[2016] UKFTT 475 (TC)

TC05227

Appeal number: TC/2013/01268

VALUE ADDED TAX – Place of supply – whether airtime sold to person with establishment in Italy – yes – appeal allowed.

FIRST-TIER TRIBUNAL
TAX CHAMBER

ESSENTIAL TELECOM LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE RICHARD THOMAS
CAROLINE DE ALBUQUERQUE

Sitting in public the Royal Courts of Justice, London on 6 June 2016

Mr Melvin Chaplin of Chaplin & Co, Solicitors for the Appellant

Mr John Nicholson, Presenting Officer, for the Respondents

DECISION

1. This was an appeal by Essential Telecom Ltd ("the appellant" or "ETL") against an assessment to VAT covering the VAT periods for the three months ending on 31 December 2010 and the three months ending on 31 March 2011. By these assessments the Commissioners for Her Majesty's Revenue and Customs ("HMRC") sought to charge VAT on supplies of airtime which the appellant had determined were outside the scope of VAT. The amounts of VAT concerned are £64,775.95 for the period 12/10 and £178,788.50 for the period 03/11.

Preliminary matters

2. This was a standard case in which, following HMRC's delivering of their statement of case, the normal directions were made by Judge Harriet Morgan on 29 October 2015. Those directions required the parties to deliver their witness statements to the Tribunal by 11 January 2016. It appears that HMRC's witness statements were delivered on 19 January 2016.

3. Skeleton arguments were to be delivered to the Tribunal by not later than 14 days before the hearing. That means the deadline was 23 May 2016. On that day at 4.30pm HMRC applied to the Tribunal for an extension of time to 5pm on 27 May 2016. Its grounds for the application were that more time was needed to settle the document.

4. At 0911 on 24 May Chaplin & Co, the appellant's legal representative, emailed the Tribunal opposing the HMRC application and, in the light of the fact that HMRC were also late in filing their witness statements, applied for HMRC's case to be struck out, the appeal to be upheld and an order for costs against the Respondents.

5. HMRC's skeleton was delivered later that day.

6. The application for leave to extend time for serving and the appellant's applications came before Judge Barbara Mosedale on 27 May at 1450. She directed that both applications be heard by the hearing judge at the start of the hearing. This we did, and in §§9 to 23 we give our decision on them and our reasons.

HMRC's application

7. Mr Nicholson explained that in fact the skeleton was complete on 23 May but that he was away from the office that day. When it became apparent to him that the skeleton was not going to be delivered in time, he arranged for the extension application to be made as a courtesy to the Tribunal fully expecting, as happened, that the Skelton would be delivered the next day.

The appellant's application

8. Mr Chaplin accepted that had it stood by itself the late filing of the skeleton would not have bothered the appellant. However considering the previous failure by HMRC to file their witness statements on time with no explanation, he considered that in the light of the Courts' and Tribunals' stricter approach to compliance set out in eg *BPP Holdings Ltd v HMRC* [2016] EWCA Civ 121 ("*BPP*"), the HMRC conduct was prejudicial to the client and unacceptable, and should be punished.

Our decision on the preliminary matter

9. At the hearing we gave an oral decision that the application to extend the time for delivering the skeleton was granted and that the appellant's applications were dismissed. We gave brief reasons on which we now expand.

10. Mr Chaplin relied on *BPP* as his sole authority. *BPP* was concerned with whether a party to an appeal should be relieved from sanctions that had already been imposed, namely to bar the party – HMRC – from taking further part in the proceedings. The applications in this case were HMRC's for an extension of time and the appellant's requesting the tribunal to impose sanctions on HMRC. But we note that in *BPP* the Court of Appeal noted with, in our view, implicit approval the approach of Morgan J in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC) as an application in the Upper Tribunal (Tax and Chancery Chamber) ("UT") of CPR r 3.9 (the Civil Procedural Rules applying in the Courts). *Data Select* involved an application to do something beyond the time laid down in law, rather than an application for relief from sanctions. We therefore see no reason not to apply CPR r 3.9 by analogy in this case.

11. In *Denton & Ors v TH White & anor* [2014] EWCA Civ 906 ("*Denton*") the Court of Appeal laid down the approach to applying CPR r 3.9 that should now be taken by Courts to applications to relief from sanctions. This is to take a three-stage approach. In *Data Select* the UT set out five questions that needed to be asked in cases where there was lateness. There is a good deal of overlap between these questions and the matters that must be considered in a *Denton* enquiry. Given that *Denton* is a more recent approach to CPR r 3.9 and that the version of CPR r 3.9 that Morgan J considered in *Data Select* was a previous version, in our view it is more appropriate to adopt the *Denton* three-stage approach, and this we did.

12. At the first stage of the *Denton* approach we are required to establish whether the failure is serious or significant. We stress that at this stage it is only the failure to deliver the skeleton that is in issue. In our opinion it is neither serious nor significant. The failure was a very technical one, given that HMRC applied before the deadline for an extension. The delay was one day, and as the skeleton did no more than set out the Revenue's case which had already been set out in their Statement of Case in July 2014 and did not introduce any new point, there cannot be any prejudice to the appellant. We observe that skeleton arguments, particularly those of an appellant, are primarily for the convenience and use of the Tribunal unless there is a new point. Had HMRC wished to introduce a new point 14 (or as it turned out 13) days before the hearing we may well have refused them leave to do so, as they should in those

circumstances have applied to amend their Statement of Case at a much earlier point. (As we may well have done had the appellant applied at that late stage to amend its Grounds of Appeal to include a wholly new point).

13. As is pointed out in *Denton*, if the answer to the first stage enquiry is that the delay or error is neither serious nor significant, the remaining stages can be dealt with briefly. We do so. Mr Nicholson explained the reason for the delay, which was a simple mix up in his office leading to the HMRC skeleton not being filed in time. We accept this was a valid reason.

14. At the third stage we consider all the circumstances including the need to deal fairly and justly with the case (ie in accordance with Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 ("FTT Rules")) and the need for the efficient conduct at a proportionate cost of the Tribunal's business. In our view the very minor delay (it was remedied within 24 hours and did not cause the hearing to be vacated) coupled with the lack of prejudice to the appellant go nowhere near convincing us that any sanctions should be applied.

15. Our decision on the application is therefore to grant it.

16. We expressed in our oral decision some disapproval of the remedy sought by the appellant and the way it was sought. Sanctions for failures etc are provided for in two of the FTT Rules, Rules 7 and 8. Rule 7 allows the Tribunal to take a number of courses of action in the face of an "irregularity": they include, but are not limited to, exercising its strike out jurisdiction (in Rule 8); restricting participating in proceedings; and exercising its power to refer a matter to the Upper Tribunal where the matter concerned relates to giving or producing evidence. In this case the applicant was in effect asking us to apply Rule 8 which when applied to a Respondent means a barring from proceedings with the almost inevitable result that the appeal will succeed.

17. The appellant did not argue that the Tribunal had no option but to bar HMRC. The Tribunal must bar them from taking any further part in the proceedings only if it has no jurisdiction (in this case it clearly has jurisdiction) or there has already been issued an "unless" direction warning that the case would be struck out if that direction was not complied with. In this case there has been no such "unless" direction.

18. That leaves Rule 8(3). This says (read with Rule 8(7) and modified accordingly):

> (3) The Tribunal may strike out the whole or a part of the proceedings if—
>
> (a) [HMRC] has failed to comply with a direction which stated that failure by [HMRC] to comply with the direction could lead to [them being barred from taking further part in the proceedings] or part of them;

> (b) [HMRC have] failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly; or
>
> (c) the Tribunal considers there is no reasonable prospect of [HMRC's] case, or part of it, succeeding.

19. There is no question of Rule 8(3)(c) applying. There was no "could lead to" direction (Judge Morgan's directions contained none). So the question is whether HMRC have failed to co-operate with the Tribunal to such an extent that the Tribunal cannot deal with the proceedings fairly and justly. The only failures to co-operate referred to by the appellant were the filing of witness statements eight days late (a matter not complained of at the time and which was nearly five months before the hearing) and the failure to file a skeleton on time which failure was remedied within 24 hours.

20. As to costs, it may be that a costs award might be an appropriate remedy for a failure. This is a standard case and costs may only be awarded if there are wasted costs or HMRC has acted unreasonably in bringing, defending or conducting the proceedings (Rule 10 of the FTT Rules). Even if its minor failures to file documents on time occurred in "conducting" the proceedings (which we do not believe they did) HMRC have not acted unreasonably (which the cases show is a high hurdle in this context). Having discovered the possibility that they may fail to comply with the direction, they took the necessary steps to bring the failure to the attention of the Tribunal and the appellant, and complied within 24 hours. That is not unreasonable behaviour. The hurdle for a wasted costs order is even higher (see s 29(4) Tribunals, Courts and Enforcement Act 2007) and we propose to say no more about it as the hurdle is obviously not cleared here.

