Neutral Citation: [2023] UKFTT 00131 (TC)

Case Number: TC08736

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/04312

Awareness of VAT fraud by customer – Kittel principles – whether input tax denied – yes – place of supply - whether customer had fixed or permanent establishment in the UK – whether supplies made in the UK – yes – appeal dismissed

Heard on: 7, 8, 9 and 10 June 2022
Judgment date: 23 November 2022

Before

TRIBUNAL JUDGE IAN HYDE
CELINE CORRIGAN

Between

FULFILLMENT LOGISTICS UK LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Tim Brown

For the Respondents: James Puzey and Uni Udom of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. With the consent of the parties, the form of the hearing was by video on the Tribunal video hearing system. The documents to which we were referred were a hearing bundle of 2,712 pages, an authorities bundle of 515 pages, skeleton arguments submitted by both parties and written submissions made by the parties following the hearing.

2. Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

3. This appeal concerns whether the appellant's engagement with third parties and its knowledge of their activities was such that:

(1) The appellant knew or ought to have known that its customer's activities were connected with VAT fraud so that input tax recovery is denied;

(2) The appellant's customer had a business or fixed establishment in the UK so that the appellant's supplies should have been standard rated for VAT purposes; and

(3) It was liable to a penalty under section 69C Value Added Tax Act 1994

4. All references to legislation are to the Value Added Tax Act 1994 unless specified otherwise.

THE FACTS

Evidence and overview

5. In addition to the bundles, Mr Paul Rooney and Mr Joel Clarke gave evidence for HMRC. Mr Rooney is the investigating officer on this matter, having taken over from a Mr Alcorn in March 2017 when Mr Alcorn retired from HMRC. Mr Clarke is in HMRC's Cyber and Digital Forensics team. He has worked in digital forensics for 10 years with a range of training across a range of technical digital analysis. We find Mr Rooney and Mr Clarke to be honest and credible witnesses and we accept their evidence.

6. Mr Jade Lambert, a director and part shareholder of the appellant, gave evidence for the appellant. We did not find Mr Lambert to be a reliable witness. He accepted in cross examination that he has lied and we find his evidence was at times partial, evasive and not credible.

7. Having considered the evidence find the facts as set out below.

8. In outline the facts of this appeal concern the business of importing and reselling to retail customers contact lenses through the website 'contactlenses.co.uk'. Throughout the narrative of this matter we find that, whilst different companies owned or played a role in its operation, the central business – what we have called in this decision "the Contact Lens Business" - carried on. Indeed, to the extent it matters in this appeal, we find that a layperson observing the premises, principally at the relevant industrial units in Bristol, would find no material difference in the physical operation of the business from 2005 to 2018, save the natural evolution and growth of a small business.

9. It is HMRC's case that the setting up of the appellant's customer, Contactlenses Limited ("CLL"), in the Seychelles by a Mr and Mrs Dreyer to carry on that trade was a deliberate attempt by them to evade UK VAT on the sale of contact lenses. According to HMRC, the appellant, through its sole director Mr Lambert, was central to that plan.

Further, HMRC argue that the provision of fulfilment services by the appellant to CLL was subject to UK VAT. Thus, it is HMRC's argument that:

(1) The two companies, CLL and the predecessor company Contact Lenses UK Limited ("CLUK"), were owned and controlled by Mr and Mrs Dreyer

(2) CLL fraudulently evaded UK VAT on the sale of the contact lenses to UK retail customers

(3) |the appellant provided fulfilment and other services to CLL, effectively the appellant's only customer

(4) the appellant's sole director and principal shareholder, Mr Lambert, was closely connected to the Dreyers and their companies so that he knew or ought to have known that CLL was evading VAT. Accordingly, VAT incurred by the appellant was irrecoverable pursuant to the principle in *Axel Kittel v Belgium; Belgium v Recolta Recycling* (C-439/04 and C-440/04) ("*Kittel*")

(5) separately, CLL had a business or fixed establishment in the UK so that the appellant's supplies to CLL were made in the UK and so standard rated for VAT purposes

10. The appellant accepts that CLL should have paid UK VAT on its sales but disputes all of HMRC's other contentions.

11. The period covered by the decisions subject to this appeal is 2013 to 2018 but it is relevant to understand the facts prior to that period. There is also a considerable overlap between the narrative of the commercial events and HMRC's various enquiries which makes for a complex fact pattern.

Jade Lambert

12. Mr Jade Lambert is a part qualified accountant who started his working life in late 2003 in a firm of accountants in Bristol.

13. At the time CLUK was one of the firm's main clients and Mr Lambert built up a good relationship with the owners, Mr and Mrs Dreyer, providing administrative and financial support to the growing business.

14. In 2004 Mr Lambert was persuaded to come and work for CLUK as finance manager, starting in December 2004.

15. Thereafter Mr Lambert worked for a number of companies broadly connected to the Contact Lens Business as described below.

Mr and Mrs Dreyer

16. Mr John Dreyer is a Canadian citizen and an optometrist.

17. According to his tax returns Mr Dreyer left the UK on 13 June 2011 he initially lived in the Seychelles but then moved to Canada.

18. Mrs Donna Dreyer is a UK citizen. Mrs Dreyer moved to Canada in 2014.

19. There was no evidence before the Tribunal from Mr and Mrs Dreyer, save for limited correspondence with HMRC during its investigations. Mr Lambert asked Mr Dreyer in 2021 if he was willing to give evidence but Mr Dreyer in his response said he was a consultant for CLL, mainly in his capacity as an optometrist, and has no knowledge of CLL's operational issues. Following further requests, Mr Dreyer said he was unwilling to get further involved.

2000-2007

CLUK

20. In or about 2000, Mr Dreyer conceived of the idea of selling contact lenses online and CLUK was incorporated on 24 October 2000 for this purpose.

21. CLUK was registered for VAT from 20 December 2000 and its main business activity was described as "wholesale export of contact lenses to America & Canada".

22. In or around 2000 CLUK started trading in the import and resale to retail customers of contact lenses in the UK and set up the website 'contactlenses.co.uk'. CLUK charged VAT on its sales.

23. The shares in CLUK were owned by Mr Dreyer.

24. The directors were held at various times Mr Dreyer, Mrs Dreyer and their son Mr Aaron Dreyer.

25. CLUK's registered office was at 4 The Avenue, Sneyd Park, Bristol, (the home address of Mrs Dreyer), save for the period 22 June 2006 to 28 February 2008 when it was Unit 7, The Laurels, Cribbs Causeway, Bristol ("Unit 7").

26. In December 2004 Mr Lambert was recruited by CLUK as finance manager. At this point CLUK was a very small company operating from a basement flat in Bristol but grew rapidly and in March 2005 it relocated to Unit 7. In May 2008 it relocated to Units 3 and 4 on the same industrial estate ("Units 3 and 4").

27. Mr Lambert's role for CLUK rapidly expanded to include not only finance functions including purchase and sales ledgers, bank reconciliations, payroll, quarterly VAT returns and monthly management accounts, but also customer refunds and customer payment queries. Mr Lambert would also manage suppliers, pricing and procurement and some element of managing the day-to-day operational running of the business.

28. All paper VAT returns submitted up to the quarter ended 28 February 2010 were signed by Mr Lambert.

29. On 7 March 2008 the company changed its name to Celcian Limited.

30. In 2017 CLUK applied to deregister from VAT which was effective from 16 November 2017.

The change from CLUK to CLL in 2007

31. On 1 November 2007 CLUK sold its website and database for £68,498.95 to CLL, a company incorporated in the Seychelles. In the transfer agreement CLUK's address was given as Unit 7 and CLL's as PO Box 679, 306 Victoria, Mahe, Seychelles ("PO Box 679"). No evidence was put before the Tribunal as to whether this transfer was at open market value.

32. Mr Lambert's evidence was that in mid-2007 Mr Dreyer explained to him that he had been approached by CLL, an international business based in the Seychelles, which wanted to break into the UK market. Mr Dreyer was concerned that there was a recession on the cards and that the supermarkets would make market conditions tougher. Mr Dreyer therefore intended to sell to CLL. Mr Dreyer also told Mr Lambert that he would be acting for CLL on a consultancy basis. Further, CLUK would act as wholesale supplier to CLL.

33. Mr Lambert accepted in cross examination that he was not asked and did not do any due diligence on CLL even though he was the finance manager, and they were about to buy the company's business.

34. Mr Lambert said was concerned as to his own position, but Mr Dreyer advised him that Mrs Dreyer would be setting up a new company, Stratta Limited ("Stratta"), that would have the contract to undertake the fulfilment and customer service function for CLL. Mr and Mrs Dreyer wanted Mr Lambert to be the manager of that company.

35. Following the transfer to CLL Mr Lambert was retained by CLUK as finance manager and appointed finance manager of Stratta.

36. It is not clear from the evidence before us as to the ownership of the CLUK assets following the establishment of CLL and Stratta. Under the 1 November 2007 agreement CLL acquired the website and database but it is silent as to the chattels and equipment at Unit 7. As Stratta carried out all the physical activities and so in practice used the equipment, we find that ownership of these assets transferred to Stratta as did the CLUK employees.

37. We make further findings of fact in respect of this sale and Mr Lambert's relationship with CLL below.

2007-2013

Stratta

38. Stratta was incorporated on 24 January 2007.

39. Mrs Dreyer was throughout the relevant period the sole shareholder. She was also Stratta's sole director except for the period 17 August 2007 to 15 February 2008 when Mr Karl Dreyer was the sole director.

40. Stratta was registered for VAT from 1 March 2007 and in its VAT registration form gave its principal place of business as Unit 7.

41. Stratta's registered office until 1 December 2008 was Unit 7, when it changed to Units 3 and 4 on the same industrial estate ("Units 3 and 4").

42. Mr Lambert was employed as finance manager for Stratta. He was also company secretary from 24 January 2007 to 1 January 2013. Mrs Dreyer was away from the office for a significant amount of time and so in practice Mr Lambert also acted as general manager.

43. Stratta deregistered for VAT with effect from 30 November 2014.

Jaydes Limited

44. From 2007, given his roles for both CLUK and Stratta, Mr Lambert decided that, as CLUK did not have any other employees, it would be easier if he were an employee of Stratta and provided his services to CLUK through a separate company.

45. Jaydes Limited ("Jaydes") was therefore incorporated on 29 October 2007. The registered office was the Lamberts' private residence and after 24 November 2014 was Units 3 and 4.

46. The shares in Jaydes were originally held by Mrs Lambert, then in 2011 Mr Jade Lambert held 600 A shares and Mrs Lambert 400 B shares.

47. Initially Mrs Lambert was the company director, and Mr Jade Lambert was the company secretary. On 1 June 2011 they both resigned from these positions with Mr Lambert becoming on the same date the sole director.

48. From 1 December 2007 to June 2011 Jaydes invoiced CLUK £3,375 per month. From June 2011, it invoiced CLUK, Stratta Limited and Contactlenses Limited. The company raised its final invoices to the three entities in March 2014.

49. Jaydes Limited never registered for VAT.

50. In 2011 Mr Lambert attempted to expand the range of clients for whom Jaydes provided business administration and bookkeeping services and engaged an employee for this purpose. However, this was not successful, the employee left and Mr Lambert terminated the engagement with the small number of clients Jaydes had secured.

CLL arrangements 2007 to 2013

51. Following the transfer by CLUK on 1 November 2007 of its website and database to CLL and the establishment of Stratta, CLUK continued to purchase contact lenses in the wholesale market but sold them to its only customer CLL, selling them at a 5% margin.

52. Stratta effectively occupied the premises at Unit 7, later Units 3 and 4, providing fulfilment services to CLL, taking and storing the contact lenses sourced by CLUK, picking goods for customer deliveries, dispatching them to customers and dealing with queries and returns.

53. CLL sold the contact lenses to retail customers in the UK.

CLL

Registered office

54. CLL was incorporated in the Republic of the Seychelles on 21 December 2005 as an International Business Company.

55. In a letter to HMRC in 2013 Mr Lambert gave CLL's address as Suite 305, Capital City Building, Victoria, Seychelles ("Suite 305"). An HSBC document gave the address as 306 Victoria House, Victoria, Mahe, Seychelles, ("306 Victoria House") and the same address was recorded in the judgment of the Supreme Court of the Seychelles, described below.

56. As CLL did not have a UK address, Mr Lambert allowed Jaydes' UK address to be used by CLL as a contact address for a number of suppliers but principally the HSBC bank and merchant acquirer account. Mr Lambert never asked CLL for a list of organisations to whom Jaydes' address had been provided. Mr Lambert's evidence was that any correspondence addressed to CLL and received at the premises was forwarded unopened to CLL at a Seychelles address.

CLL ownership and control

57. The ownership of CLL, its directors and those who controlled it were issues in this appeal.

58. Various evidence produced by HMRC showed a number of corporate directors and shareholders including Carlyle Executive Limited Equity Management Inc. Neither party suggested these entities were anything other than fronts or nominees. The debate between the parties was as to who were the real owners and controllers of CLL.

59. HMRC's position was that Mr and Mrs Dreyer set up CLL as part of the VAT fraud and they owned and controlled the company. The appellant's position was that it knew nothing of the CLL ownership and management structure save that required to provide its services to CLL. To the extent Mr Lambert had helped it was only to assist the appellant's main customer.

60. On 13 March 2013 in a letter written on Celcian (the changed name for CLUK)'s letterhead, Mr Lambert said that:

> "Mr Dreyer does not have any connection or interest in Contactlenses Limited, other than that of providing services as per contract."

61. Mr Lambert claimed in cross examination that as was clear from the beginning of the letter, these responses had been provided by Mr Dreyer. Mr Lambert wrote a nearly identical letter on Stratta notepaper in respect of Mrs Dreyer. Mr Puzey challenged Mr Lambert that he knew otherwise and he should not have misled HMRC.

62. Mr Lambert's evidence, including statements to that effect in his Contractual Disclosure Facility report, was that he was not aware that Mr and Mrs Dreyer held any position in CLL except that Mr Dreyer was a consultant, had acted as a contact point for the sale by CLUK to CLL in 2007 and had assisted in CLL setting up a merchant acquirer account. Mr Lambert did not know what Mr Dreyer's consultancy role entailed other than dealing with technical queries because Mr Dreyer was a registered optometrist.

