TC02945

Appeal number: LON/20010/8008

Excise Duty and Value Added Tax - Alleged release to the home market of duty-suspended whisky and vodka despatched from the Appellant's warehouse – One factual dispute and various secondary legal questions - Appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TDG (UK) LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE HOWARD M. NOWLAN
RUTH WATTS DAVIES

Sitting in public at 45 Bedford Square in London on 23, 24 and 26 September 2013

Geoffrey Tack of DLA Piper UK LLP on behalf of the Appellant
Sarabjit Singh, counsel, on behalf of the Respondents

DECISION

Introduction

1. This was an Excise Duty and Value Added Tax appeal in which the Appellant warehouse keeper had been charged the Excise Duty and the VAT in respect of the alleged wrongful release to the home market of duty-suspended whisky and vodka ("the spirits"), in circumstances whereunder the owner had ostensibly arranged with its appointed transport firm to export the relevant spirits to Spain. It was claimed by the Respondents that the spirits had never reached their destination, and had indeed been "slaughtered", or diverted for home consumption, when still in the UK.

2. The spirits in question had been owned by a firm called M.D. Trading ("MDT"), operated by a Mr. Michael J. Downer ("Mr. Downer"). According to the evidence of Mr. Clifford Eaton ("Mr. Eaton") who ran the transport firm JWT Transport ("JWT"), Mr. Downer had contacted Mr. Eaton with a view to his firm transporting the spirits to Cadiz, Spain following some interval during which they would be held in a duty-suspended warehouse. Mr. Eaton did not operate such a warehouse, but had previously been employed by the Appellant, and so he said that he suggested to Mr. Downer that the goods be held in the Appellant's warehouse, pending despatch. The spirits were accordingly stored in the Appellant's warehouse.

3. The spirits were then released from the warehouse, and collected by Mr. Eaton's lorries on four separate occasions on 3, 4, 6 and 7 April, 2000. By those dates, the Appellant had checked the identity and standing of the selected Spanish warehouse to which the spirits were to be transported, and ascertained that it was authorised to accept the relevant type of product. The Spanish warehouse was in Cadiz and was operated by Iberia Shipping Agencies SL ("Iberia"). When the spirits were released from the Appellant's warehouse, each of the four consignments was accompanied by Administrative Accompanying Documents ("AADs") deposited in the lorries. These AADs indicated both that the spirits were to be collected by JWT and the registration numbers of the lorries that were to collect each consignment. They also indicated that the spirits were to be taken to Iberia's Cadiz warehouse and that the guarantor of the duty was the Appellant . Each AAD then described the spirits being released on each occasion, the only relevant feature of which was that we were told that the blended whisky in question, Auld Lang Syne whisky, was not a well-known brand.

4. The Appellant subsequently received receipted copies of the AADs that purported to confirm that the spirits had been received by Iberia. These contained stamps appearing to be Iberia's official stamps. We were told that Iberia made the receipted AADs available in some way to JWT, and Mr. Eaton said in evidence that he then took them round personally to the Appellant.

5. When HM Customs & Excise officers (who in the rest of this Decision we will refer to as HMRC officers) later inspected the AADs, they noted that the spirits despatched on 3 April in the vehicle with the registration number S355UUG appeared to have arrived in Cadiz on 7 April, but that the third consignment collected on 6 April was said to have been collected by the same vehicle. Since this appeared to be impossible, HMRC made enquiries of the Spanish authorities, and asked them to ascertain whether the four consignments had indeed been received by Iberia, and held by them ostensibly for the alleged purchaser of the goods, namely a company called Davidson & Perez SL. The response received indicated that Iberia had not declared receipt of any consignments from the Appellant. Furthermore, during the year 2000

up to the date of the 28 June e-mail response from the Spanish Customs authorities, it was suggested that no Spanish company had received any loads from the Appellant, and the Spanish authorities reported that Davidson & Perez SL did not exist. The claim was that the stamps on the receipted AADs were forgeries, though whether they looked like the official stamps was never revealed to us.

6. Ignoring in this Introduction further details that we will summarise below, HMRC concluded that the spirits in question had been diverted for home consumption, and had certainly not reached the claimed destination in Cadiz. Accordingly, on 18 October 2000 HMRC issued Excise Duty and VAT assessments on the Appellant, as the guarantor of the duty and VAT. The respective assessments were for £369,223.95 and £84,275.30. It was said that on 20 October 2000, assessments were also made on MDT and JWT since those firms were jointly and severally liable for the duty and tax with the guarantor.

The various issues to be decided

7. We will now summarise the various points that we will need to address in this Decision. The most important point in this Appeal is one where there was no dispute as to the law, but simply the critical factual issue as to whether the Appellant could demonstrate, on the balance of probability, that the goods were exported. If it succeeded in that, the Appeal in relation to both duty and VAT would be allowed. We will summarise the critical factual issue in paragraphs 8 to 12 below, but will defer dealing with all the evidence in relation to that issue until paragraphs 31 to 66 below. As regards the various legal contentions material to what we might describe as the "secondary contentions", in paragraphs 13 to 28 we will indicate the points at stake and the respective contentions of the parties in relation to each point.

The critical factual point

8. The basis on which HMRC eventually sought to justify the assessments was that within paragraph 4(2)(a) of the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992/3135 ("the 1992 Regulations") there had been a duty point because *"the excise goods* [had been] *delivered for home use from a tax warehouse or* [were] *otherwise made available for consumption, including consumption in the warehouse."*

9. Were that proposition sustained, it would follow under paragraph 5(4) of the 1992 Regulations that the Appellant, i.e. the authorised warehouse keeper, would be liable for the duty, and then the following two sub-paragraphs would render the owner and the transport firm jointly and severally liable for the duty. Without dealing in detail with the VAT consequences, we can state shortly that if paragraph 4(2)(a) applied and the various parties were rendered liable for the duty in fact assessed, then liability for VAT would follow under provisions that we will refer to below.

10. It was common ground between the parties that the effect of the House of Lords' judgment in the case of *Greenalls Management Ltd v. Customs & Excise Commissioners* [2005] UKHL 34 was that liability under paragraph 4(2)(a) of the 1992 Regulations was established merely by demonstrating that the goods had left the warehouse without anyone accounting for the duty and the VAT, and that they had thereafter entered the home market. It was not in other words necessary for the warehouse keeper to despatch the goods "**for** home market consumption". Liability was established even if the warehouse keeper intended and expected the goods to be transported to a foreign "duty-suspended" warehouse, provided the goods were

diverted in the UK and made available on the home market. Furthermore it was irrelevant who had diverted them, and whether the innocent warehouse keeper was effectively the victim of fraud by some other party.

11. Since the above legal points were agreed by both parties, the critical first question was whether the goods had reached Calais, i.e the initial foreign destination on their supposed route to Cadiz. If they had reached Calais, as the Appellant contended that they had done, then the diversion would have occurred outside the UK; the duty chargeable would be duty in France or Spain (wherever the diversion had occurred), and the case for saying that the goods had been delivered *"for home use"* or *"for consumption"* (agreed by the parties to mean "domestic consumption") under paragraph 4(2)(a) would fail.

