Neutral Citation: [2023] UKFTT 372 (TC)

Case Number: TC09793

FIRST-TIER TRIBUNAL
TAX CHAMBER

City Exchange
11 Albion Street
Leeds

Appeal reference: TC/2017/01856
TC/2017/01858

PROCEDURE – strike out application by respondents – MTIC appeal – whether appellant has a realistic prospect of success – application dismissed

Heard on: 17 February 2023
Judgment date: 18 April 2023

Before

Tribunal Judge Jonathan Cannan

Between

TASCA TANKERS LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Tim Brown of counsel, instructed by Independent VAT Consultants Limited

For the Respondents: Sam Way of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs

DECISION

INTRODUCTION

1. This is an application by the respondents ("HMRC") to strike out an appeal on the ground that it has no reasonable prospect of success. The application was previously dismissed by the FTT in a decision released on 29 January 2021. HMRC appealed against that decision and the Upper Tribunal allowed their appeal. The application was remitted to be heard by a different Judge of the FTT.

2. The appellant ("Tasca"), entered into transactions involving the purchase of high specification second-hand motor vehicles in Northern Ireland which were then sold to customers in the Republic of Ireland ("RoI"). For VAT purposes, Tasca zero-rated its supplies to the RoI customers. It also claimed deduction of input tax incurred on its purchases from UK suppliers.

3. There are two appeals. The first appeal (TC/2017/01856) is against a decision of HMRC which assessed Tasca to output tax of £179,171 on the supplies to RoI customers. The assessment was made on the basis that Tasca did not hold sufficient evidence to support the zero-rating of those supplies. The present application does not concern the first appeal.

4. The second appeal (TC/2017/01858) is against a decision of HMRC which assessed Tasca to recover input tax deductions in the sum of £214,386 which it had claimed in relation to the purchases from UK customers. HMRC made the assessment on the ground that the underlying transactions were connected with the fraudulent evasion of VAT and Tasca knew or should have known of that fact. Tasca's ground of appeal is that it did not know and could not have known that the transactions were connected with fraud.

5. HMRC seek to strike out the second appeal. They say that Tasca has no reasonable prospect of rebutting HMRC's case that Tasca should have known of the connection with fraud. HMRC do not seek to strike out the appeal on the basis that Tasca must have had actual knowledge of the connection with fraud.

BACKGROUND FACTS

6. The background facts are not disputed and come principally from HMRC's evidence.

7. Tasca was incorporated in September 1994 and was registered for VAT in February 1995. It is based in Wakefield, West Yorkshire and its main business is the manufacture, sale and repair of new and second-hand road tankers.

8. Tasca had three directors: Mr Alwyn Bowering, Mr Thomas Patrick McDonnell and Mr Andrew Stokes who between themselves and in one case a spouse owned 75% of the company's shares. Mr Shaun Harte ("Mr Harte") was described as the chief executive officer of the Appellant and owned 25% of the shares. He was not an employee of Tasca but provided management services to the company. Mr Harte was solely in charge of the financial side of the business and the directors were solely involved in the manufacturing, sales and repair side of the tanker business.

9. The appeal is concerned with purchases of motor vehicles in the following VAT periods:

VAT Period	Number of Purchases
12/14	7
03/15	1

06/15	2
09/15	4
12/15	5
03/16	3
06/16	2
Total:	24

10. HMRC received mutual assistance requests from the RoI tax authorities in connection with Tasca's sales of motor vehicles. This prompted HMRC to visit the Appellant on 20 April 2016, after the date of the last purchase. An officer spoke with Ms Vicki Wood at the visit. She was Tasca's bookkeeper. There was a discussion about Tasca's trade in second-hand vehicles and Ms Wood's role in that trade. There was also a discussion about the evidence required to zero-rate intra-community supplies of goods.

11. A second visit took place on 14 June 2016 at which Mr Harte and the three directors were present. There was a discussion about the business of Tasca and how it had become involved in trading second-hand vehicles. There was a discussion about missing trader ("MTIC") fraud. Tasca was advised that all but one of the purchase transactions traced at that time traced back to tax losses. Following this visit HMRC issued an assessment for output tax on Tasca's sales of motor vehicles on the ground that there was insufficient evidence that the vehicles had been removed from the UK. HMRC subsequently assessed the input tax credit claimed by Tasca on the purchase of the vehicles.

