[2020] UKFTT 0069 (TC)

TC07565

VALUE ADDED TAX – input tax credit – missing trader fraud – electronic communication services – whether the appellant through its director knew or should have known of the connection with fraud – should have known – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2015/03654

BETWEEN

THE 3p TELEPHONE COMPANY LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE JONATHAN CANNAN

Sitting in public in Manchester on 8-10 May 2018, 7 December 2018 and 7 February 2019 with written submissions on 19 March 2019 and 20 May 2019

Mr Phil Murphy, director for the Appellant

Mr Joseph Millington of counsel instructed by HM Revenue and Customs' Solicitor's Office and Legal Services for the Respondents

DECISION

INTRODUCTION

1. This is an appeal against a decision of the respondents dated 11 February 2015 in which they denied the appellant's claim to deduct input tax in respect of 18 transactions in electronic communication services ("ECS") in periods 04/13 and 07/13. The appeal is also against a consequential assessment to VAT in the sum of £2,381,076 made on 13 February 2015. The respondents allege that those transactions were connected with the fraudulent evasion of VAT and that the appellant, through its director Mr Phil Murphy, knew or should have known of the connection with fraud at the time the appellant entered into the transactions.

2. Due to illness, the hearing of this appeal has been spread over a considerable period of time. I heard oral evidence from Officers Vincent D'Rozario and Carl Jones who are both HMRC Officers. They had previously provided witness statements. I also had witness statements from Officers Shaikh Malique, David Elliott and Julian Cook whose evidence was not disputed. The respondents also relied on a witness statement of Officer Alex Coulson who was not available to give oral evidence. Mr Murphy gave oral evidence on behalf of the appellant on 9 and 10 May 2018 and 7 February 2019. He too had previously provided a witness statement. At the conclusion of Mr Murphy's evidence provision was made for the respondents to provide written submission, received on 19 March 2019 and for Mr Murphy to provide written submissions, received on 20 May 2019.

3. The starting point when considering the denial of a claim to input tax credit where a transaction is alleged to be connected with fraud is the judgment of the ECJ in *Axel Kittel v Belgium & Belgium v Recolta Recycling SPRL (C-439/04 and C-440/04)* [2006] All ER (D) 69 (Jul). By way of summary the ECJ in *Kittel* held that:

> (1) where the tax authorities find that the right to deduct has been exercised fraudulently, those authorities are permitted to claim repayment of the deducted sums retroactively (at [55]);
>
> (2) in the same way, a taxable person who knew or should have known that, by his purchase, he was taking part in a transaction connected with fraud must be regarded as a participant in that fraud (at [56]);
>
> (3) that is the case, irrespective of whether or not the taxable person profited by resale of the goods (at [56]);
>
> (4) that is because in such a situation the taxable person aids the perpetrators of the fraud (at [57]).

4. The ECJ concluded at [61]:

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

5. In *Mobile Export 365 v HM Revenue & Customs* [2009] EWHC 797 (Ch) Sir Andrew Park gives a helpful description of MTIC fraud generally at [19]:

> "A missing trader intra-community fraud … always involves at least two elements. One of them is that one VAT registered trader acquires and sells [goods or services] in circumstances where it is liable to account to HMRC for VAT but, for whatever reason, it does not in fact pay the VAT. That trader is sometimes described as the defaulting trader... The second element is that another VAT registered trader who is involved in the same chain of sales makes a claim to repayment of input tax. It will, I think, be apparent that, if the first trader had a liability to pay output tax to HMRC but did not meet it (for whatever reason), but the second trader recovers

from HMRC an equivalent or possibly somewhat larger amount of input tax, there will be a serious loss of VAT to the Exchequer."

6. The respondents' primary case is that the appellant, through its sole director Mr Phil Murphy, knew that its purchases of ECS were connected with the fraudulent evasion of VAT. There is no direct evidence that Mr Murphy knew of the fraud but the respondents say that it can be inferred from all the circumstances in which the transactions took place that Mr Murphy must have known that they were connected with fraud. Alternatively, Mr Murphy ought to have concluded from the circumstances in which the transactions took place that 'the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud' (see *Mobilx & Others v HM Revenue & Customs* [2010] STC 1436 at [59]).

7. I set out below my findings of fact based on the evidence before me, including a large volume of documentary evidence. It is not disputed by the appellant that its transactions traced back to defaulting traders, that the resulting tax losses arose as a result of fraud and that the appellant's transactions were connected with fraud. The factual issues before me may be broadly summarised as follows:

(1) Did Mr Murphy know that the appellant's transactions in 04/13 and 07/13 were connected with fraud?

(2) Alternatively, should Mr Murphy have known that those transactions were connected with fraud.

8. In assessing the evidence, I shall adopt the approach described by Mr Justice Clarke in a familiar passage from *Red 12 Trading Limited -v- HM Revenue & Customs* [2009] EWHC 2563 (Ch), where he said at [111]:

> "…in determining what it was that the taxpayer knew or ought to have known the tribunal is entitled to look at the totality of the deals effected by the taxpayer (and their characteristics), and at what the taxpayer did or omitted to do, and what it could have done, together with the surrounding circumstances in respect of all of them."

BACKGROUND FACTS

9. The following background facts are not contentious.

10. I start firstly with the general nature of the trade in ECS, and in particular what are known as VoIP (voice over internet protocol) services. Subject to one point identified below, both parties were content with a description of the wholesale trade in such services set out by Sir William Blackburne in *Parkwell Investments Ltd v Wilson [2014] EWHC 3381 (Ch)* as follows:

> "7. Parkwell claimed to be a Tier 3 provider of voice-over-IP (or VoIP) services. These are the wholesale trading of minutes relating to telephone communications over the internet rather than through conventional telephone lines. Mr Lilly accepted as accurate the following summary of what such business involves which is to be found in the judgment of Norris J in *HMRC v Winnington Networks Ltd* [2014] EWHC 1259 (Ch) ("*Winnington*") at [17] to [19] and which I gratefully adopt as being sufficient for present purposes:
>
> > '[17] Telecommunications depend on origination of the call, transmission of the call and termination of the call. The origination and the termination of the call will be under the control of the network providers. The transmission of the call (which is the movement of the data) will normally be the subject of agreement between large telecom providers. However, there is a multiplicity of small wholesale carriers of data who specialise in interrupted or less frequented routes. Here the movement of the data would

> move from the originator through a small wholesaler and perhaps a chain of wholesalers until it reached the terminal network provider. The movement of the data from the originator and from wholesaler to wholesaler and to the termination is controlled by means of switches. Each movement of data creates something called a "Call data record" or "CDR" which indicates the number of units consumed and from which, if a unit price is applied, a charge can be calculated, the charge being for the use of the carrier's owned or leased network.
>
> [18] As Mr O'Hara explains in his affidavit at paragraph 26: 'The actual traffic, i.e. the data packets or minutes, must move through a switch every time that the data is moved between parties. At the point of every purchase and every sale the movement and direction of the data is decided by the switch. Calls must be transferred from trader A to trader B and so forth throughout a supply chain via a switch.'
>
> [19] The switch will normally be programmed with a hierarchy of specified routes in order to secure that the call is transferred according to what is called a 'least cost routing plan'. Because of the intrinsic unreliability of networks it is normal for the 'least cost routing plan' to contain, as I have indicated, a hierarchy of alternative routes. A genuine carrier would be unlikely to trade without an LCR. A genuine carrier would be unlikely to trade with only one customer and to use only one supplier since this contemplates that there will never be a problem with the route selected.'
>
> 8. From this it is apparent that the CDR details of calls are the primary record of calls made via the supply chain and the only source from which a breakdown of traffic can be obtained. They are used to generate the invoices on which payments to the VoIP trader are based. Without them the trader cannot invoice its own customers, know whether it is being correctly invoiced or deal with any dispute that might arise. The trader might lease rather than own the switch through which the calls are routed: this would not affect the information available from the switch. The other point to note, as the evidence made abundantly clear, is that the information available from the switch can only realistically be provided in electronic format, such is the volume of information which the process generates."

