



TC01821

Appeal number: LON/2009/562-3

ZERO-RATING – Exports – Pharmaceutical goods exported to Nigeria and Ghana – Evidence of export – VAT Directive 2006/112/EC Art 131, 146 – VAT Act 1994 s.30 – VAT Regs 1995 reg 129 – Notice 703 – Appeal allowed in part

INPUT TAX – Payment of invoices – Whether paid within 6 months – VAT Act 1994 s.26A – VAT Regs 1995 reg 170, 173J – Appeal allowed in part

FIRST-TIER TRIBUNAL

TAX

ARKELEY LTD (IN LIQUIDATION)

Appellant

- and -

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

Respondents

**TRIBUNAL: JUDGE THEODORE WALLACE
MRS RUTH WATTS-DAVIES, MHCIMA, FCIPD**

Sitting in public in London on 15-17 November 2010 and 30 November and 1-2 December 2011

Laurence Onwufuju, former director, for the Appellant

Sarabjit Singh, instructed by the Solicitor for HM Revenue and Customs, for the Respondents

DECISION

1. This is a consolidated appeal concerning pharmaceutical goods which the Appellant treated as exported in its monthly returns for period 01/07. Customs did not accept the evidence of export for the supplies shown on seven invoices, refusing a repayment claim and making an assessment to output tax. An assessment notified on 21 March 2007 (C 180 in Customs' bundle) for period 01/07 against which the Appellant appealed was withdrawn on 5 February 2009 (174) and the Appellant was informed that a new assessment would be notified for period 04/07 for £74,419.02 being 7/47ths of the £499,670.57 on the disallowed exports. The assessment was for 04/07 because of the three month time limit to provide evidence of export.

2. The appeal LON/2009/562 was against the decision in the letter of 5 February 2009. The new assessment was not included in the appeal bundle. A further ruling in the letter of 5 February 2009 concerning credit notes is not now in dispute.

3. In relation to period 03/07 Customs refused zero-rating on two invoices, 214 and 215, and disallowed the input tax on invoices from LogiChem Ltd and Primorose Pharma Ltd ("Primorose") on the grounds that the consideration was not paid within 6 months, although subsequently accepting that part of the Primorose invoice was paid. That decision was in a letter dated 3 January 2009 assessing £10,142.32 for 06/07 on disallowed export invoices and £22,027.64 and £14,964.02 for 09/07 (C30) in respect of the disallowed input tax on the LogiChem and Primorose invoices. This appeal was LON/2009/563 prior to consolidation.

4. There are therefore two distinct issues. The first is whether the supplies on the disallowed export invoices should be zero-rated. Although section 30(6) of the VAT Act 1994 is expressed in terms of Customs being satisfied that the goods have been exported and other conditions being fulfilled, Mr Singh accepted that on appeal the Tribunal has a full appellate jurisdiction.

5. The second issue is whether the consideration on the invoices issued by LogiChem and Primorose was unpaid at the end of six months from the date of supply or the date on which it became due, see section 26A of the 1994 Act.

6. The evidence was confused. A 42 page witness statement (C277-318) was made by the officer who notified the decisions, Mrs Michelle Hall, on 2 November 2010 less than two weeks before the initial appeal hearing with 522 pages of exhibits. That statement also covered a different appeal (LON/08/1575) which was to be heard after the consolidated appeals. Further witness statements dated 2 December 2010 with 28 pages of exhibits and dated 6 October 2011 from Mrs Hall were produced.

7. Mr Onwufuju produced his own bundles for each of the consolidated appeals. Customs produced a bundle which also covered LON/08/1575, an appeal which was not consolidated and was listed to be heard after this appeal. Much of the material in the bundles was duplicated but not all; each bundle contained material not in the other party's bundle.

8. Mr Onwufuju, who is not a lawyer, opened the Appellant's case. During Mr Onwufuju's opening submissions, Mr Singh said that, although under paragraph 3.5 of Notice 703 which has the force of law the time for limit obtaining evidence of export is limited to 3 months from the time of supply, apart from the SADs stamped
5 in France, Customs were not disputing on the basis of that time limit the material which was held by Customs when the decision of 5 February 2009 was made; Customs were however relying on the time limit in relation to further material produced by the Appellant in March 2009 and August 2010.

10 9. Mr Singh resisted a suggestion by the Tribunal that Mrs Hall should give her evidence first. Instead Mr Onwufuju confirmed two witness statements and was cross-examined for two days. Mrs Hall was being cross-examined when the appeal was adjourned at the end of the three days for which it was initially listed.

15 10. On resumption, Mr Reza was interposed and pursuant to a direction Mr Singh opened the case for Customs covering the documents before Mrs Hall's cross-examination was continued and Mr Kent gave evidence.

20 11. The witnesses for the Appellant were Mr Onwufuju and Hamid Reza; both were cross-examined. Mrs Michelle Hall and Chris Kent gave evidence for Customs and were cross-examined.

25 12. The documents relating to the various invoices are set out in the following paragraphs.

30 13. Invoice 175 (C262) dated 15 January 2007 issued to Koyejo Idowu, Lagos, was for 70 Prostag 3 Inj 11.25 mg and 1200 Zoton FS 30 mg 28 tablets at a combined cost of £40,135.50. A Certificate of Shipment (C263) by Reliance Freight gave the invoice number, the customer as Koyejo/Yinka Idowu and certified that the goods had
35 been exported on 15 January from Heathrow to Lagos under Master Air Waybill ("MAWB") No.208 LHR 40071452. An MAWB (C 264) of that number issued by Bellview Airlines, Lagos, and certified by its UK agent, Afritrade Europe Ltd ("Afritrade"), showed the flight as being on 26 January from Heathrow; goods consigned to Jimfag Nigeria Co Ltd ("Jimfag") were shown as 47 pieces weighing
40 1977 kgs described as personal effects, the shipper being Reliance Freight. These documents were held by Mrs Hall when making her decision on 5 February 2009. The remaining documents in this paragraph were produced later. An undated Certificate of Shipment by Reliance Freight (C 267) showed goods shipped from Vatry in France on 26 January under Air Waybill No.757-56009940, the weight being
45 25.2kgs, Reliance Freight's reference number RFS/6296, the carrier as Avient Aviation, the supplier as the Appellant and the receiving agent as Jimfag. An Air Cargo Manifest (C 268-9) by Reliance Freight under the same reference number showed 2 pieces weighing 32 kgs on MAWB No.757-56009940, the total weight on the manifest being 1454 kgs, and shipping on 12 March, the consignee being Yinka Idowu % Jimfag. An MAWB (C 270) issued by Afritrade in London as issuing carrier accorded with the above manifest, showing departure from Vatry on 12 March. A Simplified Administrative Document ("SAD") (271) showed 25 packages of

personal effects as declared by Afritrade on Dover on 10 March and a reference number “Reliance 9940”, the destination being “NG” which we interpret as Nigeria; it carried a French customs stamp dated 29 August 2007.

- 5 14. Invoice 176 (C293) dated 17 January 2007 to Ajibola Akporero, Benin City, Nigeria, was for 2040 Inexium 40 mg and 500 Bandalet Onetouch Ultra BT 100 for £63,063. There was a Certificate of Shipment (C 294) by Reliance Freight showing loading at Heathrow, MAWB No. 208 LHR 40071452. A further Certificate of Shipment (C 297) with the same MAWB number showed shipping on 26 January
10 from Heathrow; a Certificate of Shipment (C 200) originally printed as C 297 showed the Reliance Freight reference number as changed by hand from RFS/6212 to 6228 which corresponded to a manifest for invoice 177. Another Certificate of Shipment by Reliance Freight (C 299) was also originally printed as C 297 but with the MAWB number changed in manuscript to 208 LHR 40071334 and the date changed to 19
15 January; this was stamped as checked by Reliance Freight on 27 July 2010. An MAWB (C 300) with the latter number was certified by Afritrade on 19 January giving the goods as “Urgent courier materials books, computer supplies machine spares, copiers.”
- 20 15. Invoice 177 was for 9999 Cozaar 50 mg tablets x 28 sold to Phil Hallmark, Lagos, for £160,283.97 and dated 26 January 2007 (C 313). A Certificate of Shipment by Reliant Freight (C 314) gave the invoice number and customer’s name, loading at Heathrow for Lagos, MAWB No. 757-56008676 and the date as 26 January. An MAWB (C 315) with that number certified by Afritrade on 9 February
25 showed 26 pieces of electronics weighing 500 kgs as being freighted from Vatry to Lagos on 12 February. The manifest for that flight (SMJ 8066) covered by that MAWB listed 9999 Cozaar 50 mg tablets x 28 for Phil Hallmark. An SAD (C 316) with reference number Reliance 8676 for 26 packages of personal effects shows declaration by Afritrade at Dover on 9 February; Mrs Hall stated that this was
30 provided to her in March 2007 however it could not have then carried a French Customs stamp. Another Certificate of Shipment (C 320) by Reliance Freight showed shipment by Avient Aviation from Vatry with the same MAWB number on 26 January with the date altered in manuscript to 12 February.
- 35 16. Invoice 178 was for 2200 Inexium 40 mg sold to Kunle Adeyemi, Abuja, Nigeria, for £52,206 and dated 30 January 2007 (C 343). A Certificate of Shipment by Reliance Freight carrying reference RFS/6233 (C344) stated that the goods covered by invoice 178 were exported to Kunle Adeyemi, from Heathrow to Lagos on MAWB No. 208 LHR 40071452 and a date of 17 January 2007. An MAWB issued
40 on 26 January with that number (C345) was the same as that initially produced for invoices 175 and 176 respectively (C264). An Air Cargo Manifest (C 348) showed 2200 Inexium 40 mg weighing 45.88 kgs and other electronic goods as consigned to Kunle Adeyemi being shipped to Lagos on 12 February under MAWB No.757-56008676. An MAWB No.757-56008676 (C356) issued on 9 February was for flight
45 SMJ 8066 on 12 February from Vatry. Other documents confirmed receipt in Lagos on 13 February.