12. Accordingly the critical first question was the purely factual issue of whether the goods reached Calais. In terms of burden and standard of proof, it was for the Appellant to demonstrate, on the balance of probability, that the goods did reach Calais, or indeed any other foreign destination.

The "assessment" question

13. We mentioned in paragraph 8 above that HMRC sought "eventually" to sustain the assessment by establishing that there was a duty point under paragraph 4(2)(a) of the 1992 Regulations. Paragraph 4 itemises various other possible "duty points", and when the assessment was made on 18 October 2000, it was abundantly clear from the covering letter that the basis on which HMRC then sought to sustain the assessment was that the duty point arose under paragraph 4(8), no mention being made of paragraph 4(2)(a). Sub-paragraph 4(8) permits HMRC to issue a notice requiring an authorised warehouse keeper to produce a certificate of receipt (i.e. by the destination "duty-suspended" warehouse) of the goods that had been held in the despatching warehouse, and if that certificate is not produced within 6 months, and the duty has not been paid, then the duty is deemed to be payable at the point of release from the despatching warehouse. Accordingly the despatching warehouse keeper is rendered liable for the duty, pursuant to paragraph 5(7) of the 1992 Regulations.

14. It was common ground that HMRC's assertion that there had been a duty point under paragraph 4(8) of the 1992 Regulations was wrong. This was simply because HMRC had never actually issued the notice that occasioned the need by the warehouse keeper to provide the certificate. At some point HMRC obviously detected their error. This may have been at a fairly early point because the covering letter, accompanying the 18 October assessment, glossed over the issue of whether the notice had been issued or not. More relevantly, as late as 2007, HMRC wrote to the Appellant's lawyers, confirming that no notice had been given. They then added "Your client's liability in fact arises under regulation 4(2)(a) of the provisions. I apologise for any confusion that may have been caused by this technical error in citing the incorrect provision."

15. The Appellant's present contention was that there was more than a technical error, in that if the original reason cited for making the assessment was wrong, as plainly it was, the assessment was void. The subsequent effort to sustain the void assessment was thus claimed to be ineffective, first because the assessment was void and thus not an assessment at all, and secondly because, had there been an effort in 2007 to raise a new assessment (which of course there was not) that assessment would have been many years out of time.

16. The wording of the critical provision, contained in section 12 Finance Act 1994, under which the assessment was made, permitted the Commissioners to assess the duty if it appeared to them that *"any person is a person from whom any amount has become due in respect of any duty of excise."* The critical question for us on this issue is whether the assessment was thus validly made when the Commissioners could certainly claim that it appeared to them that the Appellant was liable for the duty, albeit that at that stage there was no liability under the provision on which the Commissioners plainly relied, and the Commissioners' frame of mind (i.e. that it appeared to them that the Appellant was liable for the duty) could only be justified on a ground that seemingly the Commissioners had not thought about in 2000, and did not indicate to the Appellant until 2007.

The "joint and several" point

17. We will give considerable detail below of the limited facts known about Mr. Downer and his company, and we will summarise the evidence given by Mr. Eaton. For present purposes, it is simply material to record that HMRC stated that they had issued assessments on MDT and JWT. They could no longer find a copy of the assessment on MDT, and they could not currently locate Mr. Downer. As regards JWT, it appeared that there was still a pending appeal on the part of JWT, standing behind the present Appeal, and HMRC had certainly seized one of JWT's lorries. HMRC confirmed that they had not recovered anything from either MDT or JWT in discharge of the joint and several assessments made against them, so that there was no issue of the potential recovery from the present Appellant occasioning a double receipt of the tax. The only entity that had paid any of the duty or tax to date was the Appellant that had paid both the duty and the tax, prior to being able to pursue its Appeal.

18. The Appellant contended that since no copy of the assessment, allegedly once issued to MDT, had been produced and HMRC admitted that they now had no copy of it, it was possible that no assessment had ever been issued. This the Appellant contended would be improper because, as Lord Hoffmann had observed at paragraph 17 of his decision in *Greenalls*, the joint and several liability provisions of paragraph 5(5) and (6) of the 1992 Regulations gave the warehouse keeper *"a right of recourse against those primarily responsible for the diversion"*. The Appellant thus contended that if no such assessment had been issued, it would have no possibility of counter-claiming from MDT, even if Mr. Downer or MDT could be located, since MDT would assert that it had no liability for the duty (not having been assessed) so that the Appellant would be unable to recover any duty and tax paid by it from MDT.

19. HMRC's response to this contention was first that they did have records that the assessments had been made on 20 October 2000 on MDT and JWT. They could admittedly not now find a copy of the assessment on MDT but that was not surprising after 13 years, and it was fairly academic since Mr. Downer could not be located. Even, however, if the assessment had not been made, this would still be irrelevant. One would invariably have expected the Appellant to insert into its contract with customers a clear provision under which customers would indemnify the Appellant against duty charged on the Appellant if that resulted from some diversion for which the client, or the client's transport firm, were in any way responsible. If the Appellant did not have confidence in the financial standing of the client, it ought either not to have accepted the client's goods into its warehouse, or should only have done so on the provision of some security for its presumed contractual right of recovery against the relevant firm.

The failure to provide the notice material to liability under paragraph 4(8) of the 1992 Regulations

20. The Appellant contended that the failure of HMRC to serve the notice, relevant in the context of paragraph 4(8) of the 1992 Regulations, had deprived the Appellant of the opportunity to pursue enquiries in relation to the tracing of the goods, and in relation to the critical issue of whether, if they had been diverted, the diversion had taken place in the UK or elsewhere. The Appellant relied, to some extent, on the ECJ case of *Hauptzollamt Neubrandenburg v. Lensing & Brockhausen GmbH,* [1999] ECJ 21.10.1999 C-233/98. That was a Customs duty case where the relevant authority was actually required to serve a notice on the party from whom duty was claimed, and required to indicate to that party that it had 3 months in which to respond to the notice. The authority failed to indicate the point about complying with the notice within the 3-month period, and it was held that that failure precluded the authority from recovering the duty.

21. HMRC contended that the Appellant was misreading paragraph 4(8) because it plainly imposed no duty on HMRC to issue the relevant notice at all. All that it said was that if such a notice was in fact issued on a warehouse keeper, and within various time periods the warehouse keeper failed to provide the certificate of receipt, and no-one had paid the duty, then the warehouse keeper was deemed to be liable to pay the duty. But if HMRC had failed to issue the notice, it had breached no obligation. The sole consequence was that there would not be an Excise Duty point under paragraph 4(8) of the 1992 Regulations.

22. In any event, certainly from 18 October 2000, the Appellant obviously appreciated that duty and VAT were being sought from the Appellant, and so within a relatively short time after the despatch of the goods, the Appellant would have been fully aware that it had every incentive to obtain all the evidence possible in order to defeat the assessments.