11. Mr Murphy did not agree with [19] quoted above and had his own observations on least cost routing. Mr Murphy described in his evidence different types of traders. Tier 1 are the network providers, Tier 2 contract directly with the network providers and the wholesalers in between are Tier 3. The appellant was Tier 3 and in common with other Tier 3 traders Mr Murphy said that it did not run least cost routing. He assumed all routes would be problem free.

12. Wholesalers require the services of a "NOC", short for "network operations centre" or network operations consultant". In practical terms a NOC deals with the technical aspects of the trade. Amongst other things the NOC will upload all countries, call rates and country codes to the switch. The NOC will ensure that incoming and outgoing calls match by sending test traffic.

13. The appellant was incorporated on 15 December 2010. At all material times Mr Murphy has been the sole director and shareholder. It became VAT registered with effect from 4 January 2011. The main intended business activity identified in the application to register for VAT was said to be wired telecommunications activities and the estimated turnover for the first 12 months was £200,000.

14. In fact, the appellant had only small amounts of outputs and inputs for VAT purposes of up to £15,000 in periods 07/11 to 10/12. From period 01/13 onwards, the outputs and inputs grew considerably when the appellant commenced trading in ECS. They were as follows:

Period	Outputs £	Inputs £
07/11	Nil	15,121
10/11	1,420	6,361
01/12	1,511	5,076
04/12	1,159	12,071
07/12	10,221	9,628
10/12	8,079	10,022
01/13	1,867,321	1,831,680
04/13	12,445,552	20,024,181
07/13	13,340,144	3,497,700
10/13	104,936	423,458
01/14	1,953,699	1,937,568
04/14	1,677,340	1,786,642
07/14	2,850,578	2,830,671

15. In period 04/13 the appellant carried out 13 transactions in which it purchased ECS from InterX Limited ("InterX"), a UK company based in Stratford-upon-Avon. In each case the ECS were sold on to Orange County Telecommunications Inc ("Orange"), a US corporation based in California. In period 07/13 there were 6 such transactions. During both periods, the appellant also made acquisitions of ECS from Orange and sold on to InterX. The net effect of this trading gave rise to a very small net amount of VAT due in each of the returns as follows:

Period	**Output VAT £**	**Input VAT £**	**Outputs £**	**Inputs £**	**Net VAT £**
04/13	2,093,949	2,093,030	12,445,552	20,024,181	919
07/13	341,828	332,950	13,340,144	3,497,700	8,878

16. It is common ground that 18 of the 19 transactions where the appellant purchased from InterX traced back to fraudulent tax losses, either to Swift IQ Limited or Simax (UK) Limited. The one remaining transaction in period 07/13 was traced back to a non-UK supplier rather than a UK defaulter. That is not to say that it was not connected with fraud, but there is no evidence before me of a connection with fraud.

17. The input tax denied by the respondents was £2,092,624 for period 04/13 and £298,467 for period 07/13. The total of these two sums with a small adjustment for output tax overdeclared in period 07/13 comprises the assessment of £2,381,076.

FRAUD AND CONNECTION WITH FRAUD

18. It is not disputed that the appellant's transactions were connected with fraud. In period 04/13 I am satisfied from the evidence before me that the appellant entered into 13 transactions involving the purchase and sale of ECS from InterX to Orange. In simple terms what was being bought and sold were wholesale airtime minutes for international telephone calls made over the internet. The appellant's transactions in period 04/13 formed part of chains of purchases and sales which were the same for each transaction. Each chain was as follows:

Swift IQ > Connect Trading > Parkwell Investments > InterX > 3p > Orange

19. In period 07/13 the appellant entered into 5 transactions in ECS which formed part of chains of purchases and sales which again were the same for each transaction. Each chain was as follows:

Simax UK > Enhanced Communications > InterX > 3p > Orange

20. There is no evidence as to who supplied ECS to Swift IQ or Simax UK, in particular whether the supplier was a UK business or a business outside the UK.

21. I am satisfied from the evidence before me that Swift IQ and Simax UK either incurred output VAT liabilities in relation to their transactions with Connect Trading and Enhanced Communications which were not accounted for and which those companies fraudulently never intended to account for, alternatively that their VAT registration numbers were hijacked and whoever used their VAT numbers fraudulently never intended to account for VAT on the transactions.

22. The supplier to 3p in relation to all the transactions was InterX. On 18 July 2013 HMRC notified InterX that supplies it had received from Parkwell during its VAT accounting period 05/13 traced back to tax losses. On 19 July 2013 InterX ceased purchasing ECS from Parkwell. At that stage InterX was already sourcing supplies from Enhanced Communications.

23. InterX was the subject of decisions in which it was denied input tax credit on supplies from Parkwell and Enhanced Communications for VAT periods in 2013. It entered liquidation on 14 October 2014 with a VAT liability of some £2.4m. The director of InterX was Mr Barry Lawson who signed a disqualification undertaking on 17 August 2017 pursuant to the Company Directors Disqualification Act 1986. He undertook not to be a director of a company for a period of 12 years. In doing so he acknowledged that he had caused InterX to enter into transactions connected with the fraudulent evasion of VAT and that he either knew or should have known of that connection.

EVIDENCE AND FINDINGS OF FACT

24. In this section I describe the evidence and set out certain findings of fact based on that evidence. I make further findings of fact in the discussion section which follows. In considering Mr Murphy's evidence I take into account certain medical issues for which he was receiving medication at the time he was giving evidence. I recognise that these issues affected his concentration and focus and I have made allowances for possible lapses in memory and concentration when assessing the reliability of his evidence. Overall, I am satisfied that Mr Murphy was able to fairly participate in the proceedings. Mr Murphy apologised for the effect his medical issues had on the conduct of the hearing but really no apology was necessary.

25. It is convenient at this stage to describe the 18 transactions in respect of which the appellant had been denied input tax credit. They are summarised in the schedule in the Annex to this decision which gives details of the appellant's purchases from InterX and sales to Orange with some simplification. The details are taken from deal sheets prepared by Officer D'Rozario which were not the subject of any challenge by the appellant, although certain minor amendments were made to them during the course of the evidence. Deals 1-13 are in period 04/13 and Deals 14-18 are in period 07/13. The schedule uses the InterX sales invoice numbers for purchases from InterX and the "Akirix" invoice numbers for sales to Orange. I describe the involvement of Akirix in more detail below. By my calculations, the appellant made a gross profit of $101,570 on these deals.

26. I was told in May 2013 the appellant was dropped as a trading partner by Mr Lawson. Following the 18 transactions it did not do any further business with Orange. However, the

appellant continued to trade ECS with various businesses, mostly selling to Tata Communications Limited, part of the Tata group. I understand it also contracted with Jersey Telecom and others, although eventually I understand that it ceased to trade and de-registered from VAT.

27. The Respondents rely on a number of factors, to be considered both individually and in the round, which they say establish that Mr Murphy knew or should have known that the appellant's transactions were connected with fraud. Those factors may be summarised as follows and I shall make findings of fact in relation to them under appropriate headings. I shall focus on those facts and matters which the appellant knew or which the appellant arguably should have known.

28. The factors relied upon by the respondents are as follows:

(1) The appellant's trading history and the fact that it was able to achieve remarkable success in a short space of time.

(2) The appellant's relationship with Barry Lawson and a Mr Kevin McCann.

(3) The appellant's relationship with its switch provider, Unique Techniques Inc, a United States corporation based in California.

(4) The appellant's use of an alternative banking platform called Akirix, also based in the United States.

(5) The appellant's relationship with other individuals and businesses and links between those individuals and businesses.

(6) Deficiencies and inconsistencies in the appellant's business records, including its payment records.

(7) The absence of reliable due diligence checks by the appellant on its trading partners.

