mr Allison in the decision-making process and raises a question as to why one of the factors that led to the rejection of Harjen (multiple directorships of failed companies) did not also raise a red flag in respect of Skynet.

206. HMRC submitted that Askaris had ignored explicit warnings about the inadequacy of its due diligence. Having considered the communications between HMRC and Askaris during the period in which the transactions were being conducted we are not satisfied that this is made out. We have considered in particular:

(1) 19 September 2013 – Officer Ginn gave Ms Steer a copy of Notice 726 at that meeting and referred her specifically to section 6 and explained that airtime and minutes had been identified as a commodity used in MTIC transactions;

(2) 23 September 2013 – Officer Ginn asked for information which included all due diligence undertaken by Askaris on all customers and suppliers; and

(3) 26 September 2013 - Officer Ginn stated that HMRC were concerned that the business could be at risk of involvement in supply chains that are connected with fraud

207. None of these (nor the other letters from HMRC during this period) can be said to be an explicit warning that HMRC considered Askaris' due diligence was inadequate. This did become clear from the meetings in December 2013 onwards, but trading had ceased by that time. Nevertheless, it was agreed that from the outset Mr Allison was aware of the risk of fraud, and he accepted that after 19 September 2013 he recognised that there was a possibility that something was seriously wrong in the supply chain, which would have been reinforced by the letter of 26 September 2013.

208. We have considered whether there is any evidence that this awareness and these warnings caused any significant change in approach by Askaris. Mr Allison explained that after the unannounced visit in September 2013 he met with Mr Azadi and Mr Dunn to discuss what the potential problem was. Mr Azadi contacted Skynet to ask them what the problem might be, but Skynet would not disclose the identity of its suppliers. There was no record of these internal discussions, or of Mr Azadi's contact with Skynet (and thus who he spoke to there). Mr Allison continued talking to Mr Azadi about the potential issue, and told the shareholders that there was an issue with HMRC.

209. We accept that these conversations did happen, but it was also apparent that no additional information was obtained as a result of the internal discussions or the communication with Skynet. Mr Allison accepted that this was an urgent issue, yet at this stage Askaris continued to trade as before and there was no evidence that Askaris sought to renew or conduct further more vigorous checks on Skynet.

210. It was agreed that HMRC did not tell Askaris that it was monitoring Skynet. The first visit to Askaris was a pre-credibility check on Askaris' 08/13 return and as a result of a visit request in the light of the monitoring of Skynet. Whilst Askaris may well have been interested to know that Skynet was being monitored, we would not have expected HMRC to disclose this information, for reasons of taxpayer confidentiality. Furthermore, given that Askaris only had one supplier, any warnings given to Askaris about fraud in its supply chain can only have related to its transactions with Skynet.

211. In his witness statement Mr Allison stated that he was aware that caution needs to be taken with any new supplier and customer, and described the due diligence (or know your client) conducted as extensive. We disagree. It was perfunctory at best. In the context of Skynet, a company which Askaris happened across as a result of internet research, the due diligence conducted appears to have focused on identifying that the company existed, that the

identity of the directors could be confirmed and had a basic level of creditworthiness. Askaris was, on its own account, new to airtime trading and had rejected dealing with one supplier on the grounds of red flags raised by the due diligence. One question Mr Allison did feel the need to pose at the time was whether Skynet was a new trader, and he was satisfied that it had been around for a while. But there was no effort to probe the experience and other directorships of the directors of Skynet, consider why the credit rating of Skynet had dropped or ask Skynet about its own business practices and the checks it made of its own suppliers.

212. Mr Allison is correct to note that Askaris could not control its supplier's payment of VAT, and that protection of commercial interests means that a supplier is unlikely to reveal its own supplier to its customer, for fear of being cut out of the chain. But in the overall circumstances, much greater care should have been taken. This lack of care was illustrated by the fact that the first fourteen invoices received from Skynet were not valid VAT invoices as the amount in respect of VAT had been charged in US dollars. Furthermore, Askaris should have been prompted to challenge its own due diligence processes after the visit from HMRC in September 2013, yet the evidence was that the only action taken was a phone call from Mr Azadi to his contact at Skynet. Further checks would not necessarily have revealed the fraudulent defaults which HMRC identified after much more extensive work, but would have been likely to identify the Adrian Seadon directorships (a ground on which Harjen had been dismissed as unsuitable as a supplier).

213. We understand the reasoning for the lack of further enquiry into the identification of Jersey Telcom. However, as we have set out in the context of Askaris' dealings with Jersey Telecom and the K-Roam project, there is no evidence to indicate that Askaris questioned or challenged why Jersey Telecom would be requiring Askaris to supply them with minutes before they would agree to supply airtime for the K-Roam project. This may well not be a specific due diligence question, but due diligence is not just a box-ticking exercise and should go to identifying who you are dealing with and considering the risks which are posed thereby.

Funding of the operations

214. We have been provided with evidence of two sources of funding – a loan facility from Askaris UAE and the factoring of invoices by VOIP Capital. In addition, Askaris' position was that its overheads were also paid by others.

Loan from Askaris UAE

215. Askaris states that draw-downs under the UAE Loan funded the VAT element of invoices from Skynet.

216. HMRC submit that the evidence relating to the UAE Loan demonstrates that it was far from a legitimate source of income but was instead a source of funding which permitted Askaris to play its part in assisting the overall fraudulent operation and leads one to doubt whether the loan was in fact the true source of the funding for the VAT portion of the payments to Skynet.

217. The terms of the UAE Loan provide that:

(1) Askaris UAE will provide a US$2 million facility which is to be drawn down on request;

(2) Askaris UAE will provide funds directly to a factoring agent on an ad hoc basis;

(3) the interest rate is 99.9% APR with interest calculated daily;

(4) Askaris may allow the factoring company to remit funds directly to Askaris UAE should it so wish. Amounts received would be deducted from the outstanding balance on the day funds are received, before interest is added;

(5) Askaris UAE expects to receive (on each business day) a report from Askaris or VOIP Capital reflecting the sales price payable by Jersey Telecom to Askaris for VOIP traffic terminated over the immediately preceding "Payment Cycle". This capitalised term is not defined; and

(6) the agreement is effective until "the initial Terminal Date", whereafter it continues indefinitely unless cancelled by either party on one months' notice. The capitalised term is not defined.

218. The UAE Loan refers in the conditions precedent to Askaris UAE being satisfied that all security granted pursuant to the "Security Assignment" is free and clear of all encumbrances or that any prior security interest has been satisfactorily postponed. However, the defined terms used in this condition are not defined in the agreement, and Mr Allison confirmed in evidence that the UAE Loan was provided on an unsecured basis.

219. The explanation for the making of this loan was given by Mr Allison in his witness statement. He stated that Askaris UAE was precluded from direct involvement in K-Roam due to VOIP projects being illegal in the UAE. Askaris UAE therefore invested the money to develop the product via Askaris.

220. We are familiar with the differing levels of detail which can be adopted to record lending arrangements between companies which are, if not members of a group, under common ownership or control. The UAE Loan has the form of a relatively simple loan agreement (in quite short form), but with conditions precedent and events of default, and yet has the appearance of a document which was created from a precedent which has been insufficiently modified - the incomplete reference to security and, more fundamentally, the lack of a repayment date. These errors should have been of concern to both Askaris UAE and Askaris.

221. HMRC emphasised what they say was a high rate of interest, at 99.9%. Mr Allison gave evidence that he had queried this rate with Mr Dunn, saying this seemed a lot, and been told that not compared to, eg, Wonga it wasn't. We find it bizarre that an experienced businessman would regard this as a credible comparison. There was no evidence that Askaris had sought to obtain funding from elsewhere, or that it had assessed affordability of such a rate in the light of the profit margins on the sales of airtime, the costs of factoring with VOIP Capital and the payment times from Jersey Telecom.

222. The UAE Loan requires that Askaris provide Askaris UAE with reports of the VOIP traffic. There was no evidence that any such reports were ever provided, or that Askaris recorded the sales price payable on any working day by Jersey Telecom which would enable it to comply with its obligations in this regard. The disclosure provided by Askaris in 2017 did include various statements obtained from VOIP Capital. These were headed "Termination Statement" and some of the entries took the form, eg "15-Aug-13 Traffic 14/08", with an amount payable. Whilst many of the entries refer to traffic for a single date in this manner, there is a pattern of regularly specifying entries across more than one date, eg "19-Aug-13 Traffic 16/08-18/08" and we infer this is how data was presented across a weekend. However, we do not know if such data exists for every business day, when Askaris received this information or whether it was provided to Askaris UAE (by either Askaris or VOIP Capital) as required by the UAE Loan.