The various VAT contentions

23. HMRC's analysis of the relevant VAT law was simple. HMRC contended that the combined effect of sections18(4) and 73(7B) of VAT Act 1994 was that where goods held in bond on a duty-suspended basis had been removed from the warehousing regime, and the supply was treated as having taken place in the United Kingdom, then for VAT purposes, there was to be treated as being a supply at the point when the goods were removed from the warehouse, and the VAT chargeable on that deemed supply was payable by *"the person who is required to pay the duty"*. In other words, just as if the owner of the goods had removed the goods from the warehouse for home use consumption, and had duly paid the excise duty and the VAT, where the removal is ostensibly one intended to lead to an export of the goods but it results in an illegal diversion of the goods to the home market, the same duty and VAT become chargeable. And just as the burden of the duty falls on the warehouse keeper (and potentially others on a joint and several basis), so too the liability for the VAT falls on the warehouse keeper.

24. The Appellant raised three or four contentions in relation to VAT.

25. The first, which is obviously correct if sustained on the facts, was that if the Appellant could demonstrate that the goods had in fact been exported (even only as far as Calais), then because the diversion would have taken place abroad, the supply

would no longer be deemed to have been made in the UK. Just as there would then be no liability to duty, there would be no liability to VAT.

26. The second contention was, to our minds, a strange one to the effect that the warehouse keeper could not be rendered liable for the VAT if the diversion had occurred in the UK because it was not part of its commercial enterprise to be supplying goods. Were VAT to be charged on, or recoverable from, the warehouse keeper, there would be no way in which the VAT would then pass through, as a cost, to the ultimate consumer, and the neutral notion of VAT, with the cost being passed through to the ultimate consumer, would not be respected.

27. The next equally strange contention was that the present Appellant should be entitled to a deduction for input tax, and the result of that deduction was that there would be no net liability for VAT. At one point we were under the impression that the input tax to which reference was made might have been MDT's input tax, in the improbable scenario that the supply to MDT had been a taxable supply for VAT purposes, as distinct from a non-taxable supply because the goods were at the time held in bond.

28. The alternative "input deduction" contention seemingly raised by the Appellant was somewhat along the lines that because an importer of product has a liability for VAT, but also a deemed input deduction, with the actual tax becoming chargeable when there is a later domestic supply of the goods, in the present case the Appellant should have some equivalent input deduction. That would then be set against the output liability, whereupon there would be no net VAT to pay. It was then suggested that if we denied the input deduction in the present Appeal, this would be fairly immaterial because the Appellant would still be entitled to the same input deduction, and would duly claim it in its next VAT return.

Our decisions on the various issues in summary form

29. Having now identified all the points in contention, we will give our decision in summary form, before turning to the critical factual analysis material to the first contention, and the consideration of the various legal points relevant to the Appellant's later contentions.

30. Our decision on the critical factual issue is that the Appellant has not demonstrated, on the balance of probability, that the product had in fact been exported either to Calais or to any other foreign destination. Our decision on all the various legal contentions is that all the contentions advanced by the Appellant are incorrect. The one that has caused us an element of difficulty is the question of whether the original assessments were wholly void because they were made at a time when the reason for the Commissioners' belief that duty was owed was plainly a wrong reason. Our decision, however, is that that feature does not undermine the assessment. Accordingly since we reject all the Appellant's legal contentions, this Appeal is dismissed.

The evidence given to us

31. The way in which the evidence was produced in this case was slightly unusual, and calls for comment.

32. The Appellant only produced two witnesses, Mr. Andrew Meynell, and Mr. Raymond McCord. The former was in charge of all customs and excise duty

matters in the Norbert Dentressangle group, or at least the UK companies in that group (Norbert Dentressangle having taken over TDG shortly after the events, the subject of this Appeal), and Mr. McCord was the Managing Director of Norbert Dentressangle UK Limited.

33. The evidence of Mr. Meynell and Mr. McCord was not particularly central. Between them they confirmed that, particularly back in 2000, it had been quite common for tractors (i.e. the motor section of lorries) to be un-hitched from their trailers, with a different tractor then being substituted, and it was also quite common for transport assignments to involve elements of sub-contracting. We did not doubt either of these propositions. We could appreciate that tractors might be swapped for any number of reasons. A tractor might break down, or suffer some troublesome defect. The assigned driver of an allocated tractor might be about to exceed his particular mileage restriction under the tachometer rules. Return journeys, presumably vital to the efficient conduct of international haulage business, might both involve the need to swap tractors, or indeed to arrange for part of a journey to be undertaken by a sub-contractor.

34. One piece of information was not given to us during the hearing. We were certainly told that several of the copies of the AADs would be carried in the lorry. It was suggested that they were usually held in the tractor part of the vehicle, though particularly with a sealed trailer, they might be locked in the sealed trailer, or carried in a box attached to the trailer. The point that was not clarified was what was actually meant to happen if an AAD indicated that a load was to be collected by one particular tractor, if following collection, the tractor was swapped and another completed the journey. Was some document meant to record the swap of one tractor for the original one, and was this document then meant to be attached to the original unchanged AAD? We were never told. In the event, this was perhaps not particularly relevant.

35. The only witness actually called to give oral evidence by HMRC was Mr. David Evans. His evidence essentially consisted of confirming a short statement that introduced a notebook that summarised the meeting that he had held in 2000 with Mr. Eaton's father that we will refer to below. He did say that back in 2000 he thought that it was more common for excise goods to be slaughtered (i.e. diverted, without payment of duty, from bonded warehouses, or during transit from one to another) actually in the UK rather than on the continent. This, he suggested, was because rates of duty in the UK were, he believed, generally higher than on the continent. We place no reliance on this evidence because it was not backed up by any actual comparative figures, and the basis on which we reach our decision on the factual issue is in fact dependent principally on other matters.

36. Evidence was not given by Mr. Downer because Mr. Downer had disappeared. We were shown, however, the transcript of a tape-recorded interview conducted in July 2000 by HMRC officers with Mr. Downer, conducted at a police station, following the arrest of Mr. Downer on the suspicion of being involved in the fraudulent evasion of excise tax. We will refer below to a few of the points indicated in that transcript.

37. Mr. Eaton had been required, by Tribunal Directions, to give evidence. The total information provided by Mr. Eaton derived firstly from a transcript of a somewhat similar interview, also conducted in July 2000, and again following Mr. Eaton's arrest. Secondly, Mr. Eaton sent a short e-mail directly to the Tribunal in 2011, making further points to which we will refer shortly. Thirdly, Mr. Eaton gave

oral evidence for the whole afternoon of the first day of the hearing, to which we will again refer below.

Two minor legal issues, relevant to the principal issue of whether the goods left the UK, and whether thus there was a duty point, and a liability for duty, at all

38. Prior to addressing the factual evidence, we will make two comments in relation to the legal issue relevant to the distinction between excise goods being slaughtered in the UK and outside the UK.