Trading history

29. I have set out above certain uncontentious findings in relation to the appellant's trading history. In this section I deal with the more contentious evidence. I do so against a background in which the dealings between Officer D'Rozario and Mr Murphy eventually became very strained. Mr Murphy considered that Officer D'Rozario had insufficient knowledge of the appellant's business, including the telecom sector generally and wholesale trading in ECS in particular. I am satisfied from the evidence as a whole that whilst Officer D'Rozario was unfamiliar with technical details relevant to wholesale trading in ECS, he was doing his best to understand the nature of the appellant's business and the circumstances of its transactions. I take into account Officer D'Rozario's unfamiliarity with technical aspects of the underlying trade in assessing the reliability of his evidence as to what he was told at certain at meetings and in conversations with Mr Murphy.

30. I am satisfied that Mr Murphy had considerable experience in the telecom sector going back to 1992. His experience was mainly in sales, including sales of non-geographic phone numbers. He has no technical telecom background, in particular no experience in VoIP prior to the autumn of 2012. Mr Murphy set up various companies prior to 2012 with a view to trading in the telecom and other sectors. Those businesses had not been successful and from this Mr Murphy was aware that trade in the telecom sector was highly competitive. Indeed, in 2012 Mr Murphy acknowledged that wholesale ECS was "far tougher than standard telecoms".

31. The appellant was set up by Mr Murphy and he intended it to be a family business. In his witness statement Mr Murphy said that 3p was set up with a view to commencing business wholesaling VoIP. In fact, the documentation at the time it was set up gives no indication that was the intended business sector and Mr Murphy accepted that his witness statement was wrong in this respect although he maintained that in 2010 everyone in the telecom sector knew that VoIP was going to be big business. He first researched ECS in early 2012. He knew an individual who lived close by and who sent him a "rate card", setting out various rates for supplying ECS on routes to various countries. Mr Murphy was unable to do anything with it. However, he saw VoIP as a natural progression following his previous telecom experience and he intended to obtain technical advice and services from Mr McCann. Mr McCann was providing services as a freelance NOC. Mr Murphy first came to know of Mr McCann in early 2012, although it is not clear how. He met him in London sometime after September 2012.

32. The appellant had no start-up capital and Mr Murphy's evidence was that it was not necessary to have capital. He intended to deal on the basis that the appellant's customers would pay the appellant 24 hours before it had to pay its suppliers. He said that he was also looking into opening an "escrow account" although he did not then understand how such accounts worked. He was also referred to "VOIP Capital" by Mr Lawson and the appellant ended up giving VOIP Capital a charge over the business. Mr Murphy understood that they "insured" any commercial risk of non-payment by a customer in the deals, principally the Tier 1 customers. He gave oral evidence that in one deal, not connected with this appeal, VOIP Capital paid his supplier directly when the customer did not pay. He did not pay a premium to VOIP Capital, but suggested that it was "all in the margin". According to Mr Murphy, VOIP Capital provided a form of factoring. He said that VOIP Capital had a switch which meant that they could monitor the business being done. Mr Murphy gave charges over his home to VOIP Capital and to Lloyds Bank for his liability pursuant to personal guarantees he had given for the indebtedness of the appellant. Mr Murphy told me that the charges secured some £40,000 in February 2019.

33. Mr Murphy was aware from his accountant prior to the appellant commencing trading in ECS that there were risks in "airtime traffic". The nature of the risks was not described by Mr Murphy, but I infer that Mr Murphy understood that those risks included the possibility of VAT fraud.

34. Mr Murphy said that in or about August 2012 he had what he described as a "chance meeting" with Mr Lawson. In fact, Mr Murphy explained that what had happened was that Mr Lawson was visiting Liverpool where Mr Murphy was based. Mr Lawson had called Mr Murphy in advance to say that he was visiting the city to see a client. They arranged to meet up and discussed VoIP. Mr Lawson also had considerable experience in the telecom sector and their paths had crossed over the years. They had known one another since about 1998 when Mr Murphy acted as a consultant to one of Mr Lawson's businesses. Mr Murphy understood that Mr Lawson had at one time been a director of Severn Trent Water Plc. I do not know whether that is the case, but the respondents did not challenge Mr Murphy's understanding or suggest that he was wrong.

35. On 15 August 2012, InterX and the appellant entered into a "Reciprocal Carrier Services Interconnect Agreement", signed by Mr Lawson and Mr Murphy. This is a 12-page agreement governing trade between the two companies and appears to be a professionally drafted document.

36. The appellant contacted HMRC Wigan office on 15 August 2012 with an application to be included on a pilot for email validation of VAT registrations. On 24 August 2012 the appellant sought to verify the VAT registration of InterX.

37. Sometime on or before 30 August 2012, InterX contacted HMRC seeking to validate the appellant's VAT registration details. In or about October 2012 the appellant sent a letter of introduction to InterX. Mr Murphy said that he did this "because everyone else does it". It was also the case that Mr Murphy had been told that HMRC's verification process required a letter of introduction to be sent to them. The letter referred to the appellant as having contacts "at carrier level with BT and several other tier one carriers".

38. On 4 September 2012 Officer D'Rozario attempted to visit the appellant at its business address in Exchange Flags, Liverpool. This was a serviced office and Mr Murphy was not present. The visit was prompted by another trader in ECS, possibly InterX contacting HMRC in order to validate the appellant's VAT registration details. Officer D'Rozario wrote to Mr Murphy on 4 September 2012 in connection with the appellant's VAT registration and received a call from Mr Murphy on 5 September 2012. In this call Mr Murphy said that he was considering moving into wholesale supply of ECS. A meeting then took place on 6 September 2012. At this stage Mr Murphy told Officer D'Rozario that potential suppliers were BT, Talk Talk and Luas Communications Limited ("Luas") who had been brought to his attention by Mr McCann. Potential customers were InterX and Orange. On 13 September 2012 Mr Murphy notified Officer D'Rozario that he had a proposal for a deal where his supplier was Luas and his customer was Orange. Details of the call destinations and rates were given. At this stage the appellant had a "Reciprocal Telecommunications Services Agreement" with Luas dated 16 August 2012. In the event Mr Murphy said he tried to validate Luas with the Irish Revenue authorities. He was told there was a proposal to strike off the company, although he was also told it was probably just that the annual return had not been lodged in time. In a note to Officer D'Rozario dated 9 October 2012, Mr Murphy told Officer D'Rozario that he had decided not to deal with Luas. He told Officer D'Rozario that he was going to keep in touch with the company and perhaps review his decision at a later date. In cross examination Mr Murphy said that he spoke with Mr Eccles of Luas at some stage and was told that the company's paperwork had got out of date because his wife had cancer. In the event no deal took place.

39. At his meeting with Officer D'Rozario, Mr Murphy mentioned doing business with CK Connect. He said that he knew the family behind this business although he was not aware that they were trading ECS until he was given their name in the summer of 2012 by Mr McCann. By co-incidence, Mr Murphy's wife worked for their insurance business. Mr Murphy told me that the reason a NOC such as Mr McCann might introduce businesses to one another is because they are paid on volume going through the switches.

40. Officer D'Rozario warned Mr Murphy about the serious problems with MTIC fraud that HMRC were experiencing in the wholesale supply of ECS. Mr Murphy said that his accountant had warned him, but that he did not think he would "get stung" because he knew the telecom industry very well. Shortly after the meeting, Officer D'Rozario sent Mr Murphy copies of HMRC Public Notice 726 which dealt with MTIC fraud generally, and referred to certain indicators of VAT fraud and examples of due diligence checks that should be made. Another officer wrote to the appellant on 12 September 2012 also describing the risk of MTIC fraud.

41. I am satisfied that by October 2012 Mr Murphy was well aware that the wholesale ECS market posed a significant risk in terms of MTIC fraud, that it was necessary to carry out effective due diligence on trading partners and that it was necessary to be vigilant in all dealings.

42. InterX again contacted HMRC on 10 October 2012 to validate the appellant's VAT registration number. HMRC validated the appellant's VAT number on 11 October 2012.