12. HMRC's evidence in the appeal to the effect that Tasca's transactions were connected with fraud is no longer disputed. The Appellant purchased the vehicles directly from four defaulting traders: DFMS (NI) Limited; Erlemo (UK) Limited; Cahal Corr trading as Mountain View Motors; and Martin Donnelly trading as MD Motor Sales. All four suppliers have been deregistered for VAT on the basis that they were missing traders with unpaid VAT liabilities. It is common ground that these traders fraudulently evaded payment of VAT that was charged to Tasca.

13. HMRC established at the visits that no-one from Tasca had met any of the suppliers. Ms Wood thought that the suppliers were "probably" contacts of Mr Harte. The transactions came about following discussions between Mr Harte and a Mr Paul Donnelly ("Mr Donnelly"). Mr Donnelly was not employed by Tasca and did not have any contractual relationship with Tasca. It is Mr Donnelly who is said to have introduced Mr Harte and Tasca to the business in second-hand vehicles. Mr Donnelly states that he is unrelated to Mr Martin Donnelly, one of the defaulting traders.

14. The circumstances in which Tasca came to deal in second-hand vehicles were described to HMRC in the visits described above. Those circumstances are also referred to in the evidence served on behalf of Tasca in this appeal. I refer to that evidence below.

HMRC'S CASE

15. It is common ground that in an appeal such as this there is a burden on HMRC to establish that Tasca knew or should have known that the transactions were connected with fraud. In support of that contention, HMRC rely on various facts and matters said to be established by the evidence which it has served in the appeal. HMRC have served detailed evidence including documentary evidence in support of the appeal. The evidence in relation to Tasca itself comes from Officer Anthony Booth. He was not involved at the time of the enquiry into Tasca's VAT returns and the assessments which followed. Most of his evidence comes from the records of HMRC including visit reports and documentary evidence to support the assessments. The facts

and matters relied on by HMRC to establish their case on what Tasca knew or should have known may be summarised as follows:

(1) At the April 2016 visit, Ms Wood said that she found everything about the deals "unusual".

(2) Funds received by Tasca in relation to some of the sales were paid by a third party and not by the RoI purchasers.

(3) Some of the suppliers used almost identical invoice templates.

(4) The transactions were all back to back transactions with the purchase and sale being effected within a few days of each other. Further, there was no evidence of any negotiation with suppliers or customers

(5) The trade in motor vehicles was conducted in a very different way to Tasca's established trade in road tankers. Further, Tasca did not insure the vehicles and did not consider which parties had title to the vehicles during the transactions.

(6) Tasca did not require funding for the transactions and did not incur risk of non-payment because it intended to pay its supplier only when paid by its customer. However, on a number of occasions, the supplier was paid before the customer had paid.

(7) Tasca did not make any profit on the purchase and sale of the vehicles.

(8) Tasca conducted no due diligence on its suppliers or customers.

(9) Checks by HMRC indicate that the vehicles were not in fact transported to RoI.

(10) One vehicle was the subject of two separate transactions.

16. During the course of the hearing, Mr Way on behalf of HMRC conceded that for present purposes the evidence before me did not establish all these factors. I consider below the evidence relied on by HMRC in relation to each of the above factors to establish that Tasca should have known that its transactions were connected with fraud.

17. HMRC's case also included detailed evidence from various officers in relation to each supplier to establish that the suppliers were fraudulent defaulters. It is not now disputed that each of Tasca's transactions was connected with the fraudulent evasion of VAT.

THE APPELLANT'S CASE

18. Tasca has served evidence in response to HMRC's case that it knew or should have known that its transactions were connected with fraud. That evidence comprises short witness statements from Mr Donnelly, Mr Harte and Ms Wood. Rather than summarise their evidence, I can set out the full contents of those witness statements.

Paul Donnelly

1. I am 54 years old and have known Shaun Harte for 30 years. I am not an employee of Tasca Tankers Limited.

2. My family business Donnelly Motor Group which I retired from 10 years ago employs 700 people and are N Irelands third largest motor retailers.