39. The reason why the Appellant's Appeal would have been allowed, had the Appellant persuaded us that the goods had, on the balance of probability, been exported in this case is that that fact would have undermined the excise duty point under paragraph 4(2)(a) of the 1992 Regulations. The excise duty point addressed in that sub-paragraph required the goods to have been "delivered for home use", or "otherwise made available for consumption", and "consumption" in that context must mean "home use consumption". This follows from the House of Lords' decision in *Greenalls.* The Appellant contended that the explanation for the elimination of the duty point under paragraph 4(2)(a) when excise goods had been exported was the exception to the duty point under the later head, namely that under paragraph 4(2)(f), available when goods had been exported. This however is only a carve-out from the duty point under the different head of charge, namely paragraph 4(2)(f), and has no bearing on the relevant duty point in this case. The explanation for the absence of liability in a case where liability is asserted under paragraph 4(2)(a), but the goods have been exported, is simply the point stated at the beginning of this paragraph.

40. The other point that we should address relates to the relevant European Directive material in this Appeal. That contained a provision, seemingly not specifically mirrored in UK domestic law, to the effect that if goods had been slaughtered, but it was not known where (i.e. in which country) they were slaughtered, they were then deemed to have been slaughtered in the country from which they were despatched. UK domestic law came close to mirroring that provision in that if HMRC contends that the goods in this case were slaughtered for home use consumption, the duty will be due in the UK unless the warehouse keeper sustains the burden of proof in establishing that they were slaughtered abroad. Hence the burden of proof point effectively achieves the same result as the deeming provision under the Directive where it is not known where the goods were in fact slaughtered. Since however we are required to interpret UK law, where possible, in a manner that is consistent with the Directive, this reinforces the point that it is clearly for the warehouse keeper to demonstrate the export in this case.

The facts and the evidence, without commentary

41. We now turn to the facts.

The facts that led to the enquiries

42. It seems that the two points that drew the attention of HMRC officers to the removal of the four consignments of spirits from the Appellant's warehouse on 3,4,6 and 7 April 2000 was the fact that these consignments were mentioned in an interview that they were having with Mr. Downer in relation to other transactions, and secondly they noted, from the AADs and the receipted AADs the fact that the truck that collected consignments 1 and 3 collected consignment 3 one day before consignment 1 was said to have been received by Iberia. This led to HMRC obtaining the

information from the Spanish authorities that no consignments had been received by Iberia, and the information that the stamps on the receipted AADs were forgeries.

The tape-recorded interview with Mr. Downer

43. This information led HMRC to interview Mr. Downer on 25 July 2000 following his arrest, and as we have indicated, this interview was tape-recorded, and then recorded in a transcript. The interview was not particularly informative, and only the following points need to be recorded. First, Mr. Downer had only set up his trade of import/export in January 2000. It was said to have been a natural extension of an earlier activity of importing Spanish ceramic tiles. Mr. Downer plainly rented some accommodation in Marbella and visited it frequently. When told that HMRC's information from the Spanish authorities was that Iberia had never received the four consignments, he simply asserted that he understood that receipted AADs had been received from Iberia by the Appellant. When told that the Spanish information threw doubt on the existence of Davidson & Perez, the ostensible Spanish purchaser of the relevant spirits, there was some inconclusive discussion as to whether the purchaser was a company or a partnership. Whatever it was, Mr. Downer had not met either of Mr. Davidson or Mr. Perez, but had been introduced to them by a friend. Whatever the status or existence of Davidson & Perez, Mr. Downer said that he had both UK and Spanish bank accounts, and that he had verified that payment for the four consignments had been made to his Spanish account. The bank statements were however in Spain, and appear never to have been requested or produced. Mr. Downer said that he had known Mr. Eaton of JWT for some time. He also said that he thought that he knew that JWT was probably sub-contracting part of the transport of the product to Cadiz but he did not know anything about the identity of the sub-contractor.

The initial meeting with Mr. Eaton's father

44. On the day after that interview, Mr. Evans attempted to meet Mr. Eaton, but in fact met his father, Mr. Eaton being away at the time. We were later told that although it was Mr. Eaton who ran the JWT business and sometimes drove the trucks himself, Mr. Eaton's father did sometimes drive the trucks, and he looked after much of the paperwork. There was a short meeting note of the meeting with Mr. Eaton's father, the very salient points in which were that whilst Mr. Eaton's father could produce the tachograph or tacho records and the daily work sheets for many periods, both the tacho records and the daily work sheets, which demonstrated which vehicles had undertaken which journeys for the week that included the dates 3 to 7 April 2000, were missing. Records for other periods were not missing. Mr. Eaton's father indicated that he had had a bit of a clear-out of tacho records, and volunteered no suggestion as to why the work sheets for the critical period were also missing. Mr. Eaton's father and the HMRC officer attending the interview then went upstairs in Mr. Eaton's house to look for further documents. They did not find any of the missing tacho or work sheet records, but they did find an invoice, and confirmation that MDT had paid £5,640 for the transportation of the four loads.

Keith Wyles' testimony

45. In early July 2000 (in fact a few days before the meetings mentioned in paragraphs 43 and 44 above), HMRC officers had, it appears, contacted a Mr. Keith Wyles, who operated a completely different transport firm. HMRC officers had presumably located Mr. Wyles because he owned or rented the truck with the registration number T93JBD that had collected consignment 2 from the Appellant's

warehouse. Mr. Wyles had provided a witness statement on 18 July 2000 that we were shown. This indicated that JWT had asked Mr. Wyles to transport one load (initially of unknown product) from the Appellant's warehouse to Spain. On collecting the load at the Appellant's warehouse, and whilst waiting for loading to be completed, Mr. Wyles was apparently phoned by Mr. Eaton, and told that there was apparently some delay before the goods could be transported to Spain, and could he therefore take the loaded trailer back to his own Brentwood depot, where it would be collected, rather than transport it to Cadiz. This he did, and another tractor unit picked the trailer up from his yard. He had never been paid for his journey from the Appellant's warehouse back to Brentwood. We will have to refer again to this evidence, but the above summary is all that emerges from the witness statement.

The September 2000 tape-recorded interview with Mr. Eaton

46. On 17 September 2000, HMRC officers interviewed Mr. Eaton, having arrested him, the interview taking place at a police station and being recorded. HMRC produced a transcript of the taped interview that was shown to us.

47. Some of the early exchanges in this interview referred to the missing tacho records and the missing work-sheets. Mr. Eaton said that he would search for them, and had no idea why they were missing. They were, however, never found and produced.

48. When turning to the transportation of the four consignments, Mr. Eaton initially said that he transported them to Cadiz, but soon corrected himself and explained that he dropped them off in Calais, and that thereafter the transport role was sub-contracted to someone called Stevie Ellis. Stevie Ellis was apparently English but he worked entirely on the continent, principally out of Zeebrugge. It seemed that Stevie Ellis owed Mr. Downer and JWT about £5,000, £4,200 of that being referable to an engine and gearbox that JWT had provided to Stevie Ellis. In order to eliminate or at least reduce this debt, Stevie Ellis was to pick up all four loads from Calais and transport them down to Cadiz.