21. For these reasons we decline to impose any sanctions under Rules 7 or 8.

22. We consider that there are two very relevant paragraphs in *Denton* which, in this case, we draw to the attention of the appellant:

> "40 Litigation cannot be conducted efficiently and at proportionate cost without (a) fostering a culture of compliance with rules, practice directions and court orders, and (b) cooperation between the parties and their lawyers. This applies as much to litigation undertaken by litigants in person as it does to others. This was part of the foundation of the Jackson report. Nor should it be overlooked that CPR rule 1.3 provides that "the parties are required to help the court to further the overriding objective". Parties who opportunistically and unreasonably oppose applications for relief from sanctions take up court time and act in breach of this obligation.
>
> 41 We think we should make it plain that it is wholly inappropriate for litigants or their lawyers to take advantage of mistakes made by opposing parties in the hope that relief from sanctions will be denied and that they will obtain a windfall strike out or other litigation advantage. In a case where (a) the failure can be seen to be neither serious nor significant, (b) where a good reason is demonstrated, or (c) where it is otherwise obvious that relief from sanctions is appropriate,

> parties should agree that relief from sanctions be granted without the need for further costs to be expended in satellite litigation. The parties should in any event be ready to agree limited but reasonable extensions of time up to 28 days as envisaged by the new rule 3.8(4)."

23. This approach has already been reflected in decisions of Tribunals. In *Dorset Healthcare NHS Foundation Trust v MH* [2009] UKUT 4 (AAC) the Administrative Appeals Chamber of the Upper Tribunal said of Rule 2 of the First-tier Tribunal Rules (Overriding Objective):

> "Those provisions therefore impose an express obligation upon the parties to assist in the furtherance of the objective of dealing with cases fairly and justly, which includes the avoidance of unnecessary applications and unnecessary delay. That requires parties to cooperate and liaise with each other concerning procedural matters, with a view to agreeing a procedural course promptly where they are able to do so, before making any application to the tribunal. This is particularly to be expected where parties have legal representation."

24. We now turn to the substantive case.

The evidence

25. We had a hearing bundle, an authorities bundle and a witness bundle. The hearing bundle contained the documents identified by HMRC and by the appellant as the ones they wished to rely on.

26. There were witness statements from Mr Chowdhury. We do not at this stage describe Mr Chowdhury as having any particular status with the appellant company as HMRC were at pains to point out that many documents had been signed by his wife, the sole director, but he was clearly the person in charge. We also had a confirming witness statement from Mr Rumi who was a consultant to the appellant. Mr Chowdhury gave oral evidence and was cross-examined by Mr Nicholson. Mr Chowdhury was not always easy to follow as it was clear that his world of airtime and switching of international phone calls was something outside the knowledge of the Tribunal at least. His evidence was confidently given and we consider him to be a credible and honest witness, and we accept his evidence. Mr Rumi was easier for us to understand, being the "back office" man and we also accept his evidence as that of a truthful witness.

27. For HMRC there were witness statements from Ms Chiejina the officer in the case and from Mr Brown who was her senior and a specialist adviser to Local Compliance officers such as Ms Chiejina.

28. Ms Chiejina was clearly nervous and somewhat hesitant especially under cross-examination. But we do not consider that her evidence was successfully challenged and we accept it, with a slight qualification which we deal with below, as that of an honest witness doing her best to assist the Tribunal.

29. Mr Brown was a much more confident and fluent witness with an impressive grasp of the documents and the arguments. We state our view of some aspects of his evidence below, but we say now that we also accept his evidence was honestly given and we accept it where it is evidence of fact.

The facts

30. Before we set out the facts and our findings on them, we need to explain an abbreviation we use frequently. We refer in many places below to "SAC". By this we mean the sole proprietorship ("impresa individuale") of Mrs Kulanthaivel Subashini, a Sri Lankan national resident in Milan, Italy. We call it SAC because Mrs Subashini's trading name or business name is registered in the Milan Chamber of Commerce (with registration number REA:MI 186285) as "Shayakaash Comunication". It should be noted that the spelling with no space between "Shay" and "akaash" and with one 'm' in the second word is what is officially registered. This sole proprietorship was at the time of the transactions in this case registered for VAT in Italy with VAT number (IT) 05897940960.

31. The reason we have spelled this out at some length is that it is HMRC's case that there is insufficient evidence to show that the counterparty to a supply by ETL of airtime was in fact SAC, and HMRC say that the most important document in the case shows the counterparty as being "Shay Akaash Comunication SRL" or "(SRL)", SRL being the Italian abbreviation for "società a responsibilita limitata" or company with limited liability, which SAC was not. HMRC also point out that in other documents "Shay Akaash Communications" is shown as the trading name of another entity entirely. We add for completeness that HMRC do not take issue with the mere misspelling of SAC with two 'm's in "Communication", or the spelling of "Shay Akaash" thus, as two words.

32. From the documents exhibited to the witness statements and from unchallenged oral evidence we find the following facts: any comments by us on these facts are in square brackets [ ].

(1) The appellant was incorporated in 2008 and registered for VAT with effect from 1 April 2008. It has share capital of £2 divided equally between Mr Chowdhury and his wife.

(2) In 2008 and 2009 it carried on a business of dealing in mobile phones, buying from supermarkets and selling on to wholesalers. This was UK to UK business.

(3) Mr Chowdhury developed the idea of wholesaling telecom airtime and when the mobile business ended following a theft he began to cultivate contacts in Bangladesh [Mr Chowdhury's first language is Bengali] and in particular the Bangladesh Telecommunications Co Ltd ("BTCL") which he described as the BT of Bangladesh.

(4) In April 2010 the appellant entered into a contract with BTCL under which BTCL supplied airtime (the provision of international private leased voice and/or data circuits) to the appellant. The airtime was provided by BTCL

on a prepaid basis. The stated rate was US$0.03 per paid minute subject to change according to government directives and subject to incentive offers made by BTCL to the appellant (ie reductions in price]. The agreement was signed on behalf of the appellant by Mrs A N Chowdhury, the wife of Mr Chowdhury and sole (and self-styled managing) director at the time. The contract was witnessed by Mr Rumi.

(5) One of the annexes to the document signed on 20 September 2010 shows that the rate of payment by the appellant was reduced to $0.028 where the call volume was at or above 400,000 paid minutes per month. This had effect from 29 August 2010 stated to be the date the circuit between the appellant and BTCL opened. This document as also signed for the appellant by Mrs Chowdhury (as director) and witnessed by Mr Rumi.

(6) Because Mr Chowdhury was only able to obtain prepaid terms from BTCL his business plan had to be that he needed a wholesale customer who would take the airtime and would pay him in advance and at a rate which allowed him to make a turn on the arrangement.

(7) The contacts in the industry who Mr Chowdhury approached were unwilling to enter into pre-pay contracts. Eventually he was introduced to people acting, they said, on behalf of SAC. For £1,000 paid by the appellant to a Mr Kalasfekhar he was given access to a Mr Nathan Kugan.

(8) He met Mr Kugan with Mr Rumi in Ilford on 5 August 2010. Mr Kugan said he was the carrier relationship manager for SAC, and he had with him a business development manager and a technician whose names were not given. Mr Kugan was, he told Mr Chowdhury, Sri Lankan.

(9) Mr Chowdhury prepared a memorandum of the discussions which was in evidence. This noted that Mr Chowdhury's target price per minute was $0.03 to $0.026.

(10) Following the meeting the appellant entered into a contract with SAC, so Mr Chowdhury thought, on a prepaid basis. The contract was dated 7 August 2010 and the other party was shown as "Shay Akaash Communication SRL" registered in Italy for VAT with number 05897940960.

(11) In all other parts of the contract the other party was shown as Shayakaash Communication" (without a space and without the SRL). The signatories were Nathan Kugan and Mr Chowdhury signing as commercial manager of ETL. The email address for the counterparty was given as "manotel.eu".

(12) Mr Chowdhury also entered into a Non Circumvention and Non Disclosure Agreement dated 10 August 2010. This was prepared using, it seems, an International Chamber of Commerce (ICC) Working Agreement as template. [It appears from the turgidity of the wording that it was drafted by American lawyers and is completely boilerplate, but there are obvious typos in the document used in this case]. The other signatory is Mr Kugan shown as Carrier Relationship manager of the "Company" Shay Akaash Comunication, email address mano@manotel.com.

(13) The service began on 28 August 2010. An email dated 30 August 2010 is a communication from the appellant's customer to the appellant about the quality of service. It was sent by "NocManotel" from the email address noc@manotel.eu. [Mr Chowdhury refers to, without exhibiting them, other emails bearing the tag "SAC".]

(14) Mr Chowdhury noticed that payments to the appellant were being made by Gayatel Ltd rather than any entity calling itself Shay Akaash Communication or similar. He had not heard of Gayatel Ltd. He discussed this and various matters with Mr Kugan, which discussion resulted in an addendum to the 7 August 2010 main contract. In that one page addendum dated 8 (it seems) September 2010 the other party is shown as "Manotel SRL. Trading as Shay Akaash Comunication" registered in Italy. It is signed by Mr Kugan.

(15) Mr Chowdhury was also told by Mr Kugan that a UK company Mano Tel Ltd [we had evidence of Mano Tel Ltd (spelled thus) as a UK registered limited company] was now acting for SAC as its "point of presence" in the UK, receiving money from customers of SAC, paying suppliers to SAC and sending the balances to SAC. It had replaced Gayatel Ltd.

(16) The bank accounts of ETL show receipts from Mano Tel Ltd in payment of the invoices.

