



**TC04775**

**Appeal number: TC/2013/00580**

*VALUE ADDED TAX – registration – date when appellant first became liable to be registered – assessment for output tax and disallowed input tax – quantum of assessment – appeal dismissed in principle, save in respect of certain input tax credits and certain consequential matters*

**FIRST-TIER TRIBUNAL  
TAX CHAMBER**

**KNUTSFORD BUSINESS SERVICES LIMITED**                      **Appellant**

**- and -**

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

**TRIBUNAL: JUDGE JONATHAN CANNAN**  
**MISS SUSAN STOTT FCA CTA**

**Sitting in public in Manchester on 27-29 April 2015**

**Mr Philip Simpson QC instructed by Minim Law for the Appellant**

**Mr Simon Charles of counsel instructed by the General Counsel and Solicitor for  
HM Revenue & Customs for the Respondents**

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## DECISION

### *Introduction*

1. The appellant (“KBS”) was incorporated on 31 May 2001. The precise nature of its business at various times is a matter we must deal with in our findings of fact. For present purposes we simply record that it acted in relation to various tax avoidance schemes (“the Schemes”) devised by Mr John Backhouse. The Schemes were marketed and implemented by various entities which we shall describe in more detail below. They involved savings, or purported savings, in PAYE and national insurance for those businesses that sought to implement the schemes.

2. KBS registered for VAT with effect from 1 June 2009. HMRC consider that it ought to have been registered for VAT with effect from 1 August 2006. They have assessed KBS for VAT said to be due for the period 1 August 2006 to 30 September 2010. We shall describe the circumstances in which the assessment was made in more detail below. By the time the appeal came on for hearing the amount claimed by HMRC in respect of output tax was £324,412. In addition HMRC have disallowed input tax credits of £119,521 claimed by KBS in periods 09/09 to 06/11.

3. The decisions under appeal are:

(1) A decision dated 4 October 2012 in which HMRC backdated KBS’s date of registration from 1 June 2009 to 1 August 2006.

(2) The decision dated 4 October 2012 also provided for the Appellant to make its first VAT return for the period 1 August 2006 to 31 May 2009 (period 05/09) by 16 October 2012. KBS appealed against the requirement to make the return by 16 October 2012 on the basis that the time given to make the return was unreasonably short.

(3) An assessment to VAT dated 17 October 2012 (“the Assessment”) in the sum of £1,504,965 for VAT periods 05/09 to period 06/11. The Assessment comprised the output tax claimed by HMRC together with the input tax claims which were disallowed.

4. The parties did not make submissions as to the date on which KBS was required to make its first return. It is not immediately clear to us that this tribunal has jurisdiction to hear an appeal against a direction by HMRC that a return must be made by a certain date. If either party requires a decision on this aspect of the appeal then it should make a written application to that effect within 28 days of the release of this decision.

5. The broad issues which arise for determination on this appeal may be summarised as follows:

(1) What was the nature of supplies being made by KBS in the period 1 April 2006 to 31 May 2009?

(2) In so far as KBS was making taxable supplies, what was the consideration for those supplies in that period and in the period from 1 June 2009 to 30 September 2010?

(3) What if any input tax credit is KBS entitled to in the period from 09/09 to 06/11?

6. The answer to questions (1) and (2) will determine the issue of when KBS was first liable to be registered for VAT and the quantum of output tax in the Assessment. The answer to question (3) will determine the quantum of input tax in the Assessment.

7. There is a separate decision denying input tax credit in periods 09/11 and 03/12 which is not the subject of this appeal.

8. As mentioned, the original Assessment made on 17 October 2012 was reduced to £324,412 in respect of output tax shortly prior to the hearing of the appeal. Mr Simpson QC, who appeared for KBS, sought to argue that the Assessment had not been made to best judgement, albeit there was no allegation of bad faith in making the Assessment. He submitted that the reduction in the Assessment led to an inference that the original Assessment was manifestly wrong. In closing submissions however Mr Simpson made clear that he was not challenging the validity of the Assessment as such. He was challenging the quantum of the Assessment. In those circumstances and in line with the decision of the Court of Appeal in *Pegasus Birds v Commissioners of HM Customs & Excise [2004] EWCA Civ 1015* we focus in this decision on whether the Assessment as reduced was excessive.

9. The burden in this appeal is on KBS to establish that HMRC's decision to backdate the registration is wrong and/or that the Assessment is excessive. We make our findings of fact relevant to those issues by reference to the balance of probabilities.

#### *Legal Framework*

10. There was little if any difference between the parties as to the relevant legal principles to be applied. Firstly we deal with the position in relation to registration for VAT.

11. Section 3 Value Added Tax Act 1994 ("VATA 1994") provides:

*"3(1) A person is a taxable person for the purposes of this Act while he is, or is required to be, registered under this Act.*

*(2) Schedules 1 to 3A shall have effect with respect to registration."*

12. Schedule 1 provides as follows:

*" 1(1) Subject to sub-paragraphs (3) to (7) below, a person who makes taxable supplies but is not registered under this Act becomes liable to be registered under this Schedule –*

(a) at the end of any month, if the value of his taxable supplies in the period of one year then ending has exceeded £61,000; or

5 (b) at any time, if there are reasonable grounds for believing that the value of his taxable supplies in the period of 30 days then beginning will exceed £61,000.

...

10 5(1) A person who becomes liable to be registered by virtue of paragraph 1(1)(a) above shall notify the Commissioners of the liability within 30 days of the end of the relevant month.

15 (2) The Commissioners shall register any such person (whether or not he so notifies them) with effect from the end of the month following the relevant month or from such earlier date as may be agreed between them and him.”

13. The above provisions and the registration threshold quoted were those applicable as at 1 August 2006.

20 14. Every taxable person who is registered for VAT must make returns in accordance with the VAT Regulations 1995. The first return period begins on the effective date of first registration and ends on such date as HMRC shall direct. Further the return shall be made by a date notified by HMRC.

25 15. Secondly we turn to the position in relation to Assessment. The Assessment was made under section 73(1) VATA 1994 which provides:

30 “ 73(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.”

35 16. In the context of appeals against assessments, the Court of Appeal in *Pegasus Birds* described the test of best judgement in terms of whether there had been an “honest and genuine attempt” to make a reasoned assessment. As to the consequences of breach, Carnwarth LJ (as he then was) stated at [29]:

40 “ In my view, the Tribunal, faced with a "best of their judgment" challenge, should not automatically treat it as an appeal against the assessment as such, rather than against the amount. Even if the process of assessment is found defective in some respect applying the *Rahman* (2) test, the question remains whether the defect is so serious or fundamental that justice requires the whole assessment to be set aside, or whether justice can be done simply by correcting the amount to what the Tribunal finds to be a fair figure on the evidence before

*it. In the latter case, the Tribunal is not required to treat the assessment as a nullity, but should amend it accordingly.”*

17. Mr Simpson indicated in closing that he was not arguing that the Assessment in the present case was a nullity. We consider that he was right to do so. Even if the  
5 Assessment had not been to best judgement for some reason, we would not have considered it appropriate in the circumstances to set it aside. The circumstances are such that the appropriate remedy would be to reduce the Assessment.

18. Finally in this section we deal with the position in relation to input tax credits.

19. Section 24(1) VATA 1994 defines input tax in the following terms:

10 *“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) ...*

*(c) ...,*

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*being (in each case) goods or services used or to be used for the purposes of any business carried on or to be carried on by him.”*

20. Section 24(6)(a) VATA 1994 makes provision for regulations to determine how a claim for input tax credit is to be evidenced:

20 *“Regulations may provide –*

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

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21. Regulations have been made under this provision concerning the documents which will evidence and quantify input tax. They are found in the *Value Added Tax Regulations 1995 (SI 1995/2518)*. Regulation 29 is the relevant provision:

30 *“(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*

*...*

35 *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.”*

22. Regulation 13 provides that where a registered person makes a taxable supply to a taxable person he shall provide a VAT invoice to that person.

5 23. Regulation 14 stipulates what particulars must be stated in a VAT invoice. For present purposes we are concerned with the particulars required by the following subparagraphs of regulation 14(1):

(a) *a sequential number ... which uniquely identifies the document*

(d) *the name, address and registration number of the supplier*

10 (e) *the name and address of the person to whom the goods or services are supplied.*

(g) *a description sufficient to identify the goods or services supplied;*

(h) *for each description, the quantity of the goods or the extent of the services ...*

15 24. Both parties relied on a summary of the legal position in relation to regulation 14 set out in *McAndrew Utilities v Commissioners of HM Revenue & Customs [2012] UKFTT 749 TC*, coincidentally a decision of same panel as the present tribunal. We were referred to what we said at [12] and [13]:

20 “ 12. *There is an issue as to the extent of the particulars necessary to constitute a valid VAT invoice. This does not appear to be the subject of any direct authority. The detailed requirements for a valid VAT invoice are left to individual member states to determine. In Reisdorf v Finanzamt Köln-West [1997] STC 180 the ECJ stated at [27]:*

25 “Article 22(2) [of the 6<sup>th</sup> Directive] thus requires every taxable person to keep accounts in sufficient detail to permit application of VAT and inspection by the tax authorities. Article 22(8) adds that Member States may impose other obligations which they deem necessary for the correct levying and collection of the tax and for the prevention of fraud.”