3. I was at the Donnelly & Taggart Toyota dealership in Derry (part of the Donnelly Motor Group) in 2015 and was introduced to a motor trader called Colm McNulty by the Sales Director Victor Pollock who introduced him to me as a trader who had recently purchased his 40th Toyota pick up and jeep from Donnelly & Taggart as he was wholesaling slightly used/pre-registered cars into the booming RoI car market as the RoI was back in growth after the devastating economic crash it suffered in 2008/9.

4. McNulty told me that he had been limited in the amount of sales he could conduct in any three month period as it was only at each quarter end he could get the VAT back on his exports and as such his cash flow was limited so he wondered if I knew of anyone who could export vehicles to the RoI for him and he would pay them £500 commission for each export sale.

5. I asked Shaun if he thought that would be any interest to Tasca in a passing conversation as I had recently got Tasca a few Tanker customers and we agreed that if all the VAT numbers etc were verified it should be ok and would be an additional income stream for Tasca.

6. McNulty's Companies, which included DFMS (NI), Erlemo (UK), Mountain View and Martin Donnelly, I can also confirm i am no relation to Martin Donnelly, invoiced Tasca and he emailed Vicki Wood at Tasca the name of each customer.

7. As far as I know, on every occasion Vicki Wood at Tasca Tankers checked all the companies details on the VIES website and on each occasion all the details matched the information on the invoices.

8. As far as I am aware Vicki checked Tasca's Bank Account to each sale to confirm that she had received payment from the customer before she paid the suppliers invoice for each vehicle sold.

9. Copy RoI documents were sent to Vicki and I also checked the RoI website cartell.ie and found RoI reg numbers for the following vehicles

[List of 4 UK registration numbers]

10. The first time I heard of VAT MTIC was when I was told by Vicki Wood after Mrs Shah's VAT inspection in May 2016. Until then and at the time of the transactions I had no inkling that they might be connected to VAT fraud.

Shaun Harte

1. My name is Shaun Harte and I have been working with Tasca Tankers Ltd for over 10 years.

2. I have known Paul Donnelly for over 30 years and have been doing business with his family business Donnelly Group for a similar time.

3. I was talking to Paul and having a general moan about business and cashflow, in particular our large VAT quarterly bill and my difficulty in managing our cashflow to pay every quarter without avoiding late payment penalties.

4. A few days later Paul approached me and suggested a method of making some more profit for the business and reducing my problem of the VAT quarterly bill.

5. He advised me that a lot of upmarket used vehicles were being exported into the Republic of Ireland from the UK and that he had met a large exporter who he thought would potentially be a revenue stream for Tasca Tankers and we would make £500 per unit and reduce the amount of VAT we would have to pay at the end of the quarter.

6. He said he would handle each transaction and he would liaise with Vicki Wood at Tasca to ensure each vehicle was paid for before it was released to the purchaser. I advised both Paul and Vicki to ensure that all the VAT numbers corresponded with the invoice details and the information held by HMRC and the company names on the invoices were the holders of the vat numbers supplied.

7. I have been present at Tasca Tankers for each and every visit from HMRC and have ensured that they have been supplied with all the information they have requested, in the time frame they have requested it.

8. When Mrs Shah, an HMRC agent visited for maybe the 3rd or 4th time she informed me that she thought we had been caught up in a MTIC vat fraud. I was totally shocked and bewildered. I had never heard of MTIC until she told me and subsequently explained what she thought had happened to us.

Vicki Wood

1. My name is Vicki Wood, I am the Accounts Administrator for Tasca Tankers Limited where I have worked for the last seventeen years.

2. In December 2014, I was asked by Shaun Harte to make payments to invoice customers when we had received cleared funds from the purchasers of the vehicles being exported to the Republic of Ireland by Paul Donnelly, a friend of Mr Harte.

I now produce copies of the relevant bank statements marked VW1

3. I would receive a purchase invoice detailing the make, model and chassis number of the vehicle, a job number would be created for the vehicle using this information and a sales invoice raised. We have online banking, so I would know daily what payments had arrived, once the sales invoice had been paid the supplier would be paid accordingly. Bank details were confirmed to either me, Mr Harte, or detailed on the relevant invoices.