223. Askaris drew down £512,920.58 under the UAE Loan. The VAT element of the Skynet invoices was £809,610, and we had no explanation as to how the balance of this amount was funded. Furthermore, the evidence as to whether Askaris has repaid any or all of the amounts drawn down under the UAE Loan was very unclear:

(1) Mr Allison's email to Officer Chisman of 27 March 2015 included:

> "Askaris has not made any repayments to date towards the loan we received to service the VAT. As you are aware, Askaris is over GBP 800,000 in debt and has been in no position to start repayments for this since this investigation started. Our investor has had to accept personal liability and give a personal guarantee with the lender in the middle east…"

(2) Mr Allison's email of 4 September 2015 appealing against the decision stated:

> "It is also incorrect to say that we failed to repay any of the loan. The profits from the transactions were paid directly to the lender in Dubai in order to reduce the daily interest on the loans. Again, this demonstrates HMRC's fundamental misunderstanding of our business."

(3) The Grounds of Appeal from July 2016 state that the profits from the transactions were paid directly to the lender in Dubai to reduce the loan and loan interest.

(4) In response to HMRC's disclosure request Askaris stated on 18 December 2017:

> "No further repayments were ever made as HMRC withheld our VAT. Richard Upshall personally settled the debt with Mohamed Al Ghafli, due to working relationship they have had over many years."

(5) On 7 September 2018 in responses to further requests for disclosure Askaris stated:

> "We had previously said that Richard Upshall personally settled the debt. Upon further investigation it is the case that Richard Upshall has personally guaranteed the debt through a Declaration of Indebtedness – this is the normal and standard way debts are guaranteed in the UAE…"
>
> An (undated) declaration of indebtedness was enclosed.

(6) Mr Allison's witness statement states that once the VAT repayment was withheld, Askaris UAE would not fund the VAT element any longer. Mr Upshall already owed over £1 million to Mohammed Al Ghafli.

(7) Giving evidence Mr Allison stated that the loan remained on Askaris' balance sheet causing customers and suppliers to comment that the balance sheet "doesn't look very good."

224. The evidence before us also included a company report on Askaris from FAME as at 25 May 2016 which shows that the balance sheet of Askaris at 31 December 2013 included long-term liabilities of £954,831. By 31 December 2014 this had increased to £1,521,297. This was exhibited by Officer Chisman. There is no additional information on the nature of these long-term liabilities but we infer, having regard to the evidence from Mr Allison, that this includes the UAE Loan, but note that this only sets out the position as at the balance sheet dates.

225. The fact that Mr Allison struggled to explain whether a loan of over half a million pounds, which was accruing interest at 99.9%, had been repaid illustrates a complete disregard for the commercial risks faced by Askaris in respect of the obligations it had incurred in seeking to enter the airtime trading market. The evidence before us indicated the amounts Jersey Telecom paid VOIP Capital (as required by the notice of assignment) and there was no evidence that any profit, after paying Skynet's invoices, was paid directly to Askaris. We conclude that it is more likely that any net balances held by VOIP Capital were then either paid to Askaris UAE (to reduce the interest and principal repayable on the UAE Loan) or were applied by VOIP Capital against the VAT element of subsequent Skynet invoices, thus reducing the need to draw down additional amounts under the UAE Loan (the latter approach possibly explaining how the amounts drawn down did not match the VAT element of the Skynet invoices).

226. HMRC submit that Askaris' claims about the UAE Loan are highly suspect and there is a powerful inference that it is used as a device to mask the true source of its funding and/or give that funding the veneer of respectability. Stepping back, all that can confidently be asserted on the basis of the evidence is that a third party was paying for the VAT portion of the payments to Skynet. This permitted the flow of VAT payments through the chain and ultimately facilitated the overall MTIC operation. Askaris' failure to demonstrate the legitimacy of these payments is further evidence that they knew or at the very least should have known that the transactions were connected with fraud.

227. We agree that there is a lack of commerciality in relation to the UAE Loan which raises several questions – eg, why did Askaris agree such a high rate in circumstances where there was no evidence before us that they had applied for other sources of funding for this amount (other than from the factor VOIP Capital), had they satisfied themselves that the airtime trading would result in a net profit given the interest costs, what were the repayment terms of this loan, why was there no record-keeping in relation to the amounts (if any) treated as having been repaid out of the payments made by Jersey Telecom to VOIP Capital? However, HMRC have not established that there was another source of funding which this loan is "masking". We do therefore accept that amounts drawn down under the UAE Loan were used to fund (some of) the VAT element of the invoices from Skynet. Askaris did not offer any explanation as to the source of the balance, although we do consider that one possible inference is that the "profit" from the deals, which was held by VOIP Capital, and, according to Mr Allison, to be paid to Askaris UAE to reduce the balance of interest and principal, was applied instead towards Skynet invoices to remove the need for having to draw down further amounts. What is significant is that Askaris was not able to provide a clear explanation of its funding.

Factoring by VOIP Capital

228. HMRC submit that the fact that Askaris was encouraged by its customer to use an alternative banking platform based overseas would have been an obvious indicator that these transactions were part of a fraudulent scheme. One of the suggested due diligence questions for determining the legitimacy of suppliers in Notice 726 which was provided to Askaris on 19 September 2013 is:

> "Does your supplier (or another business in the transaction chain) require you to make third party payments or payments to an offshore bank account?"

229. The logic of the question is explained by the fact that the use of offshore bank accounts which are not visible to or accessible by HMRC means that monies obtained in MTIC frauds can be used and/or laundered without fear of discovery.

230. The circumstances in which Askaris came to use VOIP Capital are outlined by Mr Allison in his witness statement:

> "It was obvious that the potential high volume of trade required by Jersey Telecom would have been financially impossible for Askaris to service. This led to the introduction of a factoring company VOIP Capital to deal with the cash flow issues."

231. The Grounds of Appeal then add:

> "V Capital became involved when Askaris' customer, Jersey Telecom, was made aware that Askaris would struggle to supply them the volume they required, based on their payment arrangements with small companies. Jersey Telecom offered 15 net 15, which would mean that Askaris would bill them on day 16 for all minutes sold between days 1 to 15. Jersey Telecom would then pay Askaris 15 days later, on day 30. Askaris could not afford to wait the 30 days that Jersey Telcom took to pay them. Skynet terms of business

> required them to be paid daily, twenty four hours in arrears. Jersey Telecom suggested using an alternative solution to shorten the repayment cycle. They introduced Askaris to V Capital…V Capital work on 7 net 7…"

232. We did not have any emails or other correspondence from Jersey Telecom which supports this explanation. Whilst we accept that Mr Allison believed that this is how the arrangement came about, it does raise questions, both now and which we consider should have been considered and addressed at the time of the transactions:

(1) why would Jersey Telecom insist that Askaris supply them with airtime before it would make supplies for the K-Roam project in circumstances where not only was Askaris new to the business but was also not able to fund the transactions (or provide a switch itself); and

(2) if Jersey Telecom were convinced that they needed to buy airtime from Askaris, why did they not change their payment terms in a way which enabled Askaris to fund the transactions itself.

233. In consequence, the decision to use VOIP Capital is one which we take into account when assessing whether Askaris knew or should have known that the transactions were connected to fraud.

Overheads

234. Askaris did not claim input tax on expenses or overheads (such as rent, utilities, payments for the switch) incurred during the periods 08/13 to 11/13. Credit had been claimed for the input tax on Ashdown Hurrey's fees. The explanation was that Askaris UAE paid these overheads. HMRC challenge why such payments were not made through Askaris, to give a tax deductible cost and enable input tax to be reclaimed. If Askaris could not afford to pay its overheads, this casts doubt on Askaris' ability to trade profitably.

235. In his email of 4 September 2015 Mr Allison explained that the profits from the transactions were sufficient to cover the overheads and to develop and launch the K-Roam product. The fact that Askaris UAE was physically paying for the switch was only for convenience as this was covered by profits from the trading.

236. We were not taken to any evidence to demonstrate the profitability of Askaris from the trading in airtime. We do, however, recognise that payments from Jersey Telecom were made to VOIP Capital and the difference in sale and purchase prices was not accounted for and paid to Askaris itself. We accept that companies which are related (if not members of the group) do adopt somewhat informal arrangements and that it would have been convenient for expenses to be settled by Askaris UAE. We do not regard this factor as being of any significance in the context of this appeal.

