



**TC01875**

**Appeal number MAN/2007/1320**

**FIRST-TIER TRIBUNAL  
TAX**

*VAT – Zero Rating – S.30(8) VATA 1994 – purported supplies of goods to a trader in Spain – supplies forming part of a scheme of tax avoidance – the Appellant unaware of the circumstances surrounding the supplies – lack of persuasive evidence that the goods left the United Kingdom – no commercial documentation evidencing removal from the United Kingdom – forged documentation - Appellant failing to take every reasonable precaution required – Appeal dismissed*

**KENCO SPARES LIMITED**

**Appellant**

**- and -**

**THE COMMISSIONERS FOR HER MAJESTY'S  
REVENUE AND CUSTOMS ("HMRC")**

**Respondents**

**TRIBUNAL: IAN WILLIAM HUDDLESTON, TRIBUNAL JUDGE  
JOHN ADRAIN FCA, MEMBER**

**Sitting in public in Belfast on 25 June 2009 and 4 April 2011**

**Andrew Young, BL, for the