17. Invoice 182 (C 303) was dated 22 January 2007, the customer was Teko Informa, 30 Onwufuju Street, Isolo, Lagos, and the goods were 90 Salamol Easibreathe and 500 Bendro Fluazide Tabs (Sov) for a total amount of £1,682.60. The MAWB provided to Mrs Hall (C304) in March 2007 was the same as that
5 provided for invoices 175, 176 and 178 for shipment on 26 January from Heathrow to Lagos, the consignee being Jimfag Nigeria Co Ltd, 30 Adegbola Street, Ikeja, Lagos, and the goods being personal effects. There was however nothing to link the MAWB with the invoice. Reliance Freight was shown on the MAWB as the shipper, but there was no Certificate of Shipment. There was a document dated 22 January issued by
10 TNT for medicines to be sent by express from the Appellant to Donald Onwufuju at 30 Onwufuju Street, Isolo, Lagos and an invoice (C306 and 307). Mrs Hall's evidence was that this was provided after her decision on 5 February 2009.

18. Invoice 187 (C 282) was dated 16 January 2007 before invoices 176-178 and
15 182. It was made out to Sundry Customers, Techform Ltd, Accra, Ghana, and was for 480 Aricept 10 mg tabs x 28 and 710 Combivir 150mg/300mg x 60 at a total amount of £106,505. The MAWB (C 288) provided to Mrs Hall in March 2007 was the same as that provided for invoices 175-6, 178 and 182 and was for a shipment to Lagos. Mr Onwufuju's statement of August 2008 exhibited a Certificate of Shipment (C 285)
20 by World Express International Ltd dated 16 February 2007 showing the goods on invoice 187 as shipped from Heathrow to Ghana on 13 January 2007 on a different MAWB, No. 0746247613 (sic) and the weight as 47.85 kg; an Air Waybill (C 286) by KLM for a flight to Accra attached to the Certificate of Shipment was numbered 07462474613 (with "4" between "7" and "6") dated 16 February 2007 and under
25 "accounting information" there appeared "Courier (Select Express)". MAWB No. 07462474613 was captured on Customs Handling of Import and Export Freight ("CHIEF") and stored on Customs Management Support System (C366). In 2010 Mr Onwufuju produced an amended Certificate of Shipment (C 288) to accord with the Air Waybill number and shipment date on C285.
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19. Invoice 189 (C330) dated 28 January 2007, before the date of invoice 178, was to Sundry Customers, Caelyn Company Ghana Ltd, Accra, for 380 Aricept 10 mg tabs x 28 and 487 Combivir 150 mg/300 mg x 60(G) for a total amount of £75,794.30. A Certificate of Shipment (C331) from World Express dated 30 January showed
35 shipment on that day by KLM from Heathrow on MAWB No. 07462475560 for the same goods and customer. An Air Waybill (C332) with that number for a cargo flight by KLM to Accra by "Courier (Select Express)" was also produced in March 2007 but was of poor quality (C334). Another Certificate of Shipment (C 219) was exhibited to the August 2008 statement with the Air Waybill number altered to
40 0746247613 but the shipment date unchanged; it showed a weight of 22.35 kgs. The Air Waybill number shown was the same as that on the Certificate of Shipment (C285) dated 30 January 2007 relating to invoice 187.

20. Invoice 214 (C 475) dated 2 March 2007 was for 2550 Cozaar 50 mg tabs x 28
45 for Sundry Customers, Okocha, Port Harcourt, Nigeria, at a cost of £41,335.50. A Certificate of Shipment (C 477) by Reliance Freight showed shipment of the 2550 tablets on invoice 214 from Heathrow to Lagos on 26 March for Mrs Okocha by

Avient Aviation under Air Waybill No 757-59031055 the weight being 40.86 kgs; an Air Cargo Manifest (C 478) prepared by Reliance Freight showed the same weight. An MAWB (C 480) with the same number certified on 23 January showed “Urgent Courier Material” as being shipped from Vatry to Lagos on 26 March with 25 pieces weighing 1025 kgs on flight SMJ 8066, Afritrade Europe Ltd being the issuing carrier. Another SAD (C 384) stamped by French Customs on 29 August 2007 showed Declaration A 52954 F as made at Dover on 10 March: this was stated in a letter from Mr Onwufuju (C 383) dated 30 January 2008 as relating to invoices 214 and 215 and Air Waybill No. 757-56009940.

21. Invoice 215 (C 493) dated 2 March 2007 to Sundry Customers, Eunice Obaro, Lagos, for 1650 Cozaar 50 mg tabs x 28 was for £26,763. A Certificate of Shipment by Reliance Freight (C 495) corresponding to the invoice showed the goods as shipped by Avient Aviation from Heathrow to Lagos on 19 March under Air Waybill number 757-59030576, the weight being 25.15 kgs and the receiving agent as Jimfag Nigeria Ltd. An Air Cargo Manifest (C 496) by Reliance Freight included goods for Eunice Obaro weighing 241 kgs and the flight number SMJ 8066. A house Air Waybill Number 757-59030576 (C 497) certified by Afritrade Europe on 16 March showed goods consigned to Jimfag Nigeria Ltd including pharmaceuticals as being shipped from Vatry on flight number SMJ 8066 on 19 March. An SAD (C 498) showed goods being declared by Afritrade Europe at Dover on 23 March, there was however nothing apart from a manuscript notation to link it to invoice 215 and the date is inconsistent with the house Air Waybill (C 497).

Mr Onwufuju’s evidence

22. Mr Onwufuju confirmed two witness statements dated 29 June 2009 which replaced earlier statements (C 1/263-8 and 270-6). Statements by Mr Onwufuju in relation to earlier appeals against the original decisions concerning the same transactions, dated 21 August 2008 (C 192-219) and 25 September 2008 (C 392-4) with exhibits, were in Customs’ bundles.

23. He stated that at the relevant time the Appellant was engaged in a wholesale business of pharmaceutical goods.

24. The return for the month 01/07 was submitted in February 2007. On 2 March 2007 Mrs Hall (C 176) asked for “Sage reports, purchase and sales invoices, proof of exports, bank statements and any other supporting documents that make up this claim” in order that Customs could consider the repayment claim for £47,968.48.

25. He stated that on 7 March he sent a letter enclosing

- “(1) Sage VAT report,
- (2) copies of purchase invoices,
- (3) copies of sales invoices and export documents for overseas sales (incl. Air-Way Bills)
- (4) copies of bank statements” (C177).

26. On 21 March Mrs Hall wrote (C180) that zero-rating of sales on an attached schedule was being denied because

5 “proof of export does not meet the requirements as set out in Notice 703 (particularly Section 6) a copy of which was left with you on my visit of 17 January 2007”.

The schedule listed seven invoices to customers in Nigeria and Ghana.

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27. Mr Onwufuju stated that in July 2007 Chris Kent, from Customs, visited Reliance Freight Services (“Reliance Freight”), the Appellant’s freight forwarder, to verify the export documents.

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28. Mr Onwufuju stated that on 13 September (C187, A117-8 in the Appellant’s bundle) the SADs stamped by the French authorities at Vatry International airport were passed by the Appellant to Customs (C 1/265).

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29. He stated that the goods on the invoices other than invoice 187 and 189 were not on CHIEF because they were shipped from Vatry, hence Mr Kent’s request for them to be stamped by the French authorities. The SADs were stamped in Dover, showing the date they left Dover, and at Vatry (C 267).

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30. In his statement (C 266) he listed the total sales value in respect of LON/2009/562 as made up of the following invoices and supporting documents:

	15/1/07	No.175	Kayejo Idowu	£40,135	Airway Bill
	17/1/07	No.176	Ajibola Akpo	63,063	Airway Bill
	26/1/07	No.177	Phil Hallmark	160,284	Airway Bill
30	30/1/07	No.178	Kunle Adeyemi	52,206	Airway Bill
	22/1/07	No.182	Teko Informa	1.683	No Airway Bill
	25/1/07	No.187	Techpharm Ltd	106,505	Airway Bill
	28/1/07	No.189	Caelyn Co	75,795	Airway Bill
			Total	£499,671	

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31. In his statement of 29 June 2009 in relation to LogiChem Mr Onwufuju stated (at C1/274):

40 “Please find attached a letter of satisfaction from the suppliers stating that this invoice has been fully paid (Appendix 1).”

Unfortunately we could not find this in the bundle prepared by either party. He also stated that due to the Appellant’s financial position the payment was constantly moved. He referred to the amount of £76,547.36 outstanding at the time of liquidation which tallied with the amount claimed by LogiChem from the liquidators.

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32. In relation to Primorose he stated that at the time of the assessment £88,712.50 was outstanding to Primorose and that the Respondents' letter of 13 November 2007 identified an amount of £146,776.86 on the bank statement 118 (C 66 and 470) as made to Primorose (this was on 16 May 2007). Part of this was to satisfy the debt to Primorose on invoices 101 and 102. In an earlier statement dated 25 September 2008 in the original appeal Mr Onwufuju stated (C 394) that the norm for payment in the pharmaceutical industry was 60 days from the end of the month. In addition he had asked for an extension of time from the suppliers which had been agreed.

33. Cross examined, Mr Onwufuju said that the Appellant exported the goods shown in the above invoices.

34. Mr Onwufuju was asked first about invoice 175. He accepted that the Certificate of Shipment (C263) dated 15 January 2007 reference number RFS/6219 did not have the description of goods, quantity, weight and value, the number of packages or the date of the invoice; he said that was the first certificate held when Mr Kent visited Reliance Freight in July 2007.

35. Asked about another Certificate of Shipment (C267) produced to Mrs Hall in March 2007 with the date 26.01.07 and invoice number 175 but with a different Air Waybill number, and a different reference number (RFS/6296) and a different value, airline and loading, he said that he had explained the discrepancy to Mr Kent at the visit in July 2007; the airport of loading on the second certificate namely Vatry was correct. He said that Reliance Freight had the SAD (C271) showing the goods going through Dover to Vatry; this was shown to Mr Kent but was not then stamped; it was sent to French Customs to be stamped (A11) and was sent to Customs having been stamped in France on 29 August 2007. He said that the first Certificate of Shipment with the date 15.01.07 was wrong (C263).

36. He said that the original SAD documents were sent to Customs on 13 September 2007 (C187) and denied that the originals were not sent.