Absence of documentary evidence

237. HMRC submit that Askaris' repeated failure to provide documentary evidence which could reasonably be expected to support their case can be taken as evidence that Askaris knew the transactions were linked to fraud - fraudulent activity in its very nature requires the absence of a paper trail, because the fraud could otherwise be proved without doubt.

238. Mr Allison explained that the lack of hard copies having been retained is not evidence of fraud; it is possible that it illustrates naivety in the early days of the business. As a small business, matters were discussed in person in the office, and they would follow-up with phone calls to their counterparties.

239. We have already made reference throughout to the areas where the evidence comprised solely or mainly of explanations provided by Mr Allison after the transactions had taken place

and was not supported by contemporaneous meeting notes, emails, briefing papers or other documents. Drawing this together, there was no documentary evidence of:

(1) any internal meeting notes or briefing papers taking the decision to trade in airtime, approve the supplier and customer, outsource the switch to Error Scope, borrow from Askaris UAE or factor invoices with VOIP Capital;

(2) the introduction to Jersey Telecom or the arrangement or negotiation of the supply of airtime – the only evidence was a short email from Mr Barton to Mr Azadi thanking Mr Azadi for meeting him and the finalised JT Interconnection Agreement;

(3) the introduction to Skynet, explanation of the types of supply required, negotiations of pricing (or a price list);

(4) the recommendations by Jersey Telecom that they use Error Scope and/or VOIP Capital;

(5) the introduction to Error Scope and the arrangements to provide the switch;

(6) the introduction to VOIP Capital and discussions of payment terms and pricing – although we do note that we did have the statements prepared by VOIP Capital showing VOIP trading by reference to specified dates; or

(7) negotiation of the UAE Loan.

240. It is also notable that when, several months after the transactions under appeal, Mr Allison was able to provide two DVDs of CDRs to HMRC he stated that these had been provided to Askaris by Jersey Telecom (although the description of this in the visit report suggests that it may be that Jersey Telecom had not provided the discs themselves but had provided Askaris with access to the data on a server which Askaris had then downloaded onto the discs) there was no documentary evidence of the request for this information by Askaris from Jersey Telecom, or any questions which might have arisen from such a request.

241. We do accept that a business with a small number of personnel who are often physically present together in an office will be able to discuss matters and take decisions in an informal manner, without necessarily convening a meeting or taking a note of the meeting or discussion. However, this becomes more significant in the context of the overall absence of written evidence. We do find the absence of a paper trail (or email trail) startling – it was not that there were gaps in the written evidence; there was hardly any at all. Given that the nature of trading required absolute clarity of pricing per minute and minutes used, and the exact payment cycle would then have had a significant impact on the funding costs associated with the UAE Loan, it is difficult to understand how the business could have operated on any commercial basis or with any ability to assess or control commercial risks.

242. The lack of contemporaneous documentation meant that when Officer Chisman posed questions of Mr Allison to verify the VAT repayment claims, the answers received rarely comprised the production of paperwork to demonstrate what had happened, but explanations that Mr Allison seemed to have obtained incrementally and on a somewhat piecemeal basis from Mr Azadi.

243. Mr Azadi did not give evidence, and we note that the explanation provided by Askaris relates to events from 2016 onwards – he was still employed at Askaris throughout the period of verification, and for some time after the decision was made to refuse the repayment claims. Askaris would have had full access to his emails and any social media chats and been able to provide any that existed in response to questions raised by Officer Chisman. His absence as a witness cannot therefore explain the absence of documentation.

244. We assess the lack of documentation in the context of the other factors identified in the Discussion; we do consider it relevant.

Absence of evidence from Benham Azadi and Richard Upshall

245. As has already been considered under Preliminary Issues above, two individuals who were referred to in the papers and whose roles were described by Mr Allison were Benham Azadi and Richard Upshall. They did not give witness statements (or attend the hearing to give evidence). HMRC submitted that we should draw adverse conclusions from the absence of evidence from these individuals – their absence is essentially a factor relied upon by HMRC in support of their case.

246. HMRC was highly critical of the absence of evidence from Mr Azadi and Mr Upshall, drawing attention to:

(1) Mr Azadi is a crucial figure because, on Askaris' account, he is able to explain all elements of the VOIP operations. The failure to call Mr Azadi should be seen as an attempt to evade scrutiny of the transactions. Mr Azadi's absence might have been acceptable if Askaris had kept a documentary record of its activities but it failed to do so at any time. Alternatively, Mr Azadi's role was that he was going to be blamed in his absence; and

(2) no explanation was given for a failure to provide evidence from Mr Upshall. He had been a director of Askaris until August 2013. He could have provided information about the funding of the operation, among other matters. The evidence as to him having guaranteed the UAE Loan to Mr Al Ghafli indicates that he is the loan-maker operating behind the scenes – the general approach is to keep himself at arm's length from the airtime trading.

247. HMRC have known of the identity of the witnesses being put forward by Askaris since 4 February 2019; they submit that it was not for HMRC to apply for additional witnesses to appear to help to present Askaris' case. They only became aware of Askaris' stated reasons for the absence of Mr Azadi when Mr Sangster served his written opening submissions shortly before the hearing.

248. The relevant principles as to the drawing of inferences were summarised by Morgan J in *British Airways Plc v Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch):

> "141. The consideration which a court should give to the fact that a potentially relevant witness has not been called is well established. I can take the principles from the judgment of Brooke LJ in *Wisniewski v Central Manchester Health Authority* [1998] PIQR P324 at P340 where, having reviewed the authorities, he said:
> "From this line of authority I derive the following principles in the context of the present case:
> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some

> credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."
> 142. This statement of principle is in accordance with the earlier decisions of the House of Lords in *R v IRC ex p. T C Coombs & Co* [1991] 2 AC 283 and *Murray v DPP* [1994] 1 WLR 1 and the comments of Lord Sumption in the Supreme Court in *Prest v Prest* [2013] 2 AC 415 at [44].
> 143. These principles mean that before I draw an inference and made a finding of fact adverse to a witness who was not called, I need to ask myself:
> (1) is there some evidence, however weak, to support the suggested inference or finding on the matter in issue?
> (2) has the Defendant given a reason for the witness's absence from the hearing?
> (3) if a reason for the absence is given but it is not wholly satisfactory, is that reason "some credible explanation" so that the potentially detrimental effect of the absence of the witness is reduced or nullified?
> (4) am I willing to draw an adverse inference in relation to the absent witness?
> (5) what inference should I draw?"

249. It is clear that the consideration of and drawing of adverse inferences cannot be conducted in isolation from the surrounding evidence, and regard must be had not only to the other evidence available but also whether there is a reason for the absence of a potential witness before we consider whether we are willing to draw an adverse inference and, if so, what that should be.

250. Mr Azadi was responsible for and managed the airtime trading business; this was made clear by Mr Allison to HMRC from an early stage in the discussions and he described Mr Azadi has heading up VOIP supplies. From the evidence before us we can see the extent of Mr Azadi's involvement in all aspects of this trading:

(1) Mr Suleyman's agreed witness statement confirms the background to Mr Azadi's involvement with both the K-Roam project and the move into airtime supplies. Mr Suleyman stated that Mr Azadi started to work with Mr Allison to come up with a method of allowing cheap international calls using the OES network and existing VOIP infrastructure as a carrier. Mr Azadi then approached him regarding a larger opportunity of developing a mobile phone SIM card which would allow free calls for the inspectors;

(2) Mr Azadi identified the potential suppliers (Skynet and Harjen), deciding that Harjen were too dodgy. He visited Skynet and (from the explanation given by Mr Allison at the meeting on 26 March 2014) was the person who decided to trade with them as a supplier;

(3) Mr Azadi had discussions with Jersey Telecom and agreed that Askaris could supply them with airtime. He met with Steve Barton of Jersey Telecom at Askaris' office;

(4) Mr Azadi met with Error Scope and signed the Error Scope Services Agreement on behalf of Askaris in April 2013; and

(5) Mr Azadi agreed the prices for the supply with both Skynet and Jersey Telecom. We infer that he alone was responsible for ensuring that all technical arrangements were in place for the supplies to be made, in that there was no evidence before us that anyone else had been involved.