43. Mr Murphy at some stage came across an individual called Mr Christopher Lara on Linkedin, the business networking platform. He searched under telecoms and VoIP and spoke with Mr Lara via Skype. Mr Murphy said that he was impressed with Mr Lara's knowledge

and described him as a "mine of technical information". He gave Mr Murphy some rates which Mr Murphy put on a spreadsheet and sent to Mr Lawson. Mr Lawson told Mr Murphy that he could sell four or five of the rates to Colt Telecom, who were a Tier 1 network provider. Mr Murphy was aware that Mr Lawson had a close relationship with Colt Telecom. Indeed, Mr Lawson told HMRC officers who visited him on 10 January 2013 that one of his customers was Colt Technology Services Group Ltd. Further, Mr McCann told HMRC at a visit on 24 July 2013 that when working for InterX he "carries out checks on the deals with Colt".

44. The appellant had no business plan, other than Mr Murphy wanted to earn about £500-600 per week which he described as a "residual income". Mr Murphy considered that he did not need a business plan because he did not require any capital investment. Using an alternative business platform would mean that the appellant would be paid by its customer at the same time that it was required to paid its supplier. He expected to pay Mr McCann a percentage of his profit.

45. Mr Lawson had been trading ECS through his company Betwixt IP Ltd. Betwixt had gone into liquidation in November 2012 and prior to the liquidation Mr Lawson had set up InterX to trade ECS. All trade was conducted by Mr Lawson from his home address in Stratford-upon-Avon which was described as "a rented apartment in a grand country house". Mr Murphy said that he was not aware of Betwixt's involvement in wholesaling ECS. He was aware that it was a company of Mr Lawson but believed that it was involved in wireless broadband.

46. The appellant carried out its first wholesale deals in ECS in VAT period 01/13. The deals increased substantially in periods 04/13 and 07/13. During these periods the appellant's sole trading activity was the wholesale supply of ECS. Mr Murphy said that it was because of his relationship with Mr Lawson of InterX, and Mr Lawson's connection with Colt Telecom, that he was able to generate what appear to be large amounts of business from what was effectively a standing start. Mr Murphy told me that he initially wanted to establish one supplier and one customer and then look to expand.

47. On 13 September 2012 Mr Murphy told Officer D'Rozario that he had decided to use Unique as his switch. Switches provide an essential service which enables the wholesale trade in ECS. In non-technical terms, switches provide a "key" which allows VoIP traffic to pass through various routes between switches from a person making a call to the person receiving the call. Each trader on a route must have its own switch to enable calls to pass along the route. The switches maintain call detail records ("CDR") of all telephone calls which pass through the switch. The CDR include information as to each call directed by a switch to a relevant route, including date and start time of call, call duration, billing phone number and the route by which the call entered and left the switch. Invoices for each supplier within a chain are produced from the CDR maintained by that supplier's switch. Technical issues with a switch can affect the quality of ECS being traded and the accuracy of accounting and billing between wholesalers.

48. I am satisfied from Mr Murphy's evidence, and in particular the way in which he dealt with technical questions during the course of his evidence and when asking his own questions of Officer D'Rozario, that he had a good understanding of the wholesale trade in ECS. Officer D'Rozario frankly acknowledged at times that he did not have the same technical knowledge and in some respects he had made assumptions which did not appear to be justified. For example, based on certain HMRC guidance Officer D'Rozario produced an extract from a commercial website which indicated Myanmar and Tunisia, for which the appellant supplied ECS to Orange, blocked some websites and content. Officer D'Rozario assumed that this meant that VoIP services were blocked but he accepted that this assumption may have been

wrong. Having said that, I am not concerned with Officer D'Rozario's understanding of the appellant's trade. I must make my own findings based on the evidence before me.

Relationships with Barry Lawson and Kevin McCann

49. The circumstances in which Mr Murphy came to deal with Mr Lawson and Mr McCann are described above. Mr Murphy was asked how he was able to get better rates than InterX. He said this was because the appellant concentrated on a relatively small number of destinations and was able to get rates from Orange.

50. Mr Murphy's evidence was that in May 2013 Mr Lawson visited a worldwide telecom convention in Chicago. On midnight of the day Mr Lawson returned he stopped dealing with the appellant. He closed his switch to the appellant's traffic and in Mr Murphy's words "dropped me like a stone". There was no prior warning. Mr Murphy got calls from Orange saying that they were getting no traffic from the appellant. Mr Murphy asked Mr Lawson what was happening and was told that there was a technical issue. In fact, Mr Murphy surmised that Mr Lawson had met a trader in Chicago who he preferred to deal with.

51. Mr Murphy does not appear to be right with the timing of this event. Deals 14-18 involved ECS traffic in June and July 2013. However, the timing was not explored in the evidence and I consider that Mr Murphy was probably mistaken in his reference to May 2013. There is also documentary evidence that the appellant continued to trade with InterX until January 2014. Again, this was not canvassed in the evidence.

52. In January 2013 Mr Murphy received emails from Mr McCann, on behalf of InterX, about issues with certain calls. The emails related to deals where the appellant was supplied by Orange and itself supplied InterX. Mr Murphy was aware that Mr McCann was being held out as the "Operations Director" of InterX whilst at the same time advising the appellant and acting as its NOC. Mr Murphy forwarded Mr McCann's emails to Orange asking them to check matters out. The effect of this was to reveal the identity of the appellant's customer, InterX to their supplier, Orange. Mr McCann, given his position in the appellant and InterX, would in any event have access to the trading partners of InterX as well as the trading partners of the appellant. Mr Murphy said that he was not concerned that Mr McCann or Mr Lawson would try and "snatch" his business. He said that Mr Lawson would have nothing to gain and a lot to lose by way of reputation if he did so and he described people in this market as "an incestuous breed".

53. Mr Murphy described Mr Lawson as "not being one of life's sharers or someone likely to share an opportunity with you". There was no obvious reason why Mr Lawson should have encouraged Mr Murphy to become engaged in the wholesale ECS market. Indeed, Mr Lawson could easily have identified the appellant's customer Orange through Mr McCann. Despite this, Mr Murphy emphasised in his evidence the commercial sensitivity of the identity of customers and suppliers. I am satisfied that Mr Murphy genuinely did have a high regard for Mr Lawson and did not think that Mr Lawson would cut him out of a deal by going directly to Orange.

54. I have already noted that it was not clear from the evidence how Mr Murphy first came to know of Mr McCann. Mr Murphy's evidence as to the circumstances was vague and in some respects contradictory. Further, there is no evidence that the appellant paid Mr McCann for his services which Mr Murphy accepted were vital to the appellant's trade. Mr McCann not only provided technical advice to the appellant and act as its NOC, but he also introduced potential suppliers and customers to the appellant.

55. According to Mr Lawson in interviews with HMRC officers, Mr McCann acted as an "operations director" for InterX. His services were provided through a company called Citium Ltd rather than as an employee. Mr McCann looked after customers first hand, worked out rates for routes and did technical work putting new routes onto the switch. Mr McCann ceased

working for InterX in July 2013 when Mr Lawson became aware that Mr McCann was trading ECS in his own right. Mr Lawson was noted as describing Mr McCann as a "close personal friend" who he had known for many years.

56. Mr Murphy stopped using Mr McCann when Mr McCann sent the appellant a "Know Your Customer" package on behalf of Citium in or about July 2013. Mr Murphy identified that Citium was connected to Luas through Mr Eccles, who was a director of Luas and Citium. Mr Murphy had already declined to trade with Luas.

The appellant's switch provider

57. The appellant entered into a written agreement with Unique dated 1 October 2012. The agreement was signed on behalf of Unique by Raphael Heard, President. Mr Murphy could not initially recall how he came across Mr Heard. He suggested he might have been recommended or that he came across him on Linkedin. Unique was based at 3254 Spectrum, Irvine CA. It was providing a "switching partition and billing solution along with technical support for [the appellant's] daily operations". As such, Unique routed international telecom traffic to various destinations around the world on behalf of wholesalers. The agreement was for an initial term of one year at a cost of $3,000 per month, payable 30 days in advance. It was terminable on 1 days notice for non-payment and on 15 days notice for any other breach.