37. He told Mr Singh that he was at Reliance Freight in July 2007 when Mr Kent visited and went through all the Reliance Freight documents; Mr Kent was there from 10.00am until called away at 3.00pm. Before leaving Mr Kent had picked out some SAD documents only stamped at Dover and asked him if he agreed to get them stamped by the French authorities and to alter the information to show the correct position. He denied the suggestion that he was lying. He said that Mr Kent had said that the information did not tally with the system and had asked Reliance Freight to produce correct certificates.

38. Mr Onwufuju said that after Mr Kent's visit he went through the documents with Reliance Freight. He denied that the SADs stamped in France were only sent to Mrs Hall on 3 March 2009 (C413, A96-7). Mr Singh said that he was not alleging forgery but was putting it that the details were changed in 2009; Mr Onwufuju denied this.

39. Mr Singh said that the Certificate of Shipment (C269) could not relate to invoice 175 (C262) because of the dates. Mr Onwufuju said that the date on the certificate was wrong and had been corrected to 12.03.07 (C273); the amendment was by Reliance Freight, the date having been a genuine error. He agreed that the Air Waybill 757-56009940 for 12 March 2007 was unsigned (C270).

40. Mr Singh said that two other Air Waybills numbered 757-56009940 (C274 and 275) showed different weights and descriptions of goods; Mr Onwufuju said that one (C274) was a house Air Waybill produced by Reliance Freight for Afritrade. He said that it was possible to have two master Air Waybills. He could not explain the different weight and description. Mr Singh pointed out that the Proof of Delivery Document (C277) referred to electrical equipment, not pharmaceutical products. Mr Onwufuju agreed that one Air Waybill showed 1012 kgs (C275) whereas the Certificate of Shipment showed 25.2kgs (C267 and C273). He said that he had not been asked to produce a manifest showing the goods in invoice 175.

41. Turning to invoice 187 Mr Singh asked why the Certificate of Shipment by World Express (C285) showed departure by KLM on MAWB No. 0746247613 whereas the MAWB (C 283) certified by Afritrade showed the carrier as Bellview Airlines with a different MAWB number; Mr Onwufuju said that there had been a mistake by staff, C 285 was correct and had been sent to Customs before 2009. Asked why the Air Waybill (C 286) was dated 16 February whereas the certificate (C 285) showed 13 January, he said that 16 February was correct; he did not control the certificate by World Express. He had corrected C 285 in 2010, see C 288, because World Express was dissolved by then. In relation to invoice 176, asked why the date on the certificate (C 297) as well as the Air Waybill number was changed in C 299, Mr Onwufuju said that he could not explain the change of date. He said that once the Waybill was wrong, the date would be wrong. Asked about the description on MAWB (C 300) he said that it was very difficult for goods to be described correctly on Master Air Waybills; the Appellant only knew the description on groupage cargoes when the MAWB was received.

42. Mr Singh then asked Mr Onwufuju about invoice 178 for 2200 Inexium 40mg (C343) dated 30/01/07. Mr Onwufuju said that Inexium is sold in packs of 40 tablets of 40mg giving a weight of 1600mgs per pack. Mr Singh asked him how the weight on the packing list (C348) was 45.88kgs. Mr Onwufuju said that the packing list was produced by Reliance Freight and the weight included packaging and instructions to patients. Mr Onwufuju said that the date on the Certificate of Shipment (C344) namely 17/01/07 was wrong, the Air Waybill (C345) showing the date of the flight as 26 January 2007. He said that the fridges and TVs on the packing list were nothing to do with the Appellant.

43. He was next asked about invoice 182 (C303) dated 22/01/2007 for Salamol Easybreathe which he said were portable inhalers. He said that the weight of 1977 kgs on the Air Waybill (C304) was because it was groupage. Asked about the weight of 74 kgs shown on a TNT International invoice (C307), he said that Customs could have asked questions when the Appellant was in full operation. The excess weight

compared with another TNT document (C306) might be due to packaging. He said that the goods came into the warehouse at Basildon which was in the same building as the Appellant's office; Melanie Moore did the packaging.

5 44. Mr Singh next asked about invoice 177 (C313) dated 26/01/07 to Phil
Hallmark, Lagos, for £160,283.97, the largest invoice, which was for 9999 packets of
28 tablets of 50mgs for which the Certificate of Shipment by Reliance Freight (C314)
was dated for 26/01/07 from Heathrow whereas the Air Waybill (C315) carrying the
10 same number (757-56008676) as the Certificate of Shipment showed the airport of
departure as Vatry on 12/02/07. Mr Onwufuju said that the Certificate of Shipment
by Reliance Freight was incorrect. The SAD (C322) carried a CHIEF stamp at Dover
with the date 09/02/07 and a French Customs stamp "29 Aout 07". He said that the
Air Waybill with a date 19/02/07 was issued by Reliance Freight (C321), expecting
shipment on 19 February, the actual Air Waybill (C322) with a flight date 12/02/07
15 was issued by Avient Aviation. He said that he would expect the weight of 102.77kg
for another Certificate of Shipment (C320) in respect of the same invoice to be
correct.

45. He told Mr Singh that the number of the Air Waybill on the Certificate of
20 Shipment (C336) by World Express relating to invoice 189 was not changed by him.
A further amendment (C338) to the Air Waybill number and the shipment date was
made by him because World Express was dissolved on 12 May 2009. Asked why the
numbers on two Air Waybills (C332 and 340) were different, he said that he did not
know how C340 came to be produced. He said that Patricia Morgan issued the
25 invoices; C340 was attached to the invoice.

46. Mr Singh then asked Mr Onwufuju again about invoice number 178 (C343)
dated 30/01/07 where the Certificate of Shipment by Reliance Freight (C344) showed
export on 17 January and Air Waybill No.208 LHR 40071452 but the Air Waybill
30 (C345) showed that the flight as on 26 January. He said that the date on the
Certificate of Shipment was wrong. He said that the fridges and televisions on the
packing list (C348) were nothing to do with him.

47. He was then asked about invoices 214 and 215 both on 2 March 2007 covered
35 by appeal LON/09/563. Invoice 214 was for 2550 packets of 28 tablets of 50mgs. He
agreed that the SAD (C384) with declaration Number A62954F dated 10/03/07 at
Dover was the same as that produced for invoice 175. He was asked about the
Certificate of Shipment (C477) showing a weight of 40.86kgs whereas invoice 215
showed 2550 packets with 1400mgs each. He said that the leaflets, instructions and
40 packaging would explain the difference. He did not know why the Certificate of
Shipment showed loading at Heathrow whereas the Air Waybill was from Vatry
(C480); he said that goods transported by Avient Aviation normally went from Vatry.
Asked why the SAD (C481) referred to "Personal Effects" he said that Reliance
Freight provided the document. Normally at the end of the month Patricia Morgan
45 rang the shippers to ask for supporting documents which were provided without a
covering letter leaving her to relate them to the invoices.

48. Mr Onwufuju told the Tribunal that Patricia Morgan raised queries if necessary; she filed each shipping document after the relevant invoice in numerical order; there was a lever-arched file for export sales and UK sales; Reliance Freight were given a copy of the invoice with the goods which were sent in a van which
5 might also be making UK deliveries. He did not know which airport would be used.

49. He agreed with Mr Singh that the SAD (C481) for invoice 214 did not refer to Arkeley. He said that he did not look at the documents when Patricia Morgan filed them. After the January 2007 visit it was clear that there were some questions as to
10 earlier invoices. He wrote to Mrs Hall in a letter dated 28 February (A131). This must have been 28 March because it replied to her decision letter of 21 March (C188); he said that he had sent some material before on 7 March (C177) including unstamped SADs. He relied on Reliance Freight for the assertion that the SAD (C481) was for the Appellant's invoice 214.

15 50. He was then asked about invoice 215 dated 2 March for sundry customers, Eunice Obaro, Lagos. He agreed that the SAD (C498) with a CHIEF stamp at Dover on 23 March was the same SAD as that for invoice 214 (C481). Asked about the Certificate of Shipment (C500) showing Air Waybill No.757-56009940 from Vatry
20 shipped on 12 March, whereas another Certificate of Shipment (C495) for the same goods showed a different Air Waybill number loading at Heathrow on 19 March and a different weight, Mr Onwufuju said that he did not ask Reliance Freight about the weight change. He said that the Air Waybill (C508) showing departure from Vatry on 12 March was the master Waybill.

25 51. Mr Onwufuju was then asked about a batch of SADs (4/1) which he had handed in to the Tribunal on that morning (15 November 2010) with a letter in French from M. Del Frati of French Customs (4/2). He said that the Commodity Code on (4/9) was for pharmaceutical products although the SAD did not specify the products;
30 the SAD carried a CHIEF stamp from Dover dated 10 March 2007 and a manuscript endorsement 757-56009940. He identified one (4/4) as relating to invoice 177 and another (4/8) as relating to invoices 175 and 215.

35 52. He was next asked about invoice 6119 from LogiChem Ltd (C458) for £167,545.89, on which part of the input tax had been disallowed, and invoice 101 from Primorose for £88,712.50. He said that at the time of his statement of 25 September 2008 he had not paid for invoice 6119 or for invoice 101 (C392-4). He said that on 16 May 2007 £146,776.86 was paid to Palmers Solicitors and referred to a bank statement (C66 and 470). He said that the payments shown in his letter to Mrs
40 Hall of 3 March 2009 (C413-4) included those invoices, the payment of £146,776.86 was for Primorose. Asked about a letter from Mr Reza, of LogiChem, dated 5 July 2009 stating that invoice 6119 was paid in full on 24 April 2007 (C424) which contradicted his letter of 3 March 2009, he said that he had produced a bank statement at a visit showing the payment to LogiChem. He said that sometimes the Appellant
45 paid on account and sometimes paid several invoices together; it was in financial difficulties.