63. Mr Lambert claimed, both during HMRC's investigations and in the hearing, that he had little involvement in CLL's business. He told HMRC in 2014 that he was only a consultant, for example he researched competitors in the UK and Europe for them.

64. Mr Lambert denied being the finance manager for CLL notwithstanding him using that title in correspondence. Mr Lambert had an e mail address for CLL, "….@contactlenses.co,uk" but, according to Mr Lambert, that was to enable him to deal with customer queries.

65. Mr Lambert also told HMRC he did not know whether CLL had employees in the Seychelles or what activities were carried out there.

66. During the course of HMRC's investigation Mr Lambert told HMRC that a Mr Philippe (or Phillipe) Hulen ("Mr Hulen") and a Jean Paul Aubert were the relevant contacts at CLL.

67. Mr Lambert in his evidence said he had met and corresponded with Mr Hulen. He recalled meeting Mr Hulen in Dubai in October 2009 and again when he travelled to the Seychelles in April and October 2010. Mr Lambert was able to give a detailed description of Mr Hulen.

Mr Hulen: Mr Clarke's examination of the Mbox Emails

68. As described below, during the course of his investigations in 2018 Mr Rooney had cause to doubt the existence of Mr Hulen. Mr Rooney had concerns about Mr Hulen's method of communicating, thus he did not provide a telephone number, he sometimes spelt his name differently (so "Philippe" and "Phillipe", even in the same document) and the tone of correspondence suggested the emails had been prepared to present to HMRC the appearance of unconnected individuals negotiating at arm's length.

69. Accordingly, for the purpose of investigating Mr Hulen, on 19 May 2018 HMRC served formal notice under Schedule 36 Finance Act 2008 on the appellant requesting various communications between Mr Lambert and CLL to include the metadata from the e mail headers to see if the emails had originated from the Seychelles.

70. Mr Rooney received the documents and metadata on 29 May 2018, including sample emails sent from the e mail address 'Phillippe<service@contactlenses,sc>' ("the MBox Emails").

71. The metadata was reviewed by a Mr Stevenson in HMRC as a data handler and he advised in an e mail on 14 June 2018 that the metadata had a return path to Mr Dreyer's e mail address.

72. Mr Clarke gave evidence in a witness statement and orally as to his examination of the MBox Emails. The purpose of his examination was to see who might have sent the emails from 'Phillippe<service@contactlenses,sc>'.

73. Mr Clarke processed the Mbox Emails using Nuix software to extract the emails and analyse them, and obtain information stored in the email headers. This information would include the details of who sent the email and who received it as well as the servers the email passed through on its way to the recipient.

74. Mr Clarke gave evidence that amongst the information stored in an email header are three pieces of metadata of interest for this report:

(1) Sender: the mailbox of the person responsible for sending the message. This is usually the same as the 'From' field, which is who the message is from. However, it can differ in some cases where a person is sending messages on behalf of someone else from another mailbox.

(2) Return-Path: The Return-Path is inserted by the sending email server and is used to indicate to the receiving email server where non-delivery of the sent email receipts are to be sent. This is not the address used when a user replies to an email.

(3) Message-ID: a mandated globally unique identifier given to all emails by the sending email server. The second part of the Message-ID contains the domain name for the email server from where the email originates.

75. Mr Clarke created a spreadsheet report, attached to his witness statement, for the 99 emails containing the Subject line, To, From, Communication Date, email header Sender, email header Return-Path, and email header Message-ID.

76. Mr Clarke's analysis showed that the emails from 'Phillippe ' had a Sender address of 'john.dreyer@gmail.com' and Message-ID with domain of @mail.gmail.com meaning they were sent from a Gmail mailbox email server. In short the emails apparently sent by Phillippe<service@contactlenses,sc>were sent from 'john.dreyer@gmail.com'.

77. In cross examination Mr Clarke accepted that he could not tell who actually sent the emails, just that they had been sent from the 'john.dreyer@gmail.com' e mail box.

78. Mr Brown took Mr Clarke to a number of emails from Phillippe<service@contactlenses,sc> and Mr Clarke accepted that they were not in the 99 he examined. In re-examination by Mr Puzey, Mr Clarke confirmed he did not know how the emails had been selected.

79. Mr Brown also took Mr Clarke to some internal emails within HMRC between Mark Stevenson of the 'FIS DSI:Data Handling Specialists' team and Shelley Beckett of FIS Individuals and Businesses team. In the e mail exchange Mr Stevenson discussed what would happen if an addressee were to reply to 'Phillippe<service@contactlenses,sc>'. Mr Clarke's evidence was that whether the reply went to the John Dreyer or Phillipe address depended on how the mail was set up.

80. In answer to questions put to him, Mr Clarke said that sending on behalf of another e mail address was simply a matter of what permissions were granted. He also

confirmed that anyone can send an e mail from any e mail address if they had the correct log in details.

81. Mr Clarke was taken to two versions of the same e mail to Mr Lambert of 29 January 2015. One showed the sender as 'Phillippe<service@contactlenses,sc>' and the other as 'john.dreyer@gmail.com on behalf of Phillippe<service@contactlenses". Mr Clarke suggested the difference came from how emails were formatted and what display setting was used.

The CLL banking arrangements

82. It was Mr Lambert's evidence that at the time of the transfer to CLL, Mr Dreyer asked Mr Lambert to help set up the bank accounts and merchant acquirer arrangements for CLL with HSBC in the UK. Accordingly, Mr Lambert signed a number of documents to help set up the accounts. In these documents, at Mr Dreyer's instruction, Mr Lambert stated his position to be "finance manager" of CLL. Mr Lambert did this to help Mr Dreyer as the Dreyers had been good to him and he trusted Mr Dreyer.

83. Mr Lambert also told HMRC during their investigations that he had allowed his name, email and address to be used for correspondence from the bank. He would send on such correspondence, either by email by post.

84. In October 2013, notwithstanding objections raised by Mr Lambert on behalf of Stratta, HMRC issued a notice to HSBC under Schedule 36 Finance Act 2008 requiring production of documents in respect of Stratta and CLL. HSBC subsequently provided a number of documents to HMRC.

85. As part of this disclosure, HSBC supplied data showing online access to the CLL bank account between 5 April 2011 and 31 December 2013 ("the HSBC Online Access Data"). It was HMRC's position that the HSBC Online Access Data demonstrated that the account had been accessed on 294 occasions in this period by a user with the ID 'Jade' and that 'Jade' was Mr Lambert.

86. Mr Lambert disputed that he did so as frequently as HMRC claimed. Mr Lambert's evidence was that in the period from 2007 he accessed the HSBC bank accounts for CLUK and Stratta through the HSBC portal. At some point in 2008 the CLL accounts must have appeared on the same portal and, out of curiosity, he would occasionally access these accounts.

87. Other internal HSBC documents disclosed by HMRC on another occasion showed:

(1) In the HSBC application record for CLL dated 12 January 2007 Mr Dreyer is listed as the 'sole trader/principal partner or director' and Mrs Dreyer is listed as 'second partner or director'.

(2) In a new business customer identification and verification form dated 2 January 2007 Mr and Mrs Dreyer are listed as 'beneficial owner'.

(3) In an application form for a new account the signatories are Mr Dreyer, Mrs Dreyer and Mr Lambert as finance manager. Mr Lambert confirmed he completed the form and it was his signature. Mr Lambert's evidence was that he was not aware of any other signatories to the bank accounts.

(4) Another application form, apparently for a corporate card, lists Mr Dreyer as the contact and Mr Lambert as 'secondary contact'. CLL's address is given as Unit 7.

(5) On an HSBC "simple complex mandate cover sheet" dated 10 September 2007, for CLL the instruction is "add" Jade Lambert.

(6) A fax dated 16 September 2008 on CLL letter head with an address given as PO Box 679 Seychelles, from Mr Lambert to Jo Bowden at HSBC:

> "Dear Jo.
>
> Please find to follow the management accounts information for May, as discussed yesterday.
>
> Also as discussed yesterday, the accounts for period ending 07 and more up-to-date management info will be forwarded as it becomes available over the next few weeks
>
> Kind Regards
>
> Jake Lambert
>
> Finance Manager
>
> Contactlenses Ltd"

Mr Lambert's explanation of this fax was that the accounts had been sent to him by a finance person at CLL and he had merely signed the covering fax and sent it to HSBC. In cross examination Mr Lambert conceded the accounts – and the covering e mail - had come from Mr Dreyer but could not explain why except to speculate that Mr Dreyer was also a middleman. Mr Lambert accepted that sending commercially sensitive management accounts to a supplier (the appellant, represented by Mr Lambert) was odd.

(7) A 'credit memorandum' dated 12 May 2010, which appears to be an internal HSBC request for approval of an unapproved overdraft for CLL stated:

> "Celcian Limited is a subsidiary to Contactlenses limited…and transfers are made between the accounts to cover excess positions…
>
> We contacted Jade yesterday who advised that a transfer would be made from the Contactlenses account to correct the position…
>
> I have emailed Jaed this morning …
>
> Jade has emailed me back…to confirm..."

The e mail from Mr Lambert to HSBC said:

> "Morning Helen
>
> I contacted John yesterday afternoon, asking him to make a transfer from the Contactlenses Limited account, which he has obviously not done.
>
> ….
>
> Regards
>
> Jade Lambert
>
> Manager
>
> Contactlenses.co.uk"

Mr Lambert claimed in cross examination that he did not contact Mr Dreyer, but just used the name because HSBC were familiar with Mr Dreyers' name.

(8) An internal undated HSBC document concerned with 'renewal of existing facilities' shows |CLL, CLUK and Stratta as group companies. It states:

> "John and Donna have decided to relocate to Seychelles and have incorporated Contactlenses Ltd there for tax reasons"

The 'relationship name' is given as CLUK and 'TR NAME' (which we take to mean trading name) as CLL. Without distinguishing between the companies, the management is listed as Mr and Mrs Dreyer, described as directors and each 50% shareholders, and Mr Lambert described as "now in charge of the operation of the group companies". The document sets out that the company moved to Cribbs Causeway on a five-year lease and employing eight staff split between warehousing and administrative duties. HSBC comments that the company has "good levels of financial control through JL". HMRC believed this document to have been compiled in late 2007 or early 2008. We read 'JL' as a reference to Mr Lambert.

(9) An HSBC list of signatories as at 13 January 2014 listed Mrs Dreyer (position described as "OTH"), Mr Dreyer ("CEX") and Mr Lambert("MGR"). All the signatures are stated to have been captured in 2007. We take "MGR" to be "manager".

88. In correspondence with HMRC Mrs Dreyer said that she was unaware of her standing with HSBC and was unaware she was an account signatory and card holder. Mr Lambert accepted he had been set up as a signatory to the HSBC accounts but thought that had been done in error and he had never used the authority. He requested that he be removed as a signatory in May 2014 shortly after HMRC opened its CDF investigation.

89. On 6 December 2018 Daysoft Limited, a manufacturer of contact lenses, confirmed to HMRC that it made taxable supplies to CLL between January 2007 and October 2011. According to Daysoft, CLL also had the names Celcian and Stratta. The contact details that it held were Mr and Mrs Dreyer and Jade Lambert, described as "Chief Financial Officer, finance@contactlenses.co.uk".

Findings on CLL

90. We make the following findings of fact in respect of CLL, its ownership and control. In doing so we have largely discounted the evidence of Mr Lambert as being unreliable in general terms and also, on matters of detail, farfetched and not credible.

91. Mr Browne in the hearing did not assert with any force that Mr Hulen existed. However, Mr Lambert gave evidence that he had met him more than once and there is a body of emails from and to Mr Hulen.

92. As to the Mbox Emails, we accept Mr Brown's point that even if the emails were sent from find that the emails from 'john.dreyer@gmail.com' that does not mean that Mr Dreyer sent the emails. However, we have to decide these matters on the balance of probabilities and there is no explanation as to who that third party might be, why they might construct the personality of Mr Hulen and, further, do so from Mr Dreyer's email account. We find that Mr Dreyer sent the emails and all others apparently sent by Mr Hulen.

93. The HSBC documents, showing how HSBC understood the ownership structure of CLL are instructive. Mr Hulen is not mentioned and there is a clear and consistent picture that HSBC understood Mr and Mrs Dreyer were the owners and Mr Lambert the finance manager of CLL.

94. Overall, we find that Mr Hulen does not and did not exist. We find all actions apparently taken by Mr Hulen to have been taken by Mr Dreyer. References in this decision to 'Mr Hulen' should be seen in that context as shorthand for Mr Dreyer pretending to be Mr Hulen.

95. Further, we find that CLL was during the period covered by this appeal owned by Mr and/or Mrs Dreyer. In doing so, based on the evidence not just their marital status, we draw no distinction between Mr and Mrs Dreyer acting individually or jointly and so refer for convenience to "the Dreyers" in this decision to mean them acting either individually or jointly unless stated otherwise.

96. Mr Lambert represented himself as the finance manager to HSBC, helped them with opening bank accounts with HSBC and allowed that impression to continue during the operations of the CLL business. As a part qualified accountant Mr Lambert must have known what he was doing in holding himself out as a finance manager. Mr Lambert's own evidence was that he did so to help CLL get the bank to agree to do so. Either he was part of an arrangement to mislead the bank or it was an accurate representation of his role. Mr Lambert in his evidence in effect preferred the former but we conclude it was the latter.

97. This conclusion is reinforced by the later bank documents showing he acted as manager or finance manager in dealings with HSBC. He adopted the title of manager and finance manager and acted as such in his dealings with HSBC.

98. We do not accept his evidence that he accessed the CLL accounts occasionally out of curiosity when he was looking at CLUK and Stratta accounts. Doing so 294 times over some 30 months indicates more than nosiness and in any event we are not persuaded HSBC would have so grouped the accounts on the portal of companies that were independent of each other in a way that there would be automatic access for the finance manager of Stratta and CLUK. Mr Lambert's access was due to the fact that he was known by HSBC to be the finance manager.

99. We do not accept Mr Lambert's evidence that his role with CLL was simply as a consultant, helping them with understanding the contact lens market. We find that Mr Lambert acted as finance manager for CLL. His activities for CLL went beyond helping his major customer and providing fulfilment services.