58. The appellant made no payments to Unique and does not appear to have received any invoices. Mr Murphy has consistently told HMRC since a meeting on 30 September 2013 that this was because he was not provided with "Call Line Identification" ("CLI") which identifies the telephone number of the caller. He said that when the appellant purchased minutes from InterX, InterX had the CLI but after going through Unique's switch the CLI was lost which led to complaints from Orange. Unique maintained that CLI was still intact after passing through their switch. Officer D'Rozario asked for paperwork to evidence the dispute but was told that it was being dealt with verbally. This is despite the large volume of traffic which the appellant sent though Unique's switch. By the end of July 2013 it was some $26m.

59. Mr Murphy sent an email to Unique dated 1 October 2013, the day after his meeting with HMRC in which he referred to numerous telephone and Skype calls "over the past few months". He referred to both parties having "breached" the agreement on several occasions "and generally failing in our responsibilities under the contract". Mr Murphy referred in his email to an oral agreement that the contract would not come into force until the traffic reached a certain level and that there would be a 3 month free period. At one stage in his evidence Mr Murphy said that this free period was agreed due to quality issues in the early days, and at another stage that it was a "loss leader" agreed at the start of the relationship. Despite all this, Mr Murphy suggested going forward under a new contract. He invited Unique to send him a statement of the sums it considered due. This email is the only documentary evidence of any dispute with Unique.

60. In a letter to Officer D'Rozario dated 5 December 2013, Mr Murphy stated that the whole agreement with Unique had been "a farce". He said that he had issues with quality, timing and support and had disputed the validity of the contract on several occasions but the response of Unique had been "less than forthcoming". He considered that it was a result of these issues that he lost InterX as a supplier. He referred to his email to Unique proposing that they work something out as there had been an improvement in their service but said that he received no response. Since then he had found an alternative switch.

61. On 7 April 2014 Mr Murphy wrote to Officer D'Rozario to say that he had now come to an arrangement with Unique to bring the contract to a "mutually satisfactory conclusion" which meant that they could help him salvage CDR from the prior year. He forwarded CDR for Deal 12. At the same time, he provided copies of emails from Mr McCann on behalf of InterX in the

period 7 January 2013 to 16 May 2013 making various complaints about ECS supplies by the appellant to InterX. For example, calls dropping without ringtone and short calls to invalid numbers being charged for. There was one reference to an issue with "CLI presentation" being intermittent.

62. At the meeting with Officer D'Rozario on 6 September 2012, Mr Murphy acknowledged that he would expect to have full CDR available from his switch. In the event he was unable to produce CDR, save for the sample identified above. I do not read anything into Mr Murphy's inability to provide CDR. In my view it does not add anything to the respondents' submissions concerning the relationship between the appellant and Unique.

Akirix

63. Prior to any trade in ECS, Mr Lawson required the appellant to use a banking platform provided by Akirix. He explained the benefits of this in an email to Mr Murphy. Each participant in a deal chain would have a "sub-escrow account" at Key Bank, USA and payment between parties would be simultaneous. Mr Lawson suggested that Mr Murphy should invite his own suppliers and customers to use Akirix. Mr Murphy forwarded a copy of the email to Officer D'Rozario on 9 October 2012. At the time of the transactions in 04/13 and 07/13 Akirix operated through Wells Fargo rather than Key Bank.

64. All companies in the transaction chains used the services of Akirix. Supplies of ECS in a chain were given a "project number" by Akirix, which might cover more than one deal. When payment fell due in relation to a supply, in theory it would be made automatically and simultaneously for each transaction in the chain, the ultimate purchaser having introduced funds into its account. The funds for each purchase would be "ring fenced" in each trader's account with Akirix. Akirix also provided traders with an invoice for each transaction in the chain.

65. When a deal was negotiated, the appellant would be invited to an Akirix project. The rates agreed would be input and the switches would transfer data to Akirix so that it would have information to produce invoices. The same minutes passing through each switch should show for each trader in a project. However, if different switches were used there may be a timing difference in the cut off at midnight for minutes recorded as routed by a particular switch.

66. On 17 December 2012 Officer D'Rozario wrote to the appellant warning of the use made by MTIC fraudsters of alternative banking platforms. He described various indicators of fraud in the use of such platforms. Mr Murphy was not concerned about using Akirix because he spoke to their European Director, who he named as Mr Stuart Ashmore, and other employees of Akirix. He said they had asked for a lot of information and it had taken some two weeks before his account was opened. Mr Murphy told me that he understood Akirix was "fully regulated by the FCA in the United States". I'm not sure what the reference is to the FCA, but Mr Murphy told me that he spoke to a Mr John Nelson of Akirix and was told that it was registered.

67. The respondents say that trading via Akirix facilitated the fraud and ought to have indicated to Mr Murphy the connection with fraud. The respondents' concerns about trading using alternative banking platforms were made known to Mr Murphy prior to the appellant's transactions in 04/13 and 07/13. In particular, by way of letter dated 17 December 2012 Officer D'Rozario described various characteristics of an alternative banking platform being used for the purposes of a fraud. Those characteristics included:

(1) use of an overseas financial institution with the platform itself not being regulated;

(2) no face to face contact with employees of the platform;

(3) limited information being required from account holders;

(4) abnormally high fees;

(5) trading partners requiring a trader to use the same platform.

68. I have set out above the circumstances in which the appellant came to use the Akirix platform. Mr Murphy's oral evidence was that Akirix was regulated, he did have face to face contact with its employees and it required him to provide a lot of information in order to open an account. He also said that Akirix was a very popular system and that it was still in use today.

69. In relation to fees, on 7 June 2013 Mr Murphy told Officer D'Rozario that the appellant was charged ¼ % of supplier invoice values by Akirix as fees for its service. On 30 September 2013 he told Officer D'Rozario that the charge was ¼ % of his margin. In oral evidence he said that the latter reference was a mistake and that it was ¼% of turnover. He initially recalled that it was ¼ % of his supplier invoice value and ¼ % of his sales invoice value but later said that it was only charged on funds going out of his account to his supplier. No documentation describing Akirix's fees was produced by the appellant.

70. Between 31 May 2013 and 30 July 2013 Akirix charged the appellant fees of $37,377, after a volume based refund of $5,000. In total, between 1 November 2012 and 23 July 2013 Akirix charged fees of approximately £92,000. Mr Murphy accepted that this was a significant sum to charge for banking services, but this was referable to the amount of business being done and also included the invoicing of goods between parties.

71. The respondents say that the reasons Mr Lawson gave for use of Akirix and which Mr Murphy said made it such a useful tool were not in fact effective. In particular, the respondents say that there were delays in payments, payments through the chain were made piecemeal and there were significant payment errors. I describe these matters in more detail below.

Relationship with other individuals and businesses

72. The respondents say that the evidence reveals extensive connections between traders in the deal chains, their switch providers and technical advisors. It is suggested that the possibility of the appellant "stumbling across" certain connected individuals by mere coincidence or bad fortune is remote. The most significant connections relied on are as follows:

(1) Unique and Orange were both based at the same address at 3254 Spectrum, Irvine, California. which Mr Murphy told me was a large technology business park. Mr Murphy said he realised that they had the same address and recalled that Mr Lara told him that he knew Mr Heard.

(2) The switch provider of InterX was a company called InTouch Telecom Inc, based in New Jersey. Christopher Lara was President of Orange and in April 2013 he was appointed a vice president of InTouch.

(3) Raphael Heard was President of Unique and also Chief Technical Officer of InTouch, a fact which Mr Murphy said he did not know. Mr Murphy could have discovered that fact from Linkedin. Mr Lara and Mr Heard had worked for Huntingdon Telecom in the United States which Mr Murphy thought he might have been aware of.

(4) On 16 July 2013 the appellant sought to validate the VAT registration number of Parkwell, one of the companies in the deal chains, but never did business with them. He had been interested in doing business in relation to freefone telephone numbers.