49. Mr. Eaton was then told in the interview that of the three tractor units, whose registration numbers had been given on the AADs, none had been recorded as leaving the UK in the time-scale required to effect the journeys. It will be recalled that consignments 1 and 3 were both said on the AADs to have been collected by the tractor with the registration number S553UUG, which is why only 3 trucks were involved with the four vehicle movements. In response to being told that none of these tractor units had been recorded as leaving the UK in the required time-scale, Mr. Eaton said "Try trailer numbers". This is of possible significance and we will refer to it later. It is right that trailers also have unique numbers, but they are not recorded on the AADs and it was never revealed whether whatever system operated in 2000 for recording the identity of vehicle departures from and arrivals into the UK ever recorded trailer numbers as well as the registration plates of the tractors. The tractor's registration plates were obviously attached to any trailer currently being hauled by that tractor. The further significant point is that Mr. Eaton made no other comment in relation to the revelation by HMRC officers that they had ascertained that none of the three tractors had crossed the channel.

50. We should record three other matters that emerged from this September 2000 interview. First, Mr. Eaton indicated that he would seek to obtain documentary proof that JWT had taken the four consignments as far as Calais. In the event nothing was produced. No evidence from whoever drove the different trucks that

were claimed to have crossed the channel was produced. No documentation was available in respect of the cost of channel crossings. No documents referred to the sub-contract arrangements with Stevie Ellis. The second point mentioned in the interview is that Mr. Eaton said that so far as he was aware Mr. Downer did not know that JWT would be sub-contracting the transport from Calais to Stevie Ellis. He may have known that sub-contracting would be involved, but would not have been aware of the identity of the sub-contractor.

51. The third thing that we should record in fairness is that the tenor of the interview transcript does seem to indicate that Mr. Eaton appreciated that he was in trouble, and he was seemingly indignant that he had not really been at fault, and that he was being blamed for the misdeeds of others. The tenor of the interview is perhaps fairly recorded by quoting an exchange towards the end, in which reference was made to Mr. Eaton's aim (admittedly as it turned out, unsuccessful aim) of finding the missing documents or other helpful information. The relevant passage is as follows:

> *"Eaton: Erm, oh well going back, and I mean I have a heap.*
> *HMRC: Yeah, Yeah.*
> *Eaton: Like that, and I will dig through them.*
> *HMRC: Good*
> *Eaton: To try and, I mean I've got to do something myself.*
> *HMRC: Yeah.*
> *Eaton: Cos like you've point out to me, I'm bang in shit.*
> *HMRC: Yeah*
> *Eaton: Er basically I could do without it. So I shall go back and I will try and find, and then when my father returns I shall ask him, and we will try and sort, try and find some sort of …..*
> *HMRC: Yeah*
> *Eaton: evidence that goes my way*
> *HMRC: Obviously you've gotta identify the vehicles that took these loads over to Calais. Get the tachos for them which will show the mileage.*
> *Eaton: Yeah*
> *HMRC: And then try to somehow get something from Steve Ellis to confirm that he's taken the goods to Cadiz."*

The delay

52. As we have already indicated, no documentation of any sort was produced. A very long delay then followed because it became clear that the legal liability of the Appellant for the duty would fall away if the right interpretation of paragraph 4(2)(a) of the 1992 Regulations was that the warehouse keeper was only responsible for the duty if the warehouse keeper actually released the goods, at the warehouse, for domestic consumption. This issue was being litigated in the *Greenalls* case, in which HMRC lost at the Court of Appeal, but won in the House of Lords, and this is largely why there has been such a delay in this present Appeal coming on for hearing.

Mr. Eaton's e-mail of 11 September 2011 to the Tribunal

53. Since it was doubtless anticipated that this Appeal would be heard in late 2011, Mr. Eaton sent an e-mail to the Tribunal, the purpose of which was to advance his explanation as to why the tractor numbers inserted onto the four AADs had been of vehicles that had not crossed the channel in the required time-frame. We should mention that the expression "shunt vehicles" used in the following extract was the

term that described a tractor or motor section of an articulated truck used to shift the trailer for short journeys. This did not mean that the tractor itself was any different from one that would effect international journeys. It simply described the use of the tractor for a short journey. The most relevant paragraphs (slightly edited by us) in the e-mail were as follows:

> *"The documents regarding the trailers that were used had the wrong trailer numbers on them. The shunt vehicle registrations were correct.*
>
> *The trailers were loaded at TDG Ltd and taken back to my yard. The drivers who were to take them to Calais came into the yard with loads collected in Europe for delivery in England. These trailers were dropped in my yard and the trailers for Calais were picked up by these drivers, now with different tractor unit numbers.*
>
> *When these trailers reached Calais the drivers would drop the trailers and collect others which had been loaded out of Holland to take back to England. The trailers loaded with the spirit now in Calais would be collected by Steve Ellis Transport from Zeebrugge and delivered to Cadiz. It is normal practice for drivers to exchange trailers for delivery especially European deliveries. When these 4 trailers were shipped out of England they had the correct trailer numbers and not the numbers that TDG had put on the paperwork.*
>
> *As far as I am aware these trailers were safely delivered to the bonded warehouse in Cadiz. My part of the operation was just to deliver trailers to Calais from where they were delivered to the bonded warehouse in Cadiz by Steve Ellis' drivers."*

Mr. Eaton's evidence during the hearing

54. Having been called, by Directions of the Tribunal, to give evidence before us, Mr. Eaton gave oral evidence for virtually the whole of the afternoon of the first day of the hearing.

55. Considerable attention was given to the claim that the explanation for the fact that the four tractor units (identified on the AADs) had not been recorded as departing from the UK in the required time-scale was that the trailers had been detached in all four cases and the loads had been transported from Dover to Calais by different tractors. Three of the trailers had then been unhitched again and taken to Cadiz by Stevie Ellis, and the fourth had in fact been collected in the UK by Stevie Ellis.

56. The claimed facts in relation to consignments 1,3 and 4 were broadly the same. They were that while the loads had been collected from the Appellant's warehouse by trucks S553UUG, S553UUG and L324HKM respectively, all three had returned to JWT's yard, where the trailers had been unhitched and attached to different tractors (all owned or available for use by JWT) and taken to Calais. In Calais, the trailers had been unhitched again, and transported from Calais to Cadiz by Stevie Ellis.

57. The claim in relation to consignment 2 was more significant. As mentioned above, this consignment was collected from the Appellant's warehouse by Keith Wyles' truck, registration number T93JBD. While Keith Wyles had said in his contemporary witness statement that he had been phoned by Mr. Eaton while at the Appellant's warehouse, been told that there was to be a delay in shipment to Cadiz and that he should take the trailer to his own Brentwood yard, where it would be

collected, Mr. Eaton claimed that the reason there was a trailer switch at the Brentwood yard was that Keith Wyles had told Mr. Eaton that he could not transport the load to Cadiz because he did not have an available driver. Whatever the reason for Keith Wyles' consignment being switched at the Brentwood yard, the outcome was, according to Mr. Eaton's evidence before us, that Stevie Ellis had one truck in the UK and that that truck picked up the consignment at Keith Wyles's yard, took it across the channel and down to Cadiz.