4. I checked via VIES that the VAT numbers, names and addresses of the suppliers and customers on the invoices were valid.

5. I check who we receive funds from, and the amounts receive match the invoice values as a matter of course. These transactions would have been no different.

6. Ultimately, I would have informed Mr Harte, he does a daily update of the transactions going through the bank account.

7. I, on occasion spoke to Paul Donnelly about payments and invoices.

19. The Upper Tribunal directed that the hearing of this remitted application should be limited to the evidence relied upon by the parties at the original FTT hearing in December 2020, unless permission was obtained from the FTT to adduce further evidence. Neither party has applied to adduce further evidence.

PRINCIPLES TO BE APPLIED

20. Tribunal Rule 8(3)(c) provides as follows;

8(3) The Tribunal may strike out the whole or a part of the proceedings if –

(a) …

(b) …

(c) the Tribunal considers there is no reasonable prospect of the appellant's case, or part of it, succeeding.

21. The Upper Tribunal in the present case endorsed the approach of the FTT to the test which is to be applied in determining whether an appeal should be struck out pursuant to Tribunal Rule 8(3)(c). In particular, it endorsed the FTT's reliance on the following passages in the relevant authorities.

22. First, the approach described by the Upper Tribunal in *The First De Sales Limited Partnership v HM Revenue & Customs* [2018] UKUT 396 (TCC) at [33]:

33. Although the summary in Fairford Group Plc is very helpful, we prefer to apply the more detailed statement of principles in respect of application for summary judgment set out by Lewison J, as he then was, in Easyair Ltd (t/a Openair) v Opal Telecom Ltd [2009] EWHC 339 (Ch) at [15]. This was subsequently approved by the Court of Appeal in AC Ward & Sons v Caitlin Five Limited [2009] EWCA Civ 1098. The parties to this appeal did not suggest that any of these principles were inapplicable to strike out applications.

'i) The court must consider whether the claimant has a 'realistic' as opposed to a "fanciful' prospect of success: Swain v Hillman [2001] 1 All ER 91

ii) A 'realistic' claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8]

iii) In reaching its conclusion the court must not conduct a 'mini-trial': Swain v Hillman

iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ED & F Man Liquid Products v Patel at [10]

v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd [2007] FSR 63;

vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals & Polymers Ltd v TTE Training Ltd [2007] EWCA Civ 725.'

23. Second, a passage from the opinion of Lord Hope in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16 at [94] to [96]:

94. ... I think that the question is whether the claim has no real prospect of succeeding at trial and that it has to be answered having regard to the overriding objective of dealing with the case justly. But the point which is of crucial importance lies in the answer to the further question that then needs to be asked, which is - what is to be the scope of that inquiry?

95. I would approach that further question in this way. The method by which issues of fact are tried in our courts is well settled. After the normal processes of discovery and interrogatories have been completed, the parties are allowed to lead their evidence so that the trial judge can determine where the truth lies in the light of that evidence. To that rule there are some well-recognised exceptions. For example, it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks. In that event a trial of the facts would be a waste of time and money, and it is proper that the action should be taken out of court as soon as possible. In other cases it may be possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance. It may be clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based. The simpler the case the easier it is likely to be take that view and resort to what is properly called summary

judgment. But more complex cases are unlikely to be capable of being resolved in that way without conducting a mini-trial on the documents without discovery and without oral evidence. As Lord Woolf said in Swain v Hillman, at p 95, that is not the object of the rule. It is designed to deal with cases that are not fit for trial at all.

96. In Wenlock v Moloney [1965] 1 WLR 1238 the plaintiff's claim of damages for conspiracy was struck out after a four day hearing on affidavits and documents. Danckwerts LJ said of the inherent power of the court to strike out, at p 1244B-C:

> "... this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power."

Sellers LJ said, at p 1243C-D, that he had no doubt that the procedure adopted in that case had been wrong and that the plaintiff's case could not be stifled at that stage, and Diplock LJ agreed.