(5) Mr Lara had links with Redwood Trading (UK) Limited and Blue Logic (Europe) Limited which were involved in trading ECS in the UK. Blue Logic was a supplier to Mr Lawson's company Betwixt and the trading was connected with tax losses.

(6) Andrew Thompson worked as a consultant for the appellant for a short time and the respondents say he was linked to MTIC fraud. On 13 January 2014 Mr Thompson issued an invoice to the appellant for certain services in the sum of £1,000. Mr Murphy described the services as involving line testing. In early 2012 Mr Thompson had traded in ECS but Mr Murphy said he was not aware of that. He knew him as a technician.

73. The respondents say that it is not credible for Mr Murphy to say that he found Orange and Unique via Linkedin when both were linked to a small network of traders that included Mr Lawson's companies Betwixt and InterX.

74. In his evidence Mr Murphy quite fairly expressed surprise at the close working links between Mr Lara and Mr Heard. The existence of those links would have been apparent to Mr Murphy if he had looked more closely at the material which was available to him.

75. The respondents also rely on connections between Mr Murphy, including his company Local Heroes Limited, and other traders said to be connected with fraudulent tax losses. I am not satisfied that the existence of such connections, even if they were established provides probative evidence that Mr Murphy knew or should have known that the 18 transactions were connected with fraud.

Deficiencies and inconsistencies in the business records

76. The respondents rely on the fact that the appellant's business records "were littered with obvious errors".

77. Akirix produced invoices for all traders in the deal chains. Certain traders in the chains, including InterX also produced their own paper invoices. The appellant did not produce its own invoices when it was selling to Orange, save in relation to Deal 13. Mr Murphy said that the reason he sent a paper invoice to Orange in relation to Deal 13 was because the Akirix invoice was wrong by some $3,000 and he sent a paper invoice to correct it.

78. Mr Murphy said that when the appellant was purchasing from Orange and selling to InterX he did produce paper invoices. This was because Mr Lawson wanted them.

79. I am satisfied that there were numerous errors in the documentation supporting the appellant's purchases and sales of ECS. For present purposes, it is sufficient to summarise examples of errors as follows:

(1) In Deal 13 errors in the Akirix invoices led the appellant to make an overpayment to InterX of $565,854. Mr Murphy accepted the documentation for this deal was "littered with errors". He said that such errors might have been caused by "hitting the wrong button" and "it was all sorted out on a rolling basis" and put right straight away. No evidence was produced to show how the overpayment was rectified.

(2) Deal 1 illustrates delays in the period of time between minutes being used and the date of the Akirix invoice from the appellant to Orange. The minutes were used in the period 4 – 10 March 2013. The InterX paper invoice was dated 11 March 2013. However, the Akirix invoice which it appears was intended to trigger payment was not dated until 26 April 2013, some 46 days later. Mr Murphy suggested that there may have been a dispute and that there were often disputes which affected invoicing dates.

(3) Also in Deal 1, the appellant paid InterX on 30 April 2013 even though 3p was paid in 2 separate instalments of $500 on 30 April 2013 with the balance of $100,810 not paid until 13 May 2013. Mr Murphy suggested that this might have been because of a dispute about minutes or because of different billing cycles. He said each deal had a different billing cycle, for example 15/15 meant at the end of 15 days you had 15 days to pay. The cycles could be anything from 3/1 to 30/45. However, the payment aspect of the billing cycle was not recorded on the invoices or on any documents that Mr Murphy

could point to. In Deal 1, the appellant's invoice to Orange stated an invoicing interval of 1 day but the invoice was not dated until 26 April 2013. Again, Mr Murphy suggested this may have been because of a dispute over minutes which he said would generally be dealt with over the phone without any documentation.

(4) The InterX paper invoice for Deal 6 showed the net sum due from the appellant as $1,579,523 with VAT of $315,904 and a gross payment due of $1,895,428. The same gross payment amount was then incorrectly carried into the InterX invoices in each of Deals 7-13.

(5) In Deal 10 and Deal 18 the appellant's invoices mistakenly included VAT at 20% on the sale to Orange which should have been treated as zero rated. Mr Murphy said that either he or his daughter had must have entered an incorrect VAT setting by mistake. The VAT was crossed out manually on the copy invoices in evidence. Mr Murphy wasn't sure whether he had sent the invoice with the crossing out or sent another invoice to Orange. However, Orange paid the total sums including VAT of $325,282 and $94,774 respectively. Mr Murphy said this "would all have been settled and sorted out and the invoice would have been replaced with another at a later date". He said that the replacement invoice had been provided to Officer D'Rozario. However, there was no evidence of the documentation being amended, or of the overpayment being rectified.

(6) In Deals 14-16 there was no evidence that the appellant was paid by Orange. The total invoice values for those deals was $1,291,459. In Deal 17, the appellant was underpaid by Orange by $46,700. Mr Murphy's explanation was that he had offered to account for all invoices and payments and had done so. However there was no evidence before me as to how these underpayments and the overpayment were rectified, if at all.

(7) In Deal 9, invoices from InterX and others earlier in the chain include 490,574 minutes to Algeria Mobile. The appellant's invoice to Orange includes 409,574 minutes. One explanation could be a typographical error, which would mean that the appellant suffered a loss of $22,125 in relation to that part of the deal. Mr Murphy said that the missing minutes may have been on an earlier or later invoice with the difference arising because of different billing pattern or timings on the switch. There was no documentation to explain the difference.

80. Mr Murphy fairly acknowledged that he should have picked these errors up, but he said he worked from the Akirix invoices and there was no need for Mr Lawson to produce separate sales invoices for InterX. He said that such mistakes were not typical of Mr Lawson who he described as meticulous. This is in contrast to what Mr Murphy said in a letter dated 5 December 2013 to Officer D'Rozario, that the Akirix invoices were only "instruments of payment on the platform" and that Officer D'Rozario should use the paper invoices produced by InterX in relation to the appellant's VAT returns.

81. During the course of the investigation Mr Murphy produced a spreadsheet seeking to reconcile the Akirix invoices to each "project". He also produced a schedule seeking to match Akirix invoices to the paper invoices prepared by Mr Lawson in relation to the appellant's purchases from InterX. It is fair to say that Mr Murphy found these exercises and questions in relation to invoicing very frustrating.

82. The respondents say that these mistakes would be highly unlikely to happen in genuine commercial deals and point to the absence of evidence explaining how the errors were resolved.

83. In relation to payment errors, the respondents asked Mr Murphy to provide documentary evidence to show that all supplier invoices and sales invoices had been paid in full, and overpayments corrected. Mr Murphy has never provided any analysis to show that payments to and from the appellant had been correctly accounted for. Mr Murphy accepted that his

records were "very poor" and said that there were other invoices which had not been included in the evidence. He suggested that the underlying business was simple, but the actions of Officer D'Rozario in trying to make things match which were never intended to match was causing all these difficulties. In his closing submissions, Mr Murphy suggested that he had not been expecting to deal with the documentation in this detail. In ordinary circumstances I would not accept that as a good reason for the absence of satisfactory explanations supported by documentation. However, this is an area where I take into account the difficulties Mr Murphy had in dealing with documentation and the medical issues he was faced with during the hearing. On balance, I am prepared to accept that these under and overpayments were at some stage rectified. The fraudulent scheme was very sophisticated and it seems unlikely that in such a scheme significant payment errors would be left unrectified.

The absence of reliable due diligence checks by the appellant on its trading partners

84. Mr Murphy said that he was advised by Mr McCann that he had to obtain due diligence in relation to suppliers and customers in the wholesale ECS business. He was also told this by Officer D'Rozario in September 2012. Mr Murphy contends that his due diligence was effective. He did not know who Mr Lawson was dealing with, although he understood it was Colt Telecom, both where InterX supplied the appellant with ECS and where the appellant supplied InterX with ECS The wholesale market operated between network providers.