The 2011 Stratta VAT investigation

100. On 7 June 2011 Stratta, which had previously been charging VAT to CLL, made a VAT repayment reclaim of £293,529.60 being VAT previously charged to CLL for the period 1 January 2010 to 28 February 2011 inclusive.

101. The reclaim prompted Mrs Jean O'Connor, an officer at HMRC, to open an enquiry into Stratta's VAT position and ultimately assessed it for unpaid output tax on the basis that VAT was due on its supplies as they were made in the UK, CLL having a business establishment in the UK.

102. In their letter of 25 October 2011, HMRC determined that the place of supply for Stratta's services was in the UK and gave the following reasons for rejecting the repayment claim:

> "Based on the information contained in the Agreement between Stratta Ltd and Contactlenses Ltd, and the details given by you during my initial VAT Assurance Visit, I remain of the opinion that the above address (Units 3 and 4, The Laurels, Cribbs Causeway, Bristol BS10 7TT) must be treated as the business establishment of Contactlenses for the following reasons:
>
> 1) The address is given on the Contactlenses Ltd website as the contact address for sales enquiries and customer support.
>
> 2) It is the address at which orders are received

3) It is the address at which stock is maintained and levels are controlled

4) It is the address given on the sales invoices issued by Contactlenses Ltd

5) It is the address from which all orders are packaged and dispatched."

103. In or around December 2011 Stratta received advice from its VAT advisers, The VAT Consultancy, as to HMRC's arguments that CLL had a permanent establishment in the UK and so should be charging VAT. The VAT Consultancy advised in summary that CLL did not have an establishment in the UK but that CLL should be registered for VAT in the UK:

> "We believe there are good arguments that CLL does not have an establishment in the UK capable of receiving services and therefore the place of supply of Stratta's services to CLL is The Seychelles and the supplies are outside the scope of UK VAT.
>
> There is a risk that HMRC could argue that the supplies made by Stratta to CLL are land-related and are therefore subject to UK VAT regardless of where CLL is established. There is also a risk that HMRC could argue that Stratta acts as a dependent agent of CLL and thereby creates a fixed establishment of CLL in the UK. However, we believe there are strong arguments to defend any such challenges.
>
> Whilst there are grounds for appeal to Tribunal, in our view there is a wider commercial issue for Stratta to consider relating to its relationship with CLL. Based on the information provided, it appears that CLL should be registered for VAT in the UK which we understand it is not. It is for CLL to consider whether or not a UK VAT registration is required. However, by taking the place of supply issue to Tribunal, Stratta would be raising CLL's profile with HMRC and we would expect that HMRC would then query CLL's UK VAT status and could assess CLL for a historic VAT liability together with penalties. This may present a larger commercial issue to CLL than paying the VAT on Stratta's services. If CLL were to VAT register retrospectively and if Stratta were required to charge them UK VAT, this VAT should be recoverable by them, the basic point here being that VAT should not form a cost in this B2B supply chain, provided all parties are compliant and VAT registered where they should be. However CLL would face a significant VAT cost in the form of VAT due on historic sales to private individuals"

104. The advice concludes:

> "By taking the place of supply issue to Tribunal, Stratta would be raising CLL's profile with HMRC as the focus of the appeal would be to establish how CLL operates and why it should not be seen as having a fixed establishment for VAT purposes in the UK. We would expect that HMRC would then query CLL's UK VAT status and could assess CLL for a historic VAT liability together with penalties."

105. Stratta appealed the assessment but Mr Lambert on behalf of Stratta withdrew the appeal on 2 August 2013, as a "commercial decision". Stratta did not concede there was any liability, stating that they:

> "remain of the view that Stratta's supplies to CLL should be outside the scope of UK VAT as [CLL] is not established in the UK"

106. On 5 October 2013 Stratta ceased trading and so providing fulfilment services to CLL.

107. At the time Mr Lambert was finance manager and company secretary and it is in our view relevant to this appeal as to the extent of Mr Lambert's knowledge of CLL and Stratta's VAT position. We find that Mr Lambert was closely involved in the VAT dispute with HMRC as the representative of Stratta dealing directly with HMRC, no advisers being directly involved. He wrote the VAT reclaim letter, received the advice from The VAT Consultancy, submitted the VAT appeal to the Tribunal and sent and received all intervening correspondence.

108. He was therefore aware that both HMRC and Stratta's VAT advisers believed that CLL should be registered for VAT in the UK. Indeed, during investigations Mr Lambert confirmed that he relied on The VAT Consultancy's advice in setting up the appellant.

109. Further, Mr Lambert was aware that HMRC believed that supplying fulfilment services in the way Stratta did to CLL would require the supplier to charge VAT.

110. There was no direct evidence before the Tribunal on this point as the Dreyers did not give evidence but taking in account all the circumstances, we find that the reason why Stratta ceased trading was due to the VAT investigation.

The 2011 corporation tax investigations and Contractual Disclosure Facility

111. In 2011 Mr Henry of HMRC opened corporation tax enquiries into Stratta and CLUK. As part of that enquiry HMRC asked Mr Lambert about the sale by CLUK in November 2007 of its website and database to CLL and the trading arrangements between the three companies.

112. During the course of this enquiry Mr Lambert asserted that Mr and Mrs Dreyer had no connection or interest in CLL and referred to two contacts at CLL, "Phillippe Hulen" and "Jean Paul Aubert".

113. In February 2014 Mr and Mrs Dreyer and Mr Lambert were all offered a settlement under the Contractual Disclosure Facility ("CDF").

114. Mr and Mrs Dreyer declined the offer but Mr Lambert accepted.

115. Mr Lambert's disclosure report was adopted and the certificate dated 31 March 2017. As part of that settlement Mr Lambert disclosed that whilst an employee of CLUK, in addition to his salary, he received payments totalling £312,357.81 from CLUK for services as a consultant which were not declared, thereby avoiding income tax and national insurance. As he had control of the accounting records for the company, Mr Lambert would post in the system fictitious invoices to an unconnected supplier. The payments to Mr Lambert were then recorded against this supplier's account to match the invoices and no one would notice. The underpaid tax was £127,178.

The 2013 CLL VAT investigation

116. In 2013 HMRC expanded their enquiries to CLL and started making enquiries about CLL's VAT status.

117. HMRC asked Mr Lambert a number of questions about CLL and on 13 March 2013 Mr Lambert, writing on behalf of both CLUK and Stratta, advised HMRC that CLL's registered address was Suite 305 in the Seychelles.

118. On 15 May 2013 HMRC wrote to CLL at Unit 7 enquiring as to CLL's VAT status. There was no reply.

119. HMRC wrote again on 4 October 2013 to the same address but copied to Suite 305 in the Seychelles, the address provided by Mr Lambert. In that letter HMRC advised

that they believed CLL was registrable for VAT from 1 November 2007 and gave the company an opportunity to provide information.

120. There was no reply to either the 15 May or 4 October letters. Mr Rooney could not assist as to whether the letters were sent by recorded delivery.

121. HMRC wrote a third letter on 6 November 2013 at Unit 7 copied to Suite 305 advising that a VAT return would be issued and asking for information on sales, purchases and input tax recoverable for the first VAT period.

122. There was no response to this letter so on 6 November 2013 CLL was retrospectively registered for VAT with effect from 1 November 2007. CLL's principal place of business was given as Unit 7.

123. On 28 November 2019 HMRC issued CLL with assessments for VAT in the periods from 01/14 to 07/19 inclusive in the amount £4,964,865.

124. On 13 May 2020 civil evasion penalties were issued in respect of the same sum.

125. CLL has never engaged with HMRC on its VAT position, appealed either the VAT registration, assessments or penalties and has never paid any VAT.

126. It was HMRC's position that Mr Lambert, given his involvement in the operations of the CLL, would have read the letters of November 2013 sent to Unit 7. Mr Lambert's evidence was that he forwarded letters unopened.

127. We find that, irrespective of the conflicting evidence as to the correct address for CLL, as we have found Mr Lambert was the finance manager of CLL, he would have opened the letters from HMRC. We therefore find that CLL was aware of the contents of HMRC's correspondence.

The change from Stratta and CLUK to the appellant in 2013

128. Mr Lambert gave evidence that in 2013 Mrs Dreyer advised him she intended give notice to CLL to terminate the contract and to close down Stratta. Mr Lambert gave further evidence that he had decided on reflection that he could provide the fulfilment and customer support services.

129. Further, Mr Dreyer notified him at the same time that CLUK would be closing down its wholesale import business and suggested Mr Lambert could carry out that role. Mr and Mrs Dreyer offered to support Mr Lambert in his new venture, including providing a loan.

130. On 4 July 2013 the appellant was incorporated by Mr Lambert.

131. On 11 July 2013 Mr Lambert on behalf of the appellant wrote to Jean Paul at CLL proposing that the appellant provide wholesale importing services to CLL for a fee of 3.5%.

132. On 19 July 2013 Mr Hulen responded to Mr Lambert by e mail suggesting a lower fee of 1.5%. Mr Hulen also asked why CLL had to pay VAT on costs as "we are not an EU country", which we take to mean CLL was not in an EU country.

133. On 22 July 2013 Mr Lambert said that his company

> "would provide the same services currently provided by Stratta Limited"
>
> "Having had the experience of managing Stratta Limited and as a direct result overseeing the UK fulfillment and customer service provisioning on behalf of Contactlenses Limited…"

134. In the same letter Mr Lambert suggested a fee of 2.5% Mr Lambert also explained the VAT position:

> "All costs referred to the costs of purchasing the contact lenses and associated products, that we would pay to the supplier. Although you are not in an EU country, as the products are not physically leaving the UK, it is UK VAT law that VAT be applied when reselling such physical goods. As we are a UK company, we are bound by UK law"

135. In cross examination Mr Lambert agreed with Mr Puzey that he was telling Mr Hulen that CLL should be charging VAT. In re-examination Mr Lambert clarified that he had meant that the appellant should be charging VAT.

136. On 22 July 2013 Mr Lambert wrote again to Mr Hulen at CLL proposing that the appellant act as UK fulfilment and customer service provider, purchasing the assets and taking the Stratta staff.

137. On 31 July 2013 Mr Hulen accepted Mr Lambert's proposal to provide distribution services at £6 per order and that the arrangements would start on 7 October 2013.

138. On 1 August 2013 the appellant and CLL signed a Distribution Agreement / Import Agent Agreement signed by Mr Lambert and another individual, which appears from other signatures in the evidence to be Mr Hulen, signing as 'Fulfilment Manag' (sic).

139. On 7th October 2013 the appellant and CLL signed a Package and Dispatch Service Deed of Agreement. The signatories were Mr Hulen as fulfilment manager and Mr Lambert.

140. According to the appellant's VAT records the appellant first acted for CLL on 19 August 2013.

141. On 1 November 2013 a Package and Dispatch Service Deed of Agreement is entered into between the appellant and Koppa Limited

142. According to an annual return on the Hong Kong Company Registry, Koppa Limited is a company registered wholly owned by Mr Dreyer with Mr Dreyer as the sole director.

143. Mr Lambert claimed in evidence that he did not know at the time that Mr Dreyer was behind Koppa and did not carry out any enquiries about Koppa. There was little evidence before the Tribunal as to Koppa and it is to an extent unsatisfactory. However, in our view it is sufficient that we find that Koppa took over CLUK's role in the supply chain and that Koppa was owned and controlled by Mr Dreyer.

The appellant

144. The shares in the appellant were originally owned by Mr Lambert's wife, Mrs Janet Lambert, but from 30 June 2014 they were owned as to 6 A ordinary shares by Mr Lambert and 4 B ordinary shares by Mrs Lambert.

145. Mr Lambert has always been the sole director.

146. The company's registered office was originally 3 Camellia Drive, Almondsbury, Bristol, the Lamberts' home address but it changed by 2014 to Units 3 and 4.

147. The appellant was registered for VAT from 1 August 2013. In the VAT 1 registration form completed by Mr Lambert, the main business activity was stated to be

the "wholesale of optical related products". In response to the question as to whether the trader intended to make supplies to clients in non-EU countries Mr Lambert replied "N/A".

148. As part of the move from Stratta to the appellant we take both parties as accepting that all of Stratta's office equipment, racking for stock and IT equipment located on the premises used for the purposes of the order fulfilment and customer support services was transferred from Stratta to the appellant.

149. Many of the Stratta staff transferred to the appellant. HMRC produced evidence that in 2013/14 tax year, based on the relevant monthly PAYE RTI returns of 14 staff employed by the appellant in March 3013, 10 had been employed by Stratta in October 2013.

150. By a deed of loan dated 23 July 2013 the appellant was lent £27,000 by Mr Dreyer which was paid on 1 August 2013. The loan, secured on the appellant's assets, was for a period of 5 years at an interest rate of 5% compound but rolled up until repayment. The repayment terms were as agreed from time to time. The appellant repaid the loan fitfully over a number of years.

151. CLL was not the appellant's only customer but, on HMRC's analysis of sales for the year ended 31 July 2016 which the appellant did not dispute, supplies to CLL represented 99.2% of its turnover.

152. In the years 2014 to 2018 inclusive the appellant had a turnover of between £2.2m and £2.8m and operating profits of between £77,672 and £495,197.

153. We find that for all practical purposes the appellant took over the businesses of Stratta and CLUK in providing the services they previously provided by both companies to CLL from the premises in Bristol, using substantially the same staff and equipment. The appellant's principal activity was therefore to source contact lenses, act as a fulfilment company and to provide customer support services for its customer CLL.

2013-2018

Trading arrangements 2013 – 2018

154. From August 2013, the essential structure for the purchase and sale of contact lenses was as follows:

(1) Orders were placed with suppliers based in Hong Kong or Taiwan by either CLL, or the appellant using CLL's database;

(2) The supplier would invoice the appellant, which the appellant would check against the order that had been placed for the correct product lines and so on, accessing CLL's system to do so;

(3) The appellant would then sign the order;

(4) The appellant would pay the supplier in dollars through a foreign exchange company, either in stages or at latest before shipping;

(5) The appellant acted as the importer for the goods into the UK;

(6) The appellant reclaimed the import VAT as input tax;

(7) The appellant supplied the goods to CLL and recovered the amount it had paid as import duty from CLL;

(8) The appellant organised CLL's onward supply to its (CLL's) customers; and

(9) The appellant invoiced CLL for the goods, fulfilment, and customer support services including a 2.5% margin;

(10) The appellant did not charge VAT on its sales until 2017, as described below;

(11) The appellant did not charge VAT on its fulfilment and customer support services on the basis that its customer, CLL, was not established in the UK.

