



TC02674

Appeal number: TC/2011/05616

VAT – input tax – decision by HMRC to refuse repayment by reference to Kittel principle withdrawn – subsequent refusal of major part of repayment claim on grounds of lack of proof of payment – whether on facts payment proved to have been made – s 26A VATA 1994 – held, on evidence, insufficient proof of payment – other matters not relevant to that conclusion – appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

OPTICARE LTD

Appellant

- and -

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

**TRIBUNAL: JUDGE JOHN CLARK
SHEILA CHEESMAN**

Sitting in public at 45 Bedford Square, London WC1B 3DN on 26 February 2013

John Davis of Davis Law Associates for the Appellant

**David Bedenham of Counsel, instructed by the General Counsel and Solicitor to
HM Revenue and Customs, for the Respondents**

DECISION

1. The Appellant (“Opticare”) appeals against a decision by the Respondents (“HMRC”) to refuse to give credit for input tax claimed by Opticare in respect of VAT period 01/07.

The background facts

2. The evidence consisted of four lever-arched files containing bundles of documents. These included a witness statement given by Saif Ali Khan, the sole director and shareholder of Opticare, and witness statements given for HMRC by Marva Anne-Marie Harry, Harilal Mandalia, Robert Barallon, Angela Anderson and John Burrow. In addition, Mr Khan gave oral evidence; although it had been expected that Marva Harry would give oral evidence, this did not prove necessary.

3. From the evidence we find the following background facts; other issues of fact are considered later in this decision.

4. Opticare was first registered for VAT in February 2005. Its intended business activity was described as the import and export of contact lenses and supplying customers in the UK.

5. With effect from 4 August 2006, Mr Khan became a director and shareholder of Opticare. Jay Mukherjee, another director appointed at the same time subsequently resigned on 14 December 2006.

6. A form VAT 1 (application for registration) and a form VAT 68 (transfer of registration number) in respect of Opticare were received by HMRC on 26 October 2006. (It is unclear why these forms were submitted, as according to the evidence, the business was retained by Opticare as a limited company; what Mr Khan acquired from a Mr Ashim Parti was the shares in Opticare, rather than its business as such). At the time when Opticare was taken over, its business was described as the import and export of contact lenses and products for the optical market.

7. In the form VAT 1, the estimated value of taxable supplies over the next 12 months was estimated to be £500,000. The value of goods which Opticare was likely to buy from and to sell to other EC Member States was shown in each case as £200,000.

8. In Mr Khan’s witness statement he said that shortly after he had become involved as director and shareholder of Opticare, the turnover was approximately £1 million, the profit margin being around 10 per cent. The latter percentage does not accord with that shown in a 2010 Experian Limited Company Gold Report exhibited to Miss Harry’s statement; in that report, the pre-tax profit margin for the year to 31 January 2007 is shown as 3.29 per cent. To the extent that the question of the profit ratio may have relevance to Opticare’s repayment claim, we consider the latter evidence on this point to be more persuasive than Mr Khan’s. In his statement he also

commented that as well as obtaining the products from abroad, Opticare also purchased them from Johnson & Johnson. We do not find it necessary to consider transactions other than that in issue in the present appeal.

5 9. On 14 February 2007, HMRC received from Opticare its VAT return for the period 01/07. The amount of the VAT reclaimed by this return was £51,318.23. (Details of the transaction giving rise to the input tax claim are set out later in this decision.)

10. Until its subsequent deregistration for VAT on 1 April 2007, Opticare was a “repayment trader”, and submitted monthly returns.

10 11. On 23 February 2007, Mr Barallon and another HMRC officer, Taryn Thomas, both from HMRC’s MTIC Fraud Team, visited the business premises of Opticare. A copy of their note recording the details of the meeting was exhibited to Miss Harry’s witness statement. According to the note, they interviewed Mr Khan, who explained details of the history of Opticare’s business and provided information about its current activities, customers and suppliers. They gave him information relating to MTIC fraud, of which he said that he had not previously been aware, and gave him advice concerning precautions to avoid being caught up in it. The note recorded the details of records taken away by the officers; it stated that no “relevant bank records” had been taken away, but also recorded HMRC’s retention of “relevant payment instructions”
15 in respect of VAT periods 09/06, 10/06 and 01/07. Mr Barallon’s witness statement confirms that no bank or payment records were seen or “uplifted” by HMRC during the visit.
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12. For the period from March 2007 to June 2010, HMRC carried out a process of extended verification of Opticare’s 01/07 return. (Only limited items of correspondence during this period were included in the bundle.)
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13. On 6 July 2010 HMRC notified Opticare of their decision to deny input tax in the sum of £50,990.63. The basis for this decision was that in HMRC’s view, Opticare knew or should have known that the transaction in question was connected to fraud. HMRC’s decision was subsequently upheld on review, and Opticare gave notice of appeal to the Tribunal.
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14. On 27 January 2011, Miss Harry wrote to Mr Khan at Opticare to tell him that HMRC had decided to withdraw their decision to deny input tax on the grounds that Opticare knew or should have known that its transaction was connected with fraud. However, HMRC’s view was that Opticare had failed to provide evidence of full payment being made to its supplier, Clue-Don Ltd (“Clue-Don”) for the alleged supply made on 31 January 2007. Under s 26A of the Value Added Tax Act 1994 (“VATA 1994”), a business lost its entitlement to credit for input tax on the value of a supply which was unpaid at the end of the six month period from the date of the supply (or from the payment date, if later). As a result, she would be assessing
35 Opticare for £45,570 for period 07/07. (We consider below the basis on which this amount was calculated.)
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15. Mr Khan responded by email dated 16 February 2011; among other points raised in his message, he asked Miss Harry to confirm that if he was able to provide a document showing payment of the balance of the amount to Clue-Don before the six month period had expired, then the money would be returned to him in full.

