[2015] UKFTT 0367 (TC)

TC04550

Appeal number: TC/2013/01240

VAT–Assessment- preliminary issue-whether assessment made out of time-Section 73 (6)(b)VATA 1994-held on the facts-no

FIRST-TIER TRIBUNAL
TAX CHAMBER

CARBONDESK GROUP PLC **Appellant**

- and -

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 13 and 14 May 2015

Peter Mantle, Counsel, instructed by DLA Piper UK LLP, for the Appellant

Jonathan Kinnear QC, James Puzey and Nicholas Chapman, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to a preliminary issue as to whether a VAT assessment ("the Assessment") of the Appellant, Carbondesk Group PLC ("Carbondesk"), for the periods 06/09 and 07/09 was out of time. The Assessment was made on 26 October 2012.

2. The issue turns on the interpretation and application of s 73(6) (b) of the Value Added Tax Act 1994 ("VATA").

Background

3. The Assessment was made by the Respondents ("HMRC") on the basis that Carbondesk was not entitled to a credit in respect of input tax which it had deducted. By application of the *Kittel* principle HMRC contend that transactions entered into by Carbondesk were linked to the fraudulent evasion of VAT and that Carbondesk knew or should have known that the transactions concerned were connected to fraud. Carbondesk strenuously denies that was the case. This decision is concerned solely with the question as to whether the Assessment was made in time.

4. The specific question to be resolved on the preliminary issue is whether the Assessment is out of time on the basis that HMRC had in its possession all of the material sufficient to make the Assessment more than one year before the Assessment was made. Carbondesk contends that it was wholly unreasonable and perverse of Louise King, HMRC's assessing officer, to consider that she was justified in delaying the Assessment until after she had reviewed the additional due diligence material she received on 28 October 2011 following her request for further information in that regard.

5. The total input tax denied was £95,484,820.20 in relation to two monthly tax periods, £63,158,493.48 in respect of period 06/09 and £32,326,326.72 in respect of period 07/09.

Relevant legislation

6. Sections 73(1) and (2) VATA 1994 give HMRC the power to make assessments of VAT due from a person as follows:

> "(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.
>
> (2) In any case where, for any prescribed accounting period, there has been paid or credited to any person–

(a) as being a repayment or refund of VAT, or

(b) as being due to him as a VAT credit,

an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly."

7. There are time limits to the making of assessments. Section 73(6) VATA provides as follows:

"(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following–

(a) 2 years after the end of the prescribed accounting period; or one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge

(b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

but, subject to that section where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2), or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment."

8. Section 77 VATA so far as relevant provides:

"(1) Subject to the following provisions of this section, an assessment under section 73, 75 or 76, shall not be made–

(a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned,…"

9. It is common ground that the Assessment was made more than two years after the end of the relevant prescribed accounting periods but less than four years thereafter. The two year period had expired by 31 July 2011. It is therefore common ground that the Assessment will only be in time if it was made within the period specified in s 73(6) (b), that is within one year after evidence of facts, sufficient in the opinion of HMRC to justify the making of the Assessment, came to their knowledge.

The Authorities and the correct legal test

10. The parties were in broad agreement as to the legal principles to be applied in interpreting s 73(6) (b), as derived from the authorities. These were comprehensively set out by Dyson J in *Pegasus Birds Ltd v CCE* [1999] STC 95 at pages 101g to 102 as follows:

"1.The commissioners' opinion referred to in s 73(6) (b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.

2. The evidence in question must be sufficient to justify the making of the assessment in question (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 754 per Potts J).

3. The knowledge referred to in s 73(6) (b) is actual, and not constructive knowledge (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 755). In this context, I understand constructive knowledge to mean knowledge of evidence which the commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.

4. The correct approach for a tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from the date in (ii) (see *Heyfordian Travel Ltd v Customs and Excise Comrs* [1979] VATTR 139 at 151, and *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10).

5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on *Wednesbury* principles, or principles analogous to *Wednesbury* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223) (see *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10–11, and more generally *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941 at 952 per Neill LJ).

6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s 73(6) (b) of the 1994 Act."

11. In relation to principles 4 and 5 Dyson J held that the test is a subjective rather than an objective one. The person whose opinion is to be imputed to HMRC is the person who decided to make the assessment, regardless of which person within HMRC acquired the knowledge of the facts in question: see page 102c of the judgment.

12. In relation to the circumstances in which it is possible to challenge the opinion of the assessing officer Dyson J said the following at page 102g to 103a of the judgment:

"Moreover, I do not accept that, if an objective approach is not adopted, the protection afforded by the subsection to the taxpayer is illusory. This raises the question of the circumstances in which it is possible to challenge the opinion of the commissioners. It is common ground that, in forming their opinion of what evidence of facts is sufficient to justify making the assessment, the commissioners must have regard to their obligations to act to the best of their judgment as explained in *Van Boeckel v Customs and Excise Comrs* [1981] STC 290. Thus, they must perform their function honestly and bona fide, and fairly consider all the material placed before them, and, on that

> material, come to a decision which is reasonable. In some cases, the taxpayer may complain that the commissioners have made an assessment on insufficient material. In other cases, the complaint of the taxpayer may be that, in the light of the evidence of which they were aware, it was wholly unreasonable for the commissioners to delay making the assessment. In both cases, an appeal will succeed if it is shown that the commissioners' approach was wholly unreasonable, and fails to pass a test akin to the *Wednesbury* test. I recognise that this is a high hurdle for the taxpayer to surmount, but Parliament has [1999] STC 95 at 103entrusted these matters to the judgment of the commissioners, and it is right that challenges to the exercise of judgment should only succeed when something has gone seriously wrong."

13. In the light of this he formulated the test to be applied at page 104d to e as follows:

> "The question for the tribunal on an appeal, therefore, is whether the commissioners' failure to make an earlier assessment was perverse or wholly unreasonable. In some cases, the position will be clear. Suppose that evidence of all the facts which in the opinion of the commissioners justified the making of the assessment was known to the commissioners at the beginning of year one, and the assessment was not made until the beginning of year three. Suppose further that the reason for the two-year delay is that the file was lost, or there was a change of staff with the result that the officer who had acquired the evidence did not pass it on to his successor. In those circumstances, the delay in making the assessment would be wholly unreasonable, and an appeal would succeed on the time-limits point."