30 13. *We consider that the requirements of regulation 14 are at least in part directed to ensuring that VAT invoices provide sufficient information and detail to enable a meaningful audit of transactions to take place. In particular the information must be sufficient for HMRC to identify the nature and extent of the goods or services supplied and thus be able to verify that the supply took place*  
35 *as described in the VAT invoice.”*

25. The First-tier Tribunal has since taken a similar approach, most recently in *Devi Communications Ltd v Commissioners of HM Revenue & Customs [2015] UKFTT*

216 TC and *Deadoc Construction Ltd v Commissioners of HM Revenue & Customs* [2015] UKFTT 433 TC. At [58] in *Deadoc* the F-tT (Judge Kempster and Mr Farooq) said as follows:

5           “ How much detail must an invoice contain for it to satisfy reg 14 (g) & (h)?  
Without attempting to be definitive, our view is that it depends on the matters  
being invoiced. In relation to invoices for supplies of services, one example  
(one that was cited to us in evidence and in argument) is that of a professional  
firm (say, accountants) whose fee notes simply use a stock phrase such as “To  
10 professional services rendered in the period 1 March to 31 March 2015”. That,  
it seems to us, must be adequate for the purposes of reg 14 (g) & (h). The  
services supplied can be identified (the professional services of a firm of  
accountants), as can their extent (those rendered in the month of March) ...  
Part of the purpose of reg 14 is to ensure that invoices contain sufficient  
15 information to enable an independent observer (typically HMRC) to be satisfied  
as to the identification and quantification of the goods and services supplied.”

26. Mr Simpson submitted that the present appeal was not concerned with alternative evidence under the proviso to regulation 29(2). In other words the issue was not whether there was other evidence of the charge to VAT. KBS’s case on the appeal was that the VAT invoices relied upon were valid. In particular that the  
20 descriptions of services being supplied were in each case sufficient for HMRC to conduct an audit during the course of a VAT inspection so as to verify that the supply took place as described in the invoice.

27. Mr Charles submitted that the language used in *McAndrew Utilities* was a “meaningful audit”. He observed that even without any description it would still be  
25 possible to audit whether an expense was incurred and what matters the expense related to. There must be something more than a “blank canvas”.

28. We agree with Mr Charles. The test is not whether the invoice in question could be audited in the sense that HMRC could make enquiries based on the invoice to satisfy themselves the charge to VAT in the invoice was properly identified. The  
30 question is simply whether the invoice contains sufficient information to identify the nature and extent of the services supplied and hence the charge to VAT. What is sufficient in any particular case will depend on the context in which the supply takes place.

#### *Background*

35 29. We heard evidence on behalf of KBS from Mr Dennis Hardy, who has been a director of KBS since his appointment as such on 27 May 2009. Prior to that date he had no involvement with KBS. On behalf of HMRC we heard evidence from Mr Barrington Marriott and Ms Claire Sharkey, both officers of HMRC. All witnesses had made witness statements and gave oral evidence. We were also referred to four  
40 volumes of documentary evidence. On the basis of the evidence before us we make findings of fact in this section of our decision, by way of background, and more specific findings of fact in the following sections.



30. Mr Hardy is 55 years old. He has a property portfolio and is a director of a number of companies including KBS.

31. The Schemes involved restructuring the business entities and payrolls of Scheme users with a view to achieving savings in PAYE and national insurance. The Schemes were devised by Mr John Backhouse. The precise role of KBS, Mr Backhouse and various other entities in marketing, implementing and administering the Schemes is central to the factual disputes on this appeal. We do not need to describe the Schemes in detail. For present purposes it is sufficient to record that the Schemes purported to maximise the income drawn by way of dividends or other profit shares in circumstances where existing corporate structures could not be used, for example because business owners did not wish to alter the share structures or where otherwise there might be insufficient distributable reserves. The Schemes often involved setting up a new partnership or limited liability partnership.

32. HMRC has opened enquiries into the tax affairs of businesses which used the Schemes. We understand that there are some 140 Scheme users known to HMRC and Mr Marriott has taken the lead in relation to approximately 30 of those enquiries. In that connection he has sought information from Mr Backhouse, various entities connected with Mr Backhouse, KBS and Mr Hardy personally. Mr Marriott suspects tax fraud on the part of various individuals, including Mr Hardy who was interviewed under HMRC Code of Practice 9. The investigation concerning Mr Hardy commenced in June 2012. We make reference to the investigations because they give context to the circumstances in which KBS was assessed to VAT. Our findings of fact for present purposes are limited to issues which affect the VAT liability of KBS. Some of the documentation referred to below in connection with those issues was derived from the investigation into the affairs of Mr Hardy and KBS.

33. We do not need to set out the full circumstances of Mr Marriott's enquiries, or the full circumstances in which Ms Sharkey came to make the original Assessment. We should record that Mr Hardy said in evidence that he regarded Mr Marriott as mounting a vendetta against Mr Backhouse and KBS. In circumstances where the challenge based on best judgment is not being maintained, that claim is not relevant to the issues we have to decide. Mr Simpson made plain that he was not alleging bad faith on the part of any HMRC officer in relation to the Assessment.

34. We heard evidence in relation to various individuals and entities. The most significant for the present purposes, with the abbreviations used in our decision, are as follows:

<b>Abbreviation</b>	<b>Individual / Entity</b>	<b>Description</b>
Mr Hardy	Dennis Philip Hardy	Director of KBS from 27 May 2009 onwards. Mr Hardy is not a shareholder in KBS. The shares are held by Knutsford Business Services Holdings Ltd, itself owned by Mr Justin Dempster who was described as a colleague and friend of Mr Backhouse
Mr Backhouse	John Edwin Backhouse	The individual who devised and marketed the Schemes which were intended to reduce the liability of Scheme users to PAYE and national insurance.
TAC	The Admin Centre (UK) LLP	Initially "The Admin Centre" was a trading name of Mr Brandwood who was registered for VAT. He then transferred the business as a going concern to The Admin Centre (UK) LLP, the members of which were originally Mr Brandwood and CCM Management Ltd. From 1 April 2006 the members were Mr Brandwood and KBS.
Mr Brandwood	Richard Brandwood	In addition to his connection to TAC, he was a director of KBS at all material times until 22 June 2009. He was also connected with various entities relevant to KBS's input tax claims.

5 35. KBS was incorporated on 31 May 2001. It became a member of TAC on 1 April 2006.

36. KBS registered for VAT with effect from 1 June 2009. The application to register was dated 10 July 2009 and was signed by Mr Hardy on that date. By then Mr Hardy had been a director for approximately 6 weeks. The business activity was stated to be payroll services and the estimate of turnover was £90,000 pa. The

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application was for voluntary registration, and not on the basis that KBS was required to be registered because it had exceeded the registration threshold.

37. In September 2011 a routine VAT inspection was carried out at KBS's place of business at Osborne House, 681 Knutsford Road, Latchford, near Warrington ("the Premises"). This was prompted by a net repayment claim of £34,630 by KBS in its return for period 06/11. The officer attending was Ms Linda Smith and she noted that the annual accounts for y/e 31 March 2007 identified turnover of £264,712. A question arose as to why KBS had not registered for VAT earlier.

38. There followed email correspondence in which various questions were asked from which the officer was seeking to identify the nature of KBS's trade and its relationship with various other individuals and entities, including TAC and Mr Backhouse. Mr Hardy provided information relevant to the officer's enquiries as follows.

39. In an email dated 11 October 2011, Mr Hardy described KBS's trading activities as follows:

*"1. The business started 'trading' as such on 1<sup>st</sup> Apr 2006. At this point the business became a partner in an LLP called The Admin Centre (UK) LLP. It received a share of the profits of The Admin Centre (as a partner) and in return employed staff which The Admin Centre used in its day to day operations. The business was not VAT registered at this point as it was not making taxable supplies (partnership profits being exempt).*

*2. KBS Ltd started to contract with its own clients in June 2009 and at this point officially started to trade and so registered for VAT. It also acquired further clients from a business called Corporate Staff Benefits Partnership in April 2010 although it did not take the business over as a going concern..."*

40. In a subsequent letter dated 26 November 2011 Mr Hardy sought to justify the fact that KBS had not registered for VAT prior to 1 June 2009:

*"KBS Ltd was in receipt of client payments but the services were provided by The Admin Centre (UK) LLP and KBS Ltd did not contract with the client directly. Hence at this time it was not making taxable supplies and so did not register until later when it did contract with clients directly."*

41. Mr Hardy was maintaining that prior to registration KBS had been a member of TAC and was not chargeable to VAT on its profit share. He further maintained that supplies of staff by KBS to TAC were outside the scope of VAT. The officer maintained that there were supplies of staff to TAC for VAT purposes and that the consideration was what was described in KBS's bank statements as the share of profits.