5 16. In order to enable HMRC to raise the assessment, an internal HMRC request was made for the de-registration date of 1 April 2007 to be amended to 31 August 2007. The assessment was issued on 15 March 2011.

10 17. Following further correspondence, on 29 March 2011 Mr Khan requested a review of the decision to deny the balance of his [ie Opticare's] input tax claim for period 01/07. Miss Harry explained in her letter dated 1 April 2011 that a period of 30 days had to be allowed for any additional information to be presented for consideration; Mr Khan had referred in correspondence to trying to obtain documents relating to payment for the goods.

15 18. Mr Khan's email to Miss Harry dated 13 April 2011 attached a copy of a document from an entity named Trade Alliance Financial ("TA Financial") relating to Clue-Don and headed "Your Account Summary"; we consider this below.

20 19. In her letter dated 20 April 2011, Miss Harry said that she had put the matter forward for review, as the "Account Summary" was not sufficient as proof of payment by Opticare of the amount in question. On 3 May 2011 she stated that after reconsideration of the matter, her decision in respect of this document was confirmed. In his email response dated 23 May 2011, Mr Khan requested a formal review by another HMRC officer. Miss Harry indicated in her letter dated 24 May 2011 that the request for a review should be sent to the Wigan address set out in her letter of 3 May.

25 20. On 27 May 2011 Mr Khan wrote to HMRC requesting a review. On 30 June 2011, Harilal Mandalia wrote to Opticare at Mr Khan's address, setting out the conclusions of the review. The document referred to above as the "Account Summary" was not regarded by HMRC as conclusive as proof of payment and was not evidence of Opticare's payment to Clue-Don; no reason had been found to vary or cancel Miss Harry's decision, and it was therefore upheld.

30 21. On 13 July 2011, Opticare gave Notice of Appeal to the Tribunal.

The law

22. The section principally in issue in this appeal is s 26A of the Value Added Tax Act 1994 ("VATA 1994"), which provides:

"26A Disallowance of input tax where consideration not paid

35 (1) Where—

- (a) a person has become entitled to credit for any input tax, and
- (b) the consideration for the supply to which that input tax relates, or any part of it, is unpaid at the end of the period of six months following the relevant date,

he shall be taken, as from the end of that period, not to have been entitled to credit for input tax in respect of the VAT that is referable to the unpaid consideration or part.

- 5 (2) For the purposes of subsection (1) above “the relevant date”, in relation to any sum representing consideration for a supply, is—
- (a) the date of the supply; or
 - (b) if later, the date on which the sum became payable.
- (3) . . .
- 10 (4) . . .
- (5) . . .
- (6) Section 6 shall apply for determining the time when a supply is to be treated as taking place for the purposes of construing this section.”

15 *Arguments for Opticare*

23. Mr Davis submitted that HMRC had initially treated the transaction as a potential MTIC fraud, and pursued their enquiries to the point where they had accepted that it was not an MTIC fraud. HMRC had then proceeded on the basis that no payment had been made for the goods, or alternatively that even if payment had

20 been made, this had not been within the six month period under s 26A VATA 1994.

24. The core issue was whether Opticare had proved on the balance of probabilities that it had made the payment in a timely fashion. (As this is a question of fact, we consider below Mr Davis’s submissions on the facts.)

Arguments for HMRC

25 25. Mr Bedenham’s understanding was that there were no real legal issues in dispute between the parties, and that it was accepted that the burden of proof was on Opticare. The issue between the parties was the factual one. He commented that in Mr Davis’s skeleton argument, the concluding paragraph stated:

30 “ . . . the core issue is whether the Tribunal can be satisfied that the Appellant has taken all reasonable steps to prove beyond the balance of probabilities that he did make this payment in a timely fashion and seek a refund of the VAT element, in addition to that already funded [sic], and that he has taken all reasonable steps in the circumstances to justify his appeal which it is asked be granted.”

35 26. Whether or not Opticare showed that it had taken steps to prove that it had made the payment was neither here nor there. To make the submission correct in law, the reference to taking all reasonable steps to prove that it had made the payment needed to be amended to:

“[Opticare] must prove beyond the balance of probabilities that [it] did make this payment.”