14. The Court of Appeal approved the test formulated by Dyson J. The case is reported at [2000] STC 91. Aldous LJ observed at page 97b:

> "Subsection (6) is to protect the taxpayer from tardy assessment, not to penalise the commissioners for failing to spot some fact which, for example, may have become available to them in a document obtained during a raid."

15. The Court of Appeal made it clear that it is the task of the tribunal to assess whether as a matter of fact the officer held the opinion in question. Aldous LJ said at page 97j to 98a :

> "An opinion as to what evidence justifies an assessment requires judgment and in that sense is subjective; but the existence of the opinion is a fact. From that it is possible to ascertain what was the evidence of facts which was thought to justify the making of the assessment. Once that evidence has been ascertained, then the date when the last piece of the puzzle fell into place can be ascertained. In most cases, the date will have been known to the taxpayer, as he will be the person who supplied the information."

16. It can be seen from the passage in Dyson J's judgment quoted at [12] above that the question as to whether there was a sufficiency of evidence of facts in the hands of the assessing officer to make an assessment is to a degree linked with the question as to whether any assessment that might be made at the time in question would be made to best judgment. As Dyson J indicated an assessing officer may fail to assess to best judgment if he does so without fairly considering all the material before him and on the basis of that material fails to come to a reasonable decision. If he delays in making his assessment after he had all the material before him sufficient to make the assessment he risks the assessment being held to be out of time. In both cases the

officer's decision can be challenged if it can be shown that it was *Wednesbury* unreasonable. But, as Mr Mantle submitted, it is not a particularly high threshold to meet in order to satisfy the test of best judgment when making an assessment; the officer is entitled to make an assessment on the material before him without necessarily having to make further enquiries of the taxpayer.

17. In this case Mr Mantle submits that the officer had sufficient material to make the Assessment before asking for further material, whereas the officer contends that she needed the further material in order to make the Assessment to best judgment. If she had made the Assessment earlier then it could only be set aside on the grounds of *Wednesbury* unreasonableness, but if, as in this case, she chose to delay making the Assessment until she received the further material she had requested, then her opinion that it was only until she had received that further material that she could make the Assessment to best judgment can only be challenged if, as Dyson J held in *Pegasus Birds,* the failure to make an earlier decision was perverse or wholly unreasonable.

18. Although a challenge to the officer's decision to make the Assessment only after receiving the further material can only be challenged on the basis of *Wednesbury* unreasonableness, which is the same test as would be applied in challenging any earlier assessment she chose to make on the basis that it was not made to best judgment, the question I have to determine on the preliminary issue is not to be determined by asking the question as to whether the officer could have made an earlier assessment to best judgment.

19. Although, as Mr Kinnear submitted, and as demonstrated in the authority he relied on for this submission, *Subhan & Others v CCE* (2001) VTD 17110, a decision to ask for further information before making an assessment can be justified if the officer believes that in the absence of that information the assessment would not be to best judgment, the preliminary issue in this case is to be determined by asking whether the officer's decision to make the assessment she actually made only after receiving the further material was unreasonable in the *Wednesbury* sense, with the result that her decision not to make an earlier assessment will have been shown to be perverse and wholly unreasonable. In that context, it is relevant to bear in mind the observation of Arden LJ in *BUPA Purchasing Ltd and others v CEE (No 2)* [2008] STC 101 at [58]:

> "VATA thus requires the Commissioners to make an assessment only to the best of their judgment and no doubt it is implicit in this that the Commissioners will make that assessment at as early a stage as reasonably practicable"

20. Mr Mantle's submission, which I accept, is that the question can be determined by identifying of the additional pieces of evidence received by HMRC within one year of the date of the assessment which the officer considers to have justified the assessment. It is then necessary to consider whether the additional material is of sufficient weight to justify the making of the assessment that was actually made. In judging whether the additional material is of sufficient weight Mr Mantle accepts that the tribunal is not to apply its own view as to that question. Rather it must consider whether it was perverse or wholly unreasonable of the officer to treat the further

material as the last piece of evidence of sufficient weight justifying the making of the assessment. As Mr Mantle also submitted, the test is not based on the question of the reasonableness of the decision to request the further information but is one based on the sufficiency of the evidence that was obtained as a result of the request. The assessing officer therefore takes the risk, if a request is made for further information, that the information received is not of sufficient weight and therefore, with hindsight, the decision not to make an earlier assessment without it is to be regarded as perverse or wholly unreasonable.

21. I therefore reject Mr Kinnear's submission that whether the further material when received changes the preliminary view of the officer is not material. *Pegasus Birds* makes it clear that the tribunal must determine when the assessing officer received the last piece of evidence which in the officer's opinion was of sufficient weight to justify the making of the assessment. Therefore, if the further investigations produce nothing of material significance the result must be that the last such piece of evidence was received before the officer asked for the further information.

22. It is also clear, and this was common ground, that the focus of the tribunal's enquiry is on the assessment that the officer actually made, not one that could have been made. This is clear from the emphasis on the definite article in the first and fourth principles formulated by Dyson J in *Pegasus Birds*. Thus, although it would have been possible for the officer in this case to have made a series of assessments, an earlier one in respect of trades with counterparties where she was of the view that she had all the necessary information to make such an assessment and a later one when in relation to trades with other counterparties she received the further information which in her opinion justified an assessment in respect of those transactions, that is not relevant. The tribunal must focus on the assessment that was actually made.

23. As mentioned at [3] above, the Assessment was made because HMRC decided to deny Carbondesk the right to deduct input tax for transactions in carbon credits for the periods covered by the Assessment on the basis of the *Kittel* principle, HMRC being satisfied that the transactions in question were connected with a fraudulent evasion of VAT and that Carbondesk either knew or should have known that to be the case.