24. Third, passages from the decision of the Upper Tribunal in *HM Revenue & Customs v Fairford Group Plc* [2014] UKUT 0329 (TCC) which included the following at [30] and [48]:

> 30. … The Court's powers [to strike out a statement of case under CPR 3.4(2)] may be exercised if a defence is vague, evasive, incoherent or obviously ill-founded, although in such cases the objectionable nature of the party's case can often be cured by amendment or further particulars.
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> 48. … An appellant who advances a positive case will be required, by virtue of other customary directions, to set it out in witness statements or, if that is not practicable, in a response or a letter, or in some similar way. Accordingly, an appellant putting a positive case must disclose his hand in advance; we see no reason why one merely putting HMRC to proof should be in a better position. If there is a real challenge to HMRC's evidence it should be identified; if there is not, the evidence should be accepted. We see no reason why an appellant who does not advance a positive case should be entitled to require HMRC to produce witnesses for cross-examination when their evidence is not seriously disputed. Such a course is wasteful not only of HMRC's resources but also of the resources of the FTT, since it increases the length of hearings and adds to the delays experienced by other tribunal users.

25. The Upper Tribunal in the present appeal at [39] made the following observation on what was said in *Fairford*:

> 39. … it seems to us that what is set out in Rule 8(3)(c) is essentially a summary judgment jurisdiction, the language of which reflects CPR 24.2, rather than CPR 3.4. We agree with the Upper Tribunal in First De Sales that, while the guidance in Fairford is helpful, the primary statement of the principles to be applied is to be found as set out by Lewison J (as he then was) in Easyair Ltd, at [15].

EVIDENCE RELIED ON BY HMRC

26. None of the principles stated above were in dispute, either before the Upper Tribunal or before me. With those principles in mind, I turn to consider the evidence relied on by HMRC to establish that Tasca should have known of the connection with fraud and Tasca's response to that evidence. I consider the evidence by reference to the various numbered factors described above. It is HMRC's case on this application that the evidence adduced by Tasca comes nowhere near meeting HMRC's case that it should have known of the connection with fraud when it entered into the transactions.

(1) Ms Wood's description of everything about the transactions being "unusual"

27. Tasca's trade in motor vehicles was discussed at the visit on 20 April 2016. At one stage, the officer pointed out to Ms Wood that payments for sales to a customer called Acquis Cars

were received from a bank account in the name of Mr McNulty. Ms Wood replied that she found everything about the deals "unusual".

28. In her witness statement, Ms Wood does not explain what she meant by this or why she described the transactions in that way.

(2) Third party payments

29. HMRC rely on the existence of third party payments by Mr McNulty to Tasca. Tasca received two payments of £20,000 from Mr McNulty on 28 April 2015. The entries on the bank statement have a reference of "Acquis". There is a further receipt from Mr McNulty on 30 April for £15,416 with the same reference. The total of these receipts was £55,416 which is the sale price of a Range Rover Sport HSE sold on 21 April 2015 to Acquis Cars Limited. The purchase invoice was dated 19 March 2015. It was these payments from Mr McNulty which were discussed with Ms Woods and which prompted her to say that everything about the transactions is "unusual".

30. Tasca's witnesses offer no explanation as to why these payments came from Mr McNulty.

31. In so far as this factor is relevant to the question of what Tasca should have known, it can only apply to purchase transactions after 28 April 2015, of which there were sixteen.

(3) Identical invoice templates

32. Supplier invoices from DFMS, Erlemo and Mountain View bore a striking similarity and used the same type face and layout. The invoices for DFMS and Mountain View also had the same VAT registration number and the same mobile phone contact number. It is fair to say that the invoices for MD Auto Sales, the fourth supplier were very different.

33. Tasca's witnesses have offered no explanation for these facts or said whether anyone at Tasca had noticed the similarity.

34. In so far as this factor is relevant to the question of what Tasca should have known, it can only apply to the first purchase transaction from DFMS which was dated 20 June 2015 and subsequent purchases, of which there were fourteen.

(4) Back to back transactions without negotiations

35. The evidence is that the transactions were all back to back transactions, with the purchase and sale of each vehicle effected within a few days of one another. This can be an indicator that transactions are connected with fraud, especially where there is no evidence of any negotiations with the suppliers and purchasers.