5 The last part of the sentence in Mr Davis’s concluding paragraph was superfluous: if Opticare satisfied the Tribunal on the balance of probabilities that the payment was made [ie within the six month period], then the appeal should be allowed, but if it did not, the appeal should be dismissed.

10 27. In addition to submissions on questions of fact, Mr Bedenham made various submissions concerning the burden of proof in the context of the evidence. As all these submissions related to matters of evidence as to fact, we consider these below, together with the submissions made by Mr Davis for Opticare.

Discussion and conclusions

15 28. As Mr Bedenham submitted, the question raised by Opticare’s appeal is whether it can prove on the balance of probabilities that payment of £305,970 was made to Clue-Don before the end of the six month period beginning with the supply of the goods to Opticare.

20 29. Although the evidence was presented on the basis of Mr Khan’s actions, we must point out that the appeal is that of Opticare. Mr Khan’s evidence therefore related to his actions on behalf of Opticare, in his capacity as the director and shareholder. Thus in referring to Mr Khan’s evidence as to his actions, we and the parties are attributing those actions to Opticare as a separate legal entity.

30. In summary, Mr Davis’s submissions for Opticare were that it had satisfied the required burden of proof as to the facts, whereas Mr Bedenham’s submissions were that Opticare had not done so.

25 31. In order to arrive at a conclusion as to the factual position, we need to make further findings in addition to the background facts set out above. On the evidence we find the additional facts set out in the following paragraphs.

30 32. Mr Khan encountered Clue-Don as a result of a letter of introduction dated 4 September 2006 written to him by a Mr Mahomed Kathoria of Clue-Don. Mr Kathoria indicated that “As a potential client of ours”, he would like to set up an appointment at Opticare’s offices so that they could speak further. Mr Khan replied on 6 September 2006 thanking Mr Kathoria for contacting Opticare regarding advertising on Clue-Don’s website. Correspondence continued, and on 21 September 2006 Mr Kathoria wrote to Mr Khan referring to a meeting and to Mr Khan’s agreement to purchase web space on Clue-Don’s site. In an email dated 27 September 2006, Mr Khan included the following sentence:

“I also appreciate you agreeing to the request I made of allowing us to advertise on the site and using its benefits for free until we are in a financial position to pay your charges.”

40 33. On 6 October 2006 Mr Kathoria wrote to Mr Khan to inform him that he could now view Opticare’s logo on the “Million Dollar Trader” website. Mr Kathoria

referred to Mr Khan having opened new avenues for Clue-Don and asked Mr Khan to contact him if he had any other business opportunities or ventures.

5 34. Opticare received an introduction letter from a company in Denmark named Sysdekk ApS (“Sysdekk”). This letter was not dated, nor specifically addressed to
10 Opticare; the copy in the bundle is annotated “Printed”, and forms part of the Appellant’s Disclosure made by Opticare. The letter indicated that company details had been forwarded “for your records”. The date of the introduction letter cannot be deduced from the accompanying details. In cross-examination, Mr Bedenham asked Mr Khan whether the approach from Sysdekk had been a “cold” one on the latter’s
15 part. Mr Khan replied that he did not think that he had been approached by Sysdekk through receiving an introduction letter; he received many such letters. The contact might have been via email first, but he was not sure. In the absence of persuasive evidence showing anything to the contrary, we find that the first contact was as a result of the “cold” letter approach, and that the precise date of this approach cannot be established.

20 35. On 29 January 2007 Mr Khan sent an email to Sina Kafashian at Sysdekk. Mr Khan attached details of what he described as the relevant prices. On 31 January 2007, Sysdekk sent an email to Opticare referring to an earlier telephone conversation and requesting Opticare to supply 10,500 units of Anyday Rainbow disposable contact lenses. Sina Kafashian of Sysdekk requested Opticare to send an invoice for the purchase. (The copy of the message in evidence is copied at such a small scale that it is barely legible, and we have been unable to decipher the remainder of the message.)

25 36. On 31 January 2007, Opticare sent a purchase order to Clue-Don for 10,500 Anyday Rainbow Colour Lenses. The total price was £291,375, on which the VAT was £50,990.63. A purchase order dated 31 January 2007 from Clue-Don also included in the evidence showed an order for the same quantity and type of contact lenses. The supplier was a company called Carpbell Ltd; the purchase order was addressed to a property in “Houlsworth Street Reddish Cheshire SK6 5BU”. The
30 purchase price of the lenses was £288,435, on which the VAT was £50,476.13, the total consideration inclusive of VAT being £338,911.13. The address details do not appear to be correct; the name of the street in question is “Houldsworth Street”, for which the postcode is SK5 6BU. As neither party made submissions concerning this document, we do not consider that these inaccuracies are sufficient to call into
35 question its apparent validity as a purchase order document. The address details shown on the subsequent invoice dated 2 February 2007 from Carpbell Ltd are the correct ones.