24. In the Court of Appeal's judgment in the leading case of *Mobilx Ltd (in administration) v Revenue and Customs Commissioners* [2010] STC 1436 Moses LJ clarified the *Kittel* principle at [59] and [60] as follows:

> "59. The test in *Kittel* is simple and should not be over-refined. It embraces not only those who know of the connection but those who "should have known". Thus it includes those who should have known from the circumstances which surround their transactions that they were connected to fraudulent evasion. If a trader should have known that the only reasonable explanation for the transaction in which he was involved was that it was connected with fraud and if it turns out that the transaction was connected with fraudulent evasion of VAT then he should have known of that fact. He may properly be regarded as a participant for the reasons explained in *Kittel*.

60. The true principle to be derived from *Kittel* does not extend to circumstances in which a taxable person should have known that by his purchase it was more likely than not that his transaction was connected with fraudulent evasion. But a trader may be regarded as a participant where he should have known that the only reasonable explanation for the circumstances in which his purchase took place was that it was a transaction connected with such fraudulent evasion."

It is clear from these passages that in deciding whether a taxpayer knew or should have known that the transactions in question were connected to fraud the tribunal (and therefore implicitly HMRC when considering whether to make an assessment based on the application of the *Kittel* principle) should have regard to all the surrounding circumstances, but Moses LJ cautioned against focusing unduly on the question as to whether the taxpayer acted with due diligence before entering into the transactions in question. He said at [82]:

> "But that is far from saying that the surrounding circumstances cannot establish sufficient knowledge to treat the trader as a participant. As I indicated in relation to the BSG appeal, Tribunals should not unduly focus on the question whether a trader has acted with due diligence. Even if a trader has asked appropriate questions, he is not entitled to ignore the circumstances in which his transactions take place if the only reasonable explanation for them is that his transactions have been or will be connected to fraud. The danger in focussing on the question of due diligence is that it may deflect a Tribunal from asking the essential question posed in *Kittel*, namely, whether the trader should have known that by his purchase he was taking part in a transaction connected with fraudulent evasion of VAT. The circumstances may well establish that he was."

25. He then at [83] went on to say:

> "The questions posed in BSG (quoted here at § 72) by the Tribunal were important questions which may often need to be asked in relation to the issue of the trader's state of knowledge. I can do no better than repeat the words of Christopher Clarke J in *Red12 v HMRC* [2009] EWHC 2563:-
>
> "109 Examining individual transactions on their merits does not, however, require them to be regarded in isolation without regard to their attendant circumstances and context. Nor does it require the tribunal to ignore compelling similarities between one transaction and another or preclude the drawing of inferences, where appropriate, from a pattern of transactions of which the individual transaction in question forms part, as to its true nature e.g. that it is part of a fraudulent scheme. The character of an individual transaction may be discerned from material other than the bare facts of the transaction itself, including circumstantial and "similar fact" evidence. That is not to alter its character by reference to earlier or later transactions but to discern it.
>
> 110 To look only at the purchase in respect of which input tax was sought to be deducted would be wholly artificial. A sale of 1,000 mobile telephones may be entirely regular, or entirely regular so far as the taxpayer is (or ought to be) aware. If so, the fact that there is fraud somewhere else in the chain cannot disentitle the taxpayer to a return of input tax. The same transaction may be viewed differently if it is the fourth in line of a chain of transactions all of which have identical percentage mark ups, made by a trader who has practically no capital as part of a huge and unexplained turnover with no left over stock, and mirrored by over 40 other similar chains in all of which the

> taxpayer has participated and in each of which there has been a defaulting trader. A tribunal could legitimately think it unlikely that the fact that all 46 of the transactions in issue can be traced to tax losses to HMRC is a result of innocent coincidence. Similarly, three suspicious involvements may pale into insignificance if the trader has been obviously honest in thousands.
>
> 111 Further 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."

26. It is therefore not surprising that in considering whether to make an assessment based on the application of the *Kittel* principle HMRC will wish to look at the circumstances surrounding the totality of the transactions entered into by a taxpayer with all its various counterparties, and the question as to whether a taxpayer undertook appropriate due diligence on its counterparties is clearly a relevant circumstance to take into account in assessing whether the taxpayer should have known his transactions were connected to fraud. Mr Mantle, contrary to the position taken by Mr Kinnear, submits that the due diligence question is less relevant to the question of actual knowledge and this is an issue to which I will return later.

27. I can summarise the issues that I have to consider in order to determine the preliminary issue as follows:

> (1) Did Officer King hold the opinion that the last piece of evidence of sufficient weight to justify the Assessment was all or any of the due diligence material she received on 28 October 2011 in response to her request for further information in that regard?
>
> (2) If the first question is answered in the positive was her opinion perverse or wholly unreasonable?

Evidence

28. Mr Daniel Edelman ("Mr Edelman"), a director of Carbondesk, provided two witness statements and gave oral evidence. His first witness statement largely dealt with the background to Carbondesk's trading in carbon credits and HMRC's investigation as well as giving evidence as to when information requested by HMRC had been provided. In his first witness statement Mr Edelman's evidence was that all relevant information had been provided to HMRC by 26 October 2010. He subsequently realised after reading Officer King's witness statement that this was not fully accurate because he accepted that HMRC received some further due diligence material in response to Officer King's request in October 2011. He therefore filed a second witness statement correcting his first statement.

29. Mr Kinnear's cross-examination of Mr Edelman focused on two areas, first on the question as to whether Carbondesk stopped trading for a period in July 2009 after

being alerted to possible fraud within the carbon credit market and secondly on the additional due diligence undertaken by Carbondesk on its counterparties during July 2009. As regards the first area, Mr Kinnear referred Mr Edelman to various invoices which were not on the agreed bundle of documents for the hearing (although they were on the list of documents for the appeal as a whole) and I allowed Mr Mantle's objection to those invoices being admitted late for the purpose of the preliminary issues hearing, not only because there the application to admit them was made at a late stage without good reason but also because I did not consider the question as to whether or not Carbondesk did cease to trade for a short period to be relevant for the determination of the preliminary issue and I make no findings on that point, bearing in mind it was common ground that Carbondesk did resume trading later in July 2009. Except in respect of his view as to the rigorousness of the due diligence carried out by Carbondesk before it was alerted to the possibility of fraud in the carbon credit market, which in my view he initially over exaggerated, I had no reason to doubt Mr Edelman's evidence on the matters on which I have made findings of fact so that unless I indicate otherwise I have accepted his evidence.