85. Mr Murphy told me that he was aware of Parkwell and had visited their offices in November 2013 but that they did not want to do business with him. At the time of the deals he was not aware that Parkwell traded with Mr Lawson.

86. Mr Murphy told me that he conducted due diligence on many companies where the results of that due diligence led him to decline to trade with those companies. He was not challenged on that evidence and I accept it.

87. Mr Murphy considered that he knew Mr Lawson very well from a business point of view and was aware of nothing to suggest that there was any risk of fraud in deals he was involved in. He had a long history in the telecom sector and had been a director of Severn Trent Water. He did not know of the difficulties Mr Lawson had with Betwixt. He retained a letter of introduction from InterX but he regarded such letters as worthless, and simply a formality required by HMRC.

88. Mr Murphy considered that he himself had a lot of experience and a good reputation in the telecom sector and it was no surprise that Mr Lawson should contact him and canvass the possibility of trading ECS. Mr Lawson invited him to find some routes and then talk.

89. The due diligence on InterX obtained by Mr Murphy included an Experian credit report. The report appears to be dated 7 February 2012 but this cannot be right because it refers to figures in the company's accounts for the year ended 31 October 2012. Mr Murphy did not recall obtaining the document. He said that he would not have placed much reliance on the report in any event because he had known Mr Lawson a long time and understood that he had connections with Colt Telecom.

90. The due diligence also included InterX's certificate of VAT registration, certificate of incorporation, a confirmation dated 30 January 2013 from the European Commission's VAT number validation website and a copy of Mr Lawson's passport. Mr Murphy said that he had "100% confidence in Mr Lawson" and had no suspicions that there was any fraud involved.

91. Mr Murphy said that because Orange was based in the United States he could not find much information about the business. He had spoken to and been impressed by Mr Lara for several months prior to the first deal. He traced the company to a business register which

confirmed the company was registered in California. He did not obtain any credit rating report because he was not giving credit and all the business was "covered by VOIP Capital". On 20 January 2013 he printed off a Linkedin page detailing Mr Lara's background and experience in technology related companies.

92. The appellant entered into a "Reciprocal Private Service Agreement" with Orange dated 11 September 2012. It contained provisions in relation to credit approvals, interest for payments not received within 7 days of invoice dates and dispute procedures. None of these provisions were followed in practice and in his evidence Mr Murphy appeared to show a casual disregard for the terms which governed the trading relationship between the appellant and Orange.

93. Mr Murphy initially could not recall how he came to know of Unique, although he later recalled that he came across Mr Heard on Linkedin. He never met Mr Heard but spoke with him via Skype. Mr Murphy carried out no commercial checks or due diligence on Unique, even though it was very important to the business to have a good, reliable switch.

94. The respondents rely on a failure by Mr Murphy to carry out due diligence checks on Mr McCann and Mr Thompson. The appellant did not trade with these individuals and it does not seem to me that this failure adds anything to the respondents' submissions on due diligence in relation to InterX, Orange and Unique.

95. The respondents also rely on Mr Murphy's failure to carry out due diligence checks on Akirix. I accept that Mr Murphy met individuals from Akirix and was satisfied that it was subject to some form of regulation in the United States.

DISCUSSION AND FURTHER FINDINGS OF FACT

96. I must now consider based on the evidence as a whole and my findings of fact whether Mr Murphy knew or should have known that the transactions were connected with fraud at the time the appellant entered into the transactions. The burden is on the respondents to satisfy me that is the case. I have carefully considered all the evidence before me, the parties' written submissions and the findings of fact set out above. For the purposes of this discussion I focus on what I consider to be the most relevant matters which individually or taken as a whole are probative as to what Mr Murphy knew or should have known as to the connection with fraud.

97. I must of course assess the credibility of Mr Murphy's evidence generally. In general, Mr Murphy came across as a sincere and honest witness. At times he became agitated when his honesty was questioned, and he showed his frustration when references were made to records which he himself acknowledged were very poor. On the whole I consider he was doing his best to answer questions, but his recollection on points of detail was not good.

98. In considering Mr Murphy's credibility the respondents invited me to consider his evidence in relation to a visit to the appellant's premises by Officer Carl Jones and a colleague on 29 August 2013. Officer Jones was standing in for Officer D'Rozario. Mr Murphy in his evidence said that he overheard certain derogatory comments made by Officer Jones about Officer D'Rozario. Mr Jones gave oral evidence and categorically denied making such comments.

99. I do not consider that the evidence of Mr Murphy or Mr Jones about this alleged incident really helps me form any view as to Mr Murphy's credibility. Nor does it influence me in forming any view as to the reliability of Officer D'Rozario's evidence.

100. The appellant accepts that its deals were connected with MTIC fraud. I am satisfied that this was an orchestrated fraud. The Appellant's case is that he was duped by Mr Barry Lawson of InterX. The question for me is whether he was an innocent dupe, who did not know and could not reasonably have known of the connection with fraud.

101. There was a period of a few months between Mr Murphy's contact with Mr Lawson to discuss VoIP in about August 2012 and the appellant's first deals in ECS in late 2012. Mr Murphy makes a fair point that in the context of MTIC fraud it is often the case that parties knowingly involved in the fraud will trade within a very short period of first meeting.

102. I am satisfied that after July 2013, the appellant was involved in legitimate trade in ECS. It continued to trade with various businesses including Tata Communications Ltd. The appellant's business and the market it was operating in were not inherently fraudulent. Mr Murphy had considerable experience in the telecom sector. It was natural for Mr Murphy to seek to trade in the wholesale ECS market given his experience. However, he was well aware that the wholesale trading of ECS was fraught with risk, including the risk of VAT fraud. Mr Murphy was also well aware that it was important to be vigilant to ensure that the appellant did not enter into transactions connected with VAT fraud. Given his experience, Mr Murphy was in a good position to identify suspicious trading partners. He decided to initially limit the appellant's trading partners and to concentrate on a relatively small part of the ECS wholesale market.

103. At first sight it was sensible for the appellant to trade initially with Mr Lawson's company InterX. Mr Murphy had known Mr Lawson for many years, and had cause to regard him as a legitimate businessman. Mr Murphy had full trust and confidence in Mr Lawson. For the reasons which follow I consider that trust and confidence was misplaced.

104. The respondents at one stage relied on consistent mark ups in the appellant's deals and in the deals of other traders in the deal chains. However, this was not pursued by the respondents in cross-examination of Mr Murphy or in closing submissions.

105. I accept Mr Murphy's evidence that he had no knowledge of the actual deal chains, other than that the appellant's supplier was InterX and its customer was Orange. I am satisfied that there was no information available to Mr Murphy from which he could have discovered the identity of any other traders in the deal chains. I also accept that Mr Murphy had been led by Mr Lawson to believe and genuinely did believe that in the 18 deal chains, InterX had been supplied by Colt Telecom. He also believed that his customer Orange would be supplying a Tier 1 customer. Mr Murphy still believed at the time of the hearing that Colt Telecom was a supplier in the deal chains. I am satisfied that he was genuinely convinced that "Colt was definitely in there somewhere". He said that he had seen invoices between Colt and InterX, although not for these deals.

106. The due diligence carried out by the appellant meant that it refused to deal with many companies. However, the due diligence carried out on Orange and Unique was wholly inadequate. Mr Murphy knew very little about the business of Orange, or the track record of Mr Lara. All he knew came from discussions with Mr Lara and from Mr Lara's Linkedin page, which Mr Murphy ought to have known was self-serving. Just because Mr Lara was knowledgeable about the business did not mean that he was a reliable and reputable trading partner. Similarly, in relation to the appellant's dealings with Mr Heard and Unique.