58. We were shown the departure and arrival records at the port of Dover or Eurotunnel of the tractors L324HKM, T93JBD and another of JWT's trucks (not designated actually to collect loads on the AADs), and whilst there were records of JWT's trucks leaving Dover (and no record of Keith Wyles's truck leaving the UK at a remotely relevant time), the times recorded for departures by JWT's trucks indicated that their departures did not tally with the required dates for further swaps at Calais, and arrivals in Cadiz by 10 and 11 April. In any event the trucks were going to Zeebrugge and not Calais. Mr. Eaton had not been entirely clear of the registration plates of other tractors that he had had available at the time, and in any event with the elapse of 13 years there were no other records of departures and arrivals of different tractors from and to the UK (since none had been identified in the intervening 13 years) to enable anyone to check whether other tractors had indeed transported the consignments (1,3 and 4 in other words) from JWT's base in the UK to Calais.

59. Mr. Eaton expanded on the claims in relation to Stevie Ellis. None of the figures were precise but it was claimed that Stevie Ellis owed JWT approximately £5,000, £4,200 of this being referable to the fact that JWT had provided an engine and gearbox to Stevie Ellis. Stevie Ellis then undertook to take the four loads to Cadiz, in reduction of this debt. It seems that JWT still paid Stevie Ellis about £1,200, notwithstanding that the transport of the four consignments to Cadiz was still going to leave some balance of the original debt outstanding. The payment of the £1,200 was explained by the suggestion that this was to enable Stevie Ellis to buy diesel, because otherwise it would have been impossible to undertake the trips to Cadiz. No mention of the £1,200 payment had been made before the hearing, and obviously therefore it had not been referred to in the September 2000 interview.

60. Other evidence barely advanced our understanding of the original events to any significant extent. Mr. Eaton confirmed that no records of any sort had been found. In other words there was no further information about the drivers who took the tractors across the channel; no invoices for channel crossings; and certainly no production of the missing tacho records or the missing vehicle movement records for the critical week. No evidence was given of payments into or out of bank accounts, so that it was impossible to confirm that JWT had received the £5,640 allegedly paid to JWT by MDT, or any other payments in relation to the relevant journeys. Keth Wyles had of course said that he had not been paid for his small contribution to the transport of consignment 2, but no records were produced to confirm the payment of £1,200 to Stevie Ellis or the costs of moving the goods to Calais. Mr. Eaton suggested rather vaguely that his father was capable of muddling things and that this perhaps accounted for why the records were missing.

Our decision as to whether the Appellant has demonstrated, on the balance of probability, that the consignments were transported out of the UK by JWT such that any release of the goods would not have been for "home market" consumption

61. We start with the observation that if we are meant to interpret UK law to conform to the European notion that if it is unclear where the diversion took place, it

is then deemed to have taken place at the point of despatch, then we would immediately conclude that the diversion in this case should be governed by that deeming notion. HMRC claimed in their Skeleton Argument that *"the evidence that exists in support of the Appellant's claim that the goods were exported to Calais is risible"*. We are inclined to agree with that claim, but if the simpler question must be answered as to whether it is known where the goods were diverted, the answer is plainly that it is not known where they were diverted.

62. Reverting to the UK domestic law, there was no serious dispute in relation to the required burden, and standard, of proof in this case. It is for the Appellant to demonstrate, on the balance of probability, that the goods were exported. We conclude that the Appellant has failed to do that. The Appellant itself had no idea what had happened to the goods following despatch from its warehouse. Accordingly everything hinges on the evidence given by Mr. Eaton. We consider that all other evidence is virtually irrelevant.

63. We both agreed that, ignoring the content of what he said and the glaring oddities of some of the claims, we would not have found Mr. Eaton to be a dishonest or untrustworthy witness. Having lost one lorry, seized by HMRC, and facing assessments for the duty and tax (albeit that HMRC's direct claims for the duty and tax from JWT would appear to fall away if the full duty and tax was recovered from the present Appellant) Mr. Eaton gave every indication of being frustrated, and considering himself to have been hounded for some misdeeds of others.

64. Having said that, when we bear in mind the burden of proof and the lack of any documentary or other confirmatory evidence of a chain of events that seems to be riddled with doubts, we conclude that the Appellant has failed to establish that the goods were exported.

65. We now list, in approximate descending order of significance the various factors that lead us to doubt the claim that the goods were exported, and that any diversion occurred outside the UK:

- It is highly suspicious, and certainly a serious obstacle to the Appellant sustaining its claim, that the tacho records and journey logs for the critical week in which all four movements of goods took place, had been destroyed or lost. It is not as if countless records had been thrown away, or as if it was entirely normal practice for records not to be retained. It very much appeared that the two sets of relevant records for the short, and fairly recent, period in question had deliberately been destroyed, and no explanation for this was ever provided either by Mr. Eaton's father or Mr. Eaton.
- It is very curious that when, in the September 2000 interview, Mr. Eaton was faced with the information that none of the three tractor vehicles identified on the four AADs had left Dover or the UK in the relevant period, Mr. Eaton did not immediately provide the explanation that there had been trailer swaps at his yard and one at Brentford, followed of course by further trailer swaps in Calais. It was not until 2011, and Mr. Eaton's e-mail to the Tribunal, 11 years later, that this claim was advanced. We accept that an interview in a police station, following his arrest, might have been a somewhat daunting experience, and this might have accounted for some confusion during the tape-recorded interview. Mr. Eaton must, however, have known that HMRC had been suspicious about the loss of the records, which his father would have been bound to mention to him, and he had ample time in which to recall all the events, had they been true. We accept that the pure mechanical

feature of unhitching one tractor unit from its trailer, and attaching another might be quite a simple exercise. However, the administration required in deciding which tractors will be used at which stage, when the present claim is that tractors were switched both in the UK and at Calais, must have been quite considerable. One would need to know which tractors were available, whether particular drivers were approaching their permitted hours in relation to the tachograph regulations, and which tractors could convey the various loads brought back from Europe (mentioned in the second paragraph quoted in paragraph 53 above) to their various UK destinations . It seems extraordinary that Mr. Eaton would not have remembered some of this information, utterly vital as it was to the explanation of why the tractors mentioned on the AADs had not left the UK, when asked the crucial questions in September 2000, and damaging that this claim was only advanced in 2011.

We accept that, in the September 2011 interview, when asked why the relevant tractors, identified on the AADs, had been found not to have left the UK in the required time-frame, Mr. Eaton did at one point respond "Try trailer numbers". That might have indicated that Mr. Eaton thought that the trailer numbers would have remained constant, whilst the tractor numbers would obviously have changed because of swaps. When, however, it was not the practice to record the trailer numbers on the AADs, or it seems to record them on departures and arrivals from and to the UK, and when Mr. Eaton nevertheless failed altogether to mention a word about trailer swaps, we can attach little significance to his reply that HMRC might like to check trailer numbers.