53. Asked about a letter from Richard Hodges of Primorose dated 5 July 2009 (C423) stating that invoice 101 (C467) had been paid on 16 May 2007 which conflicted with his statement of 25 September 2008, Mr Onwufuju said that the Appellant actually paid on account; he accepted that there was a contradiction. Asked
5 about the wording of the letters from Mr Reza and Mr Hodges which was similar, he said that he dictated the letters having spoken to the liquidators; if the payments had not been made Mr Reza and Mr Hodges would not have included them in the letters.
54. Mr Onwufuju then gave evidence at the end of his cross-examination by way
10 of self re-examination since he was both advocate and witness.
55. He said that the packaging overall could weigh over twice the weight of the pills themselves.
- 15 56. He produced a statement (C 523A) from LogiChem dated 21 August 2007 from his files which did not list invoice 6119 as outstanding.
57. He referred to the letter from Richard Hodges dated 5 July 2009 (see
20 paragraph 53 above) and a payment reconciliation signed by Mr Hodges on 3 August 2010 which showed part payment of invoice 101 on 26 June and 15 May 2007, the balance being part of the £146,776.86 (563/A10).
58. He said that he was a 30 per cent shareholder in Primorose but was not a
25 director. He was a director and 100 per cent shareholder in Stanford Reade Ltd (“Stanford”), a second hand computer wholesaler, selling mainly to Nigeria; he said that he became involved in pharmaceuticals through Stanford to break into the Nigerian market. In some cases the customer for pharmaceuticals and computers was the same and some Air Waybills covered supplies by Arkeley and Primorose or Stanford. The Waybill for Invoice 177 included some Stanford goods.
30
59. He said that the date on the Certificate of Shipment (C 267) for invoice 175
was wrong but that the other details were correct. He said that Customs did have C265-271 (see paragraph 13 above) on 5 February 2009, those documents had not
35 been sent afterwards.
60. Mr Onwufuju was then cross-examined on the further matters introduced. He
said that he could not remember whether he was a director of Primorose in 2007 although he did sign returns in 2009.
- 40 61. Asked about the LogiChem statement of 21 August 2007 (C 523A) showing £494,454 outstanding, he said that it was not his writing on the exhibit. He said that he found it in his files when LogiChem told him about it “yesterday” (November 15) and that it was given to Customs at a visit to LogiChem in 2007. He said that in 2007 the Appellant’s turnover was close to £3.5 million, there were other suppliers as well
45 as LogiChem. He said that his statement of 10 September 2008 (C 394) that LogiChem was paid in full in April 2007 was misleading.

62. He said that Mr Reza told him that no bad debt relief was claimed by LogiChem. Customs had visited LogiChem during inquiries about Arkeley to check that supplies were made to Arkeley.

5 63. At the resumed hearing in 2011 Mr Onwufuju was given leave to produce a further witness statement dated 14 November 2011. Mr Singh said that this did not contain anything on which he needed to cross-examine.

Mrs Hall's evidence

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64. Mrs Hall had made a statement dated 2 November 2010 comprising 45 pages with 522 pages of exhibits which also covered another separate appeal which was to follow after this appeal. On the second morning the Tribunal expressed concern at the length of the statements, given the time estimate, and the fact that they were rolled together. Mr Singh said that he would call Mrs Hall to cover orally the matters to be relied on. She did not therefore confirm the statements.

15

65. Mrs Hall said that she was a Higher Officer having been in Customs for 39 years. She was a VAT assurance officer based at Chelmsford. She said that she had visited the Appellant on 25 October 2006 and 17 January 2007. The first visit was by appointment to verify the 09/06 return and to look at the export evidence for that period and the periods from 05/05 to 07/06. Apart from 09/06 Mr Onwufuju had no official or commercial evidence on site; it was obvious at the start of the October visit that the export documents were not conclusive nor was the audit trail. He told her that the internal accounting entries were made first and were then put on the Sage system.

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66. The Appellant's premises were at Southfields Industrial Estate, Laindon, Essex. There was a rented office on the first floor which was divided into an office at the front, a general office in the middle and a stockroom at the back. She was unaware of any warehouse.

30

67. On the visit on 17 January 2007 when she was accompanied by Mr Kent there was no stock in the stockroom apart from some out of date drugs. On the first visit she met Melanie Moore who made coffee; she was told that she arranged deliveries and carried them out in a van. On the January 2007 visit Stephen Sun was there; he appeared to bring the orders together and controlled the computer system. There was no accounts department and no accounting records were on the premises. Mr Onwufuju said that he was himself an accountant. Mrs Hall said that she had never heard of Patricia Morgan before the present hearing (November 2010).

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68. Mrs Hall said that invoice 175 (C262), a Certificate of Shipment dated 15 January 2007 (C263) and an Air Waybill from Heathrow dated 26 January 2007 (C264) were provided in response to her request for supporting documentation by letter on 2 March 2007 (C256).

45

69. She said that at the time of her decision on 5 February 2009 she also held C 266-271 (see paragraph 13 above) in relation to invoice 175. She said that in August 2010 she received a Certificate of Shipment by Reliance Freight as above but with the date altered from 26/1/07 to 12/03/07 (C273), an Air Waybill (C 275) which differed
5 from C270 in the weight (1012kgs) and the description of goods shown as electrical accessories, proof of delivery by Base Aviation Systems Ltd (“Base”) signed as received on 13/3/07 (C277), a receipt by Base from the consignee for payment (C278), and Cargo Arrival Advice Notice by Base of arrival at Lagos on 11/3/07 (C279). She identified C265-271 as having been received on 3 March 2009 and
10 C272-279 as received on 3 August 2010.

70. She said that she knew that she did not have any of C 272-279 at the time of the decision because they were filed on receipt and she kept the further material separately. She did the same with the supporting documents for the other invoices.
15 She said that she received no documents between her letter of 21 March 2007 (C180) and the decision under appeal on 5 February 2009 (C172). She said that she was in charge of the case but it was handed over to Mr Kent who has since moved to other work.

71. She then said that she had received a letter from the Appellant on 22 August 2007 with SAD documents attached which were unstamped (C185) and wrote on 30 August asking for the original SADs detailing the exportation in full and documents of confirmation from the Nigerian authorities confirming receipt (C186). On 13 September 2007 Mr Onwufuju (C187) wrote to Mrs Hall enclosing 26 stamped SAD
25 documents, bank statements (C 63-85) numbers 106 to 121 from December 2006 to 29 June 2007 and other documents, which she acknowledged on 24 September 2007 (C189); annotations on statement number 115 (C69) were in her writing.

72. Mrs Hall said that once Mr Kent became involved there was a gap. The case came back to her when Mr Onwufuju served his original statement in October 2008. She said that she did not decide who would give evidence for Customs.

73. Cross-examined by Mr Onwufuju, Mrs Hall said that she would expect the Appellant to hold the original SAD as exporter when it was part of a groupage
35 consignment.

74. Mr Singh said that he did not rely on the fact that the SADs were not the originals.

75. Mrs Hall said that Mr Hawkins who was referred to in a telephone call with Mr Onwufuju on 22 August 2007 was her senior officer. She confirmed that she received the stamped SADs with Mr Onwufuju’s letter of 13 September 2007. She said that she did not meet Mr Kent again after receiving the SAD documents. The fact that the French authorities had stamped them did not affect her original decision.
45

76. She told Mr Onwufuju that Customs had received export invoices and shipping documents in September 2008 with Mr Onwufuju’s first witness statement

but that these were sent to the review officer (C191-219). There were 23 pages of documents. The review officer had identified errors causing her to alter the assessment but this did not affect the basis of the assessment.

5 77. It was at this point that the hearing in November 2010 was adjourned. The Tribunal directed her to make a further witness statement listing in respect of each invoice separately the documents which the Appellant had provided to Customs before her decision letter dated 5 February 2009.

10 78. In relation to invoice 175 her statement dated 2 December 2010 listed the Appellant's letter dated 7 March 2007 (C177), the documents listed at paragraph 68 above (C262-4) and a credit note (C266). She also listed material in relation to invoices 176-178, 182, 187 and 189. Her statement also covered material in relation to the decision on 3 January 2009 (LON/09/563) concerning the Appellant's invoices
15 214 and 215, Primorose's invoice 101 and LogiChem's invoice 6119.

Mr Reza's evidence

20 79. On 30 November 2011 when the hearing resumed Mr Reza, who attended and produced further documents (C 551-9) including HSBC statements pursuant to a summons issued by the Tribunal, was interposed before the cross-examination of Mrs Hall was continued.

25 80. Mr Reza, who is a director of LogiChem, confirmed writing a letter (C 524A) to Mr Onwufuju dated 16 November 2010 stating that invoice No. 6119 issued on 2 April 2007 for £167,545.89 had been paid in full through funds received in LogiChem's bank account with HSBC on 26 April 2007.

30 81. He also produced a statement by LogiChem to the Appellant dated 21 August 2007 showing £494,454.53 as due from the Appellant (C 523A). He said that a manuscript addition,

“Credit owed to Arkeley £417,906.97. Balance to LogiChem
£76,547.56”

35 was in his writing. The credit due was for supplies by Arkeley to LogiChem. He said that he did not recall when he wrote that, but it was probably on 21 August 2007 when he extracted the statement; the system produced the date. At that date invoice 6119 was not outstanding, otherwise it would have been listed on the statement. The
40 £76,547.56 would have related to later invoices on a first in/first out basis.

45 82. Cross-examined, Mr Reza said that in the pharmaceutical industry invoices were generally paid 30 days after the month when the invoice was issued. Sometimes LogiChem collected payment before shipment.

83. Mr Reza said that a letter (C 424) dated 5 July 2009 to Mr Onwufuju stating that invoice 6119 was finally settled in full on 24 April 2007 was his letter: it had

been produced on his computer. He did not know why the wording was similar to that in a letter by Mr Hodges on the same day; it was written because Mr Onwufuju asked for confirmation.

5 84. He said that he did not recall any request by the Appellant for an extension of
time to pay invoice 6119. The sales order (C 556) and delivery note (C 554-5) were
both on 13 March 2007. He did not know why the invoice was not issued until 2
April. The sales order was not recorded on LogiChem's Sage System; any payment
received would automatically be assigned to goods already shipped. £175,000 of the
10 £270,636.13 received on 30 March was set against shipments made.

85. Mr Reza told the Tribunal that he kept a record himself, which was separate
from LogiChem's Sage System, of all payments received for sales (C 557-8). He kept
purchases and sales separately apart from those with two or three customers.
15 LogiChem's pattern of business was that it did not set-off purchases and sales in
bilateral transactions.

86. He said that Arkeley paid LogiChem £114,585.88 on 16 April (C 69). Mr
Singh said that the writing on the statement "inv 6105" was by Mrs Hall. Mr
20 Onwufuju said that he could not explain her reference to 6105.