40 37. On 31 January 2007, Opticare sent a sales invoice to Sysdekk. The goods specified were 10,500 Anyday Rainbow Colour Lenses. The total price was £305,970; the VAT was shown as “£0.00”.

38. In a message dated 5 February 2007, Sina Kafashian asked Mr Khan whether, as they were starting to deal in “GBP” (ie sterling), he could get an account at TA Financial. In a message sent on the same day, Mr Khan stated that Opticare was in the

process of opening a “TA” account as Sysdekk had requested; TA had informed him that this would take no more than three to four working days. He also mentioned that Opticare had a NatWest account, but indicated that using this would result in it taking longer to pay Opticare’s supplier.

5 39. On the same date, there was an exchange of emails between Mr Khan and Sina Kafashian. Mr Khan explained that Opticare had received confirmation that the goods had been delivered from the freight company; he asked for confirmation that Sysdekk had received the stock. Sina Kafashian replied: “We received your stock to the requested warehouse in due time. I hope we can do more business very soon again.
10 All was perfect. Thanks again.”

40. On 7 February 2007, NatWest issued to Mr Khan at Opticare a payment debit advice showing that £39,395.63 had been remitted in favour of TA Financial to Barclays Bank (Seychelles) Ltd. The amount debited to Opticare’s account was £36,415.63; the debit date was 7 February 2007. Under “Payment details”, the advice
15 stated: “Please credit Clue-Don Ltd account”; it gave an account number, and showed that the payment had been ordered by Opticare. NatWest’s commission charges were £20.

41. In oral evidence, Mr Khan explained that the only bank details which he had been given by Clue-Don were those relating to TA Financial. The date on which Mr
20 Khan received those details is not clear from the evidence, and we are therefore unable to make any findings as to the timing.

42. On 15 February 2007, Sina Kafashian sent an email message to Mr Khan, stating: “Thanks a lot for your prompt delivery. We would like to order more stock from you. Can you please send me some prices.”

25 43. On Thursday 1 March 2007, Mr Khan emailed Sina Kafashian of Sysdekk, explaining that it had been four weeks since the deal had been completed, and that Opticare had still not received payment from Sysdekk. Mr Khan asked for the payment to be sent as soon as possible, and for Sysdekk to send the original purchase order document, as Opticare had still not received it.

30 44. No later correspondence between Opticare and Sysdekk was included in the bundle.

45. In oral evidence Mr Khan was unable to explain the reason for the amount of the payment initially made through NatWest; he thought it must be some sort of percentage. Our review of the amounts shows that £39,395.63 is just over 10.63 per
35 cent of the £342,365.63 VAT-inclusive price shown in Clue-Don’s invoice to Opticare dated 31 January 2007. That invoice makes no reference to the payment terms, and in particular gives no indication that payment may be made by instalments.

46. In a letter to Miss Harry dated 1 September 2009 setting out information requested by her in previous correspondence, Mr Khan stated:

5 “The agreement with Clue-Don was that I would approximately pay [sic] 10% within one week then the balance within the second week. The agreement with Sysdekk was payment in full upon delivery. This would give me time to receive the payment from Sysdekk and also keep Clue-Don happy. I paid Clue-Don £36,395.63 on the 7th of February 2007 and would pay the balance £305,970) once I have received it. Sysdekk were delaying payment and we had several phone conversations with them about this.”

10 47. In giving evidence, Mr Khan made no reference to this statement. As there is no documentary evidence to support the assertion that the deal had been arranged on the basis of this “agreement” as to a percentage payment to Clue-Don, we find on the balance of probabilities that this instalment arrangement was not based on a percentage calculation as described in Mr Khan’s letter.

15 48. Later in cross-examination, Mr Bedenham asked Mr Khan about the commercial basis for the deal. The net price payable to Clue-Don on the basis of the purchase order sent by Opticare to Clue-Don was £291,375. The VAT payable was £50,993.63. The sale price as shown on the purchase order from Sysdekk was £305,970. Mr Khan agreed that Opticare’s expected profit from the deal was £14,595 (ie £305,970 – £291,375). He also accepted that, after having paid the initial sum of 20 £36,395.63 to Clue-Don’s account from Opticare’s NatWest account, both the balance due to Clue-Don and the amount due from Sysdekk were the same, ie £305,970. Mr Bedenham asked Mr Khan how he expected to obtain his profit, as at that stage he had paid out the £36,395.63. Mr Khan agreed that the deal had been structured so that the profit figure of £14,595 plus the initial sum of £36,395.63 equalled the VAT amount, 25 ie £50,990.63. He was “pretty sure” that this would have been the intention of the deal; this meant that he would not have to put in a larger deposit or more money.

30 49. When asked whose idea this had been, Mr Khan’s response according to the transcript was that normally these ideas came from him. The Tribunal’s own handwritten note of his reply is: “Normally these bright ideas come from me.” Mr Bedenham then asked:

 “So what was going to happen: no money was going to be remitted from anywhere in the Seychelles. You were going to take your profit and your £36,000 back once the VAT repayment was made?”