155. Physically the goods and customer returns were delivered to Units 3 and 4, the premises rented by the appellant, and there they were stored and dispatched to retail customers ordering through the website. Mr Lambert's evidence was that 95% of orders were repeat or automated, bought ahead of customer orders. However, 5% were for unusual products would be ordered from suppliers after the customer had placed its order. The entire process was conducted by staff engaged by the appellant.

156. Customer support services were also carried out from the same premises normally involving customers wanting information on orders and returns. CLL allowed the appellant autonomy on how they managed customer service issues based on guidelines covering refunds, discounts and so on. Where the appellant staff could not deal with the issue within the guidelines it was Mr Lambert's evidence that they could contact named individuals at CLL or a ticketing system for contacting CLL's various departments.

157. Examples were produced to the Tribunal of e mail exchanges where Mr Lambert managed customer complaints where Mr Lambert's details are passed onto the customer as being 'jade@contactlenses.co.uk'.

158. An example was also produced of using 'Hayley' to cover additional workloads. Hayley had previously worked for the appellant but Mr Lambert asked 'Marie' at CLL if he could use her temporarily to cover customer engagement.

159. Another example was produced of an e mail chain where Mr Lambert notifies Mr Hulen about a type of contact lens not being available and suggesting Mr Hulen updated the website. The e mail chain involved emails to and from a 'Sally' in 'Customer service, Contactlenses ltd'

160. On 1 September 2016 Koppa instructed the appellant that it was to invoice Koppa Limited for the cost of purchasing and importing lenses from this date

161. On 8 November 2016 Koppa Limited advise Mr Lambert that it will soon be accepting charges for the appellant's services in accordance with the 1 November 2013 agreement between Koppa and the appellant for the provision of package and dispatch services.

162. On 24 November 2015 CLL e mailed the appellant notifying them that the appellant's services in providing customer support would no longer be needed as CLL was centralising customer support centres for all countries. The appellant's services in dispatching goods would still be required.

163. From 2016 the appellant ceased to deal with CLL but instead dealt with Koppa. Mr Lambert's evidence was that, whilst this appeared to be lax, there was no change in how the appellant managed the contact lenses and, in any event, some of their invoices had previously been paid by Koppa. The appellant was paid up front by Koppa and so Mr Lambert did not see any risk to the appellant.

164. In October 2017, following HMRC's enquiries about the appellant's VAT status, Mr Lambert emailed Mr Hulen advising him that, on the assumption HMRC were correct and CLL was VAT registered, the appellant intended to charge CLL VAT.

165. On 20 November 2017 Mr Hulen rejected the proposal:

> "We are unaware of any Sales Tax registration within the United Kingdom, and certainly did not apply for same. Contactlenses Limited is a Seychelles registered business and abide by the rules & constitution of our country. No other business that we conduct business with charges us their countries sales tax for services they provide."

166. On 1 December 2017 Mr Lambert responded,

> "Thank you for confirming that Contactlenses Limited is not VAT registered in the UK and that you are not charged sales tax by any other business with which you transact…I apologise that you deem the charging of a sales tax an insult. It was not in any way my intention to negatively impact our existing good relations. You will be aware from my previous communications that we share the belief that we should not be adding a sales tax on our fulfillment charges to you. However, also as previously stated, HMRC are unfortunately of a differing opinion…"

167. At the same time Mr Hulen and Mr Lambert discussed the appellant's charges. Mr Hulen suggested, given his research into fulfilment pricing in Europe and the USA that rather than charging £3.50 an order the appellant should charge no greater than £0.70 an order plus £0.20 for subsequent items. Mr Lambert offered to review their charges but ultimately in mid-January 2018 accepted that the appellant could not reduce the fee to the low level Mr Hulen had demanded. Mr Hulen responded advising that CLL had obtained a more favourable rate with another service provider and gave notice of termination of contract from the end of March 2018.

The Seychelles proceedings

168. In 2019 Mr Rooney became aware by making internet searches of "Dreyer / Contactlenses Limited / Seychelles" of separate proceedings that had been brought by the Seychelles Financial Intelligence Unit ("FIU") against CLL and Mr and Mrs Dreyer in 2017 and 2018. This included action to seize assets owned directly or indirectly by Mr and Mrs Dreyer. HMRC did not participate in these proceedings.

169. The case was heard before the Chief Justice in the Seychelles and judgment delivered on 19 June 2018

170. The FIU's argument was that CLL was:

> "associated with tax fraud whereby as a Seychellois International Business company it carried on business in the UK, did not register for VAT in the UK, committing VAT fraud and diverting substantial sums of money to or for the benefit [of Mr and Mrs Dreyer and their company]"

171. Mr Dreyer's affivadit stated:

> "He travelled with the Third Respondent to Seychelles on holiday in 2005 and decided to buy an apartment at Eden Island. They lived there for five years and moved the Contactlenses business to Seychelles...
>
> [CLL] not only traded in the UK but also in many countries but its tax residence is Seychelles. Although a Seychellois IBC cannot carry on business in Seychelles it is not precluded by law to carry on business outside Seychelles from Seychelles. Its principal place of business, management and permanent

establishment is in Seychelles solely. Hence it committed no tax offence in the UK as it was tax domiciled and resident in Seychelles…

…It confirmed its bank account with HSBC, which remains unfrozen and transfers from there to Seychelles were intercompany transfers. The transfer of business from [CLUK] to [CLL] (that is, the Seychellois IBC was a tax planning strategy taking advantage of the tax legislation in Seychelles"

172. In its answer to a statutory request from the FIU, CLL gave the following answers to the questions posed by the FIU:

Q.4 + Q5 Particularise fully and vouch the business activities of the company; insofar as the company engages with any other person by way of subsidiary, holding or associating company, partners and consultants, particularise fully and vouch the structure in question, furnish copies of any agreements and state and vouch all payments made over the past three years:

Answer Contactlenses Ltd is a direct to consumer replacement contact lens supplier…Contactlenses Ltd operates wholly on the internet through various country specific "contactlenses" domain names…

Question 6 If not specified in the reply of number 4 above, detail each state and jurisdiction where the company carries out its business activities

Answer "Contactlenses Ltd" is a totally online company with completely outsourced functions. There is no single state or jurisdiction where the company operates from…

Question 8 State where the company is domiciled for tax purposes and furnish certified copies of all tax returns since the formation of the company.

Answer Contactlenses Ltd is registered in Seychelles. It is operated internationally and there are no tax returns filled.

Question 9 State if the company is registered for Valued Added Tax or any comparable tax in any jurisdiction;

Answer No.

Question 10 Furnish and vouch details of all employees of the company…

Answer Contactlenses Ltd has no employees"

173. The judgement records a provision of Seychellois law, defining an International Business Company, being section 5 of the International Business Companies Act which provides that:

"(1) For the purposes of this Act, an International Business Company is a Company that does not –

(a) carry on business in Seychelles;"

174. The Court ultimately ruled that because of deficiencies in Seychelles law and the lack of evidence before the Court of tax evasion in other jurisdictions the assets subject to the action did not constitute the proceeds of crime. However, the Court pointed to unexplained contradictions in CLL and Mr Dreyer's evidence stating in the judgment:

"[16] I have examined the evidence against these legal propositions. It is the FIU's officers' belief that the funds used to purchase the specified property are derived from criminal conduct. The criminal conduct is the predicate offence of tax fraud or tax evasion. The plank of the FIU's belief evidence is that [CLL] as a Seychellois IBC cannot do business in Seychelles, that it is trading in the UK and has paid neither VAT nor other taxes in the UK and that

the money in the bank accounts in Seychelles and the money transferred from the UK to purchase the specified property is therefore derived from that criminal conduct….

[20] It is my understanding that [CLUK] transferred its business operations to [CLL] to take advantage of what it describes as tax incentives prescribed in the laws of Seychelles, that is, not to pay any taxes in Seychelles or anywhere else in the world…

[28] …Mr. Steve Fanny for the Financial Services Authority testified that... In the present case, [CLL] was operating in a type of vacuum and was engaging in regulatory arbitrage, in other words it was conducting business or creating services in certain locations that were outside the purview of regulators. Although they were operating in Seychelles they were deriving income from outside Seychelles. In his view they were exploiting a legal loophole…

[30] It is clear from the evidence adduced in this case and the views of the experts that the First Respondent has structured its business activities namely its online activities to avoid the application of national laws…

[34] There are many unexplained contradictions in [CLL]'s evidence. [CLL] has clearly stated that it "moved the Contactlenses business to Seychelles" and that its principal place of business, management and permanent establishment is in Seychelles solely. Yet, no evidence of these alleged facts were brought by the Respondents. In contradiction to this averment, [Mr Dreyer] also states that it does not carry out business in Seychelles but rather "carries on business outside Seychelles from Seychelles.

[35] It is clear to the Court from these averments that [CLL] is involved in a business over the internet providing contact lens products to its clients and its explanation of how it carries on such business is not convincing. Phone calls and e-mails to and from suppliers and warehouses have physical sites and they must be found in some jurisdiction. [CLL] is carrying on business somewhere but not in Seychelles. Those aiding and abetting it are also clearly part of these activities…

[37] Both the FSA and the Revenue Commission have stated in evidence that [CLL] is availing of a tax loophole and avoiding (not evading) the payment of tax in Seychelles and possibly elsewhere. Given the circumstances of the case, together with the lack of evidence as to the tax fraud or evasion committed elsewhere and the evidence of the experts that [CLL and the Dreyers] were engaging in regulatory arbitrage, I cannot find that the properties in question constitute proceeds of crime.

[38] Further, even if [CLL and the Dreyers] were to have contravened tax provisions in other jurisdictions, were this case to be brought under the new anti-money laundering provisions, evidence would have had to be adduced as concerns the necessary mutual assistance sought in this respect.

[39] In the narrow set of circumstances, the evidence before me, and the applicable law, I cannot make a finding that such tax avoidance amounts to criminal conduct. In the circumstances, I therefore refuse the orders sought and dismiss the application…"

THE VAT INVESTIGATION INTO THE APPELLANT

175. Mr Rooney gave evidence as to the investigation into the appellant.

176. On 7 April 2014 a Mr Sheehan of HMRC opened an enquiry into the appellant's VAT returns which included repayment returns. The enquiry expanded to include additional periods and looked at the relationship between the appellant and the companies

as covered in this decision. There then followed an extended period of correspondence between the appellant's advisers and HMRC.

177. On 20 September 2017 Mr Rooney, having taken over the enquiry, wrote to Mr Greenbaum at the appellant's advisers in which he said:

> "I am responding to your email of 19 May 2017, in which you put forward the argument that the supply of services by FLUK to Contactlenses Limited (CLL) are supplies falling outside the scope of VAT. I have considered the points you make in the email, and also reviewed the history of the intervention and it is my view that CLL has a fixed establishment in the UK and accordingly the supplies to it from FLUK are taxable…
>
> It is our view that FLUK creates a fixed establishment for CLL by virtue of it providing a facility for CLL to receive taxable goods into a UK warehouse for subsequent sale to UK/EU customers.
>
> It appears to us that FLUK provides the following human and technical resources to CLL, thereby creating the fixed establishment:
>
> • Liaising with UK/EU manufacturers/suppliers of contact lenses (i.e non-FLUK suppliers) and transport companies to arrange the delivery of CLL purchased goods into the Bristol warehouse.
>
> • Checking the aforementioned deliveries and resolving problems with suppliers/transport companies on behalf of CLL.
>
> • Unpacking deliveries of stock on behalf of CLL and storing them in FLUK's warehouse.
>
> • Receiving CLL's sales orders from the website and packing and despatching these to CLL's customers, with the stock system being updated by FLUK staff to reflect goods outbound.
>
> • Taking phonecall orders on behalf of CLL and acting as a point of telephone/mail contact for CLL customers with problems. This extends to interacting with CLL customers to resolve problems with their orders and deliveries of goods purchased from CLL.
>
> • Providing CLL with a UK address and 0345 telephone line. • Providing stock control for non FLUK sourced goods, which I presume will include periodic stock checking, vigilance to re-order levels, condition inspections etc.
>
> • Ordering and maintaining a stock of consumables eg labels, packaging, packing materials to use in despatching CLL products to its customers.
>
> • All management of outbound courier and postal services used to deliver CLL goods
>
> For the purposes of this response I have assumed that FLUK is acting as Principal in importing contact lenses from outside the EU for onward sale to CLL. I have doubts whether in reality these are true purchases and sales by FLUK because orders and price negotiations to/with the manufacturers appear to be undertaken by CLL. I suspect the reality is that FLUK acts as importing agent on behalf of CLL in respect of these transactions. I don't have sufficient information to form a definitive view at present on this point, and may re-consider this point in the future.
>
> Looking at CLL's role in the supply chain, it would appear as if it:
>
> • Maintains the website, although I am not sure quite how. This may be an operation carried out in the UK as I understand Karl Dreyer is the Website manager.

> • Provides an automatic customer ordering and payment facility (which may too be UK-based).
>
> • Orders stock for delivery to the Bristol warehouse and possibly arranges payment of UK/EU based-suppliers.
>
> It is clear that CLL could not supply contact lenses to its UK/EU customers without the detailed human and technical support provided by FLUK. It provides the premises and labour support throughout the transaction chain from point of goods coming in from suppliers to going out to end customers. CLL therefore has a UK-based fixed establishment.
>
> In previous correspondence (particularly your letter of 23 November 2015) you have argued that CLL has neither a business establishment, nor a fixed establishment in the UK and that these are located in the Seychelles. I suspect CLL may be incorporated as a Seychelles International Business Company and as such cannot carry on business in the Seychelles, as its website lists many countries in which it does business but strangely the Seychelles is not one of them. Please can you ask FLUK to make the appropriate enquiries of CLL to establish the nature of its (CLL's) incorporation in Seychelles? If it transpires that CLL is an International Business Company I cannot see how it can be considered to have a fixed establishment there.
>
> The recent First Tier Tribunal case of Multimedia Computing Limited /Deed Poll Services Limited v HMRC (TC/2014/06474 and TC/2015/01855) gives strong judicial support to the principle that a UK based entity providing key services to a non-EU seller can provide a fixed establishment. At paragraph 52 the Judge concludes that without the support of the UK operational base provided by the UK company, the overseas company "could not have made any supplies to its customers at all" and that the overseas company "had a fixed establishment in the UK" – para 58…"

178. Mr Rooney gave evidence as to what he had decided and what was still undecided as at the time of the letter of 20 September 2017.