42. In February 2012 Ms Sharkey was asked by Mr Marriott to examine the records of KBS from a VAT perspective to identify any risks and queries. Thereafter Ms

Sharkey was responsible for VAT enquiries into KBS, including the repayment claim for period 06/11.

43. Ms Sharkey concluded that there was an inconsistency between bankings shown on the bank statements and income shown in the annual accounts. She was not satisfied that KBS was a member of TAC. She also considered that all receipts into KBS's bank account apart from interest received represented taxable turnover for VAT purposes.

44. Many of the purchases by KBS on which it has claimed input tax are from companies and individuals which share the same address as KBS. Ms Sharkey was not satisfied that the VAT shown in those invoices was recoverable as input tax. She considered that the invoices did not satisfy one or more of the requirements of regulation 14, in particular paragraphs (a), (d), (e), (g) and (h) set out above.

45. On 4 October 2012 Ms Sharkey wrote to KBS stating that the effective date of registration ought to be 1 August 2006 which was the date on which she considered KBS was liable to be registered by virtue of its turnover. In the same letter KBS was directed to furnish a VAT return for the period 1 August 2006 to 31 May 2009 by 16 October 2012.

46. On 17 October 2012 Ms Sharkey issued the Assessment based on what she considered to be KBS's taxable turnover and disallowing input tax credits claimed by KBS in its returns since 09/09. The total VAT due under the Assessment was £1,504,965.

47. Ms Sharkey told us that the reasons why she had decided to backdate KBS's date of registration were as follows:

(1) The annual accounts showed a turnover of £264,712 in the year ended 31 March 2007, £258,696 in the year ended 31 March 2008, £48,000 in the year ended 31 March 2009 and £250,712 in the 15 months ended 30 June 2010. She assumed this was all taxable turnover.

(2) The bank statements showed that bankings for the year ended 31 March 2007 were well in excess of the turnover shown in the accounts.

(3) She was not satisfied that KBS was a member of TAC because HMRC had not been notified of any change in membership since TAC became registered for VAT in 2006.

48. In fact, as appears below, in cross examination Ms Sharkey accepted that there were fundamental flaws in her reasoning.

49. On 26 October 2012 KBS's solicitors asked for a review of the decision to backdate the registration and to require a return for the first period by 16 October 2012.

50. On 7 November 2012 KBS's solicitors asked for a reconsideration of the Assessment on the following grounds:

(1) In the period up to 31 May 2009 KBS's only source of income was its profit share from TAC which was not chargeable to VAT.

(2) From 1 June 2009 onwards KBS operated a business of payroll and similar services so that output tax was not due on all amounts passing through its bank account.

51. These are essentially the same grounds which have been pursued in this appeal in relation to the date of registration and the amount of output tax assessed.

52. The decisions in relation to registration and the Assessment were upheld in a review dated 10 December 2012. However, on 27 December 2012 there was a small variation to the Assessment because Ms Sharkey had noticed that it included as turnover sums paid into the bank account prior to 1 August 2006. The total tax assessed was therefore reduced to £1,492,766.

53. KBS lodged its Notice of Appeal to the Tribunal on 15 January 2013.

54. In the period following October 2012 Mr Marriott continued his enquiries into Mr Hardy's tax position and into those Scheme users for which he was the lead officer.

55. Shortly prior to the hearing of the appeal, Ms Sharkey made a second witness statement in which she accepted that the output tax assessed should be reduced to take into account that many payments into KBS's bank account were matched by payments out of the account. As such they appeared to relate to staff payrolls for businesses other than KBS. The amounts assessed as output tax were therefore reduced as follows:

VAT Period	Original Output Tax Assessment £	Amended Output Tax Assessment £
05/09	723,020	203,607
09/09	208,979	11,584
12/09	155,634	56,317
03/10	204,027	49,871
06/10	71,695	(1,603)
09/10	9,833	4,633
<b>Total:</b>	£ 1,373,188	£ 324,409

56. The amended output tax Assessment was therefore based on payments into the bank account with deductions to allow for interest received, payments which appeared to be to employees of Scheme users and associated payments of PAYE and national insurance to HMRC. The balance was treated as fees due to KBS from Scheme users.

57. Against this background we must now make more detailed findings in relation to the significant factual disputes between the parties.

*Findings of Fact*

58. We should say at the outset that we did not find Mr Hardy to be a reliable witness. In the period prior to May 2009 his evidence amounted to nothing more than his own speculation as to the agreements between the various parties involved in the Schemes and how the business of KBS operated at that time. Even in the period after May 2009 he seemed to have very little knowledge about significant aspects of KBS's business. We do not consider that the explanation for this lies in the passage of time between the events in question and the date on which he gave his evidence.

59. It is likely, and we find as a fact that Mr Hardy had little involvement in the running of KBS at any material time after his appointment as a director on 27 May 2009. We identify various unsatisfactory aspects of Mr Hardy's evidence in relation to the key issues on this appeal which have led us to this conclusion. Before doing so we consider his evidence in relation to more general matters.

60. In the period 2009 to 2012 Mr Hardy maintained that he was paid a salary by KBS. He was adamant that his salary was paid out of KBS's bank account however we were not taken to any entry in the bank statements which might have been a payment of his salary. Mr Hardy said that after 2012 he was not remunerated directly by KBS. He was paid no salary and had no contract of employment. When asked how he was paid Mr Hardy said that in addition to his own property portfolio he also manages three residential properties owned by a company called Mercurial Way Ltd ("Mercurial Way"). He is a director of Mercurial Way. In consideration of managing those properties he said that he received an income from the properties. However he then said that his work for Mercurial Way was not linked to his work for KBS. The job of managing Mercurial Way's properties was not onerous, and he spent most of his time working for KBS, although not 5 days a week.

61. Mr Hardy was asked a straightforward question about his remuneration. We were left unable to say how or at what level Mr Hardy was remunerated for his work as a director of KBS.

62. Mr Hardy was asked to identify the shareholders of KBS. He said "Justin Dempster, I think". When pressed he said that the shareholder was Justin Dempster. He was not certain who held the shares in Mercurial Way, despite the fact he is a director of that company.

63. In or about July 2013 Mr Hardy appointed Mr Andrew Needham of VAT Specialists Ltd to act for him in relation to Mr Marriott's investigation. Mr Needham's instructions were limited to relevant VAT matters. There was a meeting with Mr Marriott attended by Mr Hardy and Mr Needham on 8 July 2013. At that meeting Mr Hardy could not recall when he had become a director of KBS. He was asked what the company's trading activities were but declined to answer. He

requested that the question be put in writing. Mr Hardy's response to almost all the detailed questions regarding KBS was that he would reply in writing.

5 64. In the same interview Mr Hardy is recorded as disputing that KBS carried out a payroll service. In oral evidence he was not sure why he would have disputed that fact. He pointed out that HMRC have not provided the manuscript notes of the interview. We are prepared to accept for present purposes that there may have been some misunderstanding at the interview either on Mr Hardy's part or on the part of the note-taker, even though Mr Hardy did not take up an opportunity in correspondence to correct the notes.

10 65. On 22 July 2013 Mr Marriott sent Mr Hardy a letter setting out the questions he had in relation to KBS. A letter was also sent to Mr Needham raising a number of questions in relation to VAT matters. Mr Hardy failed to provide any answers in correspondence. We understand that no answers were provided until a third party Information Notice was issued to Mr Hardy on 19 May 2014.

15 66. On 7 October 2013 Mr Needham wrote to Mr Hardy (copied to Mr Marriott) to notify him that he was ceasing to act. In the letter Mr Needham stated:

20 *"...you admitted to me that you had no direct involvement with the day to day running of the business although you claimed you did in the meeting with HMRC. You therefore deliberately misled HMRC in a Code of Practice 9 interview."*

25 67. HMRC placed some reliance on this letter. It was put to Mr Hardy in cross examination but he denied the contents were true, stating that he was in dispute with Mr Needham over his fees. Whether or not that is right, we do not place any reliance on the letter. We admitted it into evidence, but expressed our reservations at the time as to the weight it might have. It amounts to hearsay in circumstances where HMRC could have called Mr Needham to give evidence. We attach no weight to the contents of the letter. Whilst we have concluded that Mr Hardy had little or no involvement in the running of KBS, that is on the basis of all the other evidence before us.

30 68. We turn now to consider the nature of KBS's supplies and the consideration it received for those supplies. We do so in relation to the following periods of time:

(1) From 1 April 2006, the date KBS became a member of TAC, until 22 April 2008.