(17) Later Mr Kugan produced a one page document evidencing an agreement under which Manotel [all one word] Ltd (of an address in Hayes, Middlesex) was to act for SAC "for financial related services". He also produced a longer agreement said to be for the "Provision of Services" and relating to the provision of "carrier services". It is made between Shay Akaash Comunication VAT No 05897940960 and Mano Tel [ie two words] Limited on an unspecified day in October 2010, and under it Mano Tel Ltd is responsible for receiving and making payments, invoicing and collecting money, accounting to SAC and if necessary appointing agents. The agreement says in capital letters "THIS IS NOT A GENERAL AUTHORITY". The signatory for SAC is Kulanthaivel Subashini signing as the owner of SAC. Mrs Subashini was certified as having signed the documents in the presence of an Italian lawyer in Milan. The date of Mrs Subashini's signature is 22 March 2011. It is signed for Mano Tel by Jeskeswaran Theepam [*sic* – not with an 'n' as in is his actual name] a Director for "Manotel Ltd" [*sic*] and dated 30 or 31 March 2011.

(18) Monthly invoices issued by ETL show the recipient as "Shay Akaash Communication SRL" in the first one and "Mano Tel T/A Shay Akaash Communications" in the rest. All but two of the invoices show two lines: "backhaul monthly recurring charge" and "air-time pre-payments". There is no further breakdown. The invoice for the month ending 26 September 2010 also shows "backhaul set-up charge". That for the period ended 31 December 2010 also shows a "backhaul capacity increase" charge.

(19) An email dated 1 February 2011 shows that ETL did not issue invoices for October, November and December 2010 until then. The email is addressed to deva@manotel.eu and opens "Dear Lin".

(20) Emails relating to problems about "call drops" were exhibited. On 13 April 2011 ETL emailed "deva@manotel.eu" about such problems. The reply on 14 April is from the same email address which is shown as having the name on ETL's email system of "DevaShayAkaask". This email attached a customer CDR [call detail record] and says "because of this customers are blocking our route". It is signed "Lin".

(21) A CDR disclosed by Mr Chowdhury to HMRC showed a detailed log of the calls switched through ETL on 13 April 2011. The vast majority of these calls had "44" numbers [the International Code for the UK] and these were the numbers of the phones used by the individual customers of SAC or a further wholesaler in the chain who initiated the call. The document shows around 1000 calls in a period of 26 minutes.

[We do not know, and cannot tell, if this CDR disclosed by Mr Chowdhury is the same as that sent to him by SAC/Manotel - §32(20).

(22) Mr Chowdhury said that in May 2011 he was told by Mr Kugan that SAC wished to pay in arrears. As he could not agree to that because it would destroy his business plan, the agreement came to a natural end.

33. In addition to the documents referred to above produced by ETL to HMRC and exhibited in the bundles, we had a further sheaf of documents which Mano Tel Ltd through Mr Theepan had produced to HMRC in April 2012. These include:

(1) A document dated 30 May 2010 on its face, but dated by the signatory 30 May 2011, being a contract termination notice on a letter headed "Mano Tel" between Manotel Ltd and Shay Akaash Communications addressed to Shay Akaash Communications and to Mrs Kulanthaivel Subashini. It is signed for Manotel by J. Theepan.

(2) Other communications between Mano Tel and SAC that are not specifically addressed to Mrs Subashini. They include "payment instructions" showing the amount of charges deducted from the account by Mano Tel in £.

(3) Miscellaneous documents in which SAC is a party. These all refer to "Shay Akaash Communication".

(a) In one instance SAC's email address is shown as billing@manotel.eu, and payment is to be made to Gayatel Ltd (it is dated 1 February 2011).

(b) There is a an agreement between SAC and Link2World Ltd (a UK company). This appears to be very similar to the agreement in §32(17) but does not refer to a "point of presence". It shows SAC's VAT number, and "Company Registration Number REA: MI186285". It is signed by Mrs Subashini on 22 March 2011 and is certified as having been signed by her in the presence of the same Italian lawyer as in §32(17).

(c) A letter from Link2world Ltd is addressed to Mrs Subashini "T/A Shay Akaash Communications".

(d) A small email chain shows someone named "Deva" acknowledging receipt of payments from a customer. The email shows the "from" name as "DevaManotel" and the email address as deva@manotel.eu The customer is asked to send hard copies to "our office address, Shay Akaash Communications, Viale Stelvio 50, 20159 Milano". The email is replying to one addressed to "BillingManotel" and "DevaManotel" and the subject is: Shay Akaash Comunication. The subject matter is "the new expansion".

(4) There is a lengthy agreement between Lycatelcom Ltda and SAC in which "Communication" is spelled throughout as "Comunication". HMRC were told that Lycatel is a major company in the communications business. The non-Lycatel party is stated as "Shay Akaash Comunication, a company incorporated under the laws of Italy" with company registration number REA:MI 186285 and whose registered office in Italy is at 50 Viale Stelvio, Milano 20159, Italy and whose VAT Number is 05897940960."

This contract was clearly professionally drafted, and reserves jurisdiction to the English Courts. The Schedule of charges is blank. It is signed for Lycatel by Richard Benn, a director. It is signed for SAC by K Devamanoharan. Schedule 4 gives "Contact Person Information" for SAC as, for billing, billing@manotel.eu and, for technical, noc@manotel.eu.

Further findings of fact on disputed evidence

34. We now turn to evidence over which there is some dispute or over which either HMRC or the appellant have expressed scepticism or doubt.

HMRC evidence: the Italian reports

35. HMRC's principal third party evidence comes from the Guardia di Finanza ("GdF") in Italy.

36. On 11 May 2011 Ms Chiejina visited the offices of Mr Mohsin Khan, accountant for ETL. During the visit she established, according to the handwritten notes she made, that the major customer of ETL was Mano Tel T/A Shay Akaash Communication and that the VAT number of that customer was IT058 979 40960. We assume that Ms Chiejina took this name from the invoices issued by ETL (see §32(18)).

37. On 13 May 2011 Ms Chiejina attempted to check the VAT number on HMRC's system. It informed her "Vat no not allocated by MS".

38. On 16 May 2011 she asked Mrs Chowdhury [who was the only director of ETL] to check that the number for "Mano Tel t/a Shay Akaash Communications" was correct. She also asked for any documents which show that the supplies of airtime were received in Italy. She added that "[i]f you are unable to supply a valid VAT number, or show that the supplies have been made outside the UK, it is possible that the supplies you made may fall to be treated as taxable …". She also asked for the contracts including the one with Mano Tel t/a Shay Akaash Communications.

39. On 18 May 2011 ETL's accountants replied with documentation concerning the VAT number of "Shayakaash Communication". This included the certificate of registration of Shayakaash Comunication with the Milan Chamber of Commerce which showed the entity was owned by Kulanthaivel Subashini, a Sri Lankan national and had €15,000 capital. It also showed the VAT number quoted by ETL.

40. Other documents showed the business as registered as a public network operator or internet café with 10 Internet points.

41. On 1 June 2011 Ms Chiejina wrote to the accountants saying that they had treated the sales to Italy as zero-rated [this is wrong, of course: they were treated as outside the scope of UK VAT].

42. On 22 June 2011 Ms Chiejina asked for information from the Italian authorities by making a request for information under Regulation 2003/1798/EC. In this request the box "Fraud is suspected" was ticked.

43. The request stated that "ETL has not been able to verify that a true business activity has taken place" and asked whether (inter alia):

(1) Mano Tel is properly incorporated business in Italy?

(2) Who are Mano Tel's directors and shareholders?

(3) Is it registered for VAT?

(4) Whether IT 058 9794 0960 is a valid VAT number?

44. ETL's accountants told Ms Chiejina on 26 August 2011 (after her request to the GdF but before the reply) that VAT numbers in Italy registered before 24 February 2011 may not appear on HMRC's VAT number database and that there were references to this change on HMRC's website.

45. The GdF replied on 10 November 2011 to the effect that the VAT number belonged to Kulanthaivel Subashini (Shay Akaash Comunication), and that Mrs Subashini was the owner. The operational office they said was viale Stelvio 50, Milano.

46. The GdF added that "according to the documents submitted by our trader the two companies had no commercial relationships in 2010" and that Mrs Subashini declared that she did not know the invoices shown to her and did not know ETL. She also said her company [*sic*] was not called Mano Tel.

47. On 15 March 2012 a further request was made to the GdF containing 44 different questions, but this time the "Fraud is suspected" box is not ticked. Mr Brown's evidence was that he had drafted the request. HMRC received a report from Italy on 11 May 2012 giving comprehensive information about Mrs Subashini's "sole proprietorship S.C.A. - Shay Akaash Communications". The report described the operations of SAC and made it clear that it was an internet café, with 20 computers [compared with the licence for 10 – see §40].

48. The report added that:

(1) Mrs Subashini did not keep the "compulsory accounting books". It stated that she acquired "telephone traffic" from UK for value of €5,000 from Link2world thanks to her cousin Markandu Pushpalingam allegedly living in London. There were no invoices for this transaction.

(2) Further, according to the report, she stated that the firm had never produced tax returns, has never reached agreements with Lycatel, and that she did not know of a Nathan Kugan.