30. Officer King also provided a witness statement and was cross-examined. I had no reason to doubt her evidence on the matters on which I have made findings of fact in this decision.

31. As well as the pleadings filed in the substantive appeal, I was provided with copies of the due diligence material provided by Carbondesk in response to Officer King's request, copies of Officer King's notebooks relating to her consideration of the case, relevant correspondence and a copy of the witness statement of Officer Julie Yeomans, filed on behalf of HMRC in respect of the substantive appeal.

Findings of Fact

32. From the documents submitted and the oral evidence I heard I make the following findings of fact.

33. It is helpful to start with some brief background findings on the trading of carbon credits. Much of this is taken from Mr Edelman's evidence (which was not challenged on this point) and an explanatory memorandum I was provided with issued by the Department of Energy and Climate Change ("DECC") in March 2009 regarding the operation of the UK Emissions Trading Registry.

34. Carbon credits are traded as if they are a physical commodity. There are basically two forms of trading, a spot contract, where title to the asset traded is transferred as soon as the contract is struck, and a futures contract, where the purchase price is agreed at the time the contract is entered into to be paid at a specific date in the future. Carbondesk traded in a particular form of carbon credit, evidenced by a certificate, and known as a European Union allowance ("EUA").

35. One certificate relating to an EUA is effectively a licence to emit one tonne of carbon dioxide in one year. They are issued by each EU state to qualifying industrial installations in that state. They are held electronically in state run registries and only

exist in dematerialised form. For the reasons mentioned below it is impossible to receive bad delivery of an EUA. The entities that are issued with these EUAs are free to buy and sell them but must, once a year, surrender the same number of EUAs as the measured and audited carbon dioxide emissions that they have made.

36. Futures trades are carried out on a standardised exchange trade basis and then lodged with the clearing house. Spot trades are bilateral agreements and are settled between the parties. Spot trades can be brokered where neither party knows the other party until the trade is struck and the broker is paid a commission for negotiating the deal, or bilateral agreements, where each party negotiates directly with the other or by using a broker as a riskless principal where, instead of a broking fee, an agreed margin is taken by the broker which ensures that each party has anonymity with regards to the other.

37. Carbondesk acted as a broker in the spot market for EUAs during 2009 on the following basis. A party wishing to enter into a transaction would instruct Carbondesk who then locates an appropriate counterparty. Carbondesk transacts simultaneously with each party at a different price. The difference in the two prices is Carbondesk's profit margin.

38. Carbondesk acted as a riskless principal in relation to its brokerage activity. The transactions were riskless as all parties wishing to trade in the certificates had to maintain an account with the relevant state registry, in this case the UK Emissions Trading Registry operated by the DECC. All certificates owned by a trader had to be held in this account and a broker or counterparty could be reassured that the trader would be able to deliver the certificates it had contracted to sell if they appeared in his account; settlement would be from one DECC account to another.

39. Opening an account with DECC in 2009 was a straightforward process. Any individual or company was able to do so and DECC's explanatory memorandum said that it "will only take a few minutes." It does not appear that there was any requirement that an applicant for an account was required to show a trading history, either in the carbon credits sector or in any other product. The only checks carried out were basic anti-money laundering identity checks of a type carried out when opening an account or establishing a customer relationship with any other type of financial institution.

40. Although Mr Edelman suggested at one point in his oral evidence that Carbondesk had to go through "substantive due diligence" to open an account with DECC and thus their counterparties would have been subjected to the same, in answer to questions from the tribunal he acknowledged that the process with DECC was not rigorous and that "the whole process was rubbish I'll be honest…we believed in everybody else's due diligence. We were innocents abroad, I suppose." To be fair to Mr Edelman, these comments were made with the benefit of hindsight. It is clear to me from his evidence that at the time Carbondesk commenced its trading in carbon credits he saw no need to undertake any due diligence on Carbondesk's counterparties beyond establishing their identity in accordance with the anti-money laundering guidance he was familiar with as a firm operating in the financial markets and

establishing that they had a DECC account so that he would be satisfied that there would always be good delivery of any certificates that were traded.

41. Mr Edelman also gave evidence in his witness statement, which was unchallenged, that he had little experience of VAT in a practical sense before his firm started to trade carbon credits in spring 2009 as he was used to dealing in financial instruments which had always been exempt from VAT. I accept that at this stage he was unfamiliar with the concept of MTIC fraud.

42. Mr Edelman accepted that the position changed following the suspension of the Bluenext exchange in June 2009. This exchange, based in France, operated a market in EU carbon credits and it appears that the large increase in trading volumes on that market led the French tax authorities to suspect that there was a risk of carousel fraud in respect of transactions effected on the market. Consequently, on 11 June 2009 the French tax authorities made the trading of carbon credits exempt from VAT, so as to bring them in line with financial instruments. Bluenext ceased trading on this news for 48 hours to enable the necessary changes to systems by market participants to be made.

43. The UK reacted to these events and on 1 August 2009 zero–rated the domestic trading of carbon credits for VAT purposes.

44. It is apparent that HMRC regarded the suspension of trading on the Bluenext exchange as something of a watershed. I heard from Officer King that her decision to assess Carbondesk was modified by a superior officer so as to exclude from the Assessment VAT in respect of any transactions effected before 9 June 2009. The clear implication from this is that HMRC were of the view that Carbondesk could not have been expected to have known that any of its trading in carbon credits was connected to VAT fraud prior to that time.