Mr Khan replied:

35 “That is correct.”

40 50. We are satisfied on the evidence that the funding of Opticare’s participation in the deal was provided on this basis, so that in order to derive its profit of £14,595, it was essential for it to obtain full repayment of the £50,990.63 VAT shown in the invoice from Clue-Don dated 31 January 2007. HMRC have accepted the input tax repayment claim to the extent of the VAT proportion of the £36,395.63 initial payment, but have refused to refund the balance of Opticare’s claim, which as shown in Miss Harry’s letter dated 27 January 2011 amounts to £45,570 (7/47ths of £305,970). In order to reclaim the remainder of the VAT, Opticare must satisfy us, on

the balance of probabilities, that it paid the balance of the £342,365.63 VAT-inclusive purchase price (ie the £305,970) to Clue-Don.

51. The evidence of direct correspondence with Sysdekk stops at 1 March 2007, the point when Mr Khan was still pursuing Sysdekk for payment. The “Account Summary” document produced by Mr Khan in April 2011 following Miss Harry’s letter dated 1 April 2011 is heavily redacted; it is headed “TA Financial, names Clue-Don, and gives an account number (1045250) corresponding to that shown in a document headed “The Million Dollar Trader Site” with Clue-Don’s logo and name and address, the sub-heading being “Bank Details”. At the foot of the latter document, a paragraph including the following appears:

“To credit our Clue-Don Ltd account please put our TA Financial account number which is 87283921 as a reference.”

52. The Account Summary document shows the latter number against a heading “Number”; the only reference to an “Account number” is to 1045250 under the earlier heading. Opposite the heading of “Account Name”, shown as “Trade Alliance Financial”, is the heading “Name”, given as “Barclays Bank Seychelles Ltd”. Below these details is the heading “Your Account Summary”. Under this, the only entry showing after redaction is:

“6th Mar 2007 Credit from Opticare Ltd 34343211

REF OPT310107-08 [Money in] 305,970.00”

53. All other entries below the latter heading are redacted, and therefore (as Mr Bedenham submitted) it is not possible to establish whether there have been any entries to cancel out the effect of the one identified transaction. There are five obliterating block lines under the heading “£ Balance”; the position of these lines does not correspond to the three blocking lines under the headings “Date” and “Description”, to the one blocking line under the heading “Money in”, or to the two blocking lines under the heading “Money out”. The positioning of the lines does not appear to us to be consistent with the positioning of figures which would normally be seen in a conventional form of bank statement, and raises questions as to the precise status of the document.

54. The evidence of John Burrow, an Officer of HMRC working in their Criminal Investigation Directorate as a Specialist Financial Investigator with experience in banking and trusts, was that the visible text of the document containing the “Account Summary” was confusing; Barclays Bank (Seychelles) Ltd operated from Independence Avenue, Victoria, Seychelles, but the document confirmed that TA Financial also traded from Independence Avenue, Victoria, Seychelles at the same time as sharing a telephone number with a separate company, GOM.

55. Mr Burrow commented that the telephone number details given in the document showed a European exit code, a Panamanian country code and a starting digit for Panama City; it might have been expected that the document would display a number showing the country code for the Seychelles and would not identify an exit code.

56. In Mr Burrow's view, it was not clear whether the word "Your" in "Your Financial Summary" was referring to TA Financial or to Clue-Don Ltd. Mr Burrow referred to the "Money in" entry shown above. In his experience in the banking industry, such a "summary" would not be proof of an international payment, as he had
5 seen no evidence that the funds were remitted through the Correspondent banking network. International payments were advised from one bank to another using the "SWIFT" system, which was a secure messaging system used by every bank. Correspondent banks settled international transactions. A form MT 103 provided evidence of this type of payment.

10 57. In essence, it appeared that TA Financial operated only as a "banking platform". Mr Burrow commented that it had attempted to disguise its true corporate status by using a number of trading names and instead of using a local telephone number in the Seychelles, it had chosen to print on statements a telephone number for a "corporate service provider" in Panama City. TA Financial had been careful not to describe itself
15 as a bank, but instead had chosen to describe itself as a "messaging service". To Mr Burrow's knowledge, TA Financial was not registered in Seychelles or Panama to provide banking services, which would normally include taking deposits from the public.

58. Mr Burrow's evidence was not challenged, and we accept it. Further, we do not
20 consider that the "Account Summary" document resembles a normal bank statement. As it is not in the local Seychelles currency, we would expect to see more than the heading "£ Balance" to indicate that the amounts specified are in Pounds sterling. In the light of our doubts arising because of the redactions, we do not consider the document to be reliable. In consequence, we find that it does not constitute evidence
25 of payment by Opticare of the sum of £305,970 to Clue-Don. (Further, as explained below, we are not satisfied that this document came from Clue-Don.)