87. He produced a Statement of Account with the Appellant (C 558-9) which was
his own running check against Sage's records; it was a print-off from his spreadsheet.
The balance where negative showed sums owed by LogiChem to Arkeley : this was
25 £175,486.95 after the payment received from Arkeley on 30 March 2007 (C 559). He
said that invoices 6118 and 6120 to Arkeley also on 2 April came to £144,505. The
statement showed a credit of £212,070.89 on 26 April 2007 with the printed narrative
"Paid in at 403902 (Arkeley)" (C 559).

30 88. Mr Reza confirmed that LogiChem is a creditor for £76,547.36 in the
Appellant's liquidation. The figure of £369,981.99 at 18 December 2007 (C 559) on
his spreadsheet statement for the Appellant was the balance due before sums owed to
the Appellant. The last payment received from the Appellant was £212,070.89 on 26
April 2007.

35 89. Re-examined, Mr Reza said that Customs had visited LogiChem although he
did not recall the dates and that he had received a letter from Customs with questions
about the Appellant asking for sales invoices, bank statements and proof of payments.
He said there was no gain to LogiChem to say that invoice 6019 had been paid if it
40 had not been paid. He believed that LogiChem had made a claim for bad debt relief :
£78,000 came to mind.

Mrs Hall's evidence continued

45 90. Mrs Hall resumed her evidence on 2 December 2011 after Mr Reza's evidence
and Mr Singh's opening in which he went through the extensive documents in some
detail.

91. Mrs Hall confirmed a further statement of 2 December 2010 made after the initial hearing and told the Tribunal that she was able to identify the documents which the Appellant sent on 7 March 2007 (see paragraph 25 above) because they were filed separately at her office in a wallet binder; they were not date stamped on receipt.
5 When making the decision in February 2009 she also had the documents exhibited with Mr Onwufuju's statement in September 2008.

92. She said that she thought that the notes made at the visit on 17 January 2007 were made by her; there were not many. The notes had been provided to the Regional Referral Team ("RRT") and had not been returned to her. The records seen at that visit were sufficient for a full audit trail and were uplifted.
10

93. Mrs Hall said that she was the case officer throughout for assurance and compliance purposes. Mr Kent came on the visit in January 2007 and identified areas of concern as to a repayment claim in respect of earlier returns. Her involvement dropped when the Appellant later made nil returns. She said that the papers were with the RRT; the Review Officer, Mr Rickeby, got them back for the review and reviewed the September 2008 documents; her decision in February 2009 did not address those documents because Mr Rickeby had considered them.
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94. Asked by Mr Onwufuju whether she remembered him telephoning her soon after Mr Kent's visit, she said that she had many conversations with him, he had telephoned daily.

95. She said that in February 2009 she had taken into consideration the documents stamped by French Customs, see paragraph 28 above; she did not read French and sent them to Mr Kent, but that she had already made her conclusions. What Mr Kent and the RRT did had no impact on her assurance, she was only concerned with whether the goods were exported. She said that she had no direct information from Mr Kent concerning the SADs; nothing was put on the electronic folder because the RRT was handling the matter.
25
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96. Mrs Hall told Mr Onwufuju that every set of documents sent had shown new anomalies. She said that she had no direct information from Mr Kent about the SADs and nothing was put on the electronic folder. If the original documents had referred to Vatry Airport she would have considered this. She said that if the documents sent on 3 March 2009 would have caused her to allow her decision she would have done so.
35

97. There was no re-examination.
40

Mr Kent's evidence

98. Mr Kent confirmed statements of 11 November 2010 and 1 December 2011. The Tribunal excluded a redacted RRT report exhibited to the second statement part of which related to the visit on 17 January 2007 which contained matters which were prejudicial and which were irrelevant.
45

99. He stated that he was present at the visit to the Appellant on 17 January 2007 when Mr Onwufuju was asked to present books and records relating to a voluntary disclosure on 27 September 2006.

5 100. Mr Kent stated that he visited Reliance Freight with Andy Sampson in July 2007; the visit ended prematurely because they were called away after 45 minutes. A man who said he was the owner of Reliance Freight told them that the Appellant's goods were shipped from Vatry not Heathrow; this was a surprise to the officers.

10 101. He stated that he did not complete any notes of the visit. He did not carry out an audit exercise, the visit being for evaluation not for assurance. Neither he nor Mr Sampson told anyone to amend any Certificate of Shipment so as to show Vatry.

15 102. Cross-examined, Mr Kent said that he did not think that the visit to Reliance Freight was by appointment. The premises was a large lock-up with a concrete floor; it was big enough for a lorry; there was a small office at the back with walls which did not extend to the roof. There was a central access way with various commodities on either side including a shrink-wrapped palletised load.

20 103. He said that they were told that none of the items stored belonged to Mr Onwufuju.

25 104. He told the Tribunal that he had not looked at the notes of the visit because he did not have access to the RRT file; he had asked, but the RRT had been disbanded and Mr Sampson had retired. He was relying on his memory as to the visit to Reliance Freight.

30 105. Mr Kent said that he remembered Mr Onwufuju being present. Mr Onwufuju told them that the Certificates of Shipment did not reflect the route by air to Nigeria and Ghana.

35 106. Asked whether he identified some SADs stamped at Dover but not in France, Mr Kent said that he did not identify them : the owner produced documents which he said accorded with the new route through France with groupage by lorry from Kent to Vatry then air freight to Nigeria and Ghana. Before the visit the officers understood that all went through Heathrow. He said that Mr Onwufuju did express surprise at the route. Mr Kent denied saying any such thing as, "Get these stamped by the French authorities."

40 107. Mr Kent said that he was aware that the SADs were retrospectively stamped by the French and that he told Mr Onwufuju to send them to Mrs Hall; this was after 29 August 2007. Mr Kent agreed that he had seen the stamped SADs and said that he was surprised that they were all stamped with the same date.

45 108. Mr Kent said that RRT would not collect documents forming part of assurance. He said that he had a meeting with a number of officers and told them to administer the Appellant strictly within the regulatory provisions.

Submissions for Customs on evidence of export

109. Mr Singh outlined section 30(6) and (8) of the VAT Act 1994 and regulation
5 129(1) of the VAT Regulations 1995. He said that although the legislation referred to
the Commissioners being satisfied that the goods were exported and that the
conditions were fulfilled, he accepted that the Tribunal had a full appellate
jurisdiction as opposed to a supervisory jurisdiction.

110. Notice 703 (August 2006) contained conditions which the Court of Appeal
10 held to be reasonable in *Henry Moss of London Ltd v Customs and Excise
Commissioners* [1981] STC 139. The parts of Notice 703 in boxes had the force of
law.

111. He said that paragraph 6.5 of Notice 703 which was mandatory specifying
15 what the export evidence must identify was not onerous. He referred to paragraphs
6.2, 6.3, 6.6, 7.1, 7.4 and 7.6 which are not in boxes. He said that it was necessary for
the evidence to identify the goods and show that they were exported by official or
commercial evidence plus, if necessary, supplementary evidence. In response to Mr
20 Onwufuju's reliance on *R (Teleos plc and Other) v Revenue and Customs
Commissioners* (Case C-409/94) [2008] STC 706, he said that good faith was not in
issue but the Appellant still had to provide the necessary evidence of export. He said
that he was not suggesting that the goods did not go to Nigeria and Ghana. Customs
case was simply that the mandatory conditions in Notice 703 were not satisfied.

112. Mr Singh said that the evidence of export had to be obtained within 3 months
25 of the time of supply which under paragraphs 3.3, 3.4 and 3.5 of Notice 703 was for
direct and indirect supplies and those involved in groupage was 3 months from the
time of supply.

113. He said that, apart from the SADs stamped in France on 29 August 2007,
30 Customs did not rely on the 3 month time limit in respect of documents held on 5
February 2009 when Mrs Hall made her decision. The SADs declared electronically
at Dover did not show the place of departure from the EU; copy 3 should have been
35 stamped at Vatry on departure.

114. Mr Singh said that although paragraph 11.3 of Notice 703 provided for
adjustment of a trader's VAT when evidence of export was obtained after accounting
for VAT, that provision was not relevant to the periods of account under appeal. If a
40 later return had been made with such adjustment, if refused that would have given rise
to a separate appeal. In any event Customs did not accept that the later evidence was
satisfactory.

115. He said that the original documents held by the Appellant as evidence of
45 export were wrong. The Certificates of Shipment and Air Waybills showed departure
from Heathrow for shipments from Vatry, and incorrect dates of departure and Air
Waybill numbers. Regardless of the 3 month time limit the documents held at 5

February 2009 did not satisfy the conditions. Successive documents produced after that date had important details changed. There were weight discrepancies also. The Air Waybills and SADs did not have the necessary documentary connection with the goods.

5

Submissions for Appellant on evidence of export

116. Mr Onwufuju said that in relation to the exports Customs had taken no account of paragraph 11.3 of Notice 703; the Appellant had not been given an opportunity to adjust the 08/07 return. The Appellant went into liquidation in 2008.

117. He submitted that the Appellant held evidence of export under paragraph 6.5 of Notice 703 within the initial 3 months although further evidence was obtained in August 2007. He said that Certificates of Shipment were produced by Reliance Freight for the groupage shipments which contained the information required by paragraph 7.4(b). He said that the evidence of export provided up to 2009 should have been accepted. He said that the conditions in Notice 703 did not stipulate that everything on the documents must be correct.

118. The Appellant had taken all reasonable steps to incorporate whatever information Customs had requested; he referred to Notice VEXP 30400, (issued after *R (Teleos plc and Others) v Revenue and Customs Commissioners* (Case C-409/04) [2008] STC 706), and he referred to *Teleos*. The Appellant had acted in good faith and the evidence submitted to Mrs Hall was consistent with the requirements of Notice 703. He said that the loading happened to be at Vatry rather than Heathrow but the Appellant did not know. There was no evidence showing fraud or an intention by Arkeley to evade tax. Mrs Hall had made her decision on the documents provided in March 2007 and those exhibited to his statement in 2008; she did not have the information which was at Reliance Freight at the visit in July 2007. He said that the exports were indirect – Reliance Freight was not paid by the Appellant.