251. Askaris' explanation for Mr Azadi's departure from the company and his absence as a witness was that in 2016 there had been an accident in Mr Azadi's family home which resulted

in the death of his young daughter. Mr Allison explained that Mr Azadi became unfit for work, and later, following the breakdown of his marriage, he left Askaris and moved to the US. Until this time, Mr Allison had expected that Mr Azadi would be a witness in this appeal (and Mr Azadi had drafted the technical annex to the Grounds of Appeal). However, Mr Allison gave evidence that, when asked to return and complete his witness statement, Mr Azadi stated that he would do so if he were paid £5,000. Askaris refused to pay him. Mr Allison had not remained in contact with Mr Azadi since then, save that he had on one occasion received a "crowdfunding" request in relation to Mr Azadi's proposed publication of a children's book in memory of his daughter. There was no submission or evidence from Askaris that they had later sought to get in touch with Mr Azadi to locate him and ask again that he give evidence.

252. HMRC did not challenge the fact of the family tragedy. However, on the first day of the hearing Mr Keene provided evidence that Mr Azadi was in the UK, being involved in nightclubs in Teesside from the end of 2017 and a bankruptcy order was made against him in May 2019. They pointed out that it had been fairly easy to find this information online. Askaris did not challenge the evidence that Mr Azadi was now back in the UK; their position was that Askaris had not been in touch with him save as described by Mr Allison.

253. Mr Sangster explained that in the absence of evidence from Mr Azadi it had been decided that Mr Allison, Mr Dunn and Mr Suleyman would give evidence for Askaris and explain the relevant history.

254. We are in no doubt that evidence from Mr Azadi would have been material. Such evidence would have assisted us with making findings of fact in relation to the supplies which were made (eg as to price negotiations with the counterparties, the nature of discussions with Jersey Telecom and whether any commitments had been given to supply the K-Roam project and whether regular updating was conducted of the credit safe checks on Skynet) and, crucially, our assessment of his credibility would have been a significant factor in our consideration of whether he and thus Askaris knew or should have known of the connection to fraud.

255. This gap in the evidence has not been addressed by the witnesses produced by Askaris, as for the most part all they can tell us is what they were told by Mr Azadi. That may or may not have accorded with what actually happened. The distance between both Mr Dunn and Mr Suleyman and the transactions is apparent from their witness statements – they knew what Mr Azadi told them when he met with them. We would have expected that Mr Allison, as an experienced businessman, and director from August 2013 (having been working for the company for several months before then) would have been closer to the transactions, even though Mr Azadi was the project manager for the airtime trading. However, the evidence before us was that this was not the case. By way of examples:

(1) At the meeting with Officers Chisman and Tosta on 6 December 2013 Officer Chisman asked Mr Allison if he knew if VOIP Capital were still in operation, as Officer Chisman understood that they had ceased trading. The visit report (which is a note of the visit and does not purport to be verbatim) then goes on:

> "SA stated that he would ask Ben to find out whether VOIP Capital were currently in operation.
>
> SA left the office to ask Ben to check if VOIP capital was still operating.
>
> SA then came back in. SA stated that Askaris Information Technology would have to find a new customer to sell VOIP supplies to when they receive their repayments back because Jersey Telecom were now receiving their VOIP supplies from other companies."

Thus Mr Allison was not aware that their only customer would no longer be purchasing from them.

(2) After that meeting, Mr Allison (as he recounted to HMRC in March 2014) then asked Mr Azadi further questions about why he, Mr Azadi, had chosen Skynet as a supplier, thus confirming that this significant decision had not been taken by Mr Allison.

256. Askaris continued to rely on Mr Azadi for information about the transactions after the event – we noted an email from Mr Azadi to Maitland Hyslop, "RU" and Sean Allison, copied to Mr Dunn, on 2 February 2015 which states that:

(1) Askaris prepaid the VAT to the factoring company, VOIP Capital, who then financed the net trading.

(2) VOIP Capital then paid Skynet's invoices, received the payments from Jersey Telecom and reimbursed Askaris the profit less their cut.

(3) Askaris made no direct payments to Skynet and received no direct payments from Jersey Telecom.

257. This email was then forwarded by Mr Hyslop to Officer Chisman. (This email is, on the basis of the evidence before us, a rare example of any communication from Mr Azadi in writing.)

258. We are faced with a situation in which there is no evidence from an individual who we consider would have had material evidence to give. There is an explanation for Mr Azadi's absence, which deals completely with his departure from Askaris but leaves open the decision of Askaris not to pursue Mr Azadi to give evidence. Given that it is clear that any adverse inferences may only be drawn where there is already some evidence of the position and that in the present instance the range of possible inferences include findings as to what Mr Azadi knew, we revert to this in the Discussion when we assess all of the evidence before us.

259. Turning to Mr Upshall, the evidence from Mr Suleyman was that he had met Mr Upshall in Dubai in 1999 and they remained good friends. Mr Upshall manged OES and in 2008 Mr Suleyman introduced Mr Allison to Mr Upshall. As regards Mr Upshall's involvement in the business of Askaris and the transactions:

(1) Mr Upshall was initially the sole director of Askaris, resigning on 23 August 2013 and then being re-appointed in September 2019;

(2) he was described as being an investor in the business by Mr Allison in the meeting of 26 March 2014; and

(3) Mr Upshall had somehow guaranteed Askaris' borrowings under the UAE Loan and had incurred indebtedness in relation thereto.

260. Mr Upshall was therefore a director of the company at the time when Askaris decided to trade in VOIP and when the trading in airtime began. However, there was no evidence that he had been involved in the decisions to trade specifically with Skynet or Jersey Telecom, or the terms on which such transactions took place. His interest in Askaris UAE means that we infer that he would have been involved in the decision that Askaris UAE make the UAE Loan available to Askaris.

261. We therefore expect that Mr Upshall could have provided evidence in relation to:

(1) the decision to make the UAE Loan available to Askaris, including its purpose of funding the VAT element of the Skynet invoices rather than funding the development of K-Roam;

(2) how the balance of the VAT element of the Skynet invoices was funded (ie the excess of £809,610 over £512,920.58);

(3) whether any of the principal and interest under the UAE Loan has been repaid and, if so, how much; and

(4) his guarantee of this indebtedness.

262. That HMRC was seeking answers to these factual questions can be seen from HMRC's requests for disclosure in 2017 and 2018.

263. HMRC are correct to note that no explanation had been given by Askaris for the absence of evidence from Mr Upshall; although from the submissions of Mr Sangster we took their position to be that Askaris had not anticipated that Mr Upshall would have material evidence to give. It is also the case that Mr Upshall lives in Dubai.

264. This is a somewhat unsatisfactory position. However, even if Mr Upshall had given evidence to enable us to make findings as to the repayment (or otherwise) of the UAE Loan, we consider that the very uncertainty around these arrangements is itself of concern. The lack of an explanation as to why Askaris UAE made the UAE Loan available to Askaris to fund the VAT element of the Skynet invoices rather than funding the development of K-Roam is a factor which we consider further below.

265. For completeness, we should add that whilst we have expressed the absence of evidence above as unsatisfactory, this does not mean that we have re-considered our decision at the hearing to refuse the application to adjourn the hearing part-heard in order that Askaris could seek to introduce witness evidence from Mr Azadi and/or Mr Upshall. The question is not whether we would have found it helpful to have heard from these individuals but whether, having regard to the overriding objective and specific rules relating to evidence, we should grant such application. Our decision to refuse was based on the prejudice to HMRC in circumstances where Askaris knew there were questions and challenges to matters which these individuals might be expected to address and had previously chosen not to call such evidence.

K-Roam

266. Askaris rely upon the K-Roam project (which was subsequently renamed RURoaming (ie Mr Upshall's initials in line with the branding he used for his other business interests)) to explain why they came to be involved in the sale of airtime (referring not only to their position that Jersey Telecom required that supplies be reciprocal, but also that this enabled testing of the buying of airtime, and the quality of the routes that could be provided), and use this project to explain or justify some elements of their operations (eg the absence of frequent renegotiation of pricing to maximise profits and the failure to look for alternative suppliers).

267. HMRC asserts that K-Roam is a contrivance so as to justify what Askaris knew was fraudulent activity. They submit that even if K-Roam existed, Askaris was still under an obligation to conduct proper checks and ensure insofar as it could that its transactions were not connected with fraud. They failed to do so. However, Askaris' explanation with respect to K-Roam, the scant evidence it has provided and the absence of reliable evidence in support of a project which Askaris claims was the focus of its business for many months leads to one conclusion: K-Roam did not in fact exist and is being used as a cover for Askaris' knowing illegitimate activity.