(3) Mrs Subashini denied knowing about the agreement between SAC and ETL, although the report states that the contract itself was not enclosed by HMRC and so could not be shown to Mrs Subashini.

(4) Mrs Subashini denied having seen the agreement between SAC and Mano Tel Ltd before. But she did say that the signature was hers and that her US$ account at Unicredit had received two payments from Mano Tel Ltd, relating to an agreement made by Markandu to whom she said she gave all her identification details and that she didn't know how he used them.

49. On 15 March 2013 Mr Brown himself made a further request to the GdF who replied on 2 May 2013. The questions had been translated into Italian but (most of) the replies were in English. Documents showing the profit and loss details of SAC were provided to HMRC, but no balance sheets as the business was not obliged to prepare them under Italian accounting laws. Bank statements of SAC's accounts at Unicredit were also provided.

50. We note however that information provided in this report in response to a request for information about payments by SAC to any British recipient purported to quote Mrs Subashini's reply. The reply was in a less well translated form of English than the 2012 report uses: for example Mrs Subashini is reported as saying: "I precise that my cousin … proposed me the acquisition of airtime ..". She is also directly quoted as saying "…I was compelled to open a bank account, in USD only …" (by Markandu) (see §48(4))

51. On 11 June 2012 Ms Chiejina informed ETL's new representatives, Tailored Tax Solutions LLP, that her decision to assess ETL for VAT and an inaccuracy penalty was based on the fact that ETL had the burden of proof of showing that supplies were made in Italy and that the lack of documentary evidence was a principal factor in reaching the decision. She then informed the representative of the gist of the Gdf report that SAC never did business with ETL, and that the person purporting to enter into the prepaid airtime contract, "Shay Akaash Communication SRL", did not exist.

52. The reports from Italy were in the exhibits attached to Ms Chiejina's and Mr Brown's witness statements. No witness statement was made by any GdF officer or Mrs Subashini. Insofar as the reports make statements about documents in the possession of the GdF they are the hearsay evidence of the GdF officer reporting on them. The Tribunal may admit hearsay evidence whether or not it would be admitted

by a Court (Rule 15(2) of the FTT Rules). We see no difficulty about accepting in evidence such reports of documents especially if the documents themselves are also exhibited.

53. The account in the reports of what Mrs Subashini told the GdF is also hearsay, in fact double hearsay. We have to take into account that Mrs Subashini and the GdF officer were either conversing in a language (English) that may not be either of their first languages (L1), certainly not the officer's, and we imagine that Mrs S's L1 is Tamil as she is a native of Sri Lanka. Or they may have been conversing in Italian which would be the officer's L1 but not Mrs Subashini's, and the Italian words used were translated into English for the reports. The scope for misinterpretation both of what Mrs Subashini said and how it is reported to HMRC is substantial. We instance that in the second report "The owner stated that she has stoked up [*sic*] at an agent for three years", and the purported direct account of Mrs Subashini's words we quoted in §50.

54. There are internal contradictions too. Mrs Subashini is said to have stated that after discussions with her cousin she received credits in her Unicredit USD account from Mano Tel Ltd but she also stated that she did not know the company. What is more she is reported as saying in the third report that he compelled her to open the USD account, but this may be a mistranslation.

55. Because of the double hearsay element and the scope for linguistic confusion we are unable to give any serious weight to the report of what Mrs Subashini was asked and her replies, unless we can find corroboration elsewhere. We have seen the documents which she said contained her signature authenticated by the lawyer. Mr Chaplin urged HMRC witnesses and us to accept that a lawyer would not have authenticated a blank piece of paper with a signature. But it is only the signature that he authenticated, not the document, and we cannot find that what she signed was a contract rather than a blank piece of paper.

HMRC evidence: the oral evidence of Ms Chiejina and Mr Brown

56. In cases where HMRC carries out a compliance check the evidence of the officers who carried out that check or who advised that officer will usually consist of their explaining what happened in the enquiry by reference to the relevant letters. notes of meetings and third party enquiries. These documents will be the material which the officer considered gave them a sufficient basis to make an assessment to the best of that officer's judgement. So far as the officer exhibits the documents then that is factual evidence of what the documents say. But it does not make the content, where it relates the officer's conclusions justifying their decision to assess, evidence of a primary fact. At most it is evidence of what inferences the officer drew from the facts they had that in their view justified the assessment.

57. This, and other appeal hearings in enquiry cases, is not usually concerned with whether the officer's assessment was justified as being to the best of their judgment, and the bona fides of the assessment were not contested in this case. We are concerned with whether the evidence put before us leads us to hold that, on the basis

of that evidence, the appellant has discharged the burden of proof or not. That is not the same thing as the exercise carried out by HMRC or their grounds for raising the assessment.

58. Consequently the evidence of Ms Chiejina and Mr Brown not amounting to simply exhibiting the documents is not of great relevance and to the extent it is their opinion we give it no weight. But there were certain exchanges which we think are of some relevance and which we consider below.

59. During Ms Chiejina's evidence in chief when Mr Nicholson referred to her request to the GdF we asked her why she put "fraud is suspected". She thought she had been told that by doing so the Italian authorities would respond more quickly.

60. In response to Mr Chaplin's questions she gave evidence that the BTCL to ETL agreement "looks real" and that she accepted that ETL provided airtime. In response to the question whether ETL was dealing with SAC she said that she accepted that ETL *believed* they were dealing with SAC.

61. Asked about the VAT number and her checking of it, she said "the VAT number did not come up". She agreed she was given an explanation by ETL's accountants for this, that the HMRC system had not taken on board the change in Italian VAT numbers.

62. She was asked by Mr Chaplin more than once whether the sentence in her letter of 16 May 2011 "If you are unable to supply a valid VAT number, or show that the supplies have been made outside the UK, it is possible that the supplies you made may fall to be treated as taxable and VAT will be due at the standard rate" carried the implication that if either of those things was provided to her she would close her enquiries. Ms Chiejina did not seem to understand Mr Chaplin's point. On re-examination the next day she said to Mr Nicholson that had she received either of those two things she would still have sought more information and documents.

63. Mr Nicholson's question on this in re-examination was leading. Because of this we have some doubts about whether Ms Chiejina would have closed her enquiries had she received a valid VAT number and whether she could now put herself in the position she was in at that time. But on this issue we accept her evidence. But like much of what Ms Chiejina gave evidence about and on which she was cross-examined her answer is not particularly germane to the issue we have to decide.

64. As far as Mr Brown is concerned, much of his evidence consisted of sparring with Mr Chaplin about the interpretation of documents and exchanging opinions of what happened and of what he would have expected to have happened. We pointed out to him at one point that what he was saying was speculation or opinion, but, to be fair to him, he was asked by Mr Chaplin to speculate on some matters. So far as his evidence was his opinion, rather than a statement of fact we discount it, but we accept his evidence of fact as truthful and we accept that the inferences he drew from the evidence were ones he honestly believed to be correct.

65. In relation to his evidence that was put under challenge by Mr Chaplin we pick out the following points:

(1) Asked if ETL gave information and was co-operative, Mr Brown agreed that it did and was.

(2) Asked to rate his confidence in the correctness of his views in terms of football scores he considered it was 4-0 to HMRC and that the Italian evidence was very clear.

(3) He agreed with Mr Chaplin that the GdF got its information from Mrs Subashini. Asked what sort of person she was, Mr Brown did not demur from the suggestion that she may have had problems with the Italian "fisc", the tax authorities.

(4) Mr Brown's evidence was that he would have expected some emails about technical problems in the supply of airtime between ETL and SAC but there were none. When Mr Chaplin referred him to the email chain referred to in §33(3)(d) Mr Brown remarked that this chain was outside the period of the VAT returns [it was in April 2011, ie after 31 March 2011].

(5) Mr Chaplin asked Mr Brown where the airtime was supplied to if not to SAC. His view was that in the absence of credible evidence that it was to SAC it was inevitable that it was to the UK.

Evidence from meeting notes

66. In meetings with Mr Brown and Ms Chiejina some statements were made by, separately, Mr Chowdhury and Mr Rumi on the one hand and Mr Theepan ("JT") and a Mr Kugathasan Kathingamanathan ("KK") on behalf of Mano Tel Ltd ("MTL"). Notes of these meetings were prepared by Mr Brown and exhibited to us.

67. We note in particular the following statements by Mr Chowdhury:

(1) ETL has no employees. It uses two self-employed engineers, and Mr Rumi acts as consultant. There is a part-time lady who does administrative work.

(2) ETL's only assets are office equipment. It rents a server from a company called Redstation. The programme installed in the server was supplied by CCN Ltd on the recommendation of BTCL. ETL has a local agent (a point of presence) in Bangladesh to assist with liaison with BTCL.

(3) Although the contract with BTCL said that ETL is authorised to provide international telecommunications services to customers in the UK, Mr Rumi said that in reality the customers could be anywhere.

(4) ETL does not know where the calls originate from.

(5) There were no negotiations with BTCL over rate changes: they were imposed by BTCL.