(2) From 22 April 2008 until 1 June 2009, the latter date being the date KBS contends that it first started making taxable supplies to Scheme users.

35 (3) From 1 June 2009 onwards.

40 69. In a separate sub-heading we also consider KBS's taxable income. The issue as to the nature of KBS's supplies requires consideration of the precise nature of its involvement in implementing and administering the Schemes. KBS has claimed throughout HMRC's enquiry that prior to June 2009 it had no direct relationship with Scheme users. It simply provided staff to TAC which administered the Schemes on

behalf of Scheme users. TAC charged fees to Scheme users and KBS's receipts until 1 June 2009 were simply its profit share from TAC which was outside the scope of VAT.

5 70. KBS claims that it started administering the Schemes directly on behalf of Scheme users with effect from 1 June 2009. From that date onwards Scheme users became clients of KBS. KBS claims that it was only from that date that it started performing a service akin to a paymaster or payroll service.

10 71. KBS's case is that when it was performing the payroll service it received the gross pre-Scheme payroll from each Scheme user plus pre-Scheme employers' national insurance. Mr Hardy's evidence was that from those sums KBS made the following payments:

- 15 (1) Salaries and wages for employees who were not participating in the Scheme, together with PAYE and national insurance contributions for those employees.
- (2) Partnership drawings to those employees who were participating in the Scheme and who were partners in the new business structure.
- (3) Dividends or advances (to be treated as dividends) to shareholders of Scheme users.
- 20 (4) Self assessment tax and national insurance for those employees participating in the Schemes.
- (5) Corporation tax due from the new business structures.
- (6) Fees to KBS.

25 72. In oral evidence Mr Hardy added another category of payments out, namely payments back to Scheme users of the net savings generated by the Scheme. It was surprising that Mr Hardy had forgotten to include this in his witness statement, given that the purpose of the Schemes for Scheme users must have been to make those savings.

30 73. We were taken to KBS's bank statements in detail covering the period from the opening of the bank account on 9 February 2006 until 4 August 2011. KBS's claims as to how it carried on business in the period 1 April 2006 to 1 June 2009 must be reconciled to the fact that between 13 April 2006 and 22 April 2008 KBS received what was described in the bank statements as partnership profit share from TAC. The statements show a clear change with effect from 22 April 2008. From that date onwards the bank statements show large receipts from Scheme users with payments  
35 out to individuals who appear to be employees of Scheme users.

*(i) Period 1 April 2006 to 22 April 2008*

40 74. Mr Hardy's evidence was that during this period KBS had been a partner of TAC and it was TAC which contracted with Scheme users rather than KBS. KBS provided its employees to TAC. Mr Hardy qualified his evidence by saying that was the position "as far as I am aware". It was right that Mr Hardy should qualify his



evidence in that way because he was not appointed as a director of KBS until 27 May 2009 and had no previous involvement with KBS.

75. Mr Hardy said that he had no reason to consider the nature of KBS's trading prior to his appointment, in particular whether it ought to have been charging VAT or not. We do not accept that is right. The application for VAT registration was made on the basis that KBS was voluntarily applying for registration and that the turnover at the time of registration was below the VAT threshold. If KBS exceeded the turnover threshold and ought to have registered for VAT at an earlier date than it did, then Mr Hardy was bound to inform HMRC.

76. Mr Brandwood trading as TAC was registered for VAT prior to 2004. TAC was incorporated on 24 November 2004 as The Admin Centre (UK) LLP and at the same time Mr Brandwood's registration for VAT was transferred to TAC. The business activity of TAC as described on its application for registration was "Payroll and accountancy provision, clerical and financial marketing and promotional". At that time the members of TAC were Mr Brandwood and CCM Management Ltd. At some stage CCM Management Ltd ceased to be a member and on 1 April 2006 KBS became a member.

77. Mr Hardy stated that TAC was wound up at some stage. He did not know when because he said it was before he had become a director. However Companies House records show that in any event KBS ceased to be a member of TAC on 19 June 2009.

78. The bank statements indicate that in this period KBS itself had up to 15 employees at any one time. It received payments each month described variously as "The Admin Centre Profit Share" or "The Admin Cen PS". That was KBS's only income, apart from interest received, from February 2006 until April 2008. The principal expenditure was salaries to its own employees.

79. The evidence before us included KBS's annual accounts. In the year ended 31 March 2007 Mr Brandwood was the sole director. The principal activity was described as "the provision of services" which remained the description in the following years. The turnover is shown as £264,712. A schedule to the profit and loss account describes that income as "partnership profits". This was consistent with the items paid into KBS's bank account with the narrative "profit share" which in the same period totalled £264,711.

80. In the year ended 31 March 2008 the turnover, described as "sales", was £258,696. We do not read anything into the description of this income as "sales". A schedule to the profit and loss account describes the income as "partnership profits". This was consistent with the items paid into KBS's bank account with the narrative "profit share" which in the same period totalled £258,936.

81. Ms Sharkey had wrongly believed until cross examined on the point that the bankings for the years ended 31 March 2007 and 2008 were well in excess of the declared turnover in the accounts. In fact they matched exactly, because the only bankings were those described as profit share.

82. Ms Sharkey said that at the time she made her assessment she had no evidence that KBS was a member of TAC. She did not appreciate that it was necessary for LLPs to notify their members to Companies House and therefore she did not do a Companies House search. Companies House records in fact show that on 24  
5 November 2006, 2007 and 2008 KBS was a member of TAC along with Mr Brandwood.

83. The accounts for TAC filed at Companies House also show KBS's share of profits in the year ended 30 November 2006 as £169,000, 30 November 2007 as £273,407 and 30 November 2008 as £129,000. The total profit share for these periods  
10 was £571,407. That sum is identical to the total profit share shown by KBS in its accounts for the three years to 31 March 2009. The partnership accounts showing distribution of partnership profits were therefore consistent with the accounts of KBS showing income in the form of partnership profits. It also suggests that KBS did not receive any profit share from TAC after 30 November 2008.

15 (ii) *Period 22 April 2008 to 1 June 2009*

84. Mr Hardy's evidence initially did not distinguish between this period and the period between 1 April 2006 and 22 April 2008. His evidence was that during both periods KBS had continued as a partner of TAC and it was TAC which contracted with Scheme users rather than KBS. It was only from 1 June 2009 that the nature of  
20 KBS's business changed and the Scheme users became clients of KBS.

85. Mr Hardy was asked about the period between April 2008 and June 2009. He conceded during cross examination that it was likely that TAC had ceased trading in or about April 2008. However he speculated that even if TAC was not trading, it did not mean that the members of the LLP were not still trading and that KBS was still a  
25 partner because TAC was not wound up until 2011. We do not think that is a likely explanation and there is no reliable evidence to support it.

86. Mr Hardy was asked who the other members of TAC were. He was not certain, but he thought Richard Brandwood was one. This was surprising given that Mr Hardy's understanding was that KBS was in receipt of partnership profits until 1 June  
30 2009. He plainly ought to have been aware of the identity of KBS's partners, whether they were partners in TAC or otherwise.

87. Up to April 2008 payments to KBS had been described as profit share. Payments out were made to KBS employees together with tax and national insurance to HMRC, dividends to Mr Brandwood and certain premiums to Sterling Life Ltd. On  
35 22 April 2008 KBS started to receive payments directly from Scheme users. Those payments were used in part to pay the salaries of the employees of those Scheme users. It is clear therefore that the arrangements between KBS, TAC and the Scheme users changed significantly from 22 April 2008 onwards. The last profit share from TAC was received on 15 May 2008, which we infer must have related to a profit  
40 share for an earlier period.

88. TAC remained registered for VAT until 18 August 2008. The latter date was referred to in a letter from HMRC to Mr Hardy dated 10 December 2012 and whilst there was no document which confirmed it as the date of deregistration both parties were content to adopt it.

5 89. In the year ended 31 March 2009 the turnover of KBS, described in its accounts as sales, was £48,000. A schedule to the profit and loss account describes that income as “partnership profits”. For the first time there is an entry of “Client balances” under  
10 creditors with a balance of £281,929. That suggests that by 31 March 2009 KBS had its own clients. The accounts were approved on 1 September 2009 by Mr Hardy, who was by then the sole director of KBS.

90. It is not clear why the turnover of KBS should have fallen so dramatically in the year ended 31 March 2009. We cannot say whether the fall related to the fact that in April 2008 TAC ceased trading. If that were the case, then the question would be what became of fee income from Scheme users in the period April 2008 to June 2009.  
15 These questions were not canvassed during the hearing.

*(iii) Period 1 June 2009 Onwards*

91. Mr Hardy’s evidence was that it was only from 1 June 2009 onwards that KBS charged fees to clients, either as a percentage of projected savings or on an hourly basis, but capped at a certain percentage of projected savings.