45. It follows that HMRC were of the view that traders should be alert to the possibility of their transactions being connected to fraud where they took place after 9 June 2009. Initially Carbondesk carried on trading as normal because, according to Mr Edelman, there were only rumours of fraud in the market and there were no indications that their own transactions were connected to fraud. Nevertheless, Carbondesk subsequently did take advice from its solicitors, Dundas & Wilson, who asked Vantis to investigate what was happening in the market. On 3 July 2009 Carbondesk was advised by Dundas & Wilson and Vantis that there were serious concerns about fraud in the market. Mr Edelman's evidence was that at that point Carbondesk "stopped trading". As indicated at [29] above, there is a dispute as to whether this was merely a very short suspension and whether trading did in fact continue almost immediately thereafter, an issue which I have indicated earlier is not necessary for me to decide for the purposes of this decision. It is clear, however, that Carbondesk resumed trading later in July 2009 and that during that month Carbondesk took steps, on the advice of Dundas & Wilson and Vantis, to enhance its due diligence process.

46. What appears to have accelerated that process was an unannounced visit by HMRC officers to Carbondesk's offices on 14 July 2009. HMRC's report of that visit shows that HMRC took away, among other things, a USB stick stated to hold Carbondesk's due diligence records. On 17 July 2009 Carbondesk also provided HMRC with copies of its sales invoices and trade summaries.

47. Consequently, during July (and in respect of one counterparty) September 2009 Carbondesk sent to each of its counterparties a letter (which I will refer to as an enhanced due diligence letter) in the following terms:

> "In the light of recent events in the EU ETA spot trading market we have taken advice in relation to enhancing our due diligence checks. As a result, we can confirm that we will be undertaking the following checks in relation to each of our customers:
>
> 1. We will take steps to verify the trading address of each of our customers.
>
> 2. We will obtain a copy of the relevant VAT Certificate and will take steps to verify the contents of this with HMRC.
>
> 3. We will obtain copies of the passports of each of the Director/s and take steps to verify the home address/es.
>
> 4. We will obtain a copy of the Certificate of Incorporation.
>
> 5. We will seek a reference for the company from any relevant external accountancy firm.
>
> 6. We will seek to obtain a letter of good standing from the customers' bank.
>
> Can you please confirm that your due diligence policy is in keeping with ours at your earliest convenience?"

48. Mr Edelman accepted that most of the recipients of this letter did not answer it. He said that no chasing action was taken in light of the decision on 1 August 2009 to zero-rate the trading of carbon credits which Mr Edelman said made the issue irrelevant. However, it appears that at least one letter was sent after that time, that to Winnington which was dated 8 September 2009, well after the only trade with that counterparty which had been effected on 27 July 2009. Mr Edelman accepted that was the case but offered no explanation as to the reason for the delay. Mr Edelman was unable to point to any evidence that Carbondesk obtained a reference from any external accounting firm or a letter of good standing from a bank, as envisaged in the letter, so I find that none were obtained. Indeed Mr Edelman said that no bank would issue a letter of good standing.

49. There were various visits from HMRC to Carbondesk and communications between them between 5 October 2009 and 26 August 2010 but it appears that the only new information received by HMRC as a result was printed copies of Carbondesk's bank statements, which were provided on 27 January 2010 along with

information about its transactions between 1 April and 31 July 2009 which had previously been provided but was provided again at HMRC's request on a USB stick.

50. On 7 May 2010 the officer then handling the investigation wrote to Carbondesk informing them that 561 of its purchases of carbon credits made between 5 May and 30 July 2009 commenced with defaulting traders, the relevant deal chains having by then having been traced. The letter gave no indication of what the next steps would be as far as Carbondesk was concerned.

51. On 14 October 2010 Louise King became the designated officer for Carbondesk. Mr Mantle cross-examined Officer King regarding what work she did on the matter following her appointment. She was quite vague about what she did before the review she carried out in August 2011 referred to below, but I accept that the first significant work she did was during 2011 when she started to prepare a means of knowledge report which was ultimately finalised on 31 July 2012. As appears from her notebooks, between 18 and 24 August 2011 she carried out a general review of all the material held by HMRC in relation to Carbondesk at that time. Just before then, on 31 July 2011, the time limit in s 73(6)(a) VATA for the making of an assessment in respect of the periods which are relevant to this appeal expired which meant that an assessment could only lawfully be made in respect of those periods if s 73(6)(b) applied on the facts.

52. Amongst the material reviewed was the due diligence material provided by Carbondesk on the USB stick referred to at [46] above. Officer King was aware that Carbondesk had, as I have found, continued to trade after this due diligence material had been provided to HMRC. In particular, Carbondesk had traded for the first time after that material had been provided with two counterparties, Pan Energy Markets limited ("Pan Energy") and Winnington Networks Limited ("Winnington") and continued to trade with Apex Global Trading Limited ("Apex") although it had undertaken a single deal before that time. Six transactions took place with Pan Energy (on 23, 24 and 28 July 2009) and one transaction with Winnington (on 27 July 2009).

53. It became common ground that the memory stick obtained in July 2009 contained incomplete due diligence material in relation to Apex and Pan Energy and no due diligence material in relation to Winnington. In addition, no material was on the USB stick in relation to another counterparty, Aducco Consulting Limited ("Aducco") although, as we shall see, the Assessment did not include any trades with that counterparty, nor, as it transpired, with Apex.

54. The Assessment included significant sums in respect of purchases made by Carbondesk from Pan Energy and Winnington, in total amounting to 1,648,977 Euros all of which save for 105,240 Euros related to Pan Energy.

55. Officer King's evidence was that she considered that the extent and quality of Carbondesk's due diligence on these suppliers at the time it obtained supplies from them was likely to be relevant to the issue as to whether it knew or should have known of the fact that these transactions were connected with fraudulent tax losses. Her evidence was that unless she had the evidence of the due diligence that

Carbondesk carried out on these suppliers she would be unable in the exercise of her best judgment to make the Assessment, and in particular to include the sums in respect of Carbondesk's purchases from Pan Energy and Winnington, because she had to be satisfied upon the objective evidence that Carbondesk knew or should have known of the connection to fraud.

56. Officer King wrote to Carbondesk on 28 October 2011 stating that she was seeking further information. In particular she asked whether any due diligence was carried out in respect of a number of named suppliers and customers, including those mentioned at [52] above. She then asked to be sent within 30 days any copy paperwork relating to due diligence checks which were undertaken in respect of the named traders in relation to carbon credit deals carried out in April, May, June and July 2009.