(6) Mr Chowdhury said that he was unsure if had met "Mr" Subashini. [The fact that he thought Subashini was male tells us that he had not met her]

(7) Mr Chowdhury said it was at his insistence that those claiming to represent SAC provided its VAT number on the contract. [Mr Brown had observed that this was highly unusual, but we note that the VAT number is also shown on the Lycatelcom contract (see §33(4))]

(8) Mr Chowdhury said that he was told that SAC was buying time from Tata and Lycatel [as to which see §33(4).]

68. We have no reason to doubt that the statements attributed to Mr Chowdhury were made by him and were correct to the extent they were within his knowledge, and nothing he said in his oral evidence contradicted them.

69. And from the meeting between HMRC and with Mano Tel Ltd we note the following statements:

(1) JT said that he set up MTL as an agent for Mrs Subashini as a favour. He knew her because they came from the same community [Sri Lankan]

(2) JT said that SAC instructs its customers to make payment to MTL. SAC had 2 or 3 customers including Globalreach and Lycatelcom Ltda.

(3) KK said he thought SAC's business "quite large", and was buying and selling airtime.

(4) KK insisted he was not Mr Nathan Kugan. [We had noted from the papers that his name Kugathasan Kathingamanathan contains the words "Kugan" and "Nathan" in the correct order]

(5) JT and KK both denied knowing Mr Chowdhury or Mr Rumi.

(6) JT and KK denied any knowledge of a Link2world. Mr Brown produced its VAT 1 submitted by JT. JT said this was all he had done for it. JT accepted he knew the director of Link2world, Mr Selvarajah.

(7) JT and KK confirmed that they had no contact with ETL and all the bank transactions had been undertaken on behalf of SAC.

70. We consider that, in view of the lack of candour in the statements (denial of knowing Link2world) and the fact that neither person gave witness statements or was called to give evidence, we should not take this evidence into account, save where it was corroborated by the production of documents from an independent source. That is the case only with the Lycatelcom contract with SAC (see §33(4)). We also consider that on the balance of probabilities KK was Mr Nathan Kugan and was not telling the truth about his contacts with ETL.

Summary of factual findings

71. From all the evidence we have seen and heard set out in §§30 to 70, we find as fact:

(1) The appellant entered into a contract with a counterparty which gave an address in Italy.

(2) Those representing that counterparty provided a fully valid Italian VAT number to the appellant, and the appellant has provided that VAT number to HMRC.

(3) They also provided to the appellant a licence to offer public telecommunication services from the Ministry of Commerce and a registration in the Milan Chamber of Commerce as a business with €15,000 capital and these were given to HMRC.

(4) The appellant issued invoices in emails addressed to and responded to by persons acting for the counterparty.

(5) The appellant has been paid for its services by Mano Tel Ltd.

(6) The appellant was informed by those representing the counterparty that payments would be made to it by "points of presence" including Gayatel Ltd and Mano Tel Ltd

(7) Mano Tel Ltd was a point of presence in the UK with a limited authority to act as agent for SAC in making payments.

(8) Communications about service quality were entered into between the appellant and those representing the counterparty.

The law

72. The relevant law is in a relatively small compass. This being a VAT case we start with the European Union law. The appellant referred only to Article 44 of the Principal VAT Directive (Council Directive 2006/112/EEC) ("PVD") which says:

> "***Place of supply of services***
>
> **…**
>
> **Section 2**
>
> **General rule**
>
> Article 44
>
> The place of supply of services to a taxable person acting as such shall be the place where that person has established his business. However, if those services are provided to a fixed establishment of the taxable person located in a place other than the place where he has established his business, the place of supply of those services shall be the place where that fixed establishment is located. In the absence of such place of establishment or fixed establishment, the place of supply of services shall be the place where the taxable person who receives such services has his permanent address or usually resides."

73. The relevant paragraphs of the preamble to the PVD seem to be:

> "(17) Determination of the place where taxable transactions are carried out may engender conflicts concerning jurisdiction as between

Member States, in particular as regards the supply of goods for assembly or the supply of services. Although the place where a supply of services is carried out should in principle be fixed as the place where the supplier has established his place of business, it should be defined as being in the Member State of the customer, in particular in the case of certain services supplied between taxable persons where the cost of the services is included in the price of the goods. □

(22) All telecommunications services consumed within the Community should be taxed to prevent distortion of competition in that field. To that end, telecommunications services supplied to taxable persons established in the Community or to customers established in third countries should, in principle, be taxed at the place where the customer for the services is established. In order to ensure uniform taxation of telecommunications services which are supplied by taxable persons established in third territories or third countries to non-taxable persons established in the Community and which are effectively used and enjoyed in the Community, Member States should, however, provide for the place of supply to be within the Community."

74. The appellant (and to an extent HMRC) also refers to the UK "transposition" of Art. 44 in VATA 1994:

"**7A Place of supply of services**

(1) This section applies for determining, for the purposes of this Act, the country in which services are supplied.

(2) A supply of services is to be treated as made—

(a) in a case in which the person to whom the services are supplied is a relevant business person, in the country in which the recipient belongs,

…

…

(4) For the purposes of this Act a person is a relevant business person in relation to a supply of services if the person—

(a) is a taxable person within the meaning of Article 9 of Council Directive 2006/112/EC,

…

(c) is identified for the purposes of VAT in accordance with the law of a member State other than the United Kingdom, or

…

and the services are received by the person otherwise than wholly for private purposes.

(5) Subsection (2) has effect subject to Schedule 4A.

…

9 Place where supplier or recipient of services belongs

(1) This section has effect for determining for the purposes of section 7A (or Schedule 4A) …, in relation to any supply of services, whether a person who is the supplier or recipient belongs in one country or another.

(2) A person who is a relevant business person is to be treated as belonging in the relevant country.

(3) In subsection (2) "the relevant country" means—

(a) if the person has a business establishment, or some other fixed establishment, in a country (and none in any other country), that country,

…"

75. HMRC referred in their skeleton to paragraph 8 of Schedule 4A VATA, the Schedule to which s 7A is subject. That paragraph reads:

"Telecommunication and broadcasting services

8—(1) This paragraph applies to a supply of services consisting of the provision of—

(a) telecommunication services,

….

(2) In this Schedule "telecommunication services" means services relating to the transmission, emission or reception of signals, writing, images and sounds or information of any nature by wire, radio, optical or other electromagnetic systems, including—

(a) the related transfer or assignment of the right to use capacity for such transmission, emission or reception, and

(b) the provision of access to global information networks.

(3) Where—

(a) a supply of services to which this paragraph applies would otherwise be treated as made in the United Kingdom, and

(b) the services are to any extent effectively used and enjoyed in a country which is not a member State,

the supply is to be treated to that extent as made in that country.

(4) Where—

(a) a supply of services to which this paragraph applies would otherwise be treated as made in a country which is not a member State, and

(b) the services are to any extent effectively used and enjoyed in the United Kingdom,

the supply is to be treated to that extent as made in the United Kingdom."

76. This paragraph was not referred to by HMRC in their submissions nor did the appellant seek to rely on it to show that the supplies of airtime should be deemed to be

made outside the EU. We accept that the services in this case are "telecommunication services" as defined.

77. HMRC also referred to Arts. 18 & 20 of the Council Implementing Regulation 282/2011/EU:

> "Article 18
>
> 1. Unless he has information to the contrary, the supplier may regard a customer established within the Community as a taxable person:
>
> (a) where the customer has communicated his individual VAT identification number to him, and the supplier obtains confirmation of the validity of that identification number and of the associated name and address in accordance with Article 31 of Council Regulation (EC) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax;
>
> …
>
> 2. Unless he has information to the contrary, the supplier may regard a customer established within the Community as a non-taxable person when he can demonstrate that the customer has not communicated his individual VAT identification number to him.
>
> ….
>
> Article 20
>
> Where a supply of services carried out for a taxable person, or a non-taxable legal person deemed to be a taxable person, falls within the scope of Article 44 of Directive 2006/112/EC, and where that taxable person is established in a single country, or, in the absence of a place of establishment of a business or a fixed establishment, has his permanent address and usually resides in a single country, that supply of services shall be taxable in that country.
>
> The supplier shall establish that place based on information from the customer, and verify that information by normal commercial security measures such as those relating to identity or payment checks.
>
> The information may include the VAT identification number attributed by the Member State where the customer is established."

78. We note that this regulation came into force on 1 July 2011 ie three months after the end of the final VAT period to which the appeal in this case applies and has direct effect. We are grateful to HMRC for very properly drawing our attention to it, as, although not binding on us, it indicates clearly what the EU considers to be appropriate evidence about the status and place of establishment of a customer for services, the principal issue in this case. To complete the picture we set out the relevant parts of the preamble to the Implementing Regulation:

> "(18) The correct application of the rules governing the place of supply of services relies mainly on the status of the customer as a taxable or non-taxable person, and on the capacity in which he is acting. In order to determine the customer's status as a taxable person, it is necessary to

establish what the supplier should be required to obtain as evidence from his customer.

(19) It should be clarified that when services supplied to a taxable person are intended for private use, including use by the customer's staff, that taxable person cannot be deemed to be acting in his capacity as a taxable person. Communication by the customer of his VAT identification number to the supplier is sufficient to establish that the customer is acting in his capacity as a taxable person, unless the supplier has information to the contrary. It should also be ensured that a single service acquired for the business but also used for private purposes is only taxed in one place.