20 92. KBS sought to register for VAT from 1 June 2009 onwards. When asked what had changed in 2009 Mr Hardy maintained that the nature of the business had changed because KBS was no longer a partner receiving a share of profits.

93. Companies House records show KBS ceasing to be a member of TAC on 18 June 2009, a few days before Mr Brandwood resigned as a director of KBS. In his  
25 evidence in chief Mr Hardy had maintained his position that until 1 June 2009 KBS was simply providing employees to TAC so that TAC could administer the payrolls. When asked why that arrangement was in place Mr Hardy replied “it was before my time. It was just the way it was. A historic thing that I inherited”.

94. Mr Hardy was not aware of any contacts or new arrangements between KBS  
30 and Scheme users informing them that KBS had taken over from TAC and it was now supplying the services previously supplied by TAC. That in itself is very surprising given that Mr Hardy’s evidence was that KBS took over from TAC as the service provider at the time of his appointment.

95. Accounts for KBS for the year ended 31 March 2010 record Mr Hardy’s  
35 appointment as a director on 27 May 2009 and Mr Brandwood’s resignation on 22 June 2009. The turnover, was £250,108. A schedule to the profit and loss account describes that income as “Fees” as opposed to “partnership profits”.

*(iv) KBS's Taxable Income*

5 96. KBS's fees when dealing directly with Scheme users were said to be payable by reference to a proportion of the savings made by Scheme users. Mr Hardy thought the fee was about a third of the savings in tax and national insurance. When asked when it was due he said "I suppose monthly". Somewhat surprisingly he said that he would need to refer to the contract to be certain. We would have thought he would have some recall of the fee structure and how KBS's fees were paid by Scheme users. He also seemed to have little understanding as to how the fees to Scheme users might alter over time as a result of changes to legislation and other variables.

10 97. Mr Hardy's evidence was that when KBS started administering the Schemes on behalf of Scheme users it would do so for as long as the Scheme users wished. KBS was also bound to litigate any of the Schemes through the tax appeal system although no case ever got that far.

15 98. Mr Hardy was not aware of the period for which Scheme users were bound to use KBS's payroll services, during which time they were effectively paying the saving to KBS. Later in his evidence he suggested that there were "broadly three year cycles", but that Scheme users could leave at any time. He was vague as to how and when Scheme users actually got the benefit of the savings. His evidence was that KBS was paid the full payroll cost before the Scheme was implemented and then paid out to employees the reduced payroll cost with the associated tax and national insurance being paid to HMRC. The purported savings associated with the Schemes remained with KBS. We were left with no understanding as to the basis upon which KBS accounted to Scheme users for the savings net of fees. It may be that there is an explanation, but Mr Hardy was unable to provide it.

25 99. Later in Mr Hardy's evidence and during cross examination HMRC produced copies of two agreements which Scheme users had provided to HMRC during the course of enquiries. None of the agreements provided to HMRC were completed as to date, parties or signatures.

30 100. In the first agreement the "Service Provider" agreed to assist in the implementation of various tax and NIC strategies so as to generate savings which were to be calculated by the Service Provider. It was clear that Scheme users could not leave at any time. Each Scheme was to run for a minimum of 15 months, and Scheme users had to give 6 months notice of termination. There was no suggestion of three yearly cycles.

35 101. Clause 7 contained KBS's fee structure. KBS was to be paid: one third of gross savings throughout the Scheme and of any increase in savings; an additional one third of gross savings in the first 15 months of the Scheme; a maximum of £20 per month per member as a "membership fee"; 1% per annum of the amount switched away from payroll under the Scheme; any corporation tax savings made as a result of shares  
40 issued under the Scheme.

102. We note that clause 16 of the first agreement anticipates a separate “savings account” being set up with an independent signatory and quarterly reconciliations. It appears that savings were intended to be paid into such an account although there was no evidence that happened in practice.

5 103. Mr Hardy thought that the first agreement referred to was that used by KBS. It was not clear to us at what stage, if at all, this form of contract was used.

104. The second agreement was in a similar but not identical form. It was on notepaper of Greenwood Business Services Ltd. Mr Hardy said that he was not aware whether Greenwood promoted similar schemes to KBS, but later he did say that  
10 Greenwood was not in competition with KBS. The evidence did not deal with how Scheme users were divided between KBS and Greenwood.

105. KBS did not refer us to any direct evidence to support the level of fees declared in its VAT returns from 1 June 2009 onwards, although we note the Bundle did include what appear to be monthly VAT invoices to Scheme users for Service  
15 Provider fees. There was no supporting documentation. KBS’s appeal against the Assessment has been directed towards explaining certain payments made from KBS’s bank account, rather than to positively establish the amount of fee income.

106. In closing submissions the principal focus was therefore on payments made by KBS, in particular those in relation to “POBS” and “CTH”. The issue we were invited  
20 to determine was whether those payments were made out of KBS’s fee income, as the Respondents contend. KBS contends that in making payments to POBS it was simply transferring fees due from Scheme users to Mr Backhouse who was entitled to those fees as against the Scheme users. Further, payments to CTH were simply refunds of savings due to a Scheme user. In both cases KBS contends that the payments were in  
25 the nature of disbursements.

107. There were numerous entries in the bank statements with the narrative POBS. It appears this stands for Premier Offshore Business Services. The first reference to POBS was on 22 May 2008. This was a payment of £23,460.79 with the narrative  
30 “PREM OFFSHORE BUS CLIENT FEES”. There were similar payments and references to POBS throughout the bank statements after that date. For example on 9 February 2009 there was a narrative “POBS Cedar Jan Fee £4,775.18”. Payments to POBS continued to be made after 1 June 2009. Mr Hardy’s evidence was that the reference to Cedar and other such references were to particular Scheme users and we accept that evidence.

35 108. Mr Hardy was unsure in his oral evidence what POBS stood for. He said that it was “*something Overseas Business Services*”. In his evidence in chief Mr Hardy was asked what the payments to POBS were for. He believed that POBS was a partnership of Mr Backhouse and that payments to POBS by KBS were fees due to Mr Backhouse. He also said that the arrangement existed before his involvement with  
40 KBS. However that does not explain his uncertainty. Payments to POBS continued after his appointment as a director. Mr Hardy was asked the same question in cross examination but replied that there was a letter which dealt with the subject, and that

he would have to look at the letter in order to answer the question. Tellingly, he then went on to say that he couldn't recall what his earlier evidence had been. When he was reminded of it, namely that this was fees payable to Mr Backhouse, he was content to adopt it. He went on to say that Mr Backhouse was the marketing arm of  
5 KBS.

109. Mr Hardy was unable to describe the terms on which Mr Backhouse was entitled to fees. For example how they would be calculated and for how long after the introduction of a Scheme user they would continue. He said that he would have to refer to the contract, but then said that he was not certain whether there was a contract  
10 between KBS and POBS. When it was put to him that payments to POBS in relation to a specific Scheme user appeared to continue over many months he suggested that payment might be made by instalments, but volunteered that he was speculating.

110. We were not taken to invoices from POBS or Mr Backhouse to KBS or any other party which related to these payments. There was no evidence as to how, if at  
15 all, Mr Hardy or KBS satisfied itself that the payments to POBS were due.

111. KBS also made payments to Corporate Staff Benefits Partnership Ireland ("CSBPI") and Tax Accounting and Business Solutions (Ireland) ("TABSI"). Mr Hardy said these were vehicles used by Mr Backhouse to market schemes on behalf of  
20 KBS. The payments represented fees due to Mr Backhouse. It was not disputed by KBS that sums paid to these entities were paid out of KBS's own fee income. The issue in relation to these payments is whether KBS is entitled to an input tax credit and we refer to these entities below in that context. Again Mr Hardy was unaware what the contractual relationship was. When asked whether it was paid by way of commission or on an hourly basis he said "commission I would have thought".

25 112. We found Mr Hardy's evidence in relation to fees paid and payable to Mr Backhouse's entities, as in other areas, to be thoroughly unsatisfactory and unreliable.

113. The issue identified by Mr Simpson in relation to payments to POBS was whether the fees payable to Mr Backhouse were payable by the Scheme users or by  
30 KBS. Effectively whether KBS's role was merely an administrative conduit for payment of the fees or whether it had a liability to Mr Backhouse. Mr Simpson submitted that KBS had no such liability to Mr Backhouse. He pointed to the fact that Mr Backhouse's other entities, CSBPI and TABSI invoiced KBS for the services of Mr Backhouse but that there were no invoices from POBS to KBS. He said that this supported Mr Hardy's evidence that fees to POBS were due by the Scheme users  
35 directly to Mr Backhouse and that, as Mr Hardy said, the Schemes were administered in that way to ensure payment of the fees by Scheme users.