36. The significance of back to back transactions depends on the nature of the commodity being traded. In this case, the apparent business model involved high specification vehicles where it may not be unusual for a specific vehicle to be purchased with a specific customer in mind. Further, Tasca's witness evidence does offer an explanation of why the transactions took the form they did. Mr Harte understood Tasca was effectively funding VAT on the transactions for Mr McNulty in return for a commission of £500 per vehicle. That could explain why Tasca was not involved in any negotiations with suppliers or purchasers.

(5) Differences with Tasca's existing trade and a failure to consider matters of title and insurance.

37. Clearly there was a difference between Tasca's established trade in road tankers and its trade in motor vehicles. Again, Tasca's witnesses have offered an explanation for the two different approaches by reference to the nature of the agreement with Mr McNulty, brokered

by Mr Donnelly. The same explanation might equally apply to the fact that Tasca did not insure the vehicles and did not consider which parties had title to the vehicles during the transactions.

(6) Funding and risk

38. Tasca's witnesses have said that it sought to ensure that Tasca was paid by its customers before it paid its suppliers. This might also explain the lack of any consideration about insurable interests. HMRC say that in fact, on a number of occasions Tasca paid the supplier before being paid by the customer. As set out above, on 28 April 2015 Tasca paid two sums of £20,000 to Mr McNulty with the reference Acquis. On 30 April 2015 Tasca paid a sum of £15,416 to Mr McNulty with the same reference. The total paid was £55,416. The supplier invoice for this vehicle was dated 31 March 2015. However, Mr Way accepted that the date of the supplier invoice did not establish the date on which the supplier was paid. There was no bank statement in the evidence before me from which HMRC could establish the date on which the supplier was paid. In the circumstances, Mr Way did not place any reliance on this factor.

(7) Absence of profit on the transactions

39. HMRC allege that Tasca did not make any profit on the transactions. However, I was told that the transaction referred to in the previous paragraph was the only transaction in which Tasca did not appear to make any profit on the deal. Mr Way did not suggest otherwise. I was taken to a sample of transactions. One where Tasca made a profit of £500 and one where Tasca made a profit of £333.

40. Whilst Tasca made a profit on all but one transaction, there is no explanation as to why it did not make a profit of £500 on every transaction, which had apparently been agreed through Mr Donnelly.

(8) Absence of due diligence

41. HMRC allege that Tasca failed to carry out any meaningful due diligence in relation to its suppliers and customers. The only check it made was to confirm that the suppliers and customers had valid VAT registration numbers. If Tasca had carried out due diligence on the four defaulting suppliers, HMRC say that it would have identified that none of them had any apparent connection to Mr McNulty.

42. HMRC also say that if Tasca had carried out checks on its suppliers and customers it would have discovered that DFMS, Erlemo and two of the RoI customers had a common director, Mr Shane McConnell.

43. Mr Way was unable to take me to any of the published information in relation to the defaulters or the RoI customers because it had not been included in the bundle for the application.

44. The evidence does show attempts by HMRC to make contact with the four defaulting suppliers:

(1) An officer tried to contact the director of DFMS in or about August 2015. There was no response from the director and when a visit was made to its principal place of business there was no-one present.

(2) The principal place of business of Erlemo was a residential address where the occupants had not heard of the company or its director.

(3) HMRC were unable to gain access to the principal place of business of Mountain View and could not speak to anyone at the property.

(4) The principal place of business of MD Motor Sales was a residential property occupied by Martin Donnelly's mother who indicated he had not lived there for a year, although post was apparently passed to Martin Donnelly.

45. HMRC say that their straightforward checks in the form of correspondence and site visits established that there were serious questions over the legitimacy of the businesses. Tasca ought to have been able to identify the same concerns if it had simply attempted to contact the businesses. It ought to have tried to identify the companies' officers to make contact with them.

46. The appellant's witnesses do not say why they did not carry out due diligence on the suppliers and customers.

47. HMRC also say that if Ms Wood had checked the VAT numbers of the RoI customers she would have discovered that 6 of the customers had been de-registered for VAT at the time of the transactions. Again, the evidence to support this was not in the bundles and Mr Way did not pursue that allegation.