268. We have already set out (see [166] above) Mr Allison's explanations of the link between the supplies to Jersey Telecom and the K-Roam project. There have been further explanations of the development of K-Roam and the priorities of the company:

(1) In the email of 4 September 2015 Mr Allison, in the context of HMRC's challenge as to the supplier and customer remaining the same and minutes not being sourced elsewhere to get a better price, Mr Allison stated:

> "…It must be remembered that this part of the model was a component we needed which was imperative in allowing us to deliver on our business plan of the larger K-Roam strategy. It was the K-Roaming product that was our goal with the wholesale market being a prerequisite. The wholesale market was not where our business was focused, but we had to have stability in the wholesale market to produce the K-Roaming product."

(2) In his witness statement Mr Allison set out the following:

(a) Askaris employed Mr Azadi and a team of technicians to come up with a solution (to the large turnover of staff at OES), and the solution revolved around the ability to provide very cheap call routing using their own SIM to provide a call back to the original caller. The anticipated profits from the trading element of this solution would provide the means to support the technical cost of development and marketing;

(b) Askaris were concerned with developing K-Roam which they could market as quickly as possible; and

(c) due to the withholding of the VAT repayment, Askaris were unable to gain the investment needed to carry out a full launch and develop the product further.

(3) Giving evidence at the hearing Mr Allison explained:

(a) whilst working for Askaris UAE in Dubai he had set up several software systems that allowed the oilfield business to communicate through their offices worldwide. He had installed and set up a VOIP system that provided free phone calls between the Middle East, Singapore, the USA, Brazil, the UK and Dubai. This operated between offices, but part of what he put in place allowed, eg, somebody in the UK to call a UAE number and that number was free. So employees of the business were able to dial numbers in the UAE, Brazil, Singapore, basically at local cost. The next stage, when he came back to the UK was to continue the business that had started in the UAE; and

(b) they had conducted beta tests, using SIM cards bought from Cloud9. Askaris team members used them, as did personnel from Ensco, based in Houston, who would go out on the rigs. Tests were about validation of process, eg, call quality, support, ability to top up.

269. Mr Suleyman's agreed statement also describes the inception of this project (see [121] above).

270. The challenges made by HMRC included:

(1) Mr Allison asserted that K-Roam was the brainchild of Mr Azadi whose sole experience appears to be that he has a degree in marketing. There was no evidence to explain how he had the experience and technical know-how to develop such a project.

(2) There is no documentary evidence prior to the "business plan" produced in November 2013 that K-Roam ever existed before that point. The business plan only came to light after the company was aware that its VAT returns were being verified. It is an amateurish document which does not reflect an ongoing plan of the size and nature described by Mr Allison in his witness statement and in his oral evidence. The fact that is one of only two documents which Askaris is capable of producing tends to demonstrate

that K-Roam is contrived for the purposes of these proceedings. At a minimum, it was not the significant concern which justified entering into the supply of airtime.

(3) Askaris justified their supply of airtime by stating that Jersey Telecom demanded reciprocal supply. No reciprocal supply was ever made. Mr Allison also stated in evidence that there "was no minimum or maximum supply commitment in either direction." He accepted the arrangement was "loose". The JT Interconnection Agreement does not refer to K-Roam and there is no independent evidence that Jersey Telecom were even aware of K-Roam. It was not until the meeting on 26 March 2014 that Mr Allison began to give an account that Jersey Telecom would only supply Askaris with airtime minutes for their K-Roam project if Askaris sold Jersey Telecom the airtime they needed.

(4) If interested parties in the UAE were genuinely interested in funding the K-Roam project it remains unexplained why they did not simply invest in that project rather than funding the VAT element of the transactions. If Askaris is giving an honest account of wanting to bring the product to market as quickly as possible and was concerned about competitor companies offering similar products, the failure to use the funding for that purpose is inexplicable.

271. HMRC thus submit that it does not appear credible that K-Roam existed as the core project of this business for the course of many months. It follows that it is dubious that Askaris entered into the business of providing airtime because of the K-Roam project and also that Jersey Telecom sought the supply of airtime from Askaris for reasons connected with the K-Roam project.

272. Mr Sangster refuted this. He drew our attention to what he described as the typical modus operandi of MTIC fraudsters - individuals and companies with no interest, need or trading history in sector become involved in buying and selling. They have no use for the product, no proper premises, no staff. They disappear as quickly as they appeared. The reason why Askaris became involved in airtime minutes could not be further from that scenario:

(1) The concept of a SIM card that could be used to make cheap calls to and from abroad, bypassing the fees charged by local network operators, using VOIP technology was, at the time, innovative. That this was a good idea has been demonstrated by the billions of free calls currently being made using internet technology and offered by the likes of Skype, Facetime and WhatsApp.

(2) The experience of Mr Allison and his Dubai connections with, amongst others, OES, Mr Upshall and Mr Azadi led to Askaris trying to develop such a service. Although initially aimed at oil workers, who were not staying in their jobs for long, partly because of the high cost of phoning their families, it was realised that such a product would appeal to travellers, other offshore workers, expatriates and anyone who travelled abroad for work or pleasure, as indeed time has proved to be the case.

(3) The suggestion that Askaris have invented the K-Roam concept as a bogus smokescreen to cover their real reason for airtime minute trading (i.e. to run a VAT fraud) is unsustainable:

(a) From the very first conversations with HMRC and in subsequent correspondence and meetings, HMRC were aware that the reason for Askaris' airtime trading was to establish the feasibility of the project. That is whether they could source the supply of minutes, the quality of the connections and the technical aspects, such as switching and blending as routes, to make the project a realistic option;

(b) in cross-examination Officer Chisman acknowledged that Ashdown Hurrey's letter of 11 July 2013 showed that there had been a conversation between Ashdown Hurrey and HMRC and considered there must have been some discussion as to the business Askaris were in;

(c) the email from Mr Hall to Officer Chisman on 13 December 2013 refers to HMRC having received copies of the business plan for the K-Roam project. Officer Chisman accepted in cross-examination that he had been provided with a business plan at the meeting on 6 December 2013, although he did not think it was the same as that which was in the hearing bundle.

273. Once it is accepted, as Mr Sangster submits it should be, that Askaris' end game was the K-Roam project, all other matters are explicable, logical and consistent with that aim, rather than witting participation in dishonest VAT fraud. The draft business plans (which set out the concept, target market, anticipated sales, costs and profits); the user guide; the production of 5,000 RURoaming SIM cards; the testing of the product in the UK and Houston and all of the correspondence with HMRC mitigate against HMRC's assertion that this was a bogus idea and a smokescreen to cover the real intentions of Askaris which was to fund, organise and participate in an MTIC fraud.

274. We have carefully considered these submissions of Mr Keene and Mr Sangster as to the existence of K-Roam, its connection with the decision to trade in airtime and the terms on which Askaris did so.

275. We accept the evidence of Mr Allison that this project existed and that, for him, it was the reason that Askaris moved into the supply of airtime. This is consistent with the evidence of Mr Suleyman as to his being concerned by the large turnover of field staff at OES and their efforts to investigate this.

276. However, we share some of the reservations expressed by HMRC:

(1) There was no evidence as to the expertise of Mr Azadi which explained either his role in K-Roam or the supply of airtime, and there was a scant amount of documentary evidence in relation to the planning, development and testing of the K-Roam project.

(2) The business plan which we saw did not evidence detailed work, research or testing, let alone work that had taken many months, eg no evidence of either arranging or conducting testing (an exercise which we would have anticipated required careful planning which we doubt could be conducted solely by phone calls), no evidence of compiling pricing from various suppliers to assess the likely costs to Askaris of offering this product.

(3) As to the timing of K-Roam being discussed with HMRC, it was agreed that Officer Chisman had been given a copy of a business plan in December 2013. We are not satisfied that the evidence which Mr Sangster sought to identify of the business of Askaris being discussed with HMRC on earlier occasions established that Askaris had explained the K-Roam project to HMRC - the letter from Ashdown Hurrey of 11 July 2013 only refers to a telephone conversation having taken place and we infer that HMRC had been informed that there was a contract with Jersey Telecom as customer. There is no evidence that K-Roam were mentioned (or that Ashdown Hurrey, who had contacted HMRC on behalf of Askaris, were aware of K-Roam at that time).