114. We do not accept that submission. There was no direct evidence whatsoever to support the proposition that Scheme users had entered into a contractual relationship  
40 with Mr Backhouse himself. Further there was no evidence that Scheme users had authorised or contracted with KBS to make payments on their behalf. Such evidence might have come from Scheme users or from Mr Backhouse himself. There were no documents at all to support the proposition.

115. The alternative explanation is that the payments to POBS were fees payable by KBS to Mr Backhouse as consideration for services provided by Mr Backhouse to KBS. As such they would be treated as payable by KBS out of fees it received from Scheme users.

5 116. The burden is on KBS to satisfy us that the sums it paid to POBS were not paid out of fees received by it in its own right from Scheme users. We are not satisfied that that is the case or that the Assessment is excessive in this regard.

117. On 18 March 2009 there were six payments out to named individuals with the additional narrative “CTH Partnership”. There were also 2 payments out on the same date to “AO Cumbernauld” which we infer were payments of tax to HMRC. It appears that “CTH” was an abbreviation for Consolidated Timber Holdings, one of the Scheme users. We accept that these payments were part of the operation of CTH’s payroll under the Scheme.

118. On 5 March 2009 KBS made ten payments from its bank account each of £10,000. Five of those payments had the narrative “The Inman Partners CTH Partnership”. The other five had the narrative “The Inman Partners CTH Partnership 2”. In his evidence in chief Mr Hardy was asked about these payments. He said that he had recently spoken to Mr Brandwood who was the sole director of KBS at the time and had been told that as far as Mr Brandwood could remember this was “an element of the fees generated as a result of savings” that CTH had made by using the Schemes. CTH had asked for repayment and the reason ten separate payments were made was because at that time KBS’s bank had a £10,000 ceiling on transfers.

119. Mr Hardy did not appear to understand what these “fees” represented. He suggested that the reason he was unsure what they represented was that the payments were made before he became a director. However the payments were made only 3 months before he became a director and one might expect a newly appointed sole director to give at least some consideration to such significant recent payments. Indeed it was Mr Hardy who signed the accounts of KBS for its year ended 31 March 2009. There was also a payment of £100,000 to CTH on 23 June 2010 for which the only explanation offered by Mr Hardy was “maybe that was the end of the Scheme”.

120. It seems likely from the bank statements that CTH first became a client of KBS in June 2008. Mr Hardy was unable to explain why it might be that they were only paid savings some 9 months later, if that is what the payments were.

121. HMRC’s calculation of KBS’s turnover was on the basis that all sums paid into the bank account was turnover, save funds which were paid to employees and to HMRC in respect of the operation of payrolls for Scheme users. Mr Simpson submitted that whatever the payments to CTH were, they ought to be deducted from the calculation of KBS’s turnover. Either they were savings being returned to CTH or they were some other form of disbursement. There was no other explanation for such payments to be made.

122. The bank statements do contain three other examples of what appear to be savings paid to a client, all in the period when Mr Hardy was a director. On 10 March 2010 there were 3 payments of £10,000 and one payment of £5,389.70 with the narrative “Old Brook Consult Savings”. Having said that there is no clue as to which client this might refer to because there was no other reference to “Old Brook” in the bank statements or in other documents we were referred to. On 21 December 2009 a sum of £72,302.90 was paid with the narrative “Pararail Pship LLP Savings/Tax/NI”, and on 29 January 2010 a sum of £36,900 was paid with the narrative “Cedar Partnership ref savings/CT/NIC”.

123. These entries suggest that some of the sums paid by KBS to Scheme users were the savings to which they were entitled. However the documentation one would expect to confirm such a conclusion has not been provided by KBS. Mr Hardy was unable to say when savings were paid to clients or give any reliable description as to how they were calculated. The bank statements show that there were numerous other Scheme users with no evidence of savings being paid to them by KBS.

124. Mr Simpson submitted that Mr Marriott had been clear in his evidence that this was the only explanation for such payments. In fact Mr Marriott’s evidence was only to the effect that payment back of savings was consistent with his understanding of how the Schemes operated. Anything beyond that would in our view be speculation.

125. The uncertainty about the nature of these payments is compounded by Mr Hardy’s description of them not as savings but as “fees generated as a result of savings”, although he couldn’t say what the fees were.

126. The burden is on KBS to establish that these sums, when received by KBS as part of a gross payroll, should not be treated as fees due to KBS. In the absence of any reliable supporting evidence we are not satisfied that these payments were payments of savings, or that they amounted to some form of disbursement. There is no reason why KBS should not have supporting documentation or other reliable evidence to identify the nature of the payments. The only evidence we have is the bank statements, the hearsay evidence of Mr Hardy as to what Mr Brandwood thought the payments might represent and Mr Hardy’s own vague and unsatisfactory evidence.

#### *Date of Registration and the Assessment*

127. In the light of Mr Hardy’s evidence as a whole, it is clear to us that Mr Hardy had very little involvement in the running of KBS. We cannot say, on the evidence before us, who was running KBS. In any event that is not an issue we are called upon to decide in this appeal. We are however unable to accept Mr Hardy’s evidence save where it is corroborated by other evidence, in particular documentary evidence.

128. It is abundantly clear that from April 2008 onwards the Schemes involved a payment by Scheme users to KBS from which KBS paid employees of the Scheme users. Mr Marriott described this as the operation of two payrolls, but that description is not apt. There was only one payroll which was administered by KBS and funded by



the Scheme users. There were also payments out to HMRC which it is apparent were payments of PAYE and national insurance in relation to the payroll payments.

129. Mr Simpson did not seek to argue in closing submissions that from 22 April 2008 KBS supplied services to anyone other than the Scheme users. In our view he was right not to do so. There was no evidence of KBS supplying its services to anyone other than the Scheme users after that date. We are satisfied that TAC ceased trading on that date. There was no evidence of any other partnership taking the place of TAC. We are satisfied therefore that KBS's claims in correspondence and in this appeal that KBS did not commence trading on its own account until 1 June 2009 are wrong. It was making taxable supplies to Scheme users with effect from 22 April 2008. Those services were payroll services and possibly other services in connection with the implementation of the Schemes.

130. The position in the period from 1 April 2006 to 22 April 2008 is less straightforward.

131. Mr Simpson submitted that the evidence from the accounts of KBS and TAC taken together with the narrative in the bank statements justified a conclusion that from April 2006 to April 2008 KBS's receipts were not taxable turnover but were its profit share from TAC. He submitted that services provided by a partner to a partnership would not be taxable supplies for the purposes of VAT.

132. Mr Charles submitted that it was not in dispute that there were payments from TAC to KBS and that KBS provided TAC with the services of its staff to administer the payrolls of Scheme users. Prima facie that was a supply of services and there was no reliable evidence on which to find that the payment was KBS's profit share.

133. The best evidence to confirm that KBS's receipts in this period were solely a profit share from TAC would be the partnership agreement of TAC. The partnership agreement was not adduced in evidence before us. We did have the accounts of both KBS and TAC. Those accounts were certainly consistent in treating the sums received by KBS from TAC as partnership profits.

134. Having said that, we were not addressed as to whether and in what circumstances a member of an LLP might make a taxable supply to an LLP. Mr Charles did submit that we should look at the commercial reality. We do not have any evidence as to the basis on which KBS provided staff to TAC. It does not appear that there were any separate payments in addition to the profit share which KBS received as a partner, certainly none that appear in the bank statements. It may be that the partnership agreement made provision for the basis on which KBS would supply staff to TAC and how it would be remunerated for that, whether by way of profit share or otherwise.

135. The burden is on KBS to satisfy us that the provision of staff was not a taxable supply. That argument can only be made good if the staff were supplied otherwise than for a consideration.

136. Where an incoming partner makes a capital contribution in cash there is no supply by the partnership for VAT purposes – see the ECJ judgment in *KapHag Renditefonds 35 Spreecenter Berlin-Hellersdorf 3. Tranch GbR v Finanzamt Charlottenburg Case 442/01* which was not cited to us. In *KapHag* a German partnership admitted a new partner upon payment by him of a sum of money by way of capital contribution. One of the questions referred to the Court of Justice was whether the admission of a new partner who pays a contribution in cash constitutes a supply of services for a consideration for the purposes of VAT. The Court of Justice held that there was no supply of services by the partnership to the incoming partner because there was no reciprocal consideration from the partnership.

137. At [32] and [33] Advocate General Colomer stated as follows:

“ 32. *the court will have to examine the legal nature of the relationship which is established between a partnership and the new partner when, in order to acquire that capacity, the new partner makes an economic contribution to the partnership which he is joining.*

33. *I have not the slightest doubt that the future partner performs an act involving the disposal of his assets, of which becoming a member of the partnership is not the counterpart. Or, in other words, the fact of joining a partnership does not constitute a supply of services whereby the partnership confers an economic advantage on the new partner.”*

138. *KapHag* was concerned with contributions to partnership capital on joining a partnership. That is not the present case, but the difficulty with the present case is that we know nothing of the agreements between TAC and KBS by which KBS provided staff for use by the partnership. We do not even know the basis on which KBS’s entitlement to profits of TAC was to be calculated or whether that entitlement took into account any contribution in kind. The most we know is that KBS received what was described in TAC’s accounts as a share of profits. There is no reference in TAC’s accounts at any stage between 2006 and 2009 to any capital contribution at all from KBS to acquire its interest in TAC. In the circumstances we do not regard the description of KBS’s entitlement as “profit share” as determinative.