179. His evidence was that by the time of writing the letter he had reviewed various documents and papers including Mr Lambert's CDF disclosure. He had an understanding of the roles carried out by CLL and the appellant, but he was not certain. Accordingly, when he wrote the letter had not reached a definitive view and was still asking questions. Thus, he was unsure whether the appellant acted as principal or agent, the extent that CLL was involved in liaising with wholesale suppliers and transport providers and the status of CLL in the Seychelles as an International Business Company. Mr Rooney also asked in the letter about Koppa, Mr Greenbaum had provided little information on previous enquiries and Mr Rooney was unaware of Koppa's role in the supply chain.

180. In an e mail exchange on 13 June 2018 with a colleague Mr Bennett within HMRC Mr Rooney advised him that he would be making assessments to deny input VAT relief having received approval for such action from the HMRC VAT Fraud team and added:

> "I would add that I haven't completed my deliberations on whether FLUK should have charged output VAT to CLL on the fulfilment services it provided (it has argued that these are outside the scope as CLL considers itself not to have a fixed establishment in the UK). So I may need to raise further assessments in the future on this point. FYI, my enquiries continue on this aspect, and is a point I will need to make in the Kittle (sic) letter I issue. But I'm conscious that time limits are at play on the assessment(s) so don't want to delay dealing with the Kittel point"

181. Accordingly, even by 13 June 2018 Mr Rooney had not reached a decision. It was Mr Rooney's evidence that the key information he needed as to whether CLL was being managed from the Seychelles concerned Mr Hulen. Mr Lambert had produced agreements signed by Mr Hulen showing Mr Hulen was managing CLL from the Seychelles. Mr Rooney questioned Mr Lambert about Mr Hulen's existence in a meeting on 22 February 2018. Mr Rooney also had wider concerns about Mr Hulen's method of communicating, as set out above.

182. In order to obtain conclusive evidence Mr Rooney served formal notice on the appellant on 19 April 2018 requesting various communications between Mr Lambert and CLL to include the metadata from the e mail headers to see if the emails had originated from the Seychelles.

183. Mr Rooney received the documents and the Mbox Emails and data on 29 May 2018. Mr Rooney could not access the Mbox Emails and so the metadata was initially reviewed by a Mr Stevenson in HMRC as a data handler. He advised in an e mail on 14 June 2018 to Mr Rooney that the metadata had a return path to Mr Dreyer's e mail address. This, according to Mr Rooney, undermined Mr Lambert's argument that Mr Hulen existed and so there was no one in the Seychelles running CLL and so no fixed or business establishment in the Seychelles.

184. Mr Rooney's evidence was that he reached his decision that CLL had a fixed establishment in the UK at some point after Mr Stevenson sent his e mail on 14 June 2018.

HMRC decisions, assessments and appeals

185. On 20th February 2019 HMRC notified the appellant of the following decisions:

(1) HMRC's decision to deny the appellant the right to deduct input tax totalling £1,011,973 on the purchase of imported contact lenses in VAT periods 10/13 to 10/18 inclusive. HMRC's grounds for doing so were that these transactions were connected with the fraudulent evasion of VAT by CLL, the appellant's customer, and the appellant actually knew or should have known of that fact ("the First Decision").

(2) A decision to assess the appellant for £293,775 of output tax on supplies of services to CLL in respect of supplies during VAT periods 10/13 and 04/17 to 10/18 inclusive on the basis that the appellant's customer, CLL, had a fixed establishment in the UK ("the Second Decision").

186. Notices of assessment to that effect were issued on 26 February 2019 ("the Assessments").

187. On 15 March 2019 the appellant requested an internal review of the decisions in the 20 February 2019 letter and the Assessments but HMRC's position were upheld by letter dated 24 May 2019.

188. On 19 June 2019 the appellant appealed the First and Second Decisions to the Tribunal.

189. On 28th November 2019 HMRC issued a penalty notice under section 69C in the sum of £50,001.88 in relation to input tax denied on the purchase of contact lenses in VAT periods 04/18, 07/18 and 10/18 on the basis that the appellant knew or should have known that its transactions were connected to fraud. HMRC applied a penalty rate of 30% and considered mitigation, as required under section 70, but decided that it was not appropriate ("the Third Decision").

190. On 4 December 2019 the appellant appealed the Third Decision to the Tribunal

ISSUES IN THIS APPEAL

191. The appellant appeals the First, Second and Third Decisions

192. The appellant also argues as part of its appeal that HMRC were out of time in raising assessments in respect of VAT periods ending 10/13 to 01/15 inclusive. Specifically, the appellant argues;

(1) As regards periods ending 10/13 to 01/15 inclusive the 4 year time limit for raising VAT assessments in section 77(1)(a) applies so the assessments were out of time. The 20 year time limit for an assessment in section 77(4) is not available because the appellant's conduct was not deliberate.

(2) As regards period ending 10/13 it is in any event out of time because it was not issued within 1 year of evidence of fact sufficient in the opinion of the Commissioners to justify the making of the assessments came to their knowledge within section 73(6)(b) ("the Time Limit Issues").

193. As regards the Third Decision it is common ground between the parties that the penalty stands or falls on whether the appellant succeeds in its appeal on the First Decision. Specifically, the appellant does not, on the assumption the Tribunal dismisses the appellant's appeal on the First Decision, dispute that the penalty issued in the Third Decision is payable. The point is therefore not considered further.

194. It is most convenient to deal with each of these relatively discrete issues separately.

THE FIRST DECISION: DENIAL OF INPUT TAX

195. The First Decision concerns whether HMRC were right to deny the appellant the right to deduct input tax totalling £1,011,973 on the purchase of imported contact lenses on the grounds the relevant transactions were connected with the fraudulent evasion of VAT by CLL, the appellant's customer, and the appellant actually knew or should have known of that fact.

Relevant legislation and principles

196. There was little disagreement between the parties as to the relevant legislation and principles to be applied.

197. Sections 24, 25 and 26 provide:

> **"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;
>
> (b) VAT on the acquisition by him from another Member State of any goods; and
>
> (c) VAT paid or payable by him on the importation of any goods from a place outside the Member States,
>
> 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…
>
> (6) Regulations may provide –
>
> (a) for VAT on the supply of goods or services to a taxable person, VAT on the acquisition of goods by a taxable person from other Member States and VAT paid or payable by a taxable person on the importation of goods from

places outside the Member States 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 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, and

(b) in respect of the acquisition by him from other Member States of any goods,

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(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, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below."

198. Regulation 29 of the Value Added Tax Regulations 1995 ("VAT Regulations") provides:

"29(1) Subject to paragraph (1A) below, and 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 …. evidence of the charge to VAT as the Commissioners may direct."

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

"167 – A right of deduction shall arise at the time the deductible tax becomes charged.

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."

200. The entitlement to the right of deduction is, however, subject to certain important conditions. One of the aims and objectives of the Principal VAT Directive is the prevention of the abuse of the common VAT system.

201. In *Axel Kittel v Belgium; Belgium v Recolta Recycling* (C-439/04 and C-440/04) ("*Kittel*"), the ECJ held that:

> "56. …a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraudulent evasion of VAT must, for the purposes of the Sixth Directive, be regarded as a participant in that fraud, irrespective of whether or not he profited by the resale of the goods.
>
> 57. That is because in such a situation the taxable person aids the perpetrators of the fraud and becomes their accomplice.
>
> 58. In addition, such an interpretation, by making it more difficult to carry out fraudulent transactions, is apt to prevent them.
>
> 59. Therefore, it is for the referring court to refuse entitlement to the right to deduct where it is ascertained, having regard to objective factors, that the taxable person knew or should have known that by his purchase, he was participating in a transaction connected with fraudulent evasion of VAT, and 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"."

202. The denial of the right to deduct input tax may extend to a situation where the vendor of goods knew or should have known that his transactions were connected to fraud by his purchaser (*Mecsek Gabona kft* (C – 273/11) [2013] STC 171). It therefore applies "…upstream or downstream in the chain of supply…" (*Bonik EOOD* C-285/11 at [40]).

203. The Court of Appeal in *Mobilx and others v The Commissioners for HM Revenue and Customs* [2010] STC 1436 ("*Mobilx*") held that in relation to the right to deduct input tax, Community and domestic law are one and the same. Further, it was held that the provisions governing the entitlement to input tax credit are to be interpreted in the light of the wording and purpose of the Principal VAT Directive and applying those principles expounded in the case law of the ECJ.

204. Accordingly, a domestic court must refuse the right to deduct input tax where a transaction is "connected with fraudulent evasion of VAT", and this is something which the taxable person knew or should have known or had the means of knowing.

205. In *Mobilx*, the Court of Appeal (Moses LJ giving judgment) considered what it described as two essential questions:

> "4. … firstly, what the ECJ meant by "should have known" and secondly, as to the extent of the knowledge which it must be established that the taxpayer ought to have had: is it sufficient that the taxpayer knew or should have known that it was more likely than not that his purchase was connected to fraud or must it be established that he knew or should have known that the transactions in which he was involved were connected to fraud?"

206. On the first question, the Court concluded as follows:

> "52. …If a taxpayer has the means at his disposal of knowing that by his purchase he is participating in a transaction connected with fraudulent evasion of VAT he loses his right to deduct, not as a penalty for negligence, but because the objective criteria for the scope of that right are not met. It profits nothing to contend that, in domestic law, complicity in fraud denotes a more

culpable state of mind than carelessness, in the light of the principle in Kittel. A trader who fails to deploy means of knowledge available to him does not satisfy the objective criteria which must be met before his right to deduct arises."

207. In relation to the second question, the Court stated as follows:

"53. Perhaps of greater weight is the challenge based, in Mobilx and BSG, on HMRC's denial of the right to deduct on the grounds that the trader knew or should have known that it was more likely than not that transactions were connected to fraud….In short, does a trader lose his entitlement to deduct if he knew or should have known of a risk that his transaction was connected to fraudulent evasion of VAT? HMRC contends that the right to deduct may be denied if the trader knew or should have known that it was more likely than not that by his purchase he was participating in such a transaction. …

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."

208. The Court held that the alternative view would infringe the principle of legal certainty.

209. The Court of Appeal concluded that the test in *Kittel* is "simple and should not be over-refined":

"59…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."

210. The Court of Appeal also held that the Tribunal should examine all the circumstances and consider a given transaction in the context of the other transactions conducted, and patterns that may exist. Moses LJ cited with approval the dictum of Christopher Clarke J in *Red 12 v HMRC* [2009] EWHC 2563:

"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."

211. It is necessary to determine the individual's subjective knowledge or belief, even if that is wrong or unreasonable, *Ivey v Genting Casinos (UK) Ltd (t/a Crockfords)* [2017] UKSC 67 at [74]. (set out in *Beigebell v HMRC* [2019] UKFTT 0335 (TC) at [153]):

"When dishonesty is in question the fact-finding tribunal must first ascertain (subjectively) the actual state of the individual's knowledge or belief as to the facts. The reasonableness or otherwise of his belief is a matter of evidence (often in practice determinative) going to whether he held the belief, but it is not an additional requirement that his belief must be reasonable; the question is whether it is genuinely held. When once his actual state of mind as to knowledge or belief as to facts is established, the question whether his conduct was honest or dishonest is to be determined by the fact-finder by applying the

(objective) standards of ordinary decent people. There is no requirement that the defendant must appreciate that what he has done is, by those standards, dishonest."

Issues in the appeal of the First Decision

212. It is agreed that in the current appeal, based on the legislation and relevant case law, that HMRC have in summary to show that:

(1) CLL did not account to HMRC for the VAT due on its supplies so that there was a loss of tax:

(2) CLL's failure to account for VAT was fraudulent:

(3) CLL's transactions were connected to the appellant's purchases or supplies;

(4) The appellant either

(a) knew its transactions were connected to fraud; or

(b) if the appellant did not know, it ought to have known that the only reasonable conclusion for the transactions was that they were connected to fraud

213. The appellant accepted that VAT was due on CLL's supplies of contact lenses because, even if CLL did not have a business or fixed establishment in the UK (the Second Decision), the supplies to retail customers in the UK were on general principles made in the UK. Accordingly, there was a tax loss.

214. The appellant also accepted that the appellant's supplies were connected to CLL's transactions.

215. However, the appellant disputes that the other conditions are satisfied. The open issues in this appeal are therefore;

(1) Whether CLL was fraudulent

(2) Whether the appellant knew of any fraud

(3) If not, whether the appellant ought to have known

HMRC's arguments

whether CLL was fraudulent

216. HMRC's primary argument is that setting up CLL in the Seychelles and was a deliberate attempt by the Dreyers to evade VAT on the sale of contact lenses, meeting the first condition in the *Kittel* test.

217. It was not in dispute that CLL has caused a tax loss in the UK by not accounting for VAT because even if there was no fixed or business establishment in the UK it would have to account for VAT on its supplies in the UK and CLL never did so for a period in excess of 10 years

218. It is evident from the HSBC documentation and the judgment of the Court in the Seychelles that the objective of the Dreyers in setting up CLL was to ensure it paid no tax in any jurisdiction.

219. When the Dreyers and Mr Lambert operated CLUK between 2004 and 2007 it had charged VAT. They knew of their liability to account for VAT on supplies in the UK. Mr Lambert told Mr Hulen in 2013 that CLL was liable to charge VAT on its UK sales.

220. Letters from HMRC from 25 October 2011 telling Mr Lambert and CLL that it was registrable for VAT were sent to Unit 7 but were also sent to Suite 305 in the Seychelles.