(4) Askaris UAE made available $2 million under the UAE Loan to be drawn down by Askaris. There was no satisfactory explanation as to why the parties did not agree that this amount could be used to fund the development of K-Roam (either rather than entering into the airtime trading at all or after that ceased). Mr Allison gave evidence

that the cost of the software development work over the lifetime of the project would be several hundred thousand pounds, north of £500,000. This could have been funded by the amount Askaris UAE were prepared to advance. Mr Allison stated that they had not used this for this purpose, as previously there had been a revenue stream from the airtime trading (but that is a somewhat circular explanation) and that afterwards although there was a pot of money there was also a liability of £800,000 which put the company in a difficult trading position.

(5) As set out at [169] above, we are not satisfied that Jersey Telecom required that Askaris provide them with airtime before they would supply the airtime Askaris required for the K-Roam project.

277. We have carefully considered the extent to which these conclusions may play a part in our overall analysis:

(1) Askaris was working on the K-Roam project and was aware of the need to proceed to launch swiftly.

(2) We are very clear that, as HMRC submit, the existence of the K-Roam project cannot excuse failings in relation to the supply of airtime – eg failure to consider risk of fraud, or the lack of due diligence.

(3) It may, however, help to explain a somewhat complacent approach to pricing (both in terms of lack of aggressive price negotiations and also not seeking out alternative, cheaper, suppliers throughout a short period of trading).

(4) For Mr Allison, there was a direct and crucial link between the K-Roam project and the sales of airtime to Jersey Telecom (and thus the need to purchase airtime from Skynet). We were not satisfied that such a link existed for Jersey Telecom. Given that Mr Azadi conducted all negotiations with Jersey Telecom and met with Steve Barton, this does support the proposition that within Askaris different individuals were operating with different agendas.

(5) It remains unclear to us why, given that we accept that Askaris UAE was keen to ensure the K-Roam project was launched, and that company was prepared to make $2 million available to Askaris, it did not invest that in the research and development of K-Roam itself, rather than in agreeing to fund the VAT payable to UK suppliers on trades in a high risk business sector.

Time taken by HMRC to conduct its investigation

278. Since Askaris notified its appeal to the Tribunal, HMRC has sought (and been granted) various extensions of time due to the complexity of the investigation and for their legal team to be provided with any relevant evidence gathered in a criminal investigation being conducted in which a number of individuals connected with the transaction chains have been arrested (but not including the officers of Askaris itself). Askaris had sought a hearing in 2017, but HMRC stated that was unrealistic and suggested the second half of 2018. The hearing was ultimately listed for 2020.

279. Mr Sangster drew attention to the fact that, after seven years of investigations by a number of specialist MTIC officers, with the resources and powers of HMRC, HMRC have been able to trace the transactions to fraudulent defaults. Officer Chisman confirmed that the civil investigations have now concluded but as far as he was aware the criminal investigations had not been completed; no one had yet been charged and he did not know if anyone would be charged. It is, submitted Mr Sangster, unrealistic to suggest that Mr Allison had, or had the means of acquiring such knowledge at the time of the transactions.

280. The chains and their connection to fraud are agreed. The direct tax loss chains are simple (and consistent), as are the contra chains themselves. The dirty chains in which Bartel was party are the main source of complexity. The simplicity or complexity of the chains, or the time which is required to piece them together, cannot be of any relevance to the consideration of whether Askaris actually knew of the connection to the fraudulent evasion of VAT. In considering the potential relevance to the question of whether Askaris should have known, we are mindful of the principles set out in the case law which include that this includes:

(1) 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 (*Mobilx* at [59]);

(2) this does not mean that the trader has to have the means of knowing how the fraud that actually took place occurred (*Fonecomp* at [51]); and

(3) in the context of contra trading there are two potential frauds, both the dishonest failure to account for VAT and the dishonest cover-up of that fraud by the contra trader.

281. Whilst there has been a lengthy investigation by HMRC, involving multiple officers, we are not persuaded that this factor is of any significance in assessing either what Askaris knew or whether it should have known of the connection to the fraudulent evasion of VAT.

Costs

282. Askaris argue that the total costs incurred by both sides now exceed the amount in dispute. They submit that this a factor which we can take into account when considering the honesty of Askaris and its genuine belief in the strength and justice of its case.

283. HMRC submit that this is not a proper argument - there are many reasons why Askaris may have decided to throw good money after bad which are not consistent with there being merit in the appeal. They also draw attention to the fact that some of those costs are the fees of RU Licit, a company owned by Mr Upshall, the director of which (Ben Houchen) had been the adviser to Askaris prior to Mr Houchen being elected Tees Valley Mayor in May 2017.

284. We do not doubt that the costs incurred by the parties are significant, particularly when viewed in the light of the amount of the input tax credit which has been denied by HMRC. That is not to criticise the conduct of the parties or the level of fees charged by their advisers. Following the denial, Askaris was faced with a decision between accepting that denial (even if its own view was that HMRC was wrong) or challenging it (incurring costs in the process, with the prospect of the Tribunal allowing its appeal). If the denial was not challenged, or if Askaris appealed but was unsuccessful, Askaris faced the prospect of HMRC seeking to impose penalties (either on the basis that the errors were deliberate or careless).

285. The decision to appeal the denial is one that was open to Askaris to take, and there are various possible reasons for this which do include its own view of the strength of its case, or the weaknesses it perceives in HMRC's case (noting that HMRC bear the burden of proof), and also a desire to mitigate penalties. We do not consider that the choice made in this respect is of any relevance in our assessment as to whether Askaris knew or should have known that its transactions were connected with the fraudulent evasion of VAT. We place no weight on this.

Discussion

286. We have already set out, at [69] to [89] above, our approach to the application of the test and the case law principles which we have taken into account in considering the issue. We have been particularly mindful of:

(1) Moses LJ's guidance at [59] in *Mobilx* that those who "should have known" include those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraudulent evasion of VAT then he should have known of that fact;

(2) in many of the transactions under appeal the transactions were connected with a fraudulent tax loss through the operation of a contra trader, Bartel. Bartel was offsetting its output tax on the chains with Askaris against input tax reclaimed in chains which traced back to a defaulting trader. The consequence of this is that Askaris' transactions are not, on their face, directly connected with a fraudulent default;

(3) Lewison J in *Livewire* considered the position of a trader who was not himself a dishonest co-conspirator and considered there were two potential frauds – the dishonest failure to account for VAT by the defaulter in the dirty chain and the dishonest cover up of that fraud by the contra trader. It was not necessary that the trader knew or should have known of the connection between his own transaction and both of those frauds;

(4) the significance of the state of knowledge of the contra trader was considered by both Lewison J in *Livewire* and the Chancellor in *Blue Sphere*, as considered further by Briggs J in *Megtian*, and the conclusions of the Court of Appeal in *Fonecomp* at [51] that the trader simply has to know, or have the means of knowing, that fraud has occurred or will occur at some point in the transactions. The participant does not need to know how the fraud was carried out in order to have this knowledge.

(5) in *Livewire*, Lewison J left open the possibility of the *Kittel* test being satisfied in respect of the broker even where there was an innocent contra trader providing the connection with the fraudulent default, albeit that the circumstances would be very unusual, whereas in *Blue Sphere* the Chancellor concluded that, in reality, the alleged contra trader must be deliberately offsetting its input and output tax in the knowledge of fraud in its dirty chains.

287. HMRC submitted that the evidence supports the inference that all the transactions entered into by Askaris were part of organised chains and Askaris knew its transactions were connected with fraud. Alternatively, it should have known that its transactions were connected with fraud.

288. Taking into account the relevant case law and the principles derived from it we have considered, stepping back to look at all the facts and circumstances, whether Askaris knew or should have known that the sales were connected to fraud. We set out our conclusions separately on these two (alternative) questions below, but do note at the outset that when reviewing and assessing all of the evidence there have throughout been three matters of concern to us, which overlap across some of the factors relied upon by HMRC and the counter-arguments presented by Askaris.

289. First, the role of Mr Azadi in all of the arrangements – he was apparently given complete responsibility for the VOIP transactions, despite no evidence being before us of any previous experience in this field. He was identifying potential counterparties and taking decisions as to suitability (rejecting Harjen, albeit having discussed with Mr Dunn, and approving Skynet). He attended the meetings with the supplier and the customer and agreed the prices. When

Askaris was informed that there was a potential problem in its supply chain (not just risks in the sector generally) it was Mr Azadi who was asked to contact Skynet and seek reassurances. When HMRC were verifying the transactions and putting questions to Mr Allison, Mr Azadi was the main source of all responses.