(20) In order to determine the customer's place of establishment precisely, the supplier of the service is required to verify the information provided by the customer.

…

(22) The time at which the supplier of the service must determine the status, the capacity and the location of the customer, whether a taxable person or not, should also be specified."

79. We add that HMRC included regulation 14 of the Value Added Tax Regulations (SI 1995/2518) in their authorities. As that regulation is about the form and content of a VAT invoice we do not think it is relevant as it does not apply to a supply outside the scope of VAT.

80. In addition HMRC included parts of their VAT Public Notice 741A in its January 2010 version.

The appellant's contentions

81. The appellant's primary contention was that the supplies of airtime which HMRC agree were actually made were made to Shay Akaash Communication whose place of establishment was in Italy, and that the evidence shows that.

82. Its secondary contention was that in any event it had reasonable grounds for believing that supplies were made to that business.

83. In support of its primary contention Mr Chaplin pointed out that the HMRC case depended very substantially on the report from the GdF and the statements in it given to the GdF by Mrs Subashini. He pointed out that she was a person who had not kept proper accounting records and had not filed tax returns. She had signed blank pieces of paper and had given contradictory accounts in her statements. Yet HMRC preferred her second-hand evidence to that of the appellant who had co-operated and provided information as requested and which had obtained a VAT number and other corroborating evidence from those representing its customer.

84. The money chain clearly shows that funds came to MTL which were passed to ETL and that Mano Tel Ltd acted only for SAC. The funds from Mano Tel Ltd matched the invoices to SAC.

85. Further it could only be the case that SAC had an establishment in the UK if Mano Tel Ltd, its point of presence, conducted the business of routing telephone calls to Bangladesh in the UK. The evidence of the appellant and of those representing Mano Tel Ltd was that this was not the case.

86. In support he cited Case C-190/05 *Aro Lease BV* [1997] STC 1272 ("*Aro*") to the effect that performing some services in the UK by an agent did not automatically amount to an establishment; *Commissioners of Customs & Excise v Chinese Channel Ltd* [1998] to show that the starting point should always be the customer's main place of business; and the A-G's opinion in C-452/03 *RAL (Channel Islands) Ltd* [2005] STC 1025 that regard has to be paid to the nature of the business in assessing whether there was a fixed establishment.

87. In support of its secondary contention Mr Chaplin cited C-273/11 *Mecsek-Gabona Kft v Nemzeti Adó- és Vámhivatal Dél-dunántúli Regionális Adó Főigazgatósága* [2013] TC 171 to the effect that traders who in good faith believe goods have been exported and who have taken all reasonable precautions should not be penalised because of an actual failure to export.

The HMRC contentions

88. Mr Nicholson's only contention was that there was insufficient evidence to show that supplies of airtime were made to the business whose VAT number was given to ETL. This contention relied on the pointing out of numerous inconsistencies in the evidence, many of which were set out in Mr Brown's witness statements. He instanced:

(1) The contracting party in the agreement with SAC is shown as an SRL, but SAC was not incorporated. A surprising fact, Mr Brown had said, given that the agreement was drafted by SAC.

(2) The contracting party in the September Addendum is Manotel SRL Trading as SAC. That was a different entity (if it existed at all).

(3) The need for a point of presence of SAC in the UK was said to be because of time differences. But Italy is only one hour ahead of the UK.

(4) SAC purportedly had three points of presence ("PoPs") simultaneously in the UK, Gayatel, Mano Tel UK and Link2world.

(5) SAC's profit & loss statement for the year to 31/12/2010 (supplied by the GdF) shows turnover of €12,464 in the final quarter, of which only €2,958.70 was from sales of telephone minutes etc. This is less than 1% of the amount invoiced by the appellant. Similar figures applied in the first quarter of 2011.

(6) SAC's bank statements for the final quarter of 2010 supplied by the GdF showed no payments to Mano Tel Ltd or the appellant.

(7) Mano Tel Ltd's bank statements show no payments from SAC.

89. The following matters also supported his case:

(1) The evidence of Mrs Subashini.

(2) The fact that the money paying for the airtime came from Mano Tel Ltd a UK company.

(3) The business plan that Mr Chowdhury had mentioned could not be achieved because the rate agreed with BTCL (3¢ or 2.8¢) was greater than the rate agreed with SAC (2.6¢). Thus a loss was inevitable.

(4) There was no evidence that an Italian company named Mano Tel SRL existed.

(5) The GdF report showed that SAC was merely an internet café. Its licence, its balance sheet and its turnover were not commensurate with airtime trading.

(6) Most of the phone numbers on the CDR were UK numbers.

(7) Mr C's due diligence was inadequate as he could not or would not identify the other two people he met in Ilford when the first discussions started; he didn't question Gayatel's involvement; he didn't question why the email addresses were "manotel".

90. In addition we noted that Mr Brown had observed that it was, in his experience, highly unusual that, as Mr Chowdhury had told him, it was at Mr Chowdhury's insistence that SAC provided its VAT number on the contract with ETL.

91. Reliance on contracts was in any event not enough, for which proposition he cited case C-653/11 *Newey v Commissioners for Her Majesty's Revenue and Customs* ("*Newey*"). It was necessary to look at the economic and commercial reality.

92. As to the secondary contention, the test was an objective one, and could not be met just by a person's belief that it had been.

Discussion

93. Before we consider whether the appellant had met the burden of proof we need to consider some preliminary matters.

Language, jargon and mindset

94. We need to say something about language in this case in the widest sense. Communications from HMRC to the appellant, in interviews and with GdF were conducted in that form of Standard English known as "officialese". It uses certain stock phrases and jargon (including acronyms and abbreviations) which are also known to, and are used by, accountants, lawyers and the tax personnel in large and medium sized enterprises – tax insiders (which includes judges and members of the Tax Chamber of the First-tier Tribunal).

95. In the world of those who use "officialese", and particularly the VAT version of it, there is a tendency to think that there should be no confusion about the identity or name of the entities involved in any enquiry, especially by the people running them; that in this world companies are run by directors; "sole proprietorships" are an

abnormal way of running a large business involving the international sale and purchase of airtime; contracts should be perfectly written with no inconsistencies and should disclose everything agreed by the parties to it; and contemporary written corroboration should be available for any disputed matter. In our view Ms Chiejina and Mr Brown tended to think in that way.

96. The appellant (which in this context means Mr Chowdhury and Mr Rumi), the other individuals in this case representing Mano Tel or SAC do not use this kind of officialese to communicate with each other, and do not have the mindset described in the previous paragraph. They mostly use English but two important points need to be made about this. First, we know from Mr Chowdhury that he is a speaker and writer of Bengali as he had to clear up doubts which the Tribunal had about his signature which looked very different on certain documents – it turned out that one was in Bengali script and the other in Roman. We assume Mr Rumi is a Bengali speaker too. We also imagine that English is not their first language (L1) though both were fluent in it. We also imagine the same goes for the officials of Bangladesh Telecom with whom they entered into contract and ETL's agent there (their PoP in Bangladesh).

97. The other parties involved, including Mr Kugan, Mr Kathingamanathan (if not the same person as Mr Kugan), Mr Theepan, Mrs Subashini, Mr Pushpalingam (Mrs Subashini's cousin) and Mr Devomanoharan (the recipient and sender of emails at manotel.eu) were, HMRC were told, all part of a small community of Sri Lankans whose L1 was also we imagine neither English nor Bengali: we make the assumption that it is Tamil[1], but the main point is that L1 speakers of two different languages were conducting their business relations in a third, English, and that that English is not Standard English as used in business transactions, but another of the world's Englishes, that used by L2 etc speakers and writers of English in the Indian subcontinent, again as used in business transactions, and in particular in telecoms transactions.

98. And the English used in their documents by the people we have mentioned, including in particular their contracts, cannot be assumed to be Standard English as it is used by those drawing up contracts for a living in England and Wales. We were told that the contractual documents in the case (other than those to which BTCL was party about which we have no evidence) had not been drawn up by lawyers. And as Mr Chaplin convincingly demonstrated, if the agreement with BTCL was drawn up by a lawyer it was not a very good effort, containing as it did defined terms which were not then used in the contract, and terms about the length of the contract in the main body and in an Annex which seemed mutually inconsistent.

99. Some qualification is needed to the previous paragraph. The main agreement between SAC and ETL of 7 August 2010 does *seem* to be professionally drawn up. It does however bear a very close resemblance to a contract which was exhibited between Lycatelcom Ltda and SAC and which was roughly contemporary with the

[1] We make this assumption because the place of birth of Mrs Subashini given to the Italian Communications Ministry among others is Kilinochchi. This is in the very north of Sri Lanka which is a Tamil area.

ETL contract. Lycatelcom is a far bigger outfit than any person in this case and the document is clearly drawn up professionally. The SAC/ETL airtime contract is we find copied out from the Lycatel one with minimal changes as to names etc.

100. The documents in this case, other than the Lycatel one, were then drawn up by non-professionals whose first language was probably not English and who shared a common background in the trading of telecommunications facilities and resources. Precision about the names of entities, important terms such as prices, what the difference is between coming into effect and being in force or commencing and possibly dates, and what the exact status is of the signatory is not required because the parties trust each other or in that business "we know what we mean" and "everyone knows that prices vary, sometimes daily" and that they deal with issues as businessmen, probably on the phone. Mr Chowdhury's evidence was to this effect and we accept it.