The Legislation and the Conditions as to Exports

119. We consider first the disallowed zero-rating of exports on invoice numbers 175-178, 182, 187, 189 and 214-5.

120. Article 146 of the VAT Directive 2006/112/EC which replaced the Sixth Directive requires Member States to exempt the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor or a customer not established within the territory. Under Article 131 the exemptions apply in accordance with conditions which the Member States shall lay down for the purpose of ensuring the correct and straightforward application of the exemptions and of preventing any possible evasion, avoidance or abuse.

121. The primary domestic legislation is in section 30 of the Value Added Tax Act 1994, subsection (6) of which provides that a supply of goods is zero-rated:

“if the Commissioners are satisfied that the person supplying the goods-

- 5 (a) has exported them to a place outside the Member States;
or
(b) ...

and in either case if such other conditions, if any, as may be specified in regulations or the Commissioners may impose are satisfied.”

10 The regulation in question is regulation 129 of the Value Added Tax Regulations 1995 which adds nothing to section 30(6) and refers to “such other conditions as they may impose”.

122. The conditions are contained in Notice 703 (August 2006) which states that the parts having the force of law under regulation 129 are indicated by being placed in a box. Paragraph 6.5 which has the force of law provides:

“The evidence you obtain as proof of export, whether official or commercial, or supporting must clearly identify –

- 20 - the supplier
- the consignor (where different from the supplier)
- the customer
- the goods
25 - the accurate value
- the export destination, and
- the mode of transport and route of export movement.”

123. Since the Appellant did not finance the transport to Africa and apart from delivering the goods to Reliance Freight did not arrange the dispatch it appears that the exports were indirect so that paragraph 3.4 of Notice 703 applies. This provides that the overseas customer

- 35 “- exports the goods from the EC within the specified time limits (see paragraph 3.5) and
- obtains and gives [the supplier] official or commercial evidence of export as appropriate (see paragraphs 6.2 and 6.3) within the specified time limits and you
40 - keeps (sic) supplementary evidence of export transactions (see paragraph 6.4) and ...”

That part of paragraph 3.4 is in a box. Paragraph 3.5 specifies the time limit for obtaining evidence as 3 months whether the export is direct (under control of the supplier), indirect (ex-works) or involved in groupage; this is in a square box.

124. Paragraphs 6.2 to 6.4 of Notice 703 although not in square boxes are referred to in paragraph 6.5. Official evidence includes an SAD endorsed by Customs at the

point of exit from the EC; commercial transport evidence includes authenticated Air Waybills, Master Air Waybills and Certificates of Shipment containing full details of the consignment and how it left the EC; supplementary evidence includes order, sales invoice, packing list, evidence of payment and evidence of the receipt of goods.

5

Discussion as to Exports

125. Mr Singh relied on the requirements of paragraph 6.5 of Notice 703 and did not rely on paragraphs 7.4 (Groupage or consolidation transactions) or 7.6 (Exports by Courier), neither of which have the force of law.

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126. In *Henry Moss or London Ltd v Customs and Excise Commissioners* [1981] STC 139 the Court of Appeal reversed the decision of the High Court that the conditions were unreasonable. That appeal was conducted on the footing that if the conditions were valid they were mandatory. Article 131 obliges Member States to lay down conditions to prevent abuse. While their purpose is to ensure that the goods have been exported as claimed, these conditions which have legal effect must themselves be satisfied. There is no entitlement to zero-rating if the conditions are not satisfied.

15

20

127. Paragraph 6.5 of Notice 703 does not require that the necessary proof of export must all be contained in any one document. In our judgment provided that the documents can be linked together a number of documents may together “clearly identify” the necessary matters under paragraph 6.5. Where there is a conflict between documents this may prevent the necessary linkage and may result in the matters not being clearly identified. While Mr Onwufuju is correct in saying that Notice 703 did not stipulate that everything in the documents must be correct, the evidence of export must read as a whole clearly and correctly identify all the matters specified in paragraph 6.5. Under paragraph 3.4 which is binding the evidence of export must include either official or commercial evidence of export.

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128. It is to be noted that the vires in Article 131 for the conditions refer to ensuring the correct and straightforward application of the exemptions which include exemption on exportation under Article 146.

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129. Paragraph 6.5 of Notice 703 requires clear identification of the mode of transport and route of the export movement. In our judgment the reference in paragraph 6.5 to the route of the export movement is to the movement from the EU; this does not require identification of the route to the point of departure from the EU. Nor does paragraph 6.5 require identification of the route and mode of transport from the point of arrival in the country of destination to the customer’s address; such a requirement would not be straightforward, it would need excessive paperwork and was not suggested by Mr Singh. The mode of transport, here by air, and the points of departure and arrival are clearly necessary to ensure correct application of zero-rating.

40

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130. The SADs produced by the Appellant were stamped by French Customs outside the 3 month time limit under paragraphs 3.4 and 3.5 of Notice 703,

furthermore none could be readily identified with the goods shown on the invoices. There was no other official evidence.

5 131. Commercial evidence includes authenticated Air Waybills and Master Air Waybills as well as Certificates of Shipment. As regards the supplier, customer and goods in our judgment it suffices for Notice 703 if the invoice containing those details is identified. In the absence of contrary evidence the invoice price is evidence of an accurate value.

10 132. Paragraph 6.5 requires clear identification. Although Notice 703 does not specifically state that the evidence must be documentary, paragraph 3.4 provides for the overseas customer to obtain and give valid evidence and to keep supplementary evidence. Apart from exceptional circumstances, it is difficult to see how this could be other than documentary. Oral evidence by a witness cannot in our judgment make
15 good matters not clearly identified by evidence under paragraph 6.5. Nor in our judgment can oral evidence be used to explain conflicting or contradictory documentary evidence. Where there is conflicting documentary evidence, in order for paragraph 6.5 to be satisfied the conflict must be capable of satisfactory resolution from the documentary evidence obtained within the time limit.

20 133. Clearly the matters under paragraph 6.5 must be correctly identified. If other evidence whether documentary or otherwise shows that the matters are not correctly identified then paragraph 6.5 is not satisfied.

25 134. Paragraph 6.5 of Notice 703 requires that the evidence be obtained and the effect of paragraph 3.4 is that this must be within the time limit. This is not the same as requiring that it be provided to Customs within the time limit. Ordinarily, apart from periodic assurance checks Customs will not see or ask for the evidence. However where evidence is provided that shows that it must have been obtained by
30 the date on which it was provided.

135. In this case the Appellant did not provide a list of the individual documents sent to Mrs Hall on 7 March 2007, see paragraph 25 above. He did not keep a list of those documents and Mrs Hall did not list them on receipt although she filed them.
35 Mr Onwufuju provided further material, in particular the SADs stamped in August 2007 and exhibits to a statement made in August 2008 in an earlier appeal. The need to decide whether all the material held by Customs at the time of Mrs Hall's decision of 5 February 2009 was obtained by or on behalf of the Appellant within the six month time limit was removed by Mr Singh's very sensible concession recorded at
40 paragraph 8 above.

136. Mr Onwufuju said that he provided more material to Customs, however he gave no clear evidence as to what he provided and when. Mrs Hall's evidence that she could identify the documents provided by the method of filing was far from ideal,
45 furthermore Customs' bundle did not contain Mr Onwufuju's response (A 131) which was wrongly dated by him 28 February 2007 to her letter of 21 March 2007 in which he wrote that he enclosed,

- “(1) Copies of amended Certificate of Shipment;
- (2) Copies of Packing List for each customer from the supplier records;
- (3) Copies of Air Cargo Manifests from the Shipper’s records.”

5

137. The fact that the Appellant was not legally represented gave rise to substantial difficulties, particularly since the Appellant and Customs produced separate bundles with substantial duplication and separate numbering. Customs produced two bundles containing over 800 pages, both bundles being separately numbered instead of being sequential. The Appellant’s two bundles contained over 250 pages.

138. Mr Onwufuju had clearly put in a large amount of work in preparing the Appellant’s case, however the conduct of the appeal would have been challenging for an experienced advocate, let alone for an advocate who was also the principal witness. The time estimate of 3 days was hopelessly unrealistic with Mr Onwufuju’s evidence taking up two full days; the result was a split hearing with a substantial interval.

139. Mr Onwufuju’s opening was based on the documents in his bundles, whereas his cross-examination by Mr Singh was understandably based on Customs’ bundles with different pagination. With hindsight it was a mistake by the Tribunal not to direct Mr Singh to open and go through the documentary evidence before hearing the witnesses. This was only partially remedied by the direction to Mr Singh to open on the documents before Mrs Hall’s cross-examination resumed on 30 November 2011.

140. Although in their Statement of Case it was pleaded that the Respondents were not satisfied that the goods had ever been exported, the appeal was conducted simply on the basis that the conditions in Notice 703 as to evidence of export had not been satisfied. As recorded at paragraph 111 above Mr Singh stated that good faith was not in issue and that he was not suggesting that the goods did not go to Nigeria and Ghana.

141. We have already pointed out at paragraph 134 that Notice 703 requires the evidence of export to be obtained within the time limit rather than that it should be provided to Customs within the time limit. Clearly the material provided by Mr Onwufuju in response to Mrs Hall’s letter of 2 March 2007 was obtained within the time limit, however her further statement referred to at paragraph 91 did not include any documents sent by Mr Onwufuju on 21 March 2007 (see paragraph 136 above). Her initial decision on 21 March 2007 to disallow zero-rating was made without any further visit after that on 17 January 2007.

142. It became apparent to Mr Kent and his colleague at the visit to Reliance Freight in July 2007 that goods had been shipped from Vatry in France rather than from Heathrow. It is quite unclear what documentary evidence was seen by the officers on that visit. It is far from satisfactory that no notes or record of that visit were available, including even the date of the visit.

143. We now turn to consider the goods covered by the individual invoices starting with invoice 175, see paragraph 13 above. The invoice (C 262) shows the Appellant as supplier, Kajeju Idowu as customer, the goods and the invoiced amount and the customer's address in Lagos; it is dated 15 January 2007. A Certificate of Shipment by Reliance Freight (C 263) stated that the goods on invoice 175 had been exported by them on 15 January to the customer being loaded at Heathrow for Lagos and gave an MAWB number which was that on an MAWB (C 264). The MAWB with that number produced to Mrs Hall in March 2007 was certified by Afritrade on behalf of Bellview Airlines for a flight from Heathrow on 26 January, Reliance Freight being the shipper.