- The evidence given by Keith Wyles and Mr. Eaton as to why Keith Wyles was asked to take the third consignment from the Appellant's warehouse to the Brentwood depot, and no longer to take it to Cadiz, is very suspicious. The former claimed that he had been phoned at the Appellant's yard, and told that plans had changed; Mr. Eaton suggested that the occasion for the change of plan was Keith Wyles's inability to find a driver. Keith Wyles' evidence was given very shortly after the event, and seems credible. We certainly know of no reason why Keith Wyles should fabricate evidence when, to all appearances, his role in the events was very far from central. His explanation also fits in with the possibility that somebody was planning some diversion. We are inclined therefore to accept Keith Wyles's version of events, which suggests that Mr. Eaton was either confused or lying.
- Quite apart from the enormous delay in Mr. Eaton advancing the claim about the UK trailer swaps, it does seem curious that all four loads collected at the Appellant's warehouse were said to be collected by shunt vehicles which would very shortly afterwards be replaced by other trailers. Furthermore, with the exception of Stevie Evans tractor that had allegedly collected consignment 2, the replacement trailers were only to go as far as Calais anyway. We were told by the Appellant's two witnesses that trailer swaps were not unusual, though HMRC claimed that they were unusual. Whatever the facts, it does seem decidedly curious that in relation to these critical consignments, all four consignments were the subject of trailer swaps, three of them on two occasions, and particularly odd when all the journeys were short journeys, save for the transport from Calais to Cadiz.
- Aside from the destruction or loss of the tacho and vehicle route logs, the total absence of any documentation for Mr. Eaton's claimed chain of events is surprising, and it certainly lessens the chance of anyone establishing that on the balance of probability the claimed events did occur.

- No evidence was given to confirm even the existence of Stevie Ellis. He sounded, on the one hand, to be a single driver, struggling to replace an engine and gearbox in a lorry, and being unable to take the loads to Cadiz without receiving some cash to buy diesel. On the other hand, it is inconceivable that the claimed journeys to Cadiz could have been undertaken unless Stevie Ellis had at least three available tractor units, probably four, and one ready in the UK to pick up Keith Wyles's consignment. Had Stevie Ellis been the required somewhat more substantial outfit, it would have appeared somewhat easier to have confirmed the truth of his claimed role.
- It was only in oral evidence that mention was made of paying Stevie Ellis £1,200 for diesel, and as with all other presumed payments and receipts, no documentation confirmed any of the claims.
- We attach relatively little importance to HMRC's claim, which was not backed up by any facts and figures, that back in 2000, diversions of excise goods and spirits were more likely to occur in the UK than on the continent. Were this evidence correct, and were the diversion to have occurred in the UK in this case, then Stevie Ellis may not have existed at all, and at least he may have had none of the claimed involvement. Significantly there was actually no confirmation of any sort that Stevie Ellis, or indeed a modest size transport business operated by the Englishman, Stevie Ellis, out of Zeeburgge, did exist.
- Whilst again we attach little importance to this point, HMRC did point out that Mr. Eaton had said in the original interview that he had only three tractor vehicles, and he mentioned that they were driven by himself, his father and one named driver. In fact he admitted in his oral evidence that he had five vehicles and other drivers were mentioned. The explanation for the change of story was that he feared that HMRC, who had already seized one vehicle, would seize others, and so he understated the number of vehicles that he operated in the 2000 interview. This had no particular bearing on the claimed chain of events, and is of little significance, but HMRC asserted that it was further support for the proposition that we should view Mr. Eaton's evidence with considerable caution.

66. Our conclusion, on the evidence, is that Mr. Eaton's story is sufficiently curious for us to require at least some documentary or other evidence to support it before we can accept it. There is absolutely no such evidence or corroboration. We conclude that the Appellant has failed to demonstrate that the claimed chain of events occurred, and that it has not been demonstrated that the goods were moved to Calais, with any diversion then occurring outside the UK.

The Appellant's closing submissions

67. We must refer to the main point raised in the Appellant's closing submissions. In the event, it has no bearing on our conclusion, just given, but we should nevertheless refer to it.

68. The point in question was prompted by some remarks that we had made. We had indicated that Mr. Eaton had not struck us as dishonest, but that there was a reason why we found it difficult to accept all of his evidence. Aside from all of the doubtful point referred to in paragraph 65 above, we raised the following dilemma with the Appellant's counsel. We tentatively suggested that:

- Mr. Downer appeared to have been implicated in the diversion, wherever it occurred, because although no duty had been paid either in the UK or in Spain,

MDT had nevertheless been paid in full, according to his interview replies, for the sale of the spirits.

- If Mr. Downer was in some way involved with the fraud, and Mr. Eaton claimed that the transport beyond Calais had been undertaken by Stevie Ellis, we failed to understand how Mr. Downer could have engineered a diversion beyond Calais if both Mr. Downer's and Mr. Eaton's evidence was that Mr. Downer was unaware of who was dealing with the transport beyond Calais.

69. Since these points seemed to make it improbable that Mr. Downer could have engineered a diversion after the point at which the goods were carried by some party, allegedly unknown to him, we suggested that this pointed to the fraud more likely being perpetrated in the UK, and this threw further doubt on Mr. Eaton's evidence.

70. The Appellant's representative's initial response to this dilemma was irrelevant, but the response in the closing submissions was not so easily dismissed. It was suggested that even if Mr. Downer had been oblivious to the role of Stevie Ellis, the diversion might have occurred in Cadiz, with either Iberia or one of the employees at the Cadiz warehouse being involved in the fraud. It was suggested that Mr. Downer could have engineered the fraud at that point, without having to know anything about the transport from Calais to Cadiz, and without thus throwing Mr. Eaton's claims into doubt. The Appellant's representative then reminded us that Mr. Downer regularly visited some rented accommodation in Marbella, and that in HMRC's initial e-mail to the Spanish authorities, reference had been made to the fact that *"The bond at (A) above* (in other words the Cadiz warehouse operated by Iberia) *I believe is known as it was involved in a recent operation run by Belfast and the group at (B)* (another bonded warehouse in Madrid, in no way involved with the present Appeal) *was well used by UK diverters a couple of years ago."* Nobody explained the significance of the words just quoted, but they did appear to suggest that HMRC had been familiar with the two warehouses referred to, and it sounded as if they had been involved in some capacity (whether honestly or dishonestly we do not know) with earlier activities that HMRC had had to investigate.

71. The suggestion was accordingly made that the diversion may have occurred in Spain, and may have been arranged between Mr. Downer, the regular visitor to Marbella, and someone in the Cadiz warehouse. It was of course pure speculation as to whether the fraud might have consisted of some employee simply issuing receipted AADs fraudulently when the goods had never left the UK, or whether the fraud had involved genuine receipts of the goods into the warehouse, followed by the goods leaving through the back door, without payment of Spanish duty.