57. Carbondesk replied to this letter, sending a memory stick containing the information requested. This was received by HMRC on 28 October 2011.

58. Much of this information had previously been provided by Carbondesk. When Mr Edelman prepared his first witness statement he believed that HMRC received no new material in response to Officer King's letter of 12 October 2011 but accepted in his second witness statement and in cross examination that some new material had been provided, in particular the letter set out at [47] above sent to all of its counterparties following the advice Carbondesk received to enhance its due diligence procedures. These letters clearly had not been created at the time the original material had been provided on the memory stick handed over after the visit on 14 July 2009. Other material which although available, had not, as Mr Edelman explained, been uploaded on to Carbondesk's computer database at the time the first memory stick was provided.

59. In relation to those counterparties in respect of whose trades VAT was included in the Assessment, the only new material received was as follows:

Pan Energy

An enhanced due diligence letter, in the form set out at [47] above, dated 20 July 2009 and a company details document on Pan Energy headed paper.

Winnington

The full set of due diligence material then required according to Carbondesk's enhanced procedures. This consisted of

- documentation to establish Winnington's identity and that of its directors;
- details of other information filed at Companies House, including a description of its business as being involved in wholesale electrical goods;
- its VAT registration certificate and HMRC's response validating its VAT number;

- an introduction letter from Winnington describing its business as being a trader in the OTC energy and emissions market which letter also enclosed Winnington's "know your customer" documents; and

- the enhanced due diligence letter from Carbondesk, dated 8 September 2009.

60. Officer King's evidence was that this new material was relevant to make the Assessment, including as it did VAT in respect of trades effected with Pan Energy and Winnington, and that without this material the Assessment would not have been justified in her best judgment. In my view it was implicit in her evidence that it was only the material which related to those transactions which were actually included in the Assessment (that is those relating to Pan Energy and Winnington) which influenced her in this respect.

61. In particular, Officer King said that as some of the deals in question were effected after the date of HMRC's visit on 14 July 2009 she needed to request due diligence material in respect of the traders concerned in order to further her enquiries. Officer King explained that she wished to see whether any further due diligence had been done in the light of HMRC's visit during which Carbondesk had been informed of fraud in the carbon credit market and that they could potentially become involved in it. Officer King's stated conclusion on what she saw after the additional material was provided was that not much more due diligence had been carried out and that what had been carried out was not satisfactory. In particular, she saw no evidence that any bank references, trade references or any evidence that that Carbondesk had obtained any of the additional information that it said it would in the enhanced due diligence letter, which she said she would have expected to see if due diligence was being carried out properly. She said that she expected to see more work having been done and a different way of trading after 14 July 2009, bearing in mind that Carbondesk had recently been told that their deals may well be connected to fraud. Her evidence was that these were matters she took into consideration in deciding whether to assess, the lack of documentation indicating to her that inadequate checks were made.

62. Mr Mantle did not challenge Officer King as to whether she genuinely held the opinion that such of the additional material that she obtained on which she said she relied was relevant to her decision to make the Assessment and that without that new material the Assessment would not be justified. I therefore proceed on the basis that Officer King was of the opinion that the information she received in response to her letter of 11 October 2011 included evidence of facts sufficient to justify making the Assessment and that until that point she would not have been justified in making the Assessment.

63. The Assessment was ultimately made on 26 October 2012, one day before the elapse of one year since Officer King received the new information referred to at [59] above. Certain deals which Officer King had recommended be included in the Assessment were not included, in particular those relating to Adduco as mentioned at [53] above. This was as a result of a decision by HMRC that no deals that took place before the closure of the Bluenext exchange on 9 June 2009 would be assessed.

Nevertheless, as Officer King explained, as the decision making officer, she took responsibility for the assessment that was actually made. Neither did the fact that the decision letter sent on 26 October 2012 to Carbondesk notifying it of the Assessment was signed by a more senior officer affect the position; it was accepted that for the purposes of this decision the question as to whether HMRC's opinion is open to challenge is to be tested by reference to the decisions made by Officer King, as reflected in the Assessment and its accompanying decision letter.

64. The decision letter set out a number of the features of Carbondesk's trading which HMRC say they took into account in making their decision to deny Carbondesk's claim for input tax credit as follows:

- The transactions have been traced back to fraudulent tax losses in the appropriate periods

- The Bluenext exchange in France was Carbondesk's main counterparty for its sales of carbon credits for the periods in question. On 8 June 2009, Reuters News Agency reported that the Bluenext exchange had been closed and that France was to apply a zero rate to carbon credits due to the prevalence of VAT fraud in the market

- There was also a Bloomberg report published on 8 June 2009 confirming the existence of fraudulent trading activities within the carbon credit trade sector

- On 11 June 2009 Reuters published a report relating to the French authorities probe into suspected multi million euro fraud in the French carbon credit market

- The due diligence undertaken by Carbondesk could not have provided it with adequate assurances that transactions undertaken were not connected with fraudulent evasion of VAT

- The rapid increase in levels of trade following the Bluenext suspension should have made Carbondesk realise that the only reasonable explanation for these supplies was that they were connected with fraud

- The individuals involved in Carbondesk each had a background in commodities dealing. Carbondesk should have queried why its suppliers were able to source EUAs cheaper than itself.

65. It is clear from this list that HMRC's view that Carbondesk's due diligence on its counterparties was inadequate was a factor in Officer King's decision to make the Assessment. It is also clear from this list that HMRC would have received many documents in the course of its investigation, in particular the complete record of transactions undertaken by Carbondesk between 1 April and 31 July 2009, 561 of which HMRC traced to deal chains with defaulting traders, 547 of which formed the basis of the Assessment. It is therefore clear that apart from the very limited

documentation that Officer King's further enquiries produced, HMRC had all the evidence of facts on which it based the Assessment more than one year before the Assessment was actually made.