144. If matters had stopped there it is arguable that the evidence satisfied paragraph 6.5 of Notice 703 since the MAWB could be linked to the Certificate of Shipment which carried the invoice number, although the dates were 11 days apart and the description of goods on the MAWB was "personal effect" and the weight was 1977 kgs for 47 pieces.

145. The documents did however not stop there. A further Certificate of Shipment by Reliance Freight (C 267) showed the goods on invoice 175 as loaded on 26 January from Vatry by Avient Aviation on a different MAWB the weight being 25.2 kgs and the receiving agent being Jimfag. An MAWB (C 270) issued by Afritrade on behalf of Avient Aviation with the number on C 267 showed the departure from Vatry on 12 March. This was consistent with an SAD (C 271) produced by the Appellant with a French Customs stamp showing declaration at Dover on 10 March.

146. The later documents produced by the Appellant on dates as to which there was no evidence apart from the stamped SAD are clearly evidence that the route of export movement was from Vatry and not from Heathrow, that the airline was Avient Aviation and not Bellview Airlines and that export was in March not January. A corrected Certificate of Shipment (C 273) showed shipment as being on 12 March rather than 26 January. The case for the Appellant was that these later documents were correct.

147. The burden of proof was on the Appellant to satisfy the Tribunal on the balance of probabilities that the correct evidence of export was obtained within 3 months of the time of supply. Quite apart from the facts that the original evidence given to Mrs Hall was incorrect and that the Certificate of Shipment showing Vatry showed shipment in January, the Appellant has produced no evidence to show that the correct evidence was obtained within the time limit. There has been no explanation as to why the original evidence provided was incorrect and as to what happened to the goods between January and March. We have examined the evidence with particular care because the Appellant was not represented. The Appellant has not satisfied us that the mandatory conditions in Notice 703 were satisfied.

148. Invoice 176 was dated 17 January 2007, the documents in support are shown at paragraph 14 above. The invoice (C 293) showed the supplier, customer in Nigeria, the goods and the value. The Certificate of Shipment initially supplied

showed the invoice number, loading at Heathrow for Lagos and MAWB 208LHR40071452; it carried the date 17 January for the date of export. An MAWB with that number showed departure from Heathrow for Lagos by Bellview Airlines on 26 January; it was clearly groupage because there were 47 items weighing 1977 kgs.
5 These three documents (C 293-5), all of which were provided to Mrs Hall in March 2007, potentially constituted satisfactory evidence of export, apart possibly from the different dates of export.

149. A further Certificate of Shipment (C 200 and 297) was consistent with the
10 above documents but apart from certifying shipment on 26 January does not carry a date. An amended version of this (C 299) was produced by the Appellant in 2010 with manuscript alterations to the MAWB number and a departure date on 19 January, but otherwise the same. Also in 2010 the Appellant produced an MAWB (C 300) with the number on the amended certificate issued on 19 January but with the
15 departure date illegible. The airline and destination in all were the same.

150. Given that the initial documents would potentially have sufficed as evidence of export, the question arises whether the conflict between the original documents and the later documents changes the position. The only differences were the MAWB
20 numbers and the difference in flight dates. Neither of those in themselves involve matters which required to be identified under paragraph 6.5 of Notice 703. Although at the hearing Mr Onwufuju produced SADs stamped in France, there was nothing to connect any of these with this invoice. We find that the Appellant has discharged the burden of proof as to the goods on this invoice.

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151. Invoice 177 for 9999 tablets x 28 dated 26 January (C 313) is covered at paragraph 15 above. Here the Certificate of Shipment (C 314) provided to Mrs Hall showed loading at Heathrow and MAWB No. 757-56008676, whereas the MAWB (C 315) provided at the same time had the same number but was for a flight from Vatry
30 on 12 February being certified by Afritrade on 9 February. These documents provided in March 2007 were in conflict as to the route and therefore did not identify the route clearly. A different Certificate of Shipment by Reliance Freight produced by the Appellant in 2010 showed loading at Vatry. There was no evidence as to when this was produced. We are not satisfied that the Appellant complied with paragraph
35 6.5 of Notice 703 in respect of invoice 177, the airport of departure being essential to the route of export.

152. Invoice 178 dated 30 January for 2200 inextium 40mg tablets is covered at paragraph 16 above. The Certificate of Shipment (C 344) shows loading at Heathrow
40 and MAWB No.208LHR40071452. The MAWB (C 345) with that number provided to Mrs Hall in March 2007 shows the carrier as Bellview Airlines leaving from Heathrow on 26 January. It is to be noted that the MAWB was thus issued before the invoice.

45 153. An Air Cargo Manifest produced by Reliance Freight (C 348) showed the goods on invoice 178 as part of a shipment on 12 February under MAWB No. 757-

56008676; an MAWB (C 356) with that number shows the flight as being from Vatry rather than Heathrow by Avient Aviation.

154. There was therefore a clear discrepancy between the documents provided to Mrs Hall in March 2007 and the later documents which showed a different airline and a different airport of departure. There was no evidence as to when the Appellant obtained the later documents. As with invoice 177, we are not satisfied that the Appellant complied with paragraph 6.5 of Notice 703.

155. Invoice 182 is covered in paragraph 17 above. The MAWB produced (C 304) showed Reliance Freight as the shipper but nothing to connect it with invoice 182 although the date is compatible. There was no Certificate of Shipment to provide a link. There is a receipt or consignment note (C 310) from TNT signed on 22 January for medicines from the Appellant to Donald Onwufuju with the same address as for the customer on the invoice (C 303) and an invoice (C 309) to the Appellant from TNT for “economy express (non docs)”.

156. Mrs Hall did not list the TNT documents as having been provided to her in March 2007. Mr Onwufuju said in his statement that there was no Airway Bill, see paragraph 30 above. We have to consider whether the TNT document is sufficiently clearly linked to the invoice and if so whether the mode of transport and route of export movement are clearly identified. It is a reasonable inference that goods sent by economy express from Southern England to Nigeria would go by air from Heathrow, however inference cannot in our judgment be a substitute for the clear identification required for the mode and route. As already stated there is no link between the MAWB produced and the invoice. The Appellant does not succeed on this invoice.

157. Invoice 187 is covered at paragraph 18 above. The same MAWB (C 283) was originally provided as for invoice 182 showing Reliance Freight as the shipper and the consignee as in Lagos. The Certificate of Shipment (C 285) dated 16 February by World Express exhibited by Mr Onwufuju in 2008 showed the supplier, customer, goods, venue and a shipment date from Heathrow of 13 January with an MAWB attached. The attached MAWB (C 286) issued by KLM was executed in London on 16 February and was numbered 07462474613, being one digit more than the Certificate of Shipment which omitted the second ‘4’; it showed a flight originating in Amsterdam going to Accra; it carried the words “Courier (Select Express)”.

158. The original MAWB provided (C 282) contained nothing to link it to invoice 187. The Certificate of Shipment by World Express matched the invoice closely, but the date of shipment was before that on the invoice and the MAWB was wrong by one digit; the Certificate was itself dated 16 February, the same date as the attached MAWB, it showed departure from Heathrow.

159. The originally provided MAWB by Bellview Airlines to Lagos was clearly not related to this consignment. Apart from the clerical error on the MAWB number and the shipment date which did not agree with date at the top, the Certificate of Shipment by World Express did provide the necessary details. The MAWB (C 286) was issued

in London and carried the words “To AMS LL ACC”. In our view “LL” refers to London. This is supported by the fact that the MAWB was captured on CHIEF so that the freight must have been declared at Heathrow (C 366).

5 160. The evidence of Mrs Hall was that the Certificate of Shipment and the MAWB were provided with Mr Onwufuju’s statement of 2008. We find that the errors in the Certificate of Shipment were not so great as to prevent that Certificate with the attached MAWB from constituting sufficient evidence for paragraph 6.5 of Notice 703.

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161. Invoice 189 dated 28 January was the final invoice covered by the 01/07 return and appeal LON/2009/562, see paragraph 19 above. The invoice and Certificate of Shipment provided to Mrs Hall in March 2007 (C 330-1) together showed all the matters required under paragraph 6.5 of Notice 703. At the same time an MAWB of very poor quality (C 332) was provided for a cargo flight to Accra with the MAWB number shown on the Certificate of Shipment; it was dated 30 January and carried the words “Courier (Select Express)”; the shipper was shown as World Express.

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20 162. Notwithstanding the poor quality of the MAWB those potentially provided the necessary evidence of export, the MAWB being corroborative.

163. A different Certificate of Shipment (C 336) by World Express showing the MAWB number as on C 331 namely 07462475560 crossed out and 0746247613 written in manuscript was provided in March 2009 and a further copy with the figure “4” added was sent in August 2010, together with an MAWB (C 340) numbered 074 62474613 dated 16 February 2007; the MAWB was that for invoice 187.

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164. Apart from the manuscript change in the MAWB number the information on the Certificate provided in March 2009 does not conflict with the contents of that provided in March 2007 (C 331). Even if the MAWB number on C 331 was incorrect, the airline and airport of loading were the same. Confusion as between two consignments to Accra by the same Shipper (World Express) using the same airline is understandable. There was no allegation of bad faith and no suggestion that the goods were not exported to Africa. Article 146 of the Principal Directive referred to the straightforward application of the exemptions. We do not consider that uncertainty as to the MAWB and the date of shipping, neither of which are required to be identified under paragraph 6.5 of Notice 703, prevents the conditions from being satisfied.