72. While we consider it appropriate to reflect these points, raised by the Appellant's representative, we confirm regrettably that the speculation that we had raised, mentioned at paragraph 68 above, had proved to be a blind alley, and that the suggestion that some fraud might have taken place in Cadiz does not lead us to doubt the conclusion given in paragraph 66 above. We cannot absolutely rule out the suggestion that the goods might have reached Cadiz, and the fraud might conceivably have been of the fraudulent evasion of Spanish duty. This, however, is all pure speculation. The question for us remains whether the Appellant has satisfied the burden of proof in demonstrating that the goods left the UK, and for all the reasons given in paragraph 65 above, we remain of the view that Mr. Eaton's evidence does not enable the Appellant to satisfy that burden, and we confirm our decision that the Appellant's appeal on the factual point is dismissed. The possibility that someone in the Cadiz warehouse may have been implicated in the fraud (which could still have

occurred either in the UK or from the Cadiz warehouse) is pure speculation and we cannot base any conclusion on it.

The secondary legal arguments

73. We will now give our decision in relation to each of the legal points advanced by the Appellant.

The wrong reason for the assessment

74. There is no doubt that HMRC identified the wrong excise duty point when making their assessment on the Appellant on 18 October 2000. The excise duty point under paragraph 4 of the 1992 Regulations is the first to occur of the various possible duty points addressed by that paragraph, and HMRC clearly considered that there had been an excise duty point under paragraph 4(8). As already explained there had not been, because no notice had been issued, and the duty point only arose under that sub-paragraph on the failure of the warehouse keeper to provide the certificate required by the notice.

75. We have found the question of whether the fact that the reason initially believed to justify the assessment was plainly wrong undermined the assessment, a difficult question.

76. As we indicated in paragraph 16 above, HMRC may assess the duty if it appeared to the Commissioners that any person is a person from whom any amount has become due in respect of any duty of exercise. The reasons why we consider that the plain error did not invalidate the assessment are as follows:

- There was no obligation on HMRC, in making the assessment, to indicate which duty point was considered to occasion the liability to duty. Accordingly it would be odd for the assessment to be undermined if a reason was volunteered even if that reason proved to be wrong, and the assessment was later justified (and plainly justified) on another ground.
- There was no reference in section 12 Finance Act 1994 to the Commissioners having to be satisfied that duty was owed under any particular duty point. Certainly in this case, on the actual relevant wording, it did appear to the Commissioners that a person had a liability to duty, and while the initial reason for that belief proved wrong, there was no error in the belief that duty was owed. Indeed it was owed.
- When HMRC raise an assessment under section 12, it does not necessarily follow that duty is definitely owed, or that the assessment is bound to be confirmed, should there be an appeal. It is possible that if the warehouse keeper appeals and establishes that HMRC were wrong in their belief that duty was owed, the result is that the Appeal will be allowed and the liability for duty extinguished. The result is not that the assessment itself would have been invalid: it is simply that the warehouse keeper has later won its appeal and shown that duty was not owed by it. Since the assessment could still have been properly made, provided it appeared to the Commissioners that duty was owed, notwithstanding that they would later have been shown to have been wrong, it would be decidedly odd in this case for the assessment to have been invalid when the Commissioners belief that duty was owed will eventually have been shown to be correct.

77. We accordingly confirm that the original assessment was valid, and that it is confirmed by reference to the later identified, and correctly identified, duty point.

The "joint and several" point

78. The complaint about the alleged failure to assess Mr. Downer is without justification.

79. We firstly accept HMRC's claim that assessments were made, two days after the assessment on the Appellant, on both MDT and JWT. If HMRC are unable to pursue the assessment against Mr. Downer because he has disappeared, this cannot undermine the other assessments. As regards Mr. Eaton and JWT, no claim was made that he had not been assessed and, as we have said, we understand that an appeal by Mr. Eaton and JWT is stood behind this appeal. We imagine that that appeal will not proceed, unless our decision in this Appeal to confirm both the liability for the duty and the VAT is overturned on appeal, because HMRC can obviously not recover the duty twice.

80. We assume that if the Appellant wishes to counter-claim against Mr. Eaton and JWT so that the liability for the duty is borne by both parties, or arguably borne entirely by JWT, it will be for the Appellant to rely on whatever contractual right it may have against JWT, establishing thereby a right to recover the duty paid by the Appellant. If the Appellant considers such an action pointless, or if the Appellant only had a contract with its direct customer, namely MDD, and no obvious right of action against JWT, none of these factors will undermine the liability on the part of the Appellant for the duty.

The failure to serve the notice, relevant to the duty point under paragraph 4(8) of the 1992 Regulations

81. This point was based on a misapprehension that HMRC had some duty to issue the notice. It had no such liability. Quite apart from the fact that the *Lensing* case addressed a somewhat different point, the basis of that decision was that there had been a liability on the authority to indicate that a response had to be made within a particular period and the authority had failed to so indicate.

82. As regards the point that the absence of the notice meant that the Appellant was oblivious to the fact that it needed to obtain all evidence to indicate that there had been no diversion of the goods within the UK, this was obviously incorrect from the moment the assessment was served on the Appellant.

83. We should mention that there were other complaints by the Appellant that HMRC had rejected certain arguments advanced on behalf of the Appellant and not been cooperative in seeking information requested by the Appellant. We are unable to comment on these complaints, save to say that they do not undermine the assessment.

The VAT points

84. The first of the Appellant's points, namely that there was no liability for VAT because the goods had been exported, is rejected because of the absence of evidence that the goods had been exported.

85. The point raised in paragraph 26 above is incorrect because the liability for VAT falls on the Appellant not because it, itself, made a domestic supply of the goods in the UK because obviously it did not. The liability is one imposed on the warehouse keeper by statute where duty suspended goods have been slaughtered in the UK. Just as the warehouse keeper is effectively the guarantor of the duty, so it is similarly liable for the VAT, regardless of the fact that it did not supply the goods to anybody, either within or for export outside the UK.

86. The point about input tax, recorded in paragraph 27 above, is incorrect because duty suspended goods would not have attracted VAT on their supply to MDT, and there was certainly no evidence or invoice, reflecting such input tax.

87. We have failed to understand the contention referred to in paragraph 28 above. The liability for VAT in this case has nothing to do with goods being imported. It simply imposes the duty on the Appellant, effectively as guarantor, just as the liability for duty is imposed on the warehouse keeper, and the VAT in question mirrors the fact that if the correct duty and VAT had actually been paid in respect of a legal withdrawal of the goods from their duty-suspended state, then duty and VAT (without an input deduction) would have been properly chargeable. That is the result that is mirrored by the legislation in the case of an improper diversion of the goods to the home market.

Overall conclusion in relation to the secondary legal points

88. The conclusion in relation to all the legal points that we have now considered is that all the Appellant's contentions were wrong, and the liability for duty and VAT is confirmed. This Appeal is accordingly dismissed.

Costs

89. HMRC made no request for costs in the event of their prevailing in this Appeal and so no order is made.

Right of Appeal

90. 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.

HOWARD M. NOWLAN

TRIBUNALJUDGE

RELEASED: 10 October 2013