139. It may be that KBS agreed to provide staff to TAC as some form of capital contribution. It may be that there was some form of agreement between KBS and TAC outside of the partnership agreement for the provision of staff. In the absence of any reliable evidence we cannot make any findings as to the relevant circumstances in which KBS provided staff to TAC.

140. There is no reason why there should not be circumstances in which a member of an LLP will make taxable supplies to the LLP. Irrespective of any capital contributions a member might make, a member can still make supplies to the LLP if the member does so for a consideration. In that case it seems to us that there would be a taxable supply.

141. There is no evidence of payment by TAC to KBS in addition to what is described as a profit share. Further, we have no evidence as to the arrangements between TAC and KBS as to how the two accounted for the provision of staff. We cannot simply assume that KBS's provision of staff to TAC was a contribution to the partnership capital recognised by way of its profit share. In those circumstances we cannot be satisfied whether or to what extent the sums paid by TAC to KBS were properly described as a profit share and therefore outside the scope of VAT. KBS has failed to satisfy the burden of establishing that the provision of staff was not a taxable supply in consideration of the sums described as "profit share".

142. For the reasons already given, we are not satisfied that payments by KBS to POBS and CTH fall to be excluded from the Assessment. As a result we are not satisfied that the Assessment is excessive in this regard.

143. We leave it to the parties to consider in the light of our findings as to taxable supplies what effect those findings have on the date of registration.

*Input Tax Credit*

144. The table below shows the amounts of input tax credit claimed by KBS in its VAT returns and the extent to which those claims were disallowed by Ms Sharkey:

<b>Period</b>	<b>Input Tax Claimed £</b>	<b>Input Tax Disallowed £</b>
09/09	728	728
12/09	1,512	1,486
03/10	15,508	15,508
06/10	6,583	6,583
09/10	9,180	9,174
12/10	8,627	8,627
03/11	10,354	10,340
06/11	67,130	67,075
<b>Total</b>	<b>£ 119,622</b>	<b>£ 119,521</b>

145. There were a number of input tax claims not supported by invoices and KBS accepts that these were correctly refused by HMRC. Those items were not specifically identified to us but we understand that the input tax credit in relation to such claims was approximately £3,500.

146. Many of the invoices were not sequentially numbered. Ms Sharkey broadly accepted that if the only issue with an invoice was that it was not sequentially numbered then she would not have disallowed the input tax credit, as long as she was satisfied that the supply had taken place. The present appeal was not concerned with

the proviso to regulation 29(2) and whether there was alternative evidence of a charge to tax. However in all cases where there was no sequential numbering there were other reasons as to why HMRC contend that the invoices were not valid. It is fair to say that both parties focussed on more fundamental aspects, such as whether the invoices contained a sufficient description to identify the services supplied and the extent of those services or were properly addressed. Mr Charles did not submit that if the only criticism that could be made of an invoice was that it did not contain a sequential number then the appeal in relation to that input tax claim should still be dismissed.

147. In the case of each supplier Mr Simpson submitted that the description of the services provided was adequate. We stress, as did Mr Simpson, that we are not concerned with whether there was alternative evidence of the charge to VAT to satisfy Regulation 29(2). We are therefore not concerned with whether the services were actually provided. It is only for the sake of completeness that we record below various aspects of the evidence which might be relevant to that question. In the light of the parties' approach to this aspect of the appeal we do not need to make findings of fact in that regard. What we are concerned with is whether the invoices comply with regulation 14.

148. The supplies in issue between the parties come from the following suppliers. We make the following findings of fact with associated conclusions in relation to the claims for input tax credit made by KBS. We do so with separate headings for each supplier and by reference to the sample invoices we were referred to during the evidence.

(i) Latchford Properties

149. As we have noted the Premises occupied by KBS were at 681 Knutsford Road. The Premises were owned by Latchford Properties which was a partnership or joint venture between Mr Brandwood and Mr A Bairstow. The Premises comprised a 2 storey building with an open plan ground floor shared by a number of businesses.

150. Invoices from Latchford Properties to KBS were for "Rental Monies Due" with reference to the specific month. In June 2009 the sum invoiced was £510 plus VAT. It was addressed to KBS at the Premises. Mr Hardy was not aware of the terms upon which KBS occupied the premises.

151. Mr Charles submitted that in the absence of any description as to the nature and extent of the property supplied the description was inadequate. We do not accept that submission. In our view the description was sufficient to satisfy regulation 14.

(ii) Easypay Accountancy Solutions LLP

152. Easypay was a VAT registered company which also occupied the Premises. It was controlled by Mr Brandwood who was one of the members. In June 2009 it invoiced KBS for "office usage costs" of £600 plus VAT. Mr Hardy stated that for convenience Easypay paid the rates, electricity and other expenses in connection with the Premises and apportioned them between the occupiers. It also appears to have

charged in relation to photocopying, but the only explanation Mr Hardy could give was “perhaps we share a copier”.

5 153. Mr Charles submitted that there was a lack of clarity as to whether what as being supplied was a serviced office or simply utilities. In our view the description was sufficient to satisfy regulation 14.

10 154. In June 2009 Easypay also invoiced a sum of £500 plus VAT to KBS for “provision of consultancy services including assistance with bank payments”. Mr Hardy stated that these services related to payroll administration, holiday and sickness coverage and general assistance to KBS. When asked what Easypay did Mr Hardy simply said that “they helped with it”. At that time he said that KBS had a lot of clients and Easypay assisted KBS.

15 155. In April 2010 Easypay invoiced KBS for £1,935 plus VAT described as “Provision of Consultancy Services”. Mr Hardy accepted that it wasn’t a good description but said that “payroll services is what Easypay did”. Mr Hardy suggested that Easypay did all the administrative work involved in operating client payrolls on behalf of KBS. He described Easypay as “the engine room of the operation”.

20 156. In May 2010 Easypay invoiced KBS for £1,380 plus VAT described as “Provision of Consultancy Services to your clients, assistance/advice given to KBS staff”. Mr Hardy described this as helping KBS to manage all clients’ payroll services efficiently, but he accepted that the Easypay was providing services to KBS rather than to KBS’s clients.

25 157. As far as consultancy services are concerned, Mr Charles submitted that the descriptions were wholly inadequate. We agree. The services being supplied and the extent of those services are wholly unclear. In the context of how Mr Hardy described Easypay’s services, descriptions such as “consultancy services” without identifying the nature of the services, the period of time over which they were provided and the clients in respect of which the services were provided do not satisfy regulation 14.

### (iii) Cortex Accounting LLP

30 158. Cortex was a VAT registered business which also occupied the Premises. Mr Hardy described this as a business carried on by Luke Potts, who provided accounting services for KBS and for clients of KBS in relation to the production of accounts. He would also help directors and employees of clients with their tax affairs if needed. In 2010 KBS contracted with clients directly to provide this service and sub-contracted the work to Cortex.

35 159. In April 2010 Cortex invoiced KBS for £4,900 plus VAT described as “Accountancy Services for various clients April 2010”.

160. Mr Simpson did accept that the description on Cortex invoices was at a high level of generality but submitted that it was sufficient.

161. Mr Charles submitted that the descriptions were wholly inadequate. It was not clear precisely what the services were and who they were being provided to. This was mirrored, he said, by Mr Hardy's vague and varied descriptions of Cortex providing services in relation to KBS's accounts, clients' accounts and general payroll services on behalf of KBS.

162. We agree that the description of the services and the extent of the services in the invoice referred to is inadequate. It does not identify what services were provided in respect of which clients. As such we do not consider that it satisfies regulation 14.

(iv) T4 Marketing Limited

163. T4 Marketing was a marketing company which Mr Hardy described as claiming that they could locate prospective clients for KBS. They would generate leads from letters and phone calls and then arrange appointments with potential clients with a view to selling the Schemes. Training to T4 Marketing staff was given by Mr Brandwood.

164. Invoices from T4 Marketing to KBS set out the total number of hours spent on telesales together with a cost per hour of calls. Those details were given for each week being invoiced.

165. Mr Charles accepted that the description of the services supplied in this case was adequate. We conclude that the invoices from T4 Marketing were valid.

(v) Greenwood Business Services Ltd

166. Greenwood was a VAT registered company controlled by Mr Mark Davey-Hayford and based at the Premises. Mr Hardy described him as an accountant, and said that Greenwood assisted KBS with accountancy services. In May 2009 when Mr Hardy became a director of KBS, Greenwood provided bookkeeping services and assisted with clients. It would oversee payments to KBS from clients and payments by KBS in respect of client payrolls. Greenwood's primary role was to make sure there were no errors. He also described Greenwood's role as overseeing Easypay. He did not regard this as duplication, but as a "safety measure".