59. There is no evidence to show movement of that sum from Sysdekk's TA Financial account to Opticare's TA Financial account, nor of its movement from the
30 latter account; to fulfil the terms of the payment arrangements, it was necessary for both these steps to have taken place. Mr Khan's email to Sysdekk dated 1 March 2007 requested payment as soon as possible, but in cross-examination he was not able to point to any specific record of any response from Sysdekk confirming that it had made payment. He commented that the documents collated were what he had printed
35 out at the time, and not after the HMRC investigation had started; if he had not printed out an email at the time, this did not mean that it did not exist. We do not consider this mere speculation as to the possible existence of a message to be sufficient to discharge the burden of showing on the balance of probabilities that there had been any confirmation by Sysdekk that it had made payment to Opticare's TA Financial account.

40 60. The date of the credit entry from Opticare as recorded on the "Account Summary" described as having been provided by Clue-Don was 6 March 2007. Mr Khan's email to Sysdekk stating that Opticare had not received payment from Sysdekk was sent on 1 March 2007, a Thursday, at 12.33. At the end of Mr Khan's evidence, we asked about the timing of the payment from Sysdekk. Mr Khan replied

that he was not sure on which date he received payment; he suggested either 2 or 3 March. He said he would have forwarded the funds more or less as soon as they came into his account, either within a day or two days maximum, but as soon as the funds cleared.

5 61. Although Mr Khan referred to the possibility that payment may have been received on 3 March 2007, we consider this unlikely given that this was a Saturday. As the terms of the deal were that payment had to be received from Sysdekk before the balancing payment could be made to Clue-Don, our view is that Mr Khan needed to be absolutely certain that the payment from Sysdekk had actually arrived. The
10 absence of any documentation whatsoever to verify the position is a major missing link in the audit trail. We consider below Mr Khan's assertions that bank statements had been provided to HMRC and retained by them, preventing him from showing that payment to Clue-Don had been made.

15 62. We asked him about the clearing arrangements. He explained that with the TA Financial account, if the payment came through the same bank, the clearance was instant.

63. In the light of Mr Burrow's evidence that TA Financial was a banking platform, rather than a bank as such, we do not consider Mr Khan's explanation of the clearing arrangements to be an accurate representation. The "Bank Details" shown on the
20 information page supplied by Clue-Don referred to Barclays Bank Seychelles Ltd. The reference to "TA Financial" was under the heading "Account Name". In the same way, the NatWest payment debit advice dated 7 February 2007 showed the "beneficiary bank" as Barclays Bank Seychelles Ltd, with the £36,395.63 payment being made in favour of "Trade Alliance Financial", and payment details referring to
25 Clue-Don. When referring in evidence to opening Opticare's account with TA Financial, Mr Khan stated that he did not actually know too much about banking. His response to our question about the clearing arrangements for amounts recorded as dealt with through TA Financial did not take into account the involvement of Barclays Bank Seychelles Ltd and its own clearing arrangements for international payments.
30 We are not satisfied that there is any evidence to show that Sysdekk provided confirmation to Opticare of a credit to Opticare's account with TA Financial.

64. We now examine the documentary evidence dealing with Mr Khan's attempts to obtain forms of verification that payment of £305,970 had been made to Clue-Don on 6 April 2007.

35 65. On 1 September 2009 Mr Khan emailed Mr Kathoria of Clue-Don; this was to follow up a telephone conversation in which Mr Khan had asked Clue-Don to find statements showing the payments which he had made to Clue-Don. He explained that TA Financial had closed down. The message was addressed to a personal Hotmail address rather than the previous Clue-Don one. On the same day, he emailed Sina
40 Kafashian of Sysdekk asking for evidence of its payment into Opticare's TA Financial account. On 3 September 2009, Mr Kathoria replied (showing "Clue-Don Limited" under his own name at the end of the message), explaining that he had had a look through "our" [ie Clue-Don's] files and that Clue-Don had no copy of the payment [ie

statement as to payment] made to Clue-Don into its TA Financial account. There is no evidence that any reply to Mr Khan's other message was ever received from Sysdekk.

5 66. At a much later stage, on 12 April 2011, an email message was sent to Mr Khan. This was shown as being from Clue-Don, but was from a Gmail account, whereas the previous message from Mr Kathoria had been from the Hotmail account referred to above. (The email address which had been used by Clue-Don at the time of the contact lens deal in 2007 had been a "clue-don.com" address.) The April 2011 email stated:

"Hi please find attached the paperwork i [sic] have for the deal.

10 Regards

Clue-don ltd [sic]"

15 67. The attachment to that message was the "Account Summary". Subsequently, on 20 August 2011, Mr Khan emailed Barclays Bank Seychelles Ltd to ask for assistance in obtaining a bank statement for an account which he had held (in the name of Opticare Ltd) with TA Financial. In oral evidence he stated that he had received no reply to his request.

20 68. Following HMRC's indication in a letter from Miss Harry dated 14 April 2011 that they did not regard the "Account Summary" document as sufficient evidence of payment, Mr Khan stated that he had no other documents to support his case that he had paid the invoice in full. Subsequently, he took further steps to seek further evidence. In April 2012, he requested details from his web hosting provider, but was informed that such details were only retained for at most a week at a time.