66. In the light of these findings of fact I now turn to the question as to whether the Assessment was out of time.

Discussion

67. As I set out at [27] above there are two issues that I need to consider in order to determine the preliminary issue. I have already determined the first issue in favour of HMRC through my finding of fact at [62] above that Officer King was of the opinion that the information she received in response to her letter of 11 October 2011 was evidence of facts sufficient to justify making the Assessment and that until that point she was of the opinion that she was not justified in making the Assessment. I therefore only now need to discuss the second issue, that is whether Officer King's opinion to that effect was perverse or wholly unreasonable.

68. In that regard I focus purely on the information that Officer King received in relation to Pan Energy and Winnington because of my finding at [60] above that Officer King placed no weight on the material she received in respect of those counterparties whose transactions were not included in the Assessment.

69. I should emphasise at the outset that I make no findings as to the quality of Carbondesk's due diligence and whether, as HMRC contend, it was no more than a smokescreen to hide the fact that it knew the transactions concerned were connected to fraud. Those are matters for the substantive hearing of the appeal. I am purely concerned with the question as to whether Officer King's opinion as to the significance of this material as being of sufficient weight to justify the Assessment was perverse or wholly unreasonable.

70. As I have indicated at [20] above I accept the thrust of Mr Mantle's submission that the correct approach to the material in question (which as I have identified at [60] above is the due diligence material received in respect of Pan Energy and Winnington) is to consider whether that material is of sufficient weight to justify the making of the assessment that was actually made. In that regard the material was insignificant in quantity compared to the many thousands of documents previously received and reviewed by HMRC in the course of its investigation and on which it based its decision to assess in respect of transactions between Carbondesk and 50 of the 52 counterparties with whom in dealt in the relevant periods. It would clearly have been open to Officer King to make an earlier assessment in relation to those transactions and leave the Pan Energy and Winnington transactions out of account at that stage to be considered later in the light of the receipt of the further information requested. Those matters are, however, not relevant to the question I have to decide because I have to focus on the assessment that was actually made. Officer King decided to make one assessment in relation to all the transactions under consideration rather than make two separate assessments. I therefore need to consider whether it was perverse or wholly unreasonable of Officer King to consider that the she could

not make an assessment which included the Pan Energy and Winnington deals until she had received and reviewed the additional material in respect of those counterparties.

71. Mr Mantle observes that HMRC's primary case is that Carbondesk was actually aware of fraud in its deal chains. He submits that the Pan Energy and Winnington documents received after Officer King's request could not be evidence of actual knowledge of fraud. He submits that there is nothing in those documents which tips the balance between having not enough evidence to show that Carbondesk had knowledge of fraud and sufficient evidence of fact to show that Carbondesk had knowledge of fraud. In effect he submits that all the essential ingredients to make the Assessment on the basis of actual knowledge were in place before the receipt of the additional information. The additional documents were so insubstantial, given the evidence which HMRC had previously obtained, that it was wholly unreasonable not to have made the Assessment earlier. The missing documents were not the "missing piece of the puzzle" referred to by the Court of Appeal in *Pegasus Birds* needed for HMRC to make the Assessment. For the same reason, he submits that it was wholly unreasonable and perverse not to have made the assessment earlier on the basis that Carbondesk should have known of the connection to fraud.

72. Mr Mantle submits that there was ample evidence of the approach to due diligence in HMRC's hands before the additional material was provided. HMRC's conclusions on that approach were expressed in the decision letter, as set out at [64] above as being that the scope of the due diligence checks undertaken could not have provided Carbondesk with adequate assurances that the transactions were not connected with fraud. It was clear from this, he submits, that HMRC regarded due diligence as providing Carbondesk with no shield, given the other points relied on by HMRC to show knowledge and means of knowledge; there was nothing expressed in HMRC's conclusions to suggest that they relied on the alleged inadequacy of the due diligence to conclude that what they did was a smokescreen to hide the fact that they knew the transactions concerned were connected to fraud.

73. With regard to the enhanced due diligence letter sent in July 2009 (in the case of Pan Energy) and September 2009 (in the case of Winnington) there was nothing in those that tipped the balance between insufficient and sufficient knowledge of fraud and in any event by 30 July when the law changed the fact that no further information was provided as envisaged by the letter was no longer relevant. Had Officer King felt that whether additional information was provided as envisaged in these letters was significant she could have followed up and asked for it, but she did not do so.

74. Finally, Mr Mantle reminded me of the warning of Moses LJ at [82] of *Mobilx* that tribunals should not unduly focus on the question whether a trader has acted with due diligence and also the observations of Arden LJ in *BUPA* as to the need to make an assessment to best judgment at as early a stage as reasonably practicable. His submission was that the reason the Assessment was made out of time was that there was delay on the part of HMRC in analysing, or reaching conclusions on the basis of, the evidence obtained by HMRC well before a year before the Assessment was made. The purpose of s73(6)(b) VATA is precisely to protect taxable persons from tardy

assessments and the facts show delay on the part of HMRC in particular in the last part of 2010 and the first half of 2011.

75. I have some sympathy with the view that this was a tardy assessment in terms of the ordinary use of language. HMRC had virtually all the information they needed well before they actually made the Assessment. Officer King took a period of over a year between becoming the designated officer and making a request for further information, during which she spent only a short amount of time (4 days) in carrying out a general review of the matter and an unspecified period of time in preparing a means of knowledge report. During this period the time limit in s 73 (6) (a) expired. It then took almost another year before the Assessment was made during which there was only a small amount of additional information to review.

76. However the legal test as to what is tardy is different. It is measured by reference to when HMRC received the last piece of evidence sufficient in its opinion to make the assessment it did. Parliament has given HMRC significant leeway in this respect, placing great weight on their judgment as to when that point has been reached; the only risk for HMRC in taking an extended period of time before they ask for further information is that what they ask for by way of further information turns out not to have the degree of importance that they thought it might have with the result that it would be perverse or wholly unreasonable to rely on it as justifying an assessment. I can therefore place no weight on the fact that HMRC should have concluded matters much quicker than they did. I do not see Arden LJ's observation in *BUPA*, referred to at [19] above as operating as a gloss on the correct test in s 73 (6) (b).