221. Importantly, Stratta had received the advice of The VAT Consultancy. In December 2011 it informed Mrs Dreyer and Mr Lambert in very clear terms that CLL was liable to VAT registration in the UK;

> "Based on the information provided, it appears that CLL should be registered for VAT in the UK which we understand it is not."

222. CLL knew that it should be accounting for VAT but it chose not to.

223. If this was a legitimate tax planning strategy it could have been explained to HMRC.

224. Instead, there was a deliberate plan to present CLL as an offshore, third-party business and that CLUK had sold its business to an unconnected third party in the Seychelles. This was motivated by the intention of CLL that it should pay no tax in the UK.

Whether the appellant knew or ought to have known of any fraud

225. HMRC's primary argument is that Mr Lambert was fully aware of the VAT fraud. Mr Lambert was central to the plan and knew that CLL's supplies were liable to UK VAT but that CLL was not accounting for VAT. Specifically:

(1) Mr Lambert was aware of the advice from The VAT Consultancy

(2) Mr Lambert was in operational control of Stratta, CLUK and CLL, as seen from his assistance in setting up the CLL HSBC bank accounts and accessing them 294 times

(3) Mr Lambert advised Mr Hulen that VAT was due on CLL's sales

(4) Mr Lambert was the finance manager of CLL

(5) Mr Lambert misled HSBC in setting up the CLL bank accounts

(6) Mr Lambert's lack of knowledge or curiosity about his only customer with whom the appellant had traded for 10 years is not credible

(7) Mr Lambert would have known, if only from his accessing the CLL bank accounts, that CLL was not accounting for VAT

(8) Mr Lambert knew from HMRC's correspondence that HMRC thought CLL was liable to register for VAT

(9) Mr Lambert has no credibility as a witness. He repeatedly failed to tell HMRC the truth and accepts he deliberately failed to declare his personal income for three years. He also accepted in evidence that he did not tell HMRC the truth, for example, when registering the appellant for VAT by entering "N/A" to the question of whether it would be dealing with non-EU businesses on the VAT1 application.

226. HMRC's alternative position is that the appellant "should have known" as explained by the Court of Appeal in *Mobilx* at [59]. This test does not change or vary the *Kittel* test and neither does it impose a higher standard of proof that the normal civil standard. It is simply another expression of the objective standard to be applied in determining what a trader "should have known".

the appellant's arguments

whether CLL was fraudulent

227. The appellant accepts that CLL should have been registered for VAT but denies that there was any evidence that CLL's failure to pay tax was fraudulent. There was no evidence that CLL's owners, who were based outside the UK, had any VAT knowledge. Further there was no evidence that CLL knew it had been compulsorily registered for VAT. Thus:

(1) The VAT registration correspondence in 2011 and notification of registration was sent to the wrong address, Unit 7

(2) There was no evidence letters described as being sent to CLL in the Seychelles were actually sent to, or received, by CLL

(3) Mr Hulen, in his email of 20 November 2017, stated CLL was unaware it was registered for VAT in the UK and used the phrase "Sales Tax", terminology he would presumably not have used if he had received any of HMRC's letters. He further stated sales tax (VAT) was only chargeable to CLL's EU customers, demonstrating an incorrect, but mistaken view. Being mistaken does not amount to dishonesty *(Ivey v Genting*).

(4) The Dreyers did not give evidence but Mr Dreyer's affidavit in the Seychelles proceedings was summarised in that decision:

(a) Mr Dreyer stated he and CLL were not resident in UK and did not have to pay tax;

(b) The judge's understanding of the evidence included;

(i) CLL transferred to Seychelles to take advantages of tax incentives and not to pay taxes anywhere in the world;

(ii) Mr Fanny, an expert witness said that CLL was operating in a vacuum and engaging in regulatory arbitrage; exploiting a legal loophole;

(iii) both FSA and Seychelles Revenue stated CLL was availing itself of tax loopholes.

(5) Tax avoidance or regulatory arbitrage is not dishonest. If the Tribunal finds that the emails from Mr Hulen were in fact from Mr Dreyer, then this point has even more relevance.

(6) The VAT Consultancy's advice in 2011 was to Stratta, not CLL. It is unclear whether the advice was forwarded to CLL, although Mrs Dreyer was a director of Stratta. However, the advice was just a one-off opinion, that "it appears CLL should be registered for VAT in the UK".

Whether the appellant knew or ought to have known of any fraud

228. It was the appellant's case that even if there was VAT fraud, the appellant (i.e. Mr Lambert) did not knew of it and there was no direct evidence to that effect. Specifically:

(1) Mr Lambert was not the finance manager of CLL. Mr Lambert went along with what was asked of him to help the Dreyers and there were no documents from the bank after 2010.

(2) The email exchange between Mr Hulen and Mr Lambert in October and November 2017 does not reflect conversations between two parties to VAT evasion.

(3) Mr Lambert's evidence that he met Mr Hulen in Dubai on several occasions was not challenged by HMRC.

(4) Mr Lambert stated he did not know CLL had been compulsory registered for VAT by HMRC. HMRC sent correspondence to CLL to the wrong address in UK and have not proven the letters addressed to CLL in the Seychelles were sent or received there. Even if they were, there is no evidence Mr Lambert knew of their contents.

(5) Mr Lambert admitted he knew that CLL should have been registered for VAT in the UK because of the advice from VAT Consultancy. But that is a long way from knowing that someone was evading VAT in the UK.

(6) Mr Lambert said in cross-examination he had advised Mr Hulen that CLL should charge VAT in the UK in his email dated 22 July 2013 but on re-examination qualified his answer that to say he had only said the appellant must charge CLL VAT in the UK.

229. As to whether the appellant ought to have known, the relevant test is whether the facts as found would have led a reasonable person, mindful of the circumstances of the transactions, to conclude that the only reason for the transactions is that they were connected to fraud. What matters is the perspective of the person alleged to have such knowledge (*Mobilx* para 75).

230. The appellant's submission is that once all of the circumstances are considered, there is insufficient evidence to prove it knew or ought to have known of any VAT fraud (assuming the tax loss was fraudulent).

Discussion

231. The relevant principles to be applied are essentially agreed by the parties but they disagree as to their application to the facts of this appeal.

232. A VAT registered trader's right to input tax can be denied if it knew or ought to have known its transactions were connected to VAT fraud (*Kittel*), including where the fraud is committed by the taxpayer's customer (*Mecsek Gabona*).

233. As we have noted above, we do not find Mr Lambert a credible witness, for example his attempt to explain his access to the CLL bank accounts on the HSBC portal was not remotely credible. Accordingly, we do take at face value what he has said about the facts of this matter.

234. As we have said above, in this decision we draw no distinction between the Dreyers.

whether CLL was fraudulent

235. We are satisfied that, notwithstanding there being no direct evidence from the Dreyers, that there was a deliberate scheme to move the Contact Lens Business offshore with a view to evading VAT.

236. In doing so we take into account all the evidence we have been presented with but a number of facts in the evidence in our viewpoint strongly to that conclusion.

237. Mr Dreyer's affidavit before the Court in the Seychelles proceedings clearly indicates the reality of the sale on 1 November 2007 from CLUK to CLL:

> "They lived there for five years and moved the Contactlenses business to Seychelles
>
> …The transfer of business from [CLUK] to [CLL] (that is, the Seychellois IBC was a tax planning strategy taking advantage of the tax legislation in Seychelles"

238. We have found that Mr Hulen did not exist and was a fictitious identity with all the e mails and correspondence coming from Mr Dreyer. Further, to the extent the appellant still disputed the point at the end of the hearing, we have found that CLL was owned or at least controlled directly or indirectly by the Dreyers.

239. Accordingly, the sale of the business by CLUK to CLL was not a sale between unconnected parties but a transfer of the business to an offshore entity owned by the same shareholders, that is Mr and Mrs Dreyer.

240. As to motive for doing so, Mr Brown for the appellant suggested that CLL was set up in the Seychelles was to avoid direct tax as opposed to VAT. However, that and regulatory arbitrage (a concept not explained to us) is speculation and we find the evasion of VAT to be a more plausible explanation.

241. The Dreyers had run CLUK from 2004 charging VAT to its customers. During most of that period Mr Lambert had been their finance manager. Either Mr Dreyer believed he had found a loophole in the VAT legislation, or he knew that setting up a new company in the Seychelles did not alter the VAT position and doing so was fraudulent. We find it was the latter.

242. We have found, based on his conduct and specifically the HSBC documents, that Mr Lambert was CLL's finance manager. We have further found that Mr Lambert, as CLL's finance manager, would have opened the letters from HMRC starting on 25 October 2011 raising the need to register for VAT.

243. Accordingly, we find that CLL and/or the Dreyers were aware of the letters, either because Mr Lambert knowing of the letters is sufficient or that he would have told the Dreyers.

244. Stratta had received advice in 2013 from The VAT Consultancy that CLL should be registered for VAT. Mrs Dreyer and Mr Lambert were aware of that advice, indeed it was Mr Lambert's evidence that he used it to structure the appellant. We find that Mr and Mrs Dreyer, and so CLL, were aware of the advice and effectively chose to ignore it.

Whether the appellant knew or ought to have known of any fraud

245. It was Mr Lambert's evidence that he knew nothing of CLL's ownership or structure. We do not accept Mr Lambert's evidence.

246. We have found Mr Lambert was closely involved with CLL. He was CLL's finance manager and party to day-to-day activities of the company. He was familiar with the VAT arrangements from working for CLUK and, with his close association with the Dreyers, we find it inconceivable that Mr Lambert did not know the real reasons for the move to CLL. He went along with the 2007 sale, became the finance manager for CLL and took advice on from The VAT Consultancy in 2013. In all that time we find he would have been told the real reason for the CLL structure.

247. Further, if he did not know he ought to have. Based on the facts as we have found them, a reasonable person, mindful of the circumstances of the transactions, would have concluded that the only reason for the transactions is that they were connected to VAT fraud.

Decision

248. We find that CLL and the Dreyers were engaged in VAT fraud and that the appellant, through its director Mr Lambert, knew or ought to have known of that fraud.

249. The Second Decision concerns whether the appellant should have charged output tax supplies of services to CLL because CLL belongs in the UK by virtue of having a fixed or business establishment in the UK. If CLL so belongs in the UK then under section 7A(2)(a), the appellant's services would be treated as made in the UK.

Relevant legislation and principles

250. Article. 44 VAT Directive 2006/112/EC defines the place of supply of services for VAT purposes;

> "The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides"

251. The effect of Article 44 is that the place of supply of services is;

(1) where a taxable person has "established his business";

(2) where supplies are made to a fixed establishment other than where that person has established his business, the supply is made to the place of that fixed establishment;

(3) in the absence of a place of establishment or fixed establishment, the place of supply is to where the recipient of the supplies has his permanent residence or usually resides.

252. Article 10 of the EU Implementing Regulation 282/2011 ("the Implementing Regulations") provides guidance as to what is a business establishment:

> **"Article 10**
>
> 1. For the application of Articles 44 and 45 of Directive 2006/112/EC, the place where the business of a taxable person is established shall be the place where the functions of the business's central administration are carried out.
>
> 2. In order to determine the place referred to in paragraph 1, account shall be taken of the place where essential decisions concerning the general management of the business are taken, the place where the registered office of the business is located and the place where management meets.
>
> Where these criteria do not allow the place of establishment of a business to be determined with certainty, the place where essential decisions concerning the general management of the business are taken shall take precedence.
>
> 3. The mere presence of a postal address may not be taken to be the place of establishment of a business of a taxable person.

253. Article 11 of the Implementing Regulations provides guidance as to what is a fixed establishment:

> **Article 11**
>
> 1. For the application of Article 44 of Directive 2006/112/EC, a 'fixed establishment' shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in

terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

2. For the application of the following Articles, a 'fixed establishment' shall be any establishment, other than the place of establishment of a business referred to in Article 10 of this Regulation, characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to provide the services which it supplies:

(a) Article 45 of Directive 2006/112/EC;

(b) from 1 January 2013, the second subparagraph of Article 56(2) of Directive 2006/112/EC;

(c) until 31 December 2014, Article 58 of Directive 2006/112/EC;

(d) Article 192a of Directive 2006/112/EC.

3. The fact of having a VAT identification number shall not in itself be sufficient to consider that a taxable person has a fixed establishment."

254. With effect from 1 January 2015 Article 13a was inserted into the Implementing Regulations and provides as follows:

"Article 13a

The place where a non-taxable legal person is established, as referred to in the first subparagraph of Article 56(2) and Articles 58 and 59 of Directive 2006/112/EC, shall be:

(a) the place where the functions of its central administration are carried out; or

(b) the place of any other establishment characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs.

255. In the case of *Berkholz* (C-168/84), the judgment noted that the purpose of the relevant place of supply legislation was to set the boundary line between national VAT rules by determining in a uniform manner the place where services are deemed to be supplied and:

"14. …The object of those provisions is to avoid, first, conflicts of jurisdiction, which may result in double taxation, and secondly, non-taxation…"

256. The Court stated that a fixed establishment had to be of a certain minimum size and permanently feature the human and technical resources to provide the services in question.