(9) Vehicles not transported to RoI

48. HMRC rely on evidence from their information systems which indicates that the vehicles were not in fact transported to RoI. Mr Way accepted that this information was not available to Tasca and was not relevant to HMRC's case that Tasca should have known of the connection with fraud.

(10) Transactions involving the same vehicle

49. Two of the transactions purportedly involved the same vehicle. Tasca purchased a BMW X5 M Sport from DFMS on 20 June 2015 and sold to a RoI customer on 30 June 2015. The registration number ended CXW and the chassis number ended 654. The same type of vehicle was purchased from Erlemo on 25 November 2015 and sold on 27 November 2015 to a RoI customer. That vehicle is noted on the November purchase and sales invoices ss having the same registration number but a different chassis number ending 503.

50. Tasca's witnesses have offered no explanation of these facts, either to explain the circumstances or to say whether anyone had noticed these matters.

51. In so far as this factor is relevant to the question of what Tasca should have known, it can only apply to the purchase on 25 November 2015 and subsequent purchases, of which there were nine.

DISCUSSION

52. The question of whether a trader should have known that its transactions were connected with fraud has been considered by the Court of Appeal in *Mobilx Ltd v Revenue and Customs Comrs* [2010] EWCA Civ 517 and in *Davis & Dann Ltd and another v Revenue and Customs Commissioners* [2016] EWCA Civ 142. In the latter case, Arden LJ as she then was described the test at [4] and [65] as follows:

> 4. It was common ground that in order to show that the respondents ought to have known of the connection between their purchases and [the] fraud, HMRC had to reach a high hurdle under EU law of showing that they ought to have known that the only reasonable explanation for the transactions was that they were connected to a VAT fraud: see *Mobilx Ltd v Revenue and Customs Comrs* [2010] EWCA Civ 517, [2010] STC 1436 (at [59] per Moses LJ). I will refer to this level of knowledge as knowledge meeting 'the no other reasonable explanation standard'.
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> 65. … in assessing whether the respondents' knowledge met the no other reasonable explanation standard, the FTT still had to go on to consider all the circumstances. The question is whether or not a reasonable person mindful of those circumstances ought to have concluded that the Transactions were connected with fraud. What matters is the perspective of the person alleged to have such knowledge…

53. Mr Way submits that by reference to this objective test, I should find on the basis of the evidence described above that a reasonable person would have concluded that the only reasonable explanation for the transactions was that they were connected with fraud.

54. Mr Brown submits that I cannot make such a finding on a summary basis and without hearing from Tasca's witnesses. HMRC are inviting me to conduct a mini-trial without the benefit of oral evidence.

55. It is common ground that in assessing whether a trader should have known of the connection with fraud, it is relevant to look at the transactions in question and all the surrounding circumstances in which they took place. It is not enough that the trader should have known that there was a risk that its transactions were connected with fraud. It must be shown that the trader should have known that the transactions were connected with fraud

56. Tasca's witnesses have set out their accounts of the circumstances in which Tasca came to enter into the transactions. Those accounts are brief, and focus on the agreement it is said that Mr Harte had with Mr McNulty, through Mr Donnelly, to the effect that Tasca would provide funding for the VAT element of his transactions in return for a commission of £500 per transaction. The commission was apparently to be paid by way of profit on the transactions.

57. There are difficulties with the evidence of Mr Harte, who as CEO was responsible for Tasca entering into the transactions. In particular, his evidence is that Tasca entered into the transactions for two reasons. Firstly, to provide an income stream, which the transactions did do, to some extent. Having said that, for reasons not explained by Mr Harte the profit was not at the rate of £500 per vehicle and in respect of one transaction there was no profit at all. Secondly, to reduce Tasca's quarterly VAT bill and thereby ease its cashflow problems. I cannot tell from Mr Harte's evidence the relative importance of those two reasons.

58. The obvious question which arises in relation to Mr Harte's evidence and which he does not explain is how these transactions would have helped ease Tasca's cashflow problems by reducing its quarterly VAT bill. The transactions did give rise to an increased input tax credit, and supplies to RoI customers should have been zero-rated if sufficient evidence of export was obtained. The quarterly VAT bill would therefore be reduced. However, that ignores the fact that Tasca would have had to pay a sum by way of VAT to its suppliers equivalent to the increased input tax credit. The transactions did not therefore assist Tasca with its cashflow, save to the extent of any profit on the transactions. Mr Brown was unable to offer any explanation as to how the transactions assisted Tasca's cashflow in relation to its VAT accounting.