167. In November 2009 Greenwood invoiced KBS for £1,200 plus VAT for "consultancy and secretarial services – October '09". Mr Hardy accepted that the description was poor in the light of Greenwood's actual role.

168. For these services we consider that the description is inadequate in the light of Mr Hardy's description of the services Greenwood provided. To that extent such invoices do not satisfy regulation 14.

169. In August 2010 Greenwood also re-charged to KBS the services of Stuart McBain Ltd. This was a company operated by Mr Stuart McBain who Mr Hardy described as "a trouble-shooter who would calm troubled waters". If KBS had any difficulties with clients, for example disputes over fees or the amount of savings then

Mr McBain was asked to assist. At a later stage he assisted clients with HMRC enquiries.

170. Stuart McBain Ltd was also VAT registered and invoiced Greenwood for work done. Greenwood then invoiced KBS, apparently for the same amounts. Greenwood's  
5 invoice had the detailed invoice of Stuart Mc Bain Limited annexed to it.

171. In relation to the services of Stuart McBain Limited which were re-charged by Greenwood, we are satisfied that the description is adequate and the invoices comply with regulation 14.

(vi) Jeremy Woolf

10 172. Jeremy Woolf is a practising tax barrister. In December 2010 he invoiced Mr Hardy personally at his home address for £2,500 plus VAT in relation to a payment on account of fees for "considering the papers and advising in conference by telephone". The fee note was headed "Mr Philip Hardy – DOTAS" and the reference was Philip Hardy. There was no reference to KBS on the invoice.

15 173. Mr Hardy said he did not know why he had been invoiced personally and that the invoice ought to have been addressed to KBS. Mr Woolf had been advising as to the feasibility of strategies KBS wanted to adopt, in particular whether some of the schemes fell to be disclosed to HMRC under the DOTAS regime.

174. Mr Charles accepted that the description of the services supplied was adequate.  
20 However it was plainly an invalid invoice if, as KBS submits, it was addressed to the wrong person.

175. Mr Simpson submitted that Mr Hardy had given clear evidence that the advice had been sought and received on behalf of KBS. However that submission does not address the validity of the invoice. We are satisfied that this invoice was not valid for  
25 the purpose of KBS reclaiming the input tax shown on the invoice. It did not contain the name and address of the person to whom the goods were supplied and therefore it did not satisfy regulation 14.

(vii) Tax Accounting and Business Solutions (Ireland)

176. Mr Hardy said that TABSI was a business of Mr Backhouse. KBS paid fees to  
30 TABSI for marketing services he provided to KBS. TABSI was VAT registered in the UK. There was an invoice in December 2010 for £1,500 plus VAT which referred to "consultancy services and advice in connection with clients".

177. Mr Charles submitted that the descriptions were wholly inadequate. There was no description of what the charges were for, even if the narrative on some of the  
35 invoices did identify certain Scheme users.

178. If the invoices represented Mr Backhouse's fees for marketing Schemes to businesses which became clients of KBS, then the invoices should have said so and should have given some indication as to the basis upon which those fees were

calculated and the period to which they related. We are satisfied that the TABSI invoices did not adequately describe the nature and extent of the services for the purposes of regulation 14.

(viii) Corporate Staff Benefits Partnership Ireland

5 179. Mr Hardy said that CSBPI was another trading name of Mr Backhouse. CSBPI was VAT registered in the UK. There was an invoice in September 2009 for £6,185.27 plus VAT which referred to “Charges regarding Tickford/TGSM/VIP”. Mr Hardy said they were all clients of KBS and indeed there are entries on KBS’s bank statements which support that fact. There were two similar invoices with identical  
10 narrative in December 2009 and March 2010 where the sums charged to KBS were £30,598.61 and £47,378.61 respectively, in each case plus VAT.

180. On 30 June 2011 CSBPI invoiced KBS for £300,000 plus VAT. The narrative was “fees on account as per agreement regarding charges”. Mr Hardy’s reaction when taken to this invoice was to say “phew!”.

15 181. Mr Hardy described the work done by Mr Backhouse to support these invoices as marketing and promoting the scheme. The fees were for securing contracts with clients. He could not recall the formula by which the fees were calculated. He said “there were quite a few meetings, the Schemes were not easily sold”. Mr Hardy himself was not involved in marketing the Schemes. He said that there was an  
20 agreement to pay Mr Backhouse for marketing the schemes and the latter invoice was an accumulation of fees. He could not be certain what period it covered, although he surmised that it was the period of 15 months from March 2010 to June 2011. He also said that KBS had a great many clients at that time.

182. Mr Hardy accepted that the invoices should perhaps have included a description  
25 of marketing, but said that they were “adequate for his purposes”. Quite how that was the case given that he was unaware of the basis by which fees were to be calculated was not explained.

183. The position is the same as TABSI, although the description for an invoice of  
30 £300,000 plus VAT does refer to “as per agreement regarding Schemes”. However there is no reference to the date or form of the agreement, the Schemes to which it relates, the nature of the services supplied or the period to which they relate.

184. The other invoices are similarly deficient, although in some cases they identify the client or at least clients to which they relate.

185. In those circumstances the CSBPI invoices do not satisfy regulation 14.

35 (ix) Direct Business Management Ltd

186. DBML was a company based in Hartlepool run by a person called Linda. It organised seminars to promote the Schemes to the public at various hotels in the North of England. Linda would arrange the seminars, book the hotels and arrange literature. Mr Backhouse would present the seminars.



187. DBML invoiced KBS for £6,500.84 on 31 July 2010. No VAT or VAT number was identified on the invoice. The invoice referred to “Expenditure incurred on behalf of KBS during July 2010”. What appears to be another invoice for £12,912.09 is in the form of a schedule and refers to expenditure on behalf of KBS in June 2010, although the individual entries cover dates in March, April, May and June 2010. Items on the schedule which KBS reimbursed to DBML included items which were personal to Mr Backhouse, such as food and office expenses for Mr Backhouse’s home. Mr Hardy’s initial reaction to this was somewhat casual. He said “thank you for pointing that out”. When the topic arose later in his evidence he said that even if he had known about the personal expenditure he would not have queried it because “without Mr Backhouse’s efforts the company wouldn’t exist”.

188. Mr Simpson did not put any case to Ms Sharkey as to why she should have allowed credit for input tax on these invoices. The invoices we were taken to were plainly invalid because they did not include DBML’s VAT registration number. We are not satisfied that KBS was entitled to any input tax credit in relation to the DBML invoices.

### *Conclusion*

189. At the commencement of closing submissions both parties agreed that there were four issues for determination:

- (1) Whether the original Assessment had been made to best judgement.
- (2) Whether credits in relation to POBS and CTH were to be treated as part of KBS’ turnover for VAT purposes.
- (3) Whether KBS was liable to be registered from 1 August 2006.
- (4) What input tax credit was KBS entitled to?

190. As we have stated, the issue as to whether the Assessment to output tax was made to best judgement has fallen away. It was based on the assertion that HMRC had originally assessed all monies banked by KBS as part of turnover when HMRC knew that was not the case. KBS does not now contend that the effect of such an assessment would be to nullify the assessment. It accepted that we should focus on identifying the proper amount of the assessment, if any.

191. For the reasons given above KBS has not satisfied us that payments to POBS and CTH were made otherwise than out of KBS’s own income. We are not satisfied that those payments were disbursements made on behalf of Scheme users. Consequently we are not satisfied that the Assessment is excessive in this regard.

192. In relation to issues (3) and (4) we were invited by both parties to make a decision in principle.

193. The date on which KBS was liable to be registered would depend on the date on which KBS started to make taxable supplies and the basis on which those supplies should be identified. The parties would then be able to identify when the registration threshold was reached. We leave it to the parties to determine on the basis of our

findings above when KBS ought to have registered for VAT and what effect there is on the quantum of the Assessment as regards output tax.

194. In relation to entitlement to input tax credits we were invited to make findings in relation to each supplier leaving it to the parties to calculate the extent to which  
5 KBS was entitled to credit. In each case that is the approach we have adopted. We have set out above our conclusions in relation to the invoices from each supplier.

195. For the reasons given above we allow the appeal in part in relation to input tax in the Assessment. Otherwise the appeal will be dismissed, subject to the parties agreeing the effect of our decision on the date of registration and the quantum of the  
10 Assessment. The parties shall have permission to apply within 3 months from the date of this decision for the Tribunal to address any further matters consequential on our findings.

196. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal  
15 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.

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**JONATHAN CANNAN  
TRIBUNAL JUDGE**

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**RELEASE DATE: 17 DECEMBER 2015**