290. Second, the actions and responsibilities of Mr Allison - the evidence before us indicates that, whilst he was company secretary throughout, employed by Askaris at least since May 2013 and appointed director from August 2013, he showed what we regard as an astonishing level of disregard for the details of the business which Askaris was entering into as regards buying and selling airtime and the risks which could be posed thereby. On his own admission, whilst he was an experienced security consultant he did not have any experience in this market. The evidence indicates that as respects the commencement of this business his own actions were confined to:

(1) an internal meeting with Mr Azadi during May 2013 at which they decided that the risk of selling airtime from Skynet to Jersey Telecom was low;

(2) he conducted some due diligence on Skynet to satisfy himself that they had been operating for some time; and

(3) he signed some of the transaction documents – the JT Interconnection Agreement (and gave notice of assignment), the factoring agreement with VOIP Capital (and later amendments) and the agreement with Skynet.

291. There was no evidence that he had been given detailed briefings by Mr Azadi in relation to any of the agreements which he signed, or how the relationships had come about or the prices agreed:

(1) At the meeting with HMRC on 6 December 2013 (after the transactions under appeal) Mr Allison was not himself aware as to whether VOIP Capital had ceased trading, leaving the meeting to check this with Mr Azadi (who was apparently in the building but not attending the meeting), and appears to have been informed for the first time in that discussion with Mr Azadi that their only customer, Jersey Telecom, was now sourcing airtime from other suppliers and therefore Askaris would need to find new customers.

(2) In the meeting with HMRC on 26 March 2014 he contradicted himself in relation to both the process for the creation of invoices to Jersey Telecom and whether there were negotiations on pricing. This suggests a general lack of familiarity with what had occurred.

(3) In that meeting he told Officer Chisman that he had asked Mr Azadi further questions about why he (Mr Azadi) had chosen Skynet as a supplier. It is surprising that it was not until after December 2013 (ie after the trades had finished) that Mr Allison sought to understand the basis for the choice of the company's own supplier.

292. Instead, the evidence demonstrates that Mr Allison paid minimal regard to Askaris' business trading in airtime. He showed signs of starting to pay an interest after the visit by HMRC in September 2013, but even then not to the extent that he chose to contact the supplier himself. He relied completely on someone he had initially met via Facebook (albeit that he may have taken comfort from the introduction being initiated by Mr Suleyman) and whose expertise in this sector was not established.

293. Whilst for him the K-Roam project was significant, and he would need suppliers of airtime to make the project operational, he appears to have given little thought to why it was that Jersey Telecom would (according to Mr Azadi) insist that Askaris provide them with the supply of airtime as part of a reciprocal supply, particularly in circumstances where Askaris

were new to the market and this was known to Jersey Telecom. We do not doubt that such supplies were made by Askaris to Jersey Telecom, but the latter did not need Askaris to do this, as evidenced by Jersey Telecom sourcing their supply from elsewhere as soon as Askaris ceased to trade.

294. Third, the interests of Jersey Telecom. We have no difficulty accepting its desire to buy airtime; and the evidence was that once Askaris ceased trading in this market Jersey Telecom bought from another supplier. But why would it have wanted or needed a reciprocal supply of such airtime from Askaris before it would agree to supply either SIM cards, airtime or other services which Askaris required for the K-Roam project to them; indeed why did it choose Askaris as a supplier of airtime at all, particularly in circumstances where Jersey Telecom were aware that Askaris was new to the market and relied on recommendations from Jersey Telecom as to which additional counterparties were required (Error Scope and VOIP Capital) to enable Askaris to be in a position to make the supplies?

295. We have reflected these concerns to the extent relevant in reaching our conclusions on the alternative submissions before us.

296. Addressing first whether Askaris should have known that its transactions were connected to the fraudulent evasion of VAT, we consider there is some support for Askaris' position in that we found Mr Allison to be an honest and credible witness, and we accept the existence of the K-Roam project and that there was a focus within Askaris on ensuring that the product could be launched in as short a time frame as possible.

297. We have not given any weight to the proportion of transactions connected to fraud, the application by Askaris to move to monthly VAT returns, Askaris' decision to deal with only one supplier and one customer or the overheads (including the switch) being paid for by Askaris UAE.

298. However, our conclusions on these matters are significantly outweighed by the findings we have made and conclusions reached in assessing the picture as a whole. We have concluded, on the balance of probabilities, that Askaris should have known that its transactions were connected to fraud.

299. We have reached this conclusion based on all of the evidence before us and the submissions put to us, but place particular weight on:

(1) Askaris' awareness of fraud in the industry from the outset, which was then re-emphasised following the visit by HMRC on 19 September 2013;

(2) the approach to due diligence was perfunctory, with basic searches at Companies House not having been obtained;

(3) a failure to critically re-examine this approach to due diligence once the company had been told that HMRC considered there was a risk of connection to fraud, a matter which Mr Allison and thus the company accepted was urgent;

(4) a failure to question Askaris' apparent ability to set itself up and enter a competitive market with no experience, relying on suppliers of a switch and invoice factoring recommended to them by their only customer, and yet realise consistent mark-ups with what they regarded as low commercial risk;

(5) entering into agreements with Skynet and Jersey Telecom in circumstances where the lack of documentation, including as to pricing of airtime, created apparent commercial risk yet was not questioned by Mr Allison. The explanation as to the focus of attention on K-Roam may help to explain the absence of aggressive and frequent price negotiations to maximise profit, but does not mitigate this factor completely, particularly

as the argument from Askaris emerged that the airtime trading was funding the development of K-Roam;

(6) explanations as to why it was decided to sell airtime to Jersey Telecom having an air of unreality (as to whether Jersey Telecom would require Askaris to sell to them) yet no evidence that this was probed further at the time;

(7) failure to protect its commercial position in relation to CDRs – in the event of a dispute over billing Askaris had no rights to access to information from Error Scope, which was in any event maintaining insufficient records, creating commercial risks where there was no evidence that such exposure had been considered by Askaris; and

(8) use of VOIP Capital, an offshore banking platform, to factor invoices at the recommendation of their only customer.

300. These factors lead us to conclude that Mr Allison, and thus Askaris, should have known that the transactions were connected to the fraudulent evasion of VAT.

301. That is sufficient to dismiss the appeal. However, HMRC also plead (and indeed it is their primary submission) that Askaris knew that its transactions were connected with the fraudulent evasion of VAT. The burden of proof is on HMRC to establish, on the balance of probabilities, that this was the case.

302. At the outset, we reiterate that our conclusion on the credibility of Mr Allison, assessed in the light of all of the other evidence before us, means that we are not satisfied, on the balance of probabilities, that Mr Allison knew that the transactions under appeal were connected with the fraudulent evasion of VAT. However, that is not the question, as it is agreed that the knowledge of any of the directors or employees should be imputed to Askaris for this purpose. We have considered all of the evidence in relation to knowledge and have addressed in this context our findings and conclusions as to the knowledge of the individuals involved.

303. The most significant evidence potentially supporting a conclusion that Askaris knew of the connection to the fraudulent evasion of VAT is as follows:

(1) the absence of documentation, in particular correspondence between Askaris and its counterparties both as to key commercial matters such as the pricing for the supply of airtime and access to CDRs to enable accurate production of invoices, and that which we would expect to be generated during routine business operations. The absence of internal briefing papers assessing the risks and benefits for Askaris of commencing trade is also of concern, albeit that we do not rely on the absence of internal meeting notes;

(2) the decision to use an offshore factoring company, coupled with the arrangement that any excess of the payments from Jersey Telecom over the amounts paid to Skynet and the costs of factoring would be retained offshore;

(3) the changing explanations which were being given throughout in response to questions from HMRC, most notably as to the reasons for the rejection of Harjen as a supplier, whether Jersey Telecom required that Askaris sell them airtime and whether there were price negotiations with Skynet and Jersey Telecom. These both serve to illustrate the extent to which Mr Allison had been distant from the airtime trading, but more importantly evidence that explanations were being given piecemeal by Mr Azadi to Mr Allison in a manner which we consider supports the conclusion that Mr Azadi was seeking to avoid disclosing the full story;

(4) the lack of commerciality apparent from Askaris' failure to maximise its profits by re-negotiating prices more frequently, the terms of the UAE Loan (in particular the interest rate and failure to ensure clear provisions as to repayment) and its failure to

ensure that it had access to adequate CDRs which should have been necessary to protect itself from commercial risk; and

(5) the lack of any adequate explanation as to why, given that Mr Allison's evidence was that Askaris UAE was keen to support the K-Roam project, the funds from the UAE Loan were not used on the development of that project. On the basis of his evidence, the amount available would have been sufficient for this purpose.