257. . In *Zurich Insurance Company v HMRC* [2006] STC 1694 the Court considered that the place where the contract was made was of subsidiary importance to the place where the services were physically provided:

"40. It remains the case that what [the Swiss head office] wanted was to get the SAP system installed into the operations of ZIC's establishment in the United Kingdom. It was in order to secure that result that ZIC engaged PwC AG to provide its consultancy services. That result is what ZIC got, and in my view the actual provision of the services to ZIC in the United Kingdom far outweighs in importance the feature that the contract which PwC AG thereby performed in the United Kingdom had been made with ZIC (HO) in Switzerland. In reality the fixed establishment of ZIC "to which the service

[was] supplied" (echoing the words of article 9.2(e)) was its establishment in the United Kingdom, and not its head office in Switzerland"

258. In *HMCE v DFDS A/S* Case C-280/95 [1997] STC 384 a Danish tour operator appointed its UK subsidiary as sales agent who marketed package tours on behalf of the parent company. It was held that

> "29…Article 26(2) of the Sixth Directive is to be interpreted as meaning that, where a tour operator established in one member state provides services to travellers through the intermediary of an agent in another member state, VAT is payable on those services in the latter member state if that company, which acts as a mere auxiliary organ of the tour operator, has the human and technical resources characteristic of a fixed establishment"

259. Article 44 is implemented in the UK by sections 7A and 9:

> **7A Place of supply of services**
>
> (1) This section applies for determining, for the purposes of this Act, the country in which services are supplied.
>
> (2) A supply of services is to be treated as made—
>
> (a) in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs, and
>
> (b) otherwise, in the country in which the supplier belongs. …
>
> (4) For the purposes of this Act a person is a relevant business person in relation to a supply of services if the person—
>
> (a) is a taxable person within the meaning of Article 9 of Council Directive 2006/112/EC,
>
> (b) is registered under this Act,
>
> (c) is identified for the purposes of VAT in accordance with the law of a member State other than the United Kingdom,
>
> (d) is registered under an Act of Tynwald for the purposes of any tax imposed by or under an Act of Tynwald which corresponds to value added tax, and the services are received by the person otherwise than wholly for private purposes."
>
> **9 Place where supplier or recipient of services belongs**
>
> (1) This section has effect for determining for the purposes of section 7A (or Schedule 4A) or section 8, in relation to any supply of services, whether a person who is the supplier or recipient belongs in one country or another.
>
> (2) A person who is a relevant business person is to be treated as belonging in the relevant country.
>
> (3) In subsection (2) "the relevant country" means—
>
> (a) if the person has a business establishment, or some other fixed establishment, in a country (and none in any other country), that country,
>
> (b) if the person has a business establishment, or some other fixed establishment or establishments, in more than one country, the country in which the relevant establishment is, and
>
> (c) otherwise, the country in which the person's usual place of residence or permanent address is.

(4) In subsection (3)(b) "relevant establishment" means whichever of the person's business establishment, or other fixed establishments, is most directly concerned with the supply.

(5) A person who is not a relevant business person is to be treated as belonging—

(a) in the country in which the person's usual place of residence or permanent address is (except in the case of a body corporate or other legal person);

(b) in the case of a body corporate or other legal person, in the country in which the place where it is established is.

(6) The reference in subsection (5)(b) to the place where a body corporate or other legal person "is established" is to be read in accordance with Article 13a of Implementing Regulation (EU) No 282/2011 (which is inserted by Council Implementing Regulation (EU) No 1042/2013).

260. Neither party argued for any difference between the EU and implemented UK law.

Issues in the appeal of the Second Decision

261. The Second Decision is concerned with whether the appellant should have charged VAT on its supplies to CLL.

262. The effect of both Article 44 and section 7A is that the appellant's services to CLL will be treated as made in the UK if CLL belongs in the UK. CLL belongs in the UK if it has a business or fixed establishment in the UK.

263. Articles 10 and 11 of the Implementing Regulations provide detailed guidance.

264. HMRC argue in the alternative, that there was either a business establishment or some other fixed establishment.

265. The appellant accepts that CLL should have been registered for VAT in the UK. However, the appellant does so the basis that its customers are in the UK. It does not accept that CLL has a fixed or business establishment in the UK.

266. The burden of proof in respect of the Second Decision is on the appellant.

the appellant's arguments

267. The appellant argues there was no fixed or business establishment in the UK and so under Section 7A, the place of supply of the appellant's services was not in the UK.

268. From the evidence before the Tribunal, the appellant argued there was no business establishment because;

(1) There are no documents i.e. board meeting minutes concerning the management of CLL. The Appellant submits as Mr Lambert was not in control of CLL nor a director, he has never seen or had access to any board minutes.

(2) CLL was incorporated in the Seychelles.

(3) Mr Dreyer appears to have been in control of CLL but even if Mr and/or Mrs Dreyer were directors there is no evidence they were in the UK from 2013 for management meetings,

(4) Mr Dreyer was resident outside the UK throughout and Mrs Dreyer became non-UK resident in 2014.

(5) Mr Lambert denies he was part of the management of CLL, nor was he finance manager or controller.

(6) The HSBC documents were produced from 2007 and 2010. The inference is Mr Dreyer included Mr Lambert as part of the management team to increase the chances of passing the banks application process and obtaining its services.

(7) There is no documentation from 2013 onwards, which describes Mr Lambert as holding any senior position in CLL.

(8) Mr Dreyer stated in his affidavit in the Seychelles proceedings that CLL was providing services from the Seychelles. Accepting the Judge said there were contradictions in his evidence, the evidence of both the Seychelles Revenue Service and Serious Fraud Office was that CLL was engaging in arbitrage i.e. that something was happening in the Seychelles. Even if what CLL did was contrary to Seychelles IBC legislation, nevertheless, the commercial and economic reality was it did perform services from there.

269. On the basis of the above evidence and applying Article 10:

(1) the place where essential decisions concerning the general management of the business are taken is unknown:

(2) the place where the registered office of the business is the Seychelles; and

(3) the place where management meets is unknown.

270. Therefore, under art 10(2), CLL's business establishment was in Seychelles.

271. The appellant disputes that CLL had the necessary degree of permanence and the human and technical resources to amount to a fixed establishment.

272. All of the services provided by the appellant are part of the service that any fulfilment services provider would offer to its customers.

273. Any help provided to customers via CLL's website was a tiny percentage of the total sales. A fixed establishment has to be of a certain minimum size (*Berkholz*) and it is clear that the appellant did not meet this test.

274. In addition, a fixed establishment must be characterised by a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs (*Welmory sp. zoo* Case C-605/12 at [58]).

275. Further;

(1) CLL supplied contact lenses to its customers. The appellant played no part in arranging that contract;

(2) CLL had no employees in the UK. Mr Lambert denied he was finance manager.

276. Mr Brown in his written submissions argued that appellant was not a wholly owned subsidiary and did not act as an auxiliary organ of its parent *(DFDS*). However, during the hearing accepted that DFDS was not authority for the proposition that for a separate body to act as an auxiliary organ and so create a fixed establishment it had to be a subsidiary.

277. Acting through intermediaries is not sufficient (*Aro Lease Case C-190/95*). In that case whether there was a structure which had a sufficient degree of permanence meant it had to provide a framework in which agreements may be drawn up or

management decisions taken to enable the services in question to be supplied on an independent basis. In this appellant's case, there was no such framework, and no management decisions were taken.

278. Even if certain management tasks had been contractually appointed by CLL to the appellant, it was insufficient to create a fixed establishment in the UK where the important management decisions were retained by CLL (*Titanium Limited* Case C931/19 [2021] STC 1193 at [40-46]). *Titanium* is not binding on UK courts post-Brexit, but it is highly persuasive (*TuneIn v. Warner Bros* [2021] EWCA Civ 441 at [90] and [91]).

279. The appellant fulfilled orders on behalf of CLL. CLL's "UK presence" gave it no power to take any management decisions about order fulfilment and CLL cannot be said to be supplying fulfilment services on an independent basis. There is no evidence CLL's sales agreements were drawn up in the UK and must have been where CLL's management is based and its head office was located.

HMRC's arguments

280. HMRC argue that the evidence shows CLL had a business establishment of CLL in the UK, or, alternatively, some other fixed establishment. The burden of proof was on the appellant to show this was not the case.

281. The case law shows that the determination of business and fixed establishment is fact dependent. Careful analysis of the industry in question and the specific functions carried out by the parties is required. The courts must look to the economic reality of the company structure in question.

282. The Tribunal must determine where, as a matter of economic reality, the requisite human and technical resources are deployed or engaged to make the supplies in issue.

283. In *Welmory* the CJEU considered the fact that the Polish company was not a formally designated subsidiary was not a matter of importance in determining whether the Cypriot company formed a permanent establishment of the Polish company.

284. In *DFDS* the CJEU held that in respect of a Danish tour operator which appointed its UK subsidiary of a Danish tour operator to market package tours on behalf of the parent, VAT was payable in the UK:

> 'if that company, which acts as a mere auxiliary organ of the tour operator, has the human and technical resources characteristic of a fixed establishment'.

285. Mr Puzey noted in submissions that during the hearing Mr Brown for the appellant withdrew his argument that *DFDS* was authority for the principle that a fixed establishment of a customer can only be found if the supplying company is a wholly owned subsidiary or merely acts as an auxiliary organ of its parent.

286. Mr Puzey acknowledged care must be taken to avoid comparative analysis of decisions in cases where the facts are entirely different to the case in front of the Tribunal and the facts of the decided cases did not comfortably fit with the provision of fulfilment services, where the putative fixed establishment company is also responsible for the purchase and importation of the goods.

287. On the question of whether CLL has a business establishment in the UK HMRC accepted that the fact or otherwise of a UK VAT registration number and a postal address is not determinative of the issue.

288. There was generally a lack of evidence as to how CLL functioned, who made decisions on prices, stock to sell and on the design and content of the CLL website. Mr Lambert was unable to assist.

289. Thus, the Tribunal was not presented with any evidence of where the essential decisions of CLL take place and where its management met (Implementing Regulation 10(2)).

290. It was HMRC's case that this was not surprising as it was an orchestrated fraud, designed specifically to ensure that no evidence was available to show who the major controlling minds of the company were. Certainly, there would be no trail left that would lead to the Dreyers.

291. HMRC argue that, whilst the appellant provided fulfilment and customer support services to CLL, Mr Lambert also acted as the finance manager of CLL and operated as the de facto controller of its operations in the UK. Therefore, he represented an additional human resource in the UK and an additional connection between CLL and the appellant.

292. HMRC's case is that whilst the appellant was not technically a subsidiary of CLL the reality of the relationship was that the two companies were inextricably connected and did not operate independently. The following factors were relevant:

(1) The decision-making functions and employee management boundaries between the appellant and CLL were unclear;

(2) Both Mr Lambert and employees of the appellant had CLL email addresses;

(3) For all intents and purposes CLL was the appellant's only customer;

(4) The appellant, through Mr Lambert, liaised and placed orders with suppliers on behalf of CLL;

(5) In 2013 Mr Dreyer provided a loan on favourable terms to the appellant in the sum of £27,000, apparently to ensure that CLL could continue to operate as before when it took over from Stratta;

(6) The appellant operated from a warehouse leased from CLUK, its office and warehouse equipment were purchased from Stratta and of April 2014 10 of the appellant's 14 employees had previously worked Stratta;

(7) There were only informal payment arrangements in place between CLL and the appellant;

(8) CLL was a Dreyer-owned vehicle. That being so it can be quickly understood that the appellant was simply an auxiliary to CLL because Mr Lambert had worked for them and would continue through CLL and on to Koppa.

293. Furthermore, Mr Lambert acted as the finance manager for CLL, with the consequence that CLL could be run from Bristol. There is a wealth of evidence, in particular from HSBC, to support this.

294. With an online contact lenses business, the essential factors to function must be having the necessary structure and apparatus to receive orders, despatch goods to the customers at speed and deal with questions and refunds.

295. In the *DFDS* case, the Danish company owned the computer reservation system and decided what holidays to sell and at what price, with the English subsidiary having only limited discretion. This was not a bar to the European Court finding that the

resources of the English subsidiary were sufficient to form a fixed establishment of the Danish parent. In this case the operational centre of the online contact lens business of CLL is in the UK.

296. Finally, HRC argue that the arguments in favour of a finding of business establishment or fixed establishment in the UK are strengthened by the element of contrivance that existed in the company structures and operations.

Discussion

297. The Second Decision is concerned with whether the appellant should have charged VAT on its supplies to CLL.

298. CLL is treated as belonging in the UK, and so VAT is chargeable on the appellant's services, if CLL either has a business establishment or some other fixed establishment in the UK.

299. HMRC argue in the alternative, that there was either a business establishment or some other fixed establishment. The appellant argues against both alternatives.

300. For there to be a business establishment in the UK Implementing Regulation 10 prescribes that the "functions of the business's central administration" would need to be carried on in the UK, that is, essential decisions concerning the general management, the place where the registered office is located and the place where management meets. Where these criteria do not determine the issue with certainty then the test to be applied is the place where "essential decisions concerning the general management of the business are taken".

301. CLL's registered office is in the Seychelles and we do not have any evidence on where the management of CLL met. For this purpose we do not accept Mr Lambert's role amounted to "management" or "general" management for the purposes of Implementing Regulation 10.

302. However, we do find that the activities at Units 3 and 4 amount and Mr Lambert's role as finance manager for CLL, taken together, amount to a fixed establishment for CLL in the UK. We accept in principle the appellant's argument that an outsourced fulfilment operation may not amount to a fixed establishment but those are not the facts in this appeal. The Dreyers made decisions outside the UK, but there was no evidence of any presence outside the UK, which is not surprising given answers given by Mr Dreyer and produced in the Seychelles proceedings that in his view CLL was "a totally online company with completely outsourced functions" so that "there is no single state or jurisdiction where the company operates from…".

303. Nevertheless, we are satisfied that the UK activities taken as a whole represented:

> "…a sufficient degree of permanence and a suitable structure in terms of human and technical resources to enable it to receive and use the services supplied to it for its own needs" (Implementing Regulation 11)

304. Whilst some decisions were made by the Dreyers the reality is that the CLL business was managed on a day-to-day basis from the UK and specifically by Mr Lambert.

305. The Time Limit Issue is concerned with whether the tax assessments of 26 February 2019 in respect of periods ending 10/13 to 01/15 inclusive was made in time. Specifically, the appellant argues;

(1) As regards periods ending 10/13 to 01/15 inclusive

(a) the 4 year time limit for raising VAT assessments in section 77(1)(a) applies so the assessments were out of time:

(b) The 20 year time limit for an assessment in section 77(4) is not available because the appellant's conduct was not deliberate.

(2) As regards period ending 10/13 it is in any event out of time because it was not issued within 1 year of evidence of fact sufficient in the opinion of the Commissioners to justify the making of the assessments came to their knowledge within section 73(6)(b).