HMRC's "preconceived" approach?

101. Mr Chaplin accused Mr Brown of approaching the case with a preconceived notion that something was seriously wrong, which he denied. There are, however, some aspects of the case which makes us think that something of a blinkered attitude was being employed. There is the statement in the first request to the GdF that fraud was suspected; there was the deployment of Mr Brown, an officer who at the time was an experienced Senior Avoidance Investigator, in a case which does not seem in itself be very significant in terms of money, nor are there obvious pointers of avoidance; the assessment of a penalty under Schedule 24 FA 2007 of an amount which shows clearly that it was imposed on the basis of there having been a deliberately brought about inaccuracy[2]; and there was the exchange between Mr Chaplin and Ms Chiejina about her letter of 16 May 2011 (see §62).

102. Ms Chiejina's letter is clear in what it says: unless ETL can provide a VAT number for its customer or other acceptable evidence of where it is established, VAT may be due at the standard rate on supplies made by ETL. The obvious corollary of that is that if such information is in fact provided VAT will not be due.

103. We do not think that Ms Chiejina has constructed this question from nothing. HMRC's VAT Manual on the Place of Supplies of Services includes at VATPOSS05620 the statement:

> **"Verifying business status**
>
> For B2B supplies within the EC the evidence required at the time of the transaction would normally be the customer's VAT registration

[2] The penalty was not before us. We asked about it and were told by Mr Chaplin that there was no appeal and that was a deliberate decision. We said to him that it seemed to be a high-risk strategy given that that the penalty was, it seems, 70% of the tax and therefore HMRC were alleging deliberate conduct. Mr Nicholson intervened to say that if the appeal succeeded HMRC would discharge the penalty.

number and country identification code prefix. The number must conform to the format for the registered person's Member State. …

…

However, where a relationship has not been established with a business customer the VAT number should be checked when

- the VAT involved exceeds £500 on a single transaction,
- or the cumulative VAT on transactions for electronically supplied services to a single customer in a VAT quarter exceeds £500.

Similarly, businesses that supply downloaded music, games, films, and so on of a kind that is normally made to a private consumer would not expect a VAT number to be quoted.

The VAT Information Exchange System (VIES) can support the supplier's decision-making process by providing an online verification system. The system can be accessed on the Europa EC website.

Businesses may also contact the VAT, Excise and Customs Duties Advice Line, as they will be able to verify names and addresses as well as dates of registration and deregistration where appropriate.

Unsatisfactory verification of business status

Where a VAT number is quoted in what is clearly a supply to a private consumer the use of that number should be challenged. Full verification should be undertaken in all cases where a business has any reason to believe that a VAT number quoted by a customer is false or is being used incorrectly.

If a customer claims to be in business but not to be VAT registered then alternative evidence should be obtained. This can be in the form of other reasonable commercial evidence or records that should normally be available, for example contracts, business letterheads, a commercial website address, publicity material, certificates from fiscal authorities, and so on. A digital certificate from a reputable organisation can also be used for this purpose.

If any of above checks fail to confirm that the customer is in business or if there remains any doubt about the use of a VAT registration number, VAT should be charged as appropriate on all supplies to that customer including supplies that have already been made."

104. We were, as we have said, also referred by Mr Nicholson in his Statement of Case and Skeleton to regulations 18 and 20 of the Implementing regulations. The following parts seem to us to be relevant to the issue of Ms Chiejina's letter:

"Article 18

1. Unless he has information to the contrary, the supplier may regard a customer established within the Community as a taxable person:

(a) where the customer has communicated his individual VAT identification number to him, and the supplier obtains confirmation of the validity of that identification number and of the associated name

> and address in accordance with Article 31 of Council Regulation (EC) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax;
>
> Article 20
>
> Where a supply of services carried out for a taxable person, or a non-taxable legal person deemed to be a taxable person, falls within the scope of Article 44 of Directive 2006/112/EC, and where that taxable person is established in a single country, or, in the absence of a place of establishment of a business or a fixed establishment, has his permanent address and usually resides in a single country, that supply of services shall be taxable in that country.
>
> The supplier shall establish that place based on information from the customer, and verify that information by normal commercial security measures such as those relating to identity or payment checks.
>
> The information may include the VAT identification number attributed by the Member State where the customer is established."

105. The Regulation, as we have noted, did not in fact come into force until 1 July 2011. But neither VATPOSS nor Notice 741A indicates that and in 2012 it would be reasonable for Ms Chiejina to have assumed from the guidance available to her that the appropriate test was whether a valid number or suitable alternative evidence would suffice to enable the case to be treated as an "out of scope" one.

106. Finally we noted that Mr Chaplin sought confirmation from Ms Chiejina that this case was selected for a compliance check because a repayment of £6,747 had been returned undelivered, and she confirmed it was.

107. These matters which we have discussed above suggest to us that this case was given an intensity of scrutiny that the bare amounts involved would not normally warrant. We could, but should not, speculate what the reasons for that might be. But we find that despite this intensity of scrutiny we do not think HMRC acted in a way which would give rise to a finding that the decision (and therefore the assessment) was not made to Ms Chiejina's best judgment (with the assistance of Mr Brown). There are sufficient gaps and oddities in the evidence to allow HMRC to reasonably conclude that it should continue its verification process and make the assessment.

108. But the Tribunal's task is different. Our task focuses on whether, on the balance of probabilities, the assessment is wrong. The burden of proof is undoubtedly on the appellant as HMRC says. But an important aspect of that is whether the appellant has shown a prima facie case that it has supplied airtime to an Italian established business customer, because, if it has, then the evidential burden passes to HMRC to show that that is not so. There is a further consideration about the evidential burden. The UK Parliament and the European Union may legislate to provide presumptions about the evidential burden, and HMRC may in their publications also allow presumptions. We think that in this area they have done, and they are the matters we refer to in §§103 to 105. While they are not binding on us, or HMRC, we think that the thrust of what they say is a factor to take into account when assessing whether the appellant has met the burden of proof.

How should we approach the law?

109. There is no doubt that, when we are considering European Union law or UK law that transposes it or is otherwise based on it, a purposive approach is required and where an exemption is in issue that it should be interpreted strictly, but not restrictively. We also consider that we should interpret transactions relating to supplies to and from one member state to another in such a way as to facilitate and not hinder the workings of the EU single market in services.

110. Despite what has been said in the case on occasion by HMRC this is not a case of zero-rating or for that matter of exemption. It is about the scope of VAT and whether VAT should be charged in the UK or another member state. There is in our view no scope for a strict interpretation.

Has the appellant made a prima facie case that its supplies were outside the scope of VAT?

111. We repeat here for convenience the summary of our findings of fact about what the appellant had done:

(1) The appellant entered into a contract with a counterparty which gave an address in Italy.

(2) Those representing that counterparty provided a fully valid Italian VAT number to the appellant, and the appellant has provided that VAT number to HMRC.

(3) They also provided to the appellant a licence to offer public telecommunication services from the Ministry of Commerce and a registration in the Milan Chamber of Commerce as a business with €15,000 capital and these were given to HMRC.

(4) The appellant issued invoices in emails addressed to and responded to by persons acting for the counterparty.

(5) The appellant has been paid for its services by Mano Tel Ltd.

(6) The appellant was informed by those representing the counterparty that payments would be made to it by "points of presence" including Gayatel Ltd and Mano Tel Ltd

(7) Mano Tel Ltd was a point of presence in the UK with a limited authority to act as agent for SAC in making payments.

(8) Communications about service quality were entered into between the appellant and those representing the counterparty.

112. We hold on the basis of these facts that the appellant has made out a prima facie case that it made supplies to a business established in, and belonging to, Italy, another member state of the EU. It has met the requirements of s 7(2A) VATA 1994 by virtue of ss (4)(c) (and probably (4)(a)).

113. We would also hold if it were a matter of law that the appellant has met the requirements of VAT Notice 741A and of Ms Chiejina's letter of 16 May 2011.

Has HMRC successfully rebutted that prima facie case?

114. In §111 we deliberately just referred to the "counterparty" because it is a major part of HMRC's case that the documentation shows that the appellant entered into its main contract with a party who was not SAC, the entity registered for VAT in Italy.

115. There are indeed a number of confusing aspects to the simple question of who the counterparty was:

(1) In a letter of 23 August 2011 to HMRC, ETL's accountants refer to "Shayakaash Communication (SRL)" as the VAT registered entity.

(2) The Agreement for Prepaid Telecommunication Services between ETL and the counterparty states on the front page that the counterparty is "Shay Akaash Comunication (SRL)" and on page 2 as "Shay Akaash Comunication SRL" (without brackets) with VAT number 05897940960. It is signed by Nathan Kugan as Carrier Relationship Manager of "Shay Akaash Communication".

(3) In the Lycatel contract the party is "Shay Akaash Communication, a company incorporated under the laws of Italy .."

(4) In the Addendum to the Agreement for Prepaid Telecommunication Services the counterparty is shown as "Manotel SRL. Trading as Shay Akaash Comunication".