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40 165. Invoice 214 and 215 were included on the Appellant’s return for 03/07 and were covered by LON/2009/563 before consolidation. Invoice 214 is covered at paragraph 20 above. Mrs Hall recorded receiving 5 documents with the 03/07 accounting records in relation to invoice 214, presumably in April or May 2007. The invoice (C 475) was for 2550 Cozaar 50 mg tablets x 28 at a cost of £41,335.50 and was addressed to “Sundry Customers, Okocha, 309/311 Aba Road, Port Harcourt, Nigeria” and dated 2 March. A Certificate of Shipment (C 477) by Reliance Freight showed the supplier, customer, value, export destination, Air Waybill No. 757-

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59031055 by Avient Aviation, loading at Heathrow and receiving agent as Jimfag, Lagos, the weight of the goods being 40.86 kgs and shipment on 26 March. A packing list with Air Cargo Manifest (C 478-9) by Reliance Freight showed the Cozaar tablets weighing 40.86 kgs, the MAWB number, flight number SMJ 8066, consigned to Mrs Okocha, among other goods on the Manifest. An MAWB (C 480), issued by Avient Aviation, with the number on the Certificate of Shipment, showed the airport of departure as Vatry by flight number SMJ 8066 on 26 March, certified by Afritrade on 23 March and marked "Urgent Courier Material". An SAD (C 481) showed goods consisting of 23 packages personal effects ad declared by Afritrade at Dover on 23 March for a private exporter, the declaration number being 120 B47559C. A letter by Mr Onwufuju on 30 January 2008 (C 383) stated that the goods in invoices 214 and 215 were "part of declaration notice A 52954F airway bill number 757-56009940". A SAD (C 469) with that number showed declaration by Afritrade at Dover on 10 March of 26 Packages of personal effects; the number of pieces on another Manifest (C 485-6) for flight number SMJ 8066 on 26 March totalled 26.

166. The Certificate of Shipment by Reliance Freight was clearly wrong in stating that loading was at Heathrow when the MAWB was for a flight from Vatry by the same airline; there was no evidence that Avient Airlines used Heathrow.

167. The weight shown on the packing list and manifest for the tablets was patently incredible. Each packet of 28 tablets of 50mg would weigh 1.4 grammes. 2550 packets would give 3.57 kgs. We are unable to accept Mr Onwufuju's explanation at paragraph 47 above that the difference between that weight and 40.86 kgs could be explained by leaflets, instructions and packaging. We note that the weight given for 9999 packets of Cozaar 50mg tablets under invoice 177 was 102.77 kgs equal to just over 10grms per package against 16 grs on this manifest. Furthermore the description "personal effects" on the declaration was inapt for pharmaceutical products and 124 DVD players.

168. Whereas the Certificate giving Heathrow could be regarded as a clerical error outweighed by the other documents provided to Mrs Hall at the same time, the airport of departure is important. The very considerable weight shown on the manifest raises serious doubts as to the goods; it simply is not credible.

169. Invoice 215 (C493) had the same date as invoice 214, namely 2 March 2007. It was also for Cozaar tablets, the customer being Eunice Obaro, Lagos. The Certificate of Shipment (C 495) gave an Air Waybill number and stated that the goods were shipped from Heathrow to Lagos on 19 March, the weight being 25.15 kgs. The Air Cargo Manifest (C 496) showed goods consigned to Eunice Obaro weighing 241 kgs to be shipped on 19 March on flight SMJ 8066 under the MAWB number shown on the Certificate of Shipment, 757-59030576. An MAWB (C 497) provided to Mrs Hall at the same time in March 2007 with that MAWB number for flight SMJ 8066 on 19 March by Avient showed electrical accessories and pharmaceuticals being despatched from Vatry. Also with the above the Appellant had provided to Mrs Hall an SAD (C 493) showing 23 packages of personal effects being declared at Dover on 23 March with a Reliance reference number. On 30 January 2008 Mr Onwufuju

provided Mrs Hall with a different SAD (C 384) showing declaration at Dover on 10 March 2007; this was the same SAD as that produced for invoice 175 (C 271).

170. The documents originally produced were inconsistent in that the Certificate of Shipment showing shipment from Heathrow whereas the departure was clearly from Vatry, the other details on the Certificate showing Avient Aviation and the MAWB number for the flight on 19 March. The SAD (C 498) provided in March 2007 was not consistent with the MAWB date, the SAD date being 4 days after shipment to Lagos. The explanation given by Mr Onwufuju for the weight at paragraph 47 above is not credible.

Disallowed input tax

171. We now turn to the two invoices disallowed for input tax disallowed under section 26A of the VAT Act 1994 on the grounds that they were not paid within 6 months of the date of supply. The assessments were amended so as to allow part of the sum as having being paid within 6 months. Section 26A provides as follows:

- “(1) Where –
- (a) a person has become entitled to credit for any input tax, and
 - (b) the consideration for the supply to which that input tax relates, or any part of it, is unpaid at the end of the period of six months following the relevant date,
- he shall be taken, as from the end of that period, not to have been entitled to credit for input tax in respect of the VAT that is referable to the unpaid consideration or part.
- (2) For the purposes of subsection (1) above “the relevant date”, in relation to any sum representing consideration for a supply, is –
- (a) the date of the supply, or
 - (b) if later, the date on which the sum became payable.”

Section 26A(3) and (4) provide for regulations. Regulation 172H of the Value Added Tax Regulations 1995 provide for the mechanics of repayment of input tax where the whole or part has not been paid within 6 months and regulation 172I provides for restoration of entitlement where it is paid subsequently in the period when it is paid. Regulation 173J provides for attribution of payments; neither party made any submission as to this regulation or regulation 170 to which regulation 172J refers. Regulation 170 applies a first in/first out approach to attribution in the absence of specific attribution with payment in full. There is no express provision for treatment of sums owed to the recipient of a supply in respect of supplies by the recipient to the supplier, however on normal legal principles in the absence of a contrary agreement the debts would be offset.

172. In relation to input tax deducted where consideration for the supply is unpaid there is no provision such as that in Notice 703 requiring evidence of payment to be obtained within a specified time. On appeal the Tribunal must decide on the evidence

before it including oral evidence whether the payment or payments for the supplies were made within six months of the time of supply or of the date when the sum became payable, the burden of proof being on the Appellant.

5 173. Mr Singh said that Customs accepted that part of invoices 6119 and 101 had
been paid but did not accept that the balance was paid within 6 months. He said that
the evidence as to payment on the invoices was inconsistent. Mr Reza's evidence that
LogiChem received payment on invoice 6119 in full by 26 April 2007 was not
10 consistent with Mr Onwufuju's statement in 2008. Mr Reza's evidence was that there
were no written terms of payment and that LogiChem did not set-off payments; he
said that LogiChem paid money to the Appellant even though the Appellant owed
money. It was not clear how Mr Reza attributed sums received. He said that the fact
that money had been paid to Palmers Solicitors did not show that Primorose had been
paid.

15 174. Mr Onwufuju submitted that there was no benefit to Mr Reza to say that
invoice 6119 was paid if it was not paid in fact. Bad debt relief had only been
claimed on the balance of £76,547 (C 523A). Page 70 of the Appellant's bank
statement showed £270,636.13 as paid on 3 April 2007 : this matched a receipt on
20 LogiChem's bank statement (C 551). The statement by LogiChem to the Appellant
dated 21 August 2007 did not include invoice 6119.

175. With regard to invoice 101 from Primorose, Mr Hodges had written (C 423)
that invoice 101 was finally settled in full on 16 May 2007 and was not part of
25 Primorose's claim in liquidation. Mr Onwufuju said that 16 May was the date of the
payment to Palmers Solicitors of £146,776.86 on page 118 of the Appellant's bank
statement (C 66): the endorsement £146,776.86 was not in his writing.

176. The evidence of Mr Onwufuju as to payment for the invoices covered at
30 paragraphs 31 and 32, 52 and 53, 56 and 57 and 61 and 62 above was confused and
contradictory and viewed on its own did not start to discharge the burden of proof.

177. By contrast we found the evidence of Mr Reza who was cross-examined for
2½ hours to be clear and consistent. We accept his evidence that LogiChem was paid
35 in full for the supplies under invoice 6119 by the sum credited to its HSBC account on
26 April 2006 which appears on LogiChem's bank statement from HSBC (C 553).

178. The evidence as to the payment for invoice 101 was another matter. We have
already stated that Mr Onwufuju's evidence on this aspect was confused and
40 contradictory. This may in part be due to the fact that the Appellant company went
into liquidation on 27 January 2009. In any event the Appellant's records appear to
have been far from adequate. If the records in the hands of the liquidator had shown
when or whether the Appellant paid for invoice 101 we assume that they would have
been produced.

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179. Mr Onwufuju relied on a letter by Mr Hodges (C 423) stating that the invoice was settled in full on 16 May 2007 and did not form part of the claim to the liquidator together with a bank statement for the Appellant (C 66 and 470) showing a payment to Palmers Solicitors of £146,776.86 on that day with an annotation “Primorose”. There was no evidence as to who wrote the annotation, although Mrs Hall’s letter of 13 November 2007 (C 445) referring to an endorsement on the Appellant’s bank statement #118 suggests that it was not her.

180. A summons was issued to Mr Hodges to attend on 30 November 2011 and to produce all documents and in particular the bank statements of Primorose in support of his statement that invoice 101 was paid in full on 16 May 2007 (C 423). Mr Hodges did not attend. Mr Onwufuju told us on 30 November that Mr Hodges was at a hospital where his mother had been admitted on the previous day. On the next day Mr Onwufuju told us that he had spoken to Mr Hodges on the previous evening to ask whether he could come. Mr Hodges did not attend.

181. Given that Mr Onwufuju is a 30 per cent shareholder in Primorose and signed tax returns in 2009 (see paragraphs 58 and 60), we can see no reason why Mr Onwufuju was not able to produce the relevant documents himself.

182. In the circumstances we attach no weight to Mr Hodges’ letter of 5 July 2007 (C 423). Our attention was not drawn to any other evidence to establish that the Appellant paid for invoice 101 on 16 May or within six months of supply. There was no evidence as to why the Appellant would have made a payment to a firm of solicitors rather than to Primorose.

183. We note that invoice 101 (C 467) states at the top “The payment terms for this order are COD.” We are not satisfied that the time for payment was extended.

184. The Appellant has not satisfied us that invoice 101 was paid in full within six months.

Summary of Conclusions

185. The appeal as to zero-rating succeeds in relation to invoices 176, 187, 189 and 6119 but fails on invoices 175, 177, 178, 182, 214, 215 and 101 (paragraphs 125 to 170).

186. The appeal in respect of input tax succeeds in relation to invoice 6119 but fails in relation to part of invoice 101.

187. 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.

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THEODORE WALLACE
TRIBUNAL JUDGE
RELEASE DATE: 13 February 2012