25 69. On 19 December 2012, Mr Khan sent an email to the Clue-Don Gmail address referred to above requesting confirmation of various points, including confirmation—

"That you received £305,970 as final balance payment from my TA financial account on the 6th of March 2007 into the TA financial account for Clue-Don Ltd."

30 70. The reply, which was sent at 13.54 but showed no date, confirmed all the points requested. The name shown at the foot of the message was "Mo". The first part of the message stated:

35 "Please take this as my last email on the matter and I would appreciate you stop calling me, texting me and leaving voice mails. I have already confirmed payment was made, I have already written and said company had no debtors and also sent you a copy of our bank statement.

I am no longer the Director of the company and as far as I am aware the company had been closed down for some time now so please stop contacting me on this matter as I have no further information to share."

40 71. For reasons considered below, there was a gap of two years between initial correspondence from HMRC requesting information from Opticare and Mr Khan's

approach to HMRC in March 2009 asking about the status of Opticare’s VAT return “due almost two years ago”. As a result of that approach, HMRC sought further information from Opticare. Mr Khan’s email to Mr Kathoria sent on 1 September 2009 was part of the process of seeking that information. We are satisfied that the response dated 3 September 2009 was from Mr Kathoria, and that Clue-Don did not have a copy of any document evidencing payment from Opticare of the balancing part of the purchase price of the contact lenses.

72. The message dated 12 April 2011 does not appear to be consistent with what Mr Kathoria had stated on 3 September 2009. We accept that at the end of this earlier message he had said “If there is any other way in which I can assist you, please do not hesitate to contact me”, but for various reasons referred to below, we are not satisfied that the message dated 12 April 2011 was actually sent by Clue-Don:

(1) In an email dated 21 March 2011 Mr Khan forwarded to Miss Harry a message which appeared to come from Clue-Don. This referred to a telephone conversation, further to which the un-named individual sending the message stated that “the paperwork” relating to the deal was with his accountant.

(2) The wording of the above message and the April 2011 message purporting to be from Clue-Don contains no explanation for the production of “the paperwork” in circumstances where Mr Kathoria had previously stated that Clue-Don had no copy of the payment details. Although Mr Khan referred in cross-examination to the papers having been with “our accountant”, we are not satisfied that those papers would have been with Opticare’s accountant, or the accountant dealing with Clue-Don (of whom there are no details anywhere in the documentary evidence).

(3) The 2011 messages are from a Gmail account; as Mr Bedenham submitted, anyone could open such an email account. Mr Khan accepted in cross-examination that this address had not previously been used in the exchanges with Clue-Don.

(4) The name of the sender at the top of the April 2011 message is “Clue Don” (without the hyphen), and the message “signature” in both messages is “Clue-don ltd” rather than “Clue-Don Limited” as shown in Mr Kathoria’s email dated 3 September 2009. In addition, previous messages between Opticare and Clue-Don had used personal names or shortened names.

73. As a result, the provenance of the “Account Summary” sent as an attachment to the April 2011 message is doubtful; for this and the reasons already considered, we find that it does not amount to evidence of payment by Opticare of the sum of £305,970 to Clue-Don.

74. For similar reasons, we are not satisfied that the email message sent to Mr Khan in response to his message dated 19 December 2012 came from Clue-Don. As a result, we find that the statements set out in that response do not amount to evidence of payment by Opticare of the sum of £305,970 to Clue-Don.

75. Mr Khan complained that he was being asked to provide evidence of payment four years after the deal had taken place. This comment was not entirely accurate. In her letter to him dated 17 June 2009 in which she introduced herself as the officer now dealing with Opticare's VAT repayment claim, Miss Harry asked him to produce
5 all existing documents relating to the deal, and specifically:

“Sales invoices and/or CMR documents as mentioned in your email of
13 June

Freight Forwarders Invoice(s)

Payments details to and from your supplier(s)/customer(s)”.
10

76. We accept that there had been a delay in progressing the enquiry. In a letter dated 28 November 2007, which referred to a previous letter dated 7 August 2007 [not included in the evidence], Miss Anderson of HMRC requested various items of information from Mr Khan. Her letter (and presumably her previous letter) was addressed to Opticare at a building in Chapel Market, London N1. We note from the
15 “Limited Company Gold Report” (obtained on 8 January 2010) which was one of the exhibits to Miss Harry's witness statement that this address was that of a company Overstrand Ltd, which was shown as company secretary to Opticare for the period from 8 January 2004 to 1 June 2006. It is not clear from the evidence whether this
20 address had at any time been given as the place of business for Opticare, but for some unidentified reason, Miss Anderson had used this rather than the details provided to the HMRC officers Robert Barallon and Taryn Thomas when they visited Mr Khan on 23 February 2007.