(5) Some invoices from ETL are addressed to "Mano Tel T/A Shay Akaash Communications"

(6) In all other documents the counterparty is called "Shay Akaash or Shayakaash Comunication or Communication or Communications (or in one document, on the front page of the SAC/Mano Tel Ltd agreement, Comminucation".

(7) In a "Visura Ordinario dell'Impresa" from the Milan Chamber of Commerce the "Forma giuridica" of Mrs Subashini is shown as "Impresa Individuale". HMRC's translator translated the former as "Standard Company Profile" and the latter as "Company type: Sole Proprietorship".

116. But on the other hand in all documents the business address is given as viale Stelvio 50, Milan(o), Italy.

117. In our view the overwhelming probability is that, despite these confusing aspects, the counterparty with whom ETL was dealing throughout was the entity Mrs K Subashini whose business name was Shay Akaash Comunication, and which was established in Milan, Italy and was registered for VAT with a valid VAT number, was registered with the Milan Chamber of Commerce and which in all documents showed its business address as viale Stelvio 50, Milan(o), Italy. We reject HMRC's list of confusing aspects as evidence to the contrary for the following reasons.

118. The translation performed by HMRC's translator together with the lack of familiarity of the part of HMRC and their translator (and for that matter of the individuals based in Italy or acting for the counterparty) of the notion of a registered sole proprietorship with capital has led in our view to many wrong assumptions about the corporate or non-corporate form of the counterparty. These fully explain the references to SRL or to SAC being a company registered under the laws of Italy. The latter phrase is fact is not necessarily wrong. "Company" in English business parlance does not just mean an incorporated body. "Registered" does not just mean "registered under the Companies Acts or their equivalent".

119. This only leaves the wording of the Addendum and some of the invoices to be explained. It is a crucial part of HMRC's case that the September 2010 addendum was purportedly entered into by an Italian company, "Manotel SRL trading as Shay Akaash Comunication", not by the entity with the VAT number quoted. In what we have referred to (§95) as VAT officialese, "A trading as B" means only one thing. The relevant party is A, but A uses in its business a different name, B, which is not the name of another entity. But we think it is probable that in this case "Manotel SRL trading as Shay Akaash Comunication" meant an entity or person acting as agent for SAC. The reason we think this is the more probable construction of the document is that an entity actually called Mano Tel did become, in short order after the contract was entered into, SAC's PoP in the UK. Admittedly that was Mano Tel Ltd a UK company. But no one has suggested that there was actually an Italian incorporated entity called Manotel or Mano Tel. We think that Mr Kugan drafted this contract as a businessman based in Italy and that he was referring to Mano Tel Ltd, if anyone, and was confused about the use and meaning of "T/A".

120. We also note that this was the only occasion in which someone from the Italian end of the business referred to Manotel or Mano Tel trading as Shay Akaash Comunication.

121. It is for these reasons that we think that HMRC have *not* shown that ETL did not enter into an agreement for the supply of airtime with a business registered for VAT in Italy, and indeed we think that they have *not* shown that ETL did not enter into a contract with Shay Akaash Comunication. We add that it is ironic that HMRC argued that we should take account of *Newey* on the primacy of contracts. First, the prime contract in this case is with Shay Akaash Comunication (even though it erroneously shows "SRL") whose VAT number is 05897940960. It is only the addendum which refers to Mano Tel and it is clearly the addendum which lead to ETL addressing its invoices accordingly. Second when *Newey* came back to the UK courts, the contractual terms did not prevail. Third, *Newey* was not about the identity of a party to a contract. Fourth, Mr Newey was a sole proprietor (J Newey t/a Ocean Finance), like Mrs Subashini, but he was not registered in a Chamber of Commerce with a disclosed capital. Fifth, and finally, *Newey* tells us to look at the economic reality: we have done so and find that it is HMRC who are concentrating on mere form, and that the economic reality is that there were supplies made to an Italian established business customer.

122. HMRC's second objection to the appellant's case relates to the information it obtained from the GdF. In particular the documents obtained by the GdF showed that for the Italian authorities SAC operated an internet café with the equipment, turnover and receipts and expenses to be expected of such an operation. Mrs Subashini appeared to deny any personal knowledge of airtime transactions. So HMRC allege that it could not have acted, and did not act, as the counterparty to ETL.

123. The GdF reports are in English. We established from HMRC that these were how the reports came: they were not translated by HMRC. Thus what happened in this case is that officers of the GdF who would be L1 Italian speakers spoke to Mrs Subashini and obtained information from her, herself probably not an L1 English speaker, either in English (or less likely in her L1 (probably Tamil) interpreted and translated into Italian by someone). The scope for misunderstanding and confusion is obvious to us. This is in addition to the point we have already made about the reliability of Mrs Subashini's evidence as second level hearsay, having as it does, inconsistences and admissions of compliance failures in the area of accounts and tax.

124. We do not place any reliance on the reports of what Mrs Subashini said to the GdF. But even if we did accept that what she said was true, it does not follow that ETL did not enter into a contract with SAC and did not supply airtime to it for which it was paid. What we do have from documentary evidence that we have accepted is that:

(1) SAC entered into a contract for reciprocal supply of airtime with a major player in the business, Lycatelcom.

(2) SAC entered into contracts with Mano Tel Ltd and Gayatel Ltd for these companies to act as its point of presence or limited authority agent in the UK

(3) People in Italy other than Mrs Subashini entered into contracts or corresponded on SAC's behalf: there is "Lin" in "billing"; there is a technical person and there is "Deva". A letter from Mano Tel Ltd to HMRC of 27 April 2012 says that "the contact person on behalf of SAC is Deva, in Milan. We assume "Deva" is the person who signed the Lycatel contract on behalf of SAC giving his status as "Carrier Relationship Manager". That contract shows his name as "K. Devamanoharan."

125. We have speculated that, as with the identity of "Nathan Kugan", the person behind "Manotel" (including "manotel.eu", the email address used by Deva and others in SAC, might well be Deva: "mano" is after all part of his surname. But we do not need to come to any conclusion about that.

126. Nor do we need to suggest why the Italian documents do not reveal the airtime transactions, despite Mr Chaplin's heavy hints. But simply because transactions are not shown in the accounts of SAC revealed to the GdF or on VAT returns and are not shown on authorisations which may have been obtained before the transactions started, it does not follow that they were not carried out by SAC. And even if Mrs Subashini did not know about them, she seems to have delegated authority to others. There is no evidence that it was not SAC which entered into the major contract with Lycatelcom: there is evidence of an organisation dealing with ETL on the airtime

contract. The fact that this organisation and people used the name "manotel" as an internet address does not prove that there was another entity by the name of Mano Tel that was that organisation which ETL dealt with.

127. On the balance of probabilities we hold that SAC did enter into airtime transactions, and that HMRC's objections on the basis of the GdF reports do not refute the appellant's case. We add that even if there had been another entity which did what SAC was said to have done in the airtime transactions, there seems to us to have been sufficient evidence given to HMRC and us to justify the proposition that the supplies of airtime were to a person belonging in Italy, and none to justify Mr Brown's view that the supplies of airtime that were made were made to a person belonging in the UK.

128. HMRC have less important objections. They say that there is no evidence that SAC put Mano Tel Ltd into funds to pay ETL (which Mano Tel Ltd undoubtedly did). Mr Theepan of Mano Tel Ltd told HMRC that SAC's customers were told to pay Mano Tel Ltd direct. While we give little or no weight to unconfirmed statements by the Mano Tel people, this arrangement is shown in the Mano Tel Ltd – SAC contract. But in any event the lack of evidence of this matter has no bearing on whether SAC was the counterparty for the contract for airtime.

129. HMRC also say that the arrangements left ETL with no profit or a loss. Mr Chowdhury explained that there were constant renegotiations of prices, and we have seen from the BTCL contract that there were to be "incentive offers". But even if that is not an adequate explanation, we cannot see how this affects the issue we have to decide. This was not a hearing to decide on the general correctness of ETL's VAT returns or corporation tax returns, nor is it about transfer pricing.

130. Finally HMRC suggested that ETL's due diligence was inadequate, in that Mr Chowdhury could not or would not identify the other two people he met in Ilford when the first discussions started; he didn't question Gayatel's involvement and he didn't question why the email addresses were "manotel".

131. In our view none of this matters. We have not been told what due diligence someone in the appellant's position was supposed or required to perform. There is no question of for example VAT Notice 726 or something equivalent being given to the appellant. As to Gayatel Ltd and Mano Tel Ltd, ETL was told that they were agents for SAC for limited purposes. If it is HMRC's contention that these companies were, as agents for SAC, fixed establishments of it in the UK they did not put forward that view. If it were necessary to do so we would find that they were not fixed establishments in the UK of SAC given the limited authority they had and the role set out in the contracts which they clearly performed. To rebut the argument that never came Mr Chaplin referred us to *Aro* and other cases (see §85). We have read them and do not see anything in them to dissuade us from our first impression of that issue.

Decision

132. The appeals by the appellant against the assessments for the VAT periods 12/10 and 03/11 are upheld.

133. 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.

RICHARD THOMAS
TRIBUNAL JUDGE

RELEASE DATE: 5 JULY 2016