107. Mr Lara was not recommended to Mr Murphy by anyone. Mr Heard may have been recommended, although Mr Murphy could not recall who by, or he may have come across him on Linkedin. It is unlikely that Mr Murphy simply came across these individuals independently through searching Linkedin. I say that because there were clear connections between the two. Mr Murphy was aware that they were based on the same business park in California. He could have identified from Linkedin that they were both connected to a switch called InTouch, and there was no reason Mr Murphy should not have identified that Mr Lawson used InTouch as a switch for InterX. Given the relationship between Mr Murphy and Mr Lawson, I would be surprised if Mr Murphy had not discussed switches with Mr Lawson. Switches provide an essential service to wholesale traders in ECS. Armed with information that InterX used

InTouch as a switch, Mr Murphy would have realised that there were close trading connections between Mr Lawson, Mr Lara and Mr Heard.

108. Mr Murphy expressed surprise at the connections between Mr Lara and Mr Heard. Even more surprising is the fact that both had trading links to Mr Lawson which Mr Murphy could and should have identified. The existence of such close trading links and the suggestion that Mr Murphy happened upon Mr Lara and Mr Heard by chance does support the respondents' case that Mr Murphy was aware of the links. On balance, however I am not satisfied that is the case. Equally likely is that Mr Murphy was in some way manipulated. I note that Mr Murphy could not recall how he came to know of Unique. It is a plausible explanation that he was steered to Unique by Mr Lawson, Mr McCann or Mr Lara.

109. The Respondents say the paucity of evidence in relation to payment and quality issues with Unique casts doubt over the veracity of Mr Murphy's explanation of the commercial relationship. In any event, even if the explanation is true, the respondents say that Unique's failure to enforce payment would have caused a reasonable trader to question the commerciality of the trading relationship. On balance I am not satisfied that Mr Murphy was being untruthful about the nature of his relationship with Unique. However, the level of informality shown by Unique was one of the factors which should have indicated to Mr Murphy the existence of an orchestrated fraud.

110. The involvement of Mr McCann on behalf of both InterX and the appellant might suggest actual knowledge of a connection with fraud on the part of Mr Murphy. Why else would Mr Murphy permit his supplier to know the identity of his customer? On balance, however, I am satisfied that this is explicable as naivety on the part of Mr Murphy rather than knowledge of a fraud.

111. The Respondents rely on the fact that the appellant was quickly able to achieve what they say was remarkable success in a new commercial venture which Mr Murphy must have known was too good to be true. I accept that Mr Murphy, armed with publicly available information, should have taken a step back and looked at all these relationships. He should have done so in light of the fact that he was apparently able to obtain better rates from Orange than Mr Lawson, an established trader in the market with connections to the appellant's switch and customer. If he had done so, he would have realised that the deals he was achieving, with apparent ease in a market rife with fraud, were too good to be true.

112. Mr Lawson had also insisted that the appellant should use the Akirix platform if it was going to do trade with InterX. Mr Murphy was aware from what Officer D'Rozario had told him that use of alternative banking platforms was an indicator of fraud. It is fair to say that not all the adverse characteristics of alternative banking platforms were present in relation to Akirix. In particular, Mr Murphy at least understood it was regulated, he did have face to face contact with employees of Akirix and he was required to provide what he described as a lot of information before his account was opened. However, Mr Lawson's insistence that the appellant should use Akirix was another factor which should have caused concern to Mr Murphy.

113. Mr Murphy was vague and inconsistent in his evidence as to the basis on which Akirix charged its fees. As far as Mr Murphy's oral evidence on this point is concerned, I am prepared to accept that Mr Murphy's medical condition may have affected the quality of his evidence. Even so, during the investigation he was also unclear about Akirix's charges. Further, it must have been clear to Mr Murphy from an early stage that in fact the Akirix platform did not provide the benefits that Mr Murphy was anticipating. In relation to Deal 1, there were issues with invoicing and payment. Mr Murphy suggested these may have been due to disputes over minutes supplied but there was no evidence to substantiate that claim. Those issues ought to have caused Mr Murphy to question the commerciality of the transactions.

114. The existence of substantial underpayments and overpayments in the transactions is evidence which might tend to suggest that Mr Murphy knew his transactions were connected with fraud. The respondents say that Mr Murphy's failure to establish that all payments in the appellants transactions were correctly made shows that he had no real concern, at the time the transactions were entered into, to ensure that payments were correct. They say that is indicative that Mr Murphy was aware the transactions were part of a fraudulent scheme.

115. Mr Murphy did say in evidence that he had other documentation which would explain these errors and show how they were rectified. I am satisfied that the overall fraudulent scheme was relatively sophisticated and it does seem unlikely to me that in an orchestrated fraud of this nature such large errors in payments would not be rectified. However, the existence of the under and overpayments was a signal to Mr Murphy that there was a wider fraudulent scheme and a lack of commerciality in the appellant's transactions. The first overpayment was in Deal 10 at the beginning of June 2013 so this would only be an indicator in relation to Deals 14-18.

116. Overall, I am satisfied that the transactions the appellant entered into with InterX and Orange, with the involvement of Mr McCann and Unique, lacked commercial rationale. They were carried out informally, with no evidence of payments being made to Unique or Mr McCann and without the documentation one would expect to see in relation to payments and disputes. Mr Murphy ought to have realised that was the case and that the reason for such informality on the part of his trading partners was because the transactions were part of an orchestrated fraudulent scheme.

117. Looking at the evidence as a whole, and on the balance of probabilities, I am not persuaded that Mr Murphy knew of the connection with fraud at the time the appellant entered into the transactions. I am satisfied, however, that he should have known of the connection with fraud. In the circumstances I must dismiss the appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

118. 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: 03 FEBUARY 2020

ANNEX

Deal No	Invoice No InterX to 3p	Invoice No 3p to Orange	Invoice Date	Net Value $	VAT $	Gross $
1	3PT13/003		11 March 2013	100,814	20,162	120,977
		I-02005	26 April 2013	101,310		101,310
2	3PT/13/004		18 March 2013	276,431	55,286	381,717
		I-02051	30 April 2013	277,787		277,787
3	3/PT/13/005		25 March 2013	515,283	103,056	618,340
		I-02070	2 May 2013	517,731		517,731
4	3/PT/13/006		1 April 2013	748,158	149,631	897,799
		I-02081	3 May 2013	751,810		751,810
5	3/PT/13/007		8 April 2013	959,566	191,913	1,151,480
		I-02014	26 April 2013	964,673		964,673
6	3/PT/13/008		15 April 2013	1,579,523	315,904	1,895,428
		I-02058	1 May 2013	1,587,821		1,587,821
7	3/PT/13/009		17 April 2013	1,465,110	293,022	1,758,132
		I-02082	3 May 2013	1,471,686		1,471,686
8	3/PT/13/010		19 April 2013	1,611,621	322,324	1,983,945
		I-02270	3 May 2013	1,623,328		1,623,328
9	3/PT/13/011		22 April 2013	1,806,968	361,393	2,168,362
		I-02302	31 May 2013	1,797,970		1,797,970
10	3PT/13/012		24 April 2013	1,614,934	322,986	1,937,921
		I-02327	3 June 2013	1,626,413		1,626,413
11	3/PT/13/013		26 April 2013	1,895,792	379,158	2,274,950
		I-02380	5 June 2013	1,909,359		1,909,359
12	3/PT/13/014		29 April 2013	2,129,365	425,873	2,555,238
		I-02390	5 June 2013	2,144,211		2,144,211
13	3/PT/13/015		30 April 2013	1,146,886	229,377	1,376,264
		I-02422	6 June 2013	1,154,655		1,154,655
14	3/PT/13/016		1 July 2013	315,411	68,082	378,493
		I-02997	13 August 2013	316,045		316,045
15	3/PT/13/017		8 July 2013	486,170	97,234	583,404
		I-03004	14 August 2013	487,153		487,153
16	3/PT/13/018		15 July 2013	487,276	97,455	584,731
		I-03010	14 August 2013	488,261		488,261

17	3/PT/13/019		22 July 2013	575,223	115,044	690,267
		I-03016	14 August 2013	576,887		576,887
18	3/PT/13/021		29 July 2013	472,916	94,583	567,499
		I-03026	14 August 2013	473,870		473,870