306. For period ending 10/13 the VAT in issue relates to denial of input tax on *Kittel* principles (The First Decision) and, underdeclared output tax based on the fixed establishment argument (The Second Decision)

307. For periods ending 01/14 to 01/15 inclusive the VAT in issue relates solely to denial of input tax on *Kittel* principles (The First Decision)

Relevant legislation and principles

308. Sections 73 and 77 provide time limits which apply to HMRC's ability to issue assessments, being insofar as relevant:

> **"73. Failure to make returns etc.**
>
> …
>
> (6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following —
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,
>
> but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment."
>
> "**77. Assessments: time limits and supplementary assessments**.
>
> (1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made —
>
> (a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned, …
>
> (4) In any case falling within subsection (4A), an assessment of a person ("P"), or of an amount payable by P, may be made at any time not more than 20 years after the end of the prescribed accounting period or the importation,

acquisition or event giving rise to the penalty, as appropriate (subject to subsection (5)).

(4A) Those cases are–

(a) A case involving a loss of VAT brought about deliberately by P (or by another person acting on P's behalf),

(b) A case in which P has participated in a transaction knowing that it was part of arrangements of any kind (whether or not legally enforceable) intended to bring about a loss of VAT,

(c) A case involving a loss of VAT attributable to a failure by P to comply with a notification obligation, and

(d) A case involving a loss of VAT attributable to a scheme in respect of which P has failed to comply with an obligation under paragraph 6 of Schedule 11A.

(4B) In subsection (4A) the references to a loss of tax brought about deliberately by P or another person include a loss that arises as a result of a deliberate inaccuracy in a document given to Her Majesty's Revenue and Customs by that person."

309. The first time limit relevant to this appeal is in section 73(6)(b), that HMRC must raise the assessment within:

"(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge"

310. In *Pegasus Birds Ltd. v Commissioners of Customs and Excise* [1999] STC 95 at 101 Dyson J. set out the legal principles to be applied:

"1. The Commissioners' opinion referred to in Section 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.

2. The evidence in question must be sufficient to justify the making of the assessment in question. *C & E Commissioners –v- Post Office* [1995] STC 749, 754G.

3. The knowledge referred to in Section 73(6)(b) is actual, and not constructive knowledge: *C & E Commissioners –v- Post Office* at p.755D. In this context, I understand constructive knowledge to mean knowledge of evidence which the Commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.

4. The correct approach for a Tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the Commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the Commissioners. The period of one year runs from the date in (ii): *Heyfordian Travel Ltd. –v- C & E Commissioners* [1979] VATTR 139, 151: and *Classicmoor Ltd. –v- C & E Commissioners* [1995] V & DR 1, 10.1.27.

5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on *Wednesbury* principles, or principles analogous to *Wednesbury: Classicmoor* paras. 27 to 29; and more generally *John Dee Ltd. –v- C & E Commissioners* [1995] STC 941, 952D-H

> 6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in Section 73(6)(b) of VATA."

311. The second relevant time limit is the requirement that in accordance with section 77(1)(a) an assessment must be raised in within 4 years after the end of the prescribed accounting period concerned unless section 77(4) applies, in which case the limit is 20 years. Section 77(4) applies where one of the conditions in section 77(4A) are satisfied being for this purpose;

> "(4A) Those cases are–
>
> (a) A case involving a loss of VAT brought about deliberately by P (or by another person acting on P's behalf),
>
> (b) A case in which P has participated in a transaction knowing that it was part of arrangements of any kind (whether or not legally enforceable) intended to bring about a loss of VAT…"

312. Section 77(4) therefore applies where there has been deliberate behaviour by the taxpayer. Section 77(4B) provides that "deliberate" in subsection (4A) includes where there has been a deliberate inaccuracy in a document given to HMRC.

313. The meaning of section 77(4B) was considered by this Tribunal in *Leach v HMRC* [2019] UKFTT 352 (TC). The Tribunal at [95]-[98] agreed with the Court of Appeal's judgment in *HMRC v Tooth* [2019] EWCA Civ 826 as to the meaning of "deliberate", applying across to section 77(4B) their interpretation in the context of the Taxes Management Act 1970:

> 95….However, our uncertainty as to his meaning does not change our summary of the position taken by the Court, which is that: (1) a majority (Males and Patten LJJ) found that a purely mechanical error, made intentionally, in part of a document was a "deliberate" inaccuracy, even if the document was not misleading when read as a whole; and (2) at least a majority (Floyd and Males LJJ, but possibly also Patten LJ) found that an error in a return therefore "causes" the return to be insufficient if it is to be processed by computer, even if the error has been explained elsewhere on the return…
>
> 96. We thus considered whether the conclusions in *Tooth* also apply to the extended time limits in VATA s 77(4B) , so that HMRC does not have to prove that the taxpayer intended to mislead in order for there to be a 20 year time limit…
>
> 98. We therefore find that the Court of Appeal's analysis in *Tooth* applies to VATA s 77(4B), so that the time limit is extended where a person knows that the return he is submitting contains an error, even when there is no intention to mislead."

the appellant's arguments

The 20 year time limit

314. The burden of proof in showing deliberate behaviour by the appellant is on HMRC. The test is whether the appellant knowingly submitted its VAT returns with the intention that HMRC should rely upon it as an accurate document, and it is a subjective test.

The one year time limit

315. The appellant argues that HMRC are in any event time barred from raising an assessment for the period 10/13 on the basis that the limitation on HMRC's powers in

section 73(6)(b) applies, HMRC having had for more than one year before the time of assessment;

> "…evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge"

316. The assessment was made on 26 February 2019 which was more than 12 months after the Commissioners had sufficient evidence to issue it (s.73(6)(b)).

317. To the extent the assessments related to the fixed establishment argument, Mr Rooney decided CLL had a fixed establishment in the UK because of the services the appellant supplied to it. He had this information in his letter dated 20 September 2017 in which he stated four times HMRC's view was that CLL had a fixed establishment in the UK supported by nine bullet point reasons. Those exact reasons were repeated in his decision letter of 20 February 2019. The enquiries that followed that letter as to whether Mr Hulen existed, or what role Koppa played, were irrelevant to the central reason for the assessment, that services were provided from the Appellant to CLL. The issue as to Mr Hulen was relevant to the *Kittel* denial, as expressly stated by him in his decision of 20 February 2019. Accordingly, in 2017, Mr Rooney had sufficient evidence of the basic facts to issue the assessment in respect of output tax and the fixed establishment issue.

318. HMRC argue that period 10/13 was necessarily "in time" if the Tribunal finds in respect of the *Kittel* denial as that would be a finding of deliberate conduct. Even if that is the case the appellant submits that HMRC are not entitled to assess for the same period the output tax relating to the fixed establishment issue. VAT that is out of time cannot become in time because of another in time decision on a separate issue. That would be assessing by the back door introducing a matter that was in itself out of time.

319. The Tribunal may, but is not bound to, set the whole assessment aside if it is satisfied that justice can be done by correcting the amount of the assessment.

320. The VAT legislation requires HMRC to make an assessment only to the best of their judgment and it is implicit in this that HMRC will make that assessment at as early a stage as reasonably practicable.

321. If an assessment for an amount in respect of a particular issue is held to be out of time, then it must also be unreasonable, and therefore not to best judgment, to include that amount in a subsequent assessment.

HMRC's arguments

The 20 year time limit

322. HMRC argued that for the same reasons set out in HMRC's submissions in relation the First Decision on *Kittel* and knowing about CLL's fraud, the loss of VAT in this case was deliberately occasioned (section 77(4A)(a)) or facilitated (section 77(4A)(b)) by the appellant. Mr Puzey argued that both section 77(4A)(a) and (b) applied but suggested that perhaps (b) fitted better to the circumstances. Not only did the appellant have actual knowledge of CLL's fraudulent default but, through Mr Lambert, it actively assisted and facilitated that default.

323. The meaning of "deliberate" was considered by this Tribunal in the case of *Leach v HMRC* [2019] UKFTT 352 (TC) and the Tribunal at [98] agreed in the context of section 77(4B) with the Court of Appeal's approach in *Tooth* to the meaning of "deliberate":

> "98. We therefore find that the Court of Appeal's analysis in Tooth applies to VATA s 77(4B), so that the time limit is extended where a person knows that

the return he is submitting contains an error, even when there is no intention to mislead."

324. The appellant's conduct was deliberate because at the time it submitted its VAT returns it knew that CLL should have been registered for VAT and charging VAT on its supplies in the UK. The appellant facilitated those supplies by making the purchases from the manufacturers and selling the contact lenses to CLL and by handling the logistical arrangements and customer service for the retail transactions of CLL.

The one year time limit

325. The person whose opinion is relevant is the assessing officer (Dyson J in *Pegasus Birds* at [101j]).

326. HMRC argued that, until its officer Mr Rooney received the information in the emails of 29 May 2018, HMRC did not have sufficient evidence to conclude that CLL did not have a fixed or business establishment in the Seychelles so that therefore it was established in the UK. The assessment was made 9 months after receipt of that information.

327. Specifically, the emails confirmed Mr Rooney's suspicion that Mr Hulen was fictitious, and it was the Dreyers were running CLL with Mr Lambert's help.

328. HMRC's investigations were directed to a significant extent to the question of whether there was an arm's length entity in the Seychelles that had no fixed or business establishment in the UK. The existence or otherwise of Mr Hulen was relevant as he was effectively being presented by the appellant as the most senior person with whom the appellant dealt at CLL.

329. Mr Hulen was first referred to in a letter from Stratta dated 15 April 2013 and the correspondence between Mr Lambert and Mr Hulen begins in July 2013. Mr Alcorn of HMRC was conducting his enquiries into the appellant between 2013 and 2016 but had reached no decision or conclusions as to assessment by the time he handed over to Mr Rooney. Mr Lambert submitted a disclosure report in August 2016, but did not formally adopt it until 7 April 2017.

330. Mr Rooney's letter of 20 September 2017 is not evidence that he had decided by that stage that he had sufficient evidence to assess the appellant. It is apparent from that letter that Mr Rooney had further outstanding enquiries which he wished to make before reaching any final decision. It is clear from Mr Rooney's evidence that he had not made a decision until after he received evidence from Mr Stevenson that the emails apparently sent by Mr Hulen in fact originated from Mr Dreyer.

331. The emails were requested in their original digital form on 22 February 2018 during the interview of Mr Lambert. They were formally demanded in an information notice dated 19 April 2018 and were provided on 29 May 2018.

332. The relevance of the emails in legal terms was to demonstrate who had "control" of CLL's operations and where that person was located.

333. Unless the appellant can satisfy the Tribunal that Mr Rooney was unreasonable in seeking such evidence its point on the one year time limit cannot succeed.

334. Lastly, the making of the assessments in this case depended both on the assessment of output tax due on the appellant's fulfilment supplies and upon the disallowance of input tax on the *Kittel* basis. The fact that an assessment could have been made before February 2019 (if indeed that was the case) does not result in this assessment being out of time because the question for the Tribunal is whether this assessment could

have been made earlier than it was (see *Royal Bank of Scotland v HMRC* [2017] UKFTT 223 (TC) at [17]:

> "It is also well established (Post Office, at 754) that the evidence of facts must be sufficient to justify the assessment that was actually made: an assessment is not out of time simply because a different assessment could have been made on what was known to HMRC more than one year before the actual assessment was made."

335. The appellant's submissions on the one year time limit have been directed to the assessment of output tax on the fulfilment supplies but not the *Kittel* decision.

Discussion

336. There are two time limit issues here. As regards periods ending 10/13 to 01/15 inclusive, as the assessment was made outside the 4 year time limit for raising VAT assessments in section 77(1)(a), the question arises as to whether the 20 year time limit for an assessment in section 77(4) is available because the appellant's conduct was deliberate. Second, as regards the period ending 10/13 whether for the purposes of section 73(6)(b) the assessment is in any event out of time because it was not issued within 1 year of evidence of fact sufficient in the opinion of HMRC to justify the making of the assessments came to their knowledge.

337. The factual position is different depending on whether the assessment relates denial of input tax on *Kittel* principles (The First Decision) and underdeclared output tax based on the fixed establishment argument (The Second Decision). The First Decision affects periods ending 10/13 to 01/15 inclusive and the Second Decision affects period ending 10/13 only.

338. The period ending 10/13 therefore has both issues. We agree with the appellant that the validity of the assessment must be considered separately in respect of each issue. Just because an assessment is in time for one issue does not make it in time for a different issue.

339. We do not agree with HMRC's reading of *Royal Bank of Scotland v HMRC.* That case was concerned with the amount of input tax to be denied under *Kittel* principles. Here "the assessment in question" (*Pegasus Birds* at [101]) encompasses with two different issues, albeit based on substantially common facts, and assessments for output tax and denial of input tax. The test in section 73(6)(b) cannot be read as meaning that in principle an assessment for denial of input tax based on *Kittel* grounds, can bring into time a place of supply output tax assessment just because they relate to the same VAT period.

The 20 year time limit

340. Mr Brown did not press the point that the appellant's conduct was not deliberate with any energy.

341. In any event, as we have found in favour of HMRC in respect of the First Decision on *Kittel*, we find that the appellant's behaviour was for the same reasons deliberate for the purposes of section 77(4).

342. As regards the output tax assessment and the Second Decision, we are satisfied that Mr Lamber knew the appellant should be charging VAT.

343. As to section 77(4) HMRC argued that when the appellant submitted its VAT returns it knew that they would bring about a loss of VAT. Further, the appellant

transacted with CLL knowing that it was part of an arrangement to evade VAT (section 77(4A)(a)).

The one year time limit

344. The burden of proof is on the appellant to show that the time limit rule in section 73(6)(b) applies and HMRC is time barred from raising an assessment. Further, in challenging the assessment on this basis, the appellant must show that the officer was unreasonable on *Wednesbury* principles not to have raised the assessment earlier.

345. We are not satisfied that the appellant has demonstrated that Mr Rooney was unreasonable on *Wednesbury* principles. We accept that Mr Rooney had substantive unresolved issues on when he wrote his letter of 20 September 2017 and they had not been resolved until at the earliest 14 June 2018 when Mr Rooney received Mr Stevenson's e mail.

decision

346. Accordingly, we reject the appellant's arguments in respect of The Time Limit Issues.

DECISION

347. For the above reasons we find in favour of HMRC on the First Decision, the Second Decision, the Third Decision and the Time Limit Issue.

348. We therefore dismiss the appellant's arguments.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

349. This document, which has been amended under rule 37 (clerical errors and accidental slips or omissions), 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.

IAN HYDE
TRIBUNAL JUDGE

Release date: 23 NOVEMBER 2022