59. Tasca has not offered any explanation for the third party payments, the existence of strikingly similar supplier invoices and the two transactions apparently involving the same vehicle. HMRC say that these were all indicators which should have alerted Tasca to the fact that its transactions were connected with fraud. None of Tasca's witnesses has said whether these matters were noticed at the time and if so why they did not alert Tasca to the possibility of fraud.

60. HMRC also relies on Tasca's failure to carry out appropriate due diligence on its suppliers and customers. Mr Brown reminded me of what Moses LJ said about due diligence in *Mobilx* at [82]:

> 82. … Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed

in *Kittel*, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was.

61. Moses LJ was not saying that the care taken by a trader in entering into the transactions is not a relevant circumstance. Further, if the checks a trader might reasonably be expected to make have not been carried out, the trader will be imputed with the knowledge such checks would have revealed. However, it is for HMRC to establish what the checks would have revealed if they wish to rely on such imputed knowledge.

62. Mr Way did rely on what checks on Tasca's suppliers and customers would have revealed if they had been carried out. He submits that they would have revealed serious questions over the legitimacy of those businesses and the absence of any connection to Mr McNulty. However, there is further evidence in this regard that has not been made available to me. In particular, information available publicly at the time of the transactions in relation to Tasca's suppliers and customers. I cannot safely say on the evidence before me what Tasca might have found if it had carried out due diligence checks on its suppliers and customers.

63. Mr Brown submitted that in considering all the circumstances, I must do so in light of the fact that neither Mr Harte nor Mr Donnelly had heard of MTIC fraud until HMRC's visits in 2016, after the last transaction had been concluded. That must be right, but in considering all the circumstances I can only take into account the circumstances that are established or might realistically be established by the evidence. Apart from publicly available due diligence material, it is not suggested that there is further evidence which might reasonably be expected to be available at the final hearing which is not available now. The question I must decide is whether there is any reason to think that a fuller investigation of the facts would affect the outcome of the appeal.

64. Mr Brown submitted that the evidence of Tasca's witnesses must be tested to establish what exactly they knew at the time the transactions took place and in the light of that knowledge whether there was any other reasonable explanation for the transactions. I disagree. The onus is on Tasca's witnesses to set out in their witness statements the evidence they intend to give. If witnesses do not take the opportunity to answer HMRC's case in their witness statements, they cannot simply rely on adducing evidence either by way of supplementary oral evidence given in chief or in the course of cross-examination. It is not for HMRC to draw out Tasca's case in cross-examination. The purpose of cross-examination is to challenge Tasca's case on the evidence given in chief.

65. It seems to me that there are considerable deficiencies with Tasca's evidence which I have noted above. In addition, Ms Wood clearly regarded the transactions as unusual. However, Tasca's evidence does not say whether Ms Wood took her concerns to Mr Harte or the directors. If Ms Wood had concerns, there is no reason why Mr Harte should not have had concerns. Mr Harte does not say that Ms Wood's concerns were misplaced or suggest any reason why he did not share her concerns.

66. Tasca has at least put forward what it says is a reasonable explanation for the transactions which might not involve a connection with fraud. Namely, the agreement with Mr McNulty. There remain significant questions as to the nature of that agreement and whether it does, in all the circumstances offer a reasonable explanation for the transactions. In my view, that is a matter which must be tested in cross-examination.

67. On balance I do not consider that HMRC have met the threshold for me to dismiss this appeal on a summary basis. There remain questions which must be explored with Tasca's witnesses as to why Tasca entered into the transactions in the circumstances it did. There is a realistic prospect of Tasca rebutting HMRC's case that it should have known of the connection

with fraud. In short, it would not be fair or just to determine what Tasca should have known without a fuller investigation of the facts.

DISPOSAL

68. For the reasons given above I dismiss HMRC's application to strike out the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

69. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JONATHAN CANNAN
TRIBUNAL JUDGE

Release date: 18th APRIL 2023