77. The use of the incorrect address was presumably the reason for the absence of progress until Mr Khan approached HMRC in March 2009. Once the enquiry began to
25 progress in the proper way, following provision by Mr Khan on 13 May 2009 of the previously requested information, the interval between then and Miss Harry's request in June 2009 for the information concerning payments was relatively short. We find that HMRC's request for information confirming payments was a central feature of HMRC's extended verification process from that point onwards.

78. In her letter dated 24 May 2011, Miss Harry commented that Opticare should have retained bank statements as part of its business records for at least six years. To her knowledge, such statements relating to period 01/07 had never been produced.
30

79. In his witness statement, Mr Khan stated that the HMRC officers had taken away or had been provided with original bank statements. In oral evidence, he stated
35 that at the time of the HMRC visit, he would not have had a bank statement at that time for the specific deal carried out at the end of January 2007. We are not satisfied that HMRC were at any time provided with bank statements relating to this particular transaction. In his email to Miss Harry dated 18 April 2011, Mr Khan stated:

40 “I have never been asked by your colleagues to show any bank statements before nor statements from any of my suppliers or customers to support my claims.”

80. There is no evidence that HMRC were ever provided with bank statements. In his witness statement, Mr Barallon stated that no bank or payment records were seen or uplifted during the visit made on 23 February 2007. The “Summary of Records Uplifted” forming part of Mr Barallon’s visit report (which was exhibited to Miss Harry’s witness statement) showed that “relevant payment instructions” had been uplifted, but that no “relevant bank records” had been taken. In her witness statement, Angela Anderson confirmed that during the period of her involvement with the matters under appeal, she had not received or had sight of any records of Opticare with regards to its supplier.

81. In the light of Mr Khan’s statement contained in the email referred to above, and the evidence given by the three HMRC officers, we find that no bank or payment records relating to the £305,970 were ever provided to HMRC. We have found that the “Account Summary” referred to above (whatever its provenance, in respect of which we have made further findings) does not amount to evidence of payment.

82. The issue in the present appeal is the narrow question whether Opticare can satisfy us on the balance of probabilities that it made payment to Clue-Don in respect of the supply of the contact lenses either at the date of the supply (or, if later, the date on which the sum became payable), or within six months of the relevant date. A number of further issues were raised in the course of the correspondence and before us; as these are of doubtful relevance to the primary issue, we emphasise that they do not form part of our decision-making process. We find it necessary to refer to these further issues in the following paragraphs, to demonstrate that they have not influenced our decision.

83. Although HMRC pursued their enquiries on the basis of their suspicion that MTIC fraud was involved, they withdrew their decision to deny the full amount of the input tax claim on the basis of the *Kittel* principle. As Opticare’s appeal against that decision therefore “fell away”, the allegations made by HMRC were never tested in the course of a hearing. It is therefore inappropriate to consider Opticare’s claim for recovery of the £45,570 input tax by reference to matters which would only have been relevant to the MTIC appeal. Thus the apparent lack of commerciality in the payment arrangements, leaving Opticare in the position of having to make a successful VAT repayment claim in order to derive its anticipated return from the transaction, is not a relevant consideration. Equally, the precise circumstances in which Mr Khan and Opticare became involved in dealings with Clue-Don and Sysdekk, although appearing odd in terms of the level of their commerciality, do not assist with the primary issue in this appeal.

84. In the same way, while we find it odd that Mr Khan said in his email to Mr Kathoria sent on 4 October 2006 that he had opened the account (ie with TA Financial) “as requested by your supplier”, we do not need to pursue this in order to examine whether Opticare has provided sufficient evidence to establish payment of £305,970 to Clue-Don. Nor do details of the history of the development of Opticare’s business and Mr Khan’s intentions for that business assist in resolving that issue.

85. Although Miss Harry referred in her letter dated 27 January 2011 to “the alleged supply of goods to Clue-Don”, there was no suggestion on behalf of HMRC in the course of the appeal that the goods did not exist, or that the transaction was fictional. As HMRC have accepted Opticare’s input tax claim to the extent of the VAT element of the initial payment to Clue-Don, we draw the inference that they are not seeking to question whether the transactions took place. Nor did HMRC suggest that Opticare was not under an obligation to pay the sum of £305,970 to Clue-Don. Their case is simply that, following the assessment dated 15 March 2011, it is for Opticare to show, on the balance of probabilities, that such payment was made; if Opticare is unable to discharge that burden of proof, the assessment made by reference to s 26A VATA 1994 stands and the disallowance of the relevant input tax element is confirmed.

86. We find that Opticare has not provided sufficient evidence of payment to Clue-Don of £305,970 made within six months of Clue-Don’s supply of the contact lenses to Opticare in January 2007. We therefore confirm the decision made by HMRC in Miss Harry’s letter dated 23 February 2011 and subsequently upheld on review, to disallow Opticare’s claim for recovery of input tax of £45,570 on the grounds of insufficient evidence of payment.

87. In the light of our findings, we dismiss Opticare’s appeal.

Right to apply for permission to appeal

88. 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.

**JOHN CLARK
TRIBUNAL JUDGE**

RELEASE DATE: 26 April 2013