77. In my view Mr Mantle's submission, summarised at [72] above, on how HMRC viewed the due diligence as expressed in the decision letter amounts to a questioning as to whether Officer King in fact did rely on the lack of what she perceived to be adequate due diligence after HMRC's visit on 14 July 2009, during which Carbondesk had been warned of potential fraud in the market, as going to the question of actual knowledge. Officer King was clear in her oral evidence that she did rely on it in her consideration of the actual knowledge issue and this was not challenged.

78. Nor do I see anything in Mr Mantle's submission that if Officer King had thought the lack of evidence that any further information was provided as envisaged by the enhanced due diligence letter was significant she would have followed up on the issue. Her letter requested "any copy paperwork relating to due diligence checks" on the specified counterparties. None of the additional information envisaged was provided and she was entitled to assume if it was not then it did not exist and take that factor into account.

79. Mr Mantle submitted that the process envisaged by the enhanced due diligence letter in effect became redundant after 30 July 2009. However, that submission fits uneasily with the fact that Winnington's letter was not sent until 8 September 2009, well after the only trade with that counterparty had been effected on 27 July 2009. Mr Edelman accepted that was the case but offered no explanation as to the reason for the delay.

80. In answer to Mr Mantle's submission that there was nothing in the enhanced due diligence letter that was relevant to the question of actual knowledge, Mr Kinnear referred me to the finding of Arnold J sitting in the Upper Tribunal in *A One Distribution (UK) Limited* [2011] UKUT 496 (TCC) where he held at [29] that it was permissible for a tribunal to consider A One's due diligence to see whether it was a genuine attempt to avoid becoming involved in transactions which were connected to VAT fraud or whether it was a "smoke-screen". As I have said earlier, I make no findings as to whether Carbondesk's due diligence is to be so characterised. Nevertheless it is clear from Officer King's evidence where she said that the reason for asking for further material was to see whether there had been a change of approach from what she had found to be an unsatisfactory process before 14 July 2009 and her conclusion that there had not been a change was a factor she relied on in coming to her decision on actual knowledge. I accept, on the basis of what was said in *A One Distribution*, that such a factor can be relevant to the issue of actual knowledge. That does not, as Arnold J said at [28] in *A One Distribution*, fall into the trap identified by Moses LJ in *Mobilx* of attaching too much weight to the due diligence issue.

81. I therefore now turn to the question as to whether it was perverse or wholly unreasonable for Officer King to place the weight she did on the additional material. She undoubtedly adopted a cautious approach; she might have taken the view that the large amount of evidence she already had on the due diligence that Carbondesk had undertaken told her all she needed to know about Carbondesk's approach to due diligence and it would be difficult to overturn any assessment then made on the basis that it was not made to best judgment; the test, as Mr Mantle submitted, not being particularly stringent as far as HMRC was concerned.

82. Mr Edelman's evidence was to the effect that prior to the suspension of trading on the Bluenext exchange and the rumours of fraud in the market that in the light of the fact that all traders had to have an account with DECC the only due diligence that was necessary was the basic identity checks commonly carried out by financial services companies. It is clear from the decision letter and its conclusions on due diligence that HMRC did not regard those steps as adequate. Whether the due diligence can be said to be adequate or not is not a matter for this decision. I do accept, however, that the visit of HMRC on 14 July 2009 and the warning given at that meeting of the potential of fraud would put the question of due diligence in a different light. It seems to me not perverse or wholly unreasonable for Officer King to investigate whether a different approach was taken to due diligence after those warnings; if extensive enhancements were made then that could be a factor indicating that Carbondesk took the question of fraud seriously, tending to cast doubt on whether it knew its previous transactions were connected to fraud. If it continued to trade without taking a different approach then that could indicate that the due diligence was in effect window dressing.

83. Therefore, I find that the key issue which leads to a conclusion that it was not perverse or wholly unreasonable to rely on the limited material obtained in response to Officer King's request in October 2011 is the fact that Carbondesk continued to trade after the warnings given on 14 July 2009. Whether or not Officer King was right

to say that the new material, or particularly what she saw as a lack of evidence of a changed approach, does help in concluding that there was actual knowledge of a connection to fraud is not a matter for this decision. However, it seems to me that it cannot be said that it was perverse or wholly unreasonable of her to pursue this issue in the light of the change of circumstances after 14 July 2009. As I have observed at [26] above, in making an assessment on the basis of the application of the *Kittel* principle it is to be expected that HMRC will take into account all the circumstances regarding the totality of the transactions that are potentially to be included in the assessment.

84. Whilst Officer King might have made the Assessment without having seen the further material, in my view it was not perverse or wholly unreasonable of her to consider that the Assessment might have been open to challenge on the basis that Carbondesk did in fact enhance its due diligence procedures after the warnings it received about the risk of its transactions being connected to fraud and this enhancement should have been taken into account before making the Assessment, so that in failing to do so HMRC did not take into account all relevant circumstances as it was obliged to do. Having received the information she did, in my view it was not perverse or wholly unreasonable of her to have formed the opinion that what she found out regarding Carbondesk's approach to due diligence after the warnings given to them was of sufficient weight to justify the Assessment, including as it did the transactions effected with Pan Energy and Winnington after 14 July 2009, and it was not perverse or wholly unreasonable of her not to have made the Assessment before she obtained that information.

85. In my view the same reasoning applies to whether it was perverse or wholly unreasonable of Officer King to rely on the additional material as being sufficient to justify the Assessment on the basis that Carbondesk should have known of the connection to fraud. In my view it was not perverse or wholly unreasonable for Officer King to consider, on the basis of the new material she had requested, whether Carbondesk enhanced its due diligence procedures after the warnings give on 14 July 2014 in the context of her considering whether Carbondesk should have known of the connection to fraud in relation to the deals effected with Pan Energy and Winnington. It was therefore not perverse or wholly unreasonable not to have made the Assessment including those transactions purely on the basis of the material received in respect of other counterparties before she made her request for the additional material

Conclusion

86. I therefore determine the preliminary issue in favour of HMRC and the appeal should now be progressed towards a substantive hearing.

87. 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.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE

RELEASE DATE: 27 JULY 2015