304. Given that we have already stated that we are not satisfied that Mr Allison knew of the connection to fraud, any conclusion that Askaris knew can only be based on a conclusion as to the knowledge of either Mr Upshall or Mr Azadi (albeit that the knowledge of the former is only relevant until his resignation as a director on 23 August 2013) in circumstances where we did not hear evidence from them. We do recognise that HMRC need only establish that Askaris knew of the connection to fraud and do not need to establish that any specified individual knew. However, in view of the clearly defined roles of the individuals concerned, and that there were only three relevant individuals, we have had regard to the knowledge of them individually in seeking to analyse the evidence and reach our conclusions.

305. We deal briefly with the position of Mr Upshall. Whilst he was a director of Askaris at the time that the transactions in airtime started and thus, we consider, he should have been aware of those matters on which we rely in reaching our conclusion that Askaris should have known of the connection to fraud, there is no evidence that he had any familiarity with these transactions or the circumstances surrounding them. There was evidence that he knew of the K-Roam project and was involved in the funding of Askaris (the latter by virtue of his role at Askaris UAE). He must therefore have been involved in the decision that the UAE Loan was only being made available to fund the airtime trading and not for K-Roam. Whilst we were not completely satisfied with the explanation given (or inferred by us) as to his absence as a witness, the position that he was not called as he cannot explain the airtime trading is credible and means that we are not prepared to draw the inference that the purpose of the UAE Loan was to fund participation in a fraud or that he knew of the connection of the airtime trading transactions to the fraudulent evasion of VAT.

306. We therefore proceed to consider whether HMRC have established that, on the balance of probabilities, Mr Azadi had the requisite knowledge. Not only was Mr Azadi the project manager for K-Roam and the airtime trading, but at a practical level he was also involved in all of the meetings and discussions with counterparties. Looking at the evidence referred to at [303] above, he was, with the exception of the decision that the UAE Loan could not be used to fund K-Roam, at the heart of these matters – he would have produced any briefing papers and generated an email trail of correspondence, he was put in contact with VOIP Capital by Jersey Telecom to factor the invoices, he was the source of the differing explanations given by Mr Allison to HMRC from the end of 2013 to (at least) the email of September 2015 and then put forward in the Grounds of Appeal and was responsible for the lack of commerciality identified in the arrangements (with the exception of the matters raised in relation to the UAE Loan).

307. Was this deliberate or did he become unwittingly involved in the fraud which was being perpetrated in the transaction chains? The absence of Mr Azadi as a witness means that this could not be put to him. We have set out the explanation for his absence above. The overall circumstances are such that whilst we are open to drawing inferences from Mr Azadi's absence, we consider this with caution – any detrimental effect is reduced, but not nullified.

308. Accordingly, addressing the evidence relating to the lack of commerciality in the manner in which Askaris conducted the transactions, given that there are potential alternative explanations (albeit that these include a failure to consider the risks), we do not ascribe this

lack of commerciality to Mr Azadi having known that he was participating in an orchestrated fraud. However, and crucially, we have concluded that the lack of documentation is so extensive, covering all of the periods in which the transactions occurred and all of the aspects of the supply of airtime that this overwhelmingly points in favour of it being as a result of deliberate behaviour. Furthermore, we consider that the failure to brief Mr Allison on the detail of the transactions and negotiations relating thereto was a deliberate attempt to avoid scrutiny. Once the transactions were being verified by HMRC and Mr Allison sought answers to questions, the piecemeal explanations, which changed to try to disguise what had happened were provided to Mr Allison by Mr Azadi and, given that Mr Azadi had dealt with the counterparties and knew what had happened, we conclude that his attempts to conceal and distract were, on the balance of probabilities, deliberate.

309. We are therefore satisfied, in the light of all of the evidence, that Mr Azadi and thus Askaris knew that the transactions were connected to the fraudulent evasion of VAT.

CONCLUSION

310. Askaris both knew and should have known that its transactions were connected with the fraudulent evasion of VAT. Its appeal against the denial of credit for input tax on its acquisition of airtime from Skynet is dismissed.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

311. 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.

JEANETTE ZAMAN
TRIBUNAL JUDGE

RELEASE DATE: 05 JUNE 2020

Annex 1 –Transactions under Appeal

08/13

Deal	Step	Source	Role	Destination	Role	Invoice	Date	Net Value	VAT	Total
1	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 001	11/06/2013	$1,043.60	£133.96	$1,252.32
2-4	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 002	17/06/2013	$1,972.43	£251.09	$2,366.91
5	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 003	28/06/2013	$3,338.75	£437.81	$4,006.50
6-7	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 004	01/07/2013	$9,825.63	£1,290.72	$11,790.76
8	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 005	15/07/2013	$20,630.34	£2,740.30	$24,756.41
9	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 006	17/07/2013	$46,392.42	£6,094.64	$55,670.91
10	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 007	22/07/2013	$146,943.66	£19,225.91	$176,332.39
11	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 008	29/07/2013	$348,230.37	£45,357.26	$417,876.44
12	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 009	05/08/2013	$304,389.87	£39,665.09	$365,267.85

13	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 010	12/08/2013	$237,286.81	£30,673.06	$284,744.17
14	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 011	19/08/2013	$403,182.23	£52,117.66	$483,818.67
									£197,987.50	

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Deal	Step	Source	Role	Destination	Role	Invoice	Date	Net Value	VAT	Total
15-17	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 012	26/08/2013	$502,457.66	£64,541.77	$602,949.19
18-20	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 013	02/09/2013	$342,200.87	£44,010.14	$410,641.04
21-23	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 014	09/09/2013	$481,645.40	£61,583.61	$577,974.48
24-27	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 015	16/09/2013	$657,251.13	£82,408.77	$788,701.36
28-30	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 016	20/09/2013	$491,839.51	£61,441.54	$590,207.41
31-33	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 017	23/09/2013	$381,520.76	£47,713.95	$457,824.91
31-33	-1	Search Corporation Limited	Buffer	Askaris	Broker	Askaris 018	27/09/2013	$111,696.09	£13,934.14	$134,035.31

									£375,633.92	

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Deal	Step	Source	Role	Step	Destination	Role	Invoice	Date	Net Value	VAT	Total
34-36	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 019	30/09/2013	$143,994.54	£17,826.62	$172,793.44
37-39	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 020	01/10/2013	$63,147.63	£7,780.63	$75,777.16
37-39	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 021	02/10/2013	$74,425.91	£9,186.68	$89,311.09
37-39	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 022	03/10/2013	$80,469.19	£9,921.61	$96,563.03
40-42	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 023	04/10/2013	$112,785.83	£14,045.56	$135,342.99
40-42	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 024	07/10/2013	$232,647.42	£28,936.25	$279,176.91
40-42	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 025	08/10/2013	$114,950.83	£14,297.37	$137,940.99
40-42	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 026	09/10/2013	$139,515.79	£17,373.24	$167,418.94
40-42	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 027	10/10/2013	$94,792.55	£11,896.66	$113,751.06

43-45	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 028	11/10/2013	$189,710.07	£23,730.07	$227,652.09
43-45	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 029	14/10/2013	$214,132.73	£26,798.41	$256,959.28
43-45	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 030	15/10/2013	$71,556.52	£8,947.92	$85,867.82
43-45	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 031	16/10/2013	$42,064.97	£5,289.86	$50,477.97
43	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 032	17/10/2013	$36,286.65	£4,537.25	$43,543.98
46, 48	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 034	21/10/2013	$183,053.25	£22,636.90	$219,663.90
46	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 035	22/10/2013	$17,897.01	£2,218.96	$21,476.41
										£225,423.99	

11/13

Deal	Step	Source	Role	Step	Destination	Role	Invoice	Date	Net Value	VAT	Total
46-48	-1	Search Corporation Limited	Buffer	0	Askaris	Broker	Askaris 033	18/10/2013	$85,320.23	£10,564.66	$102,384.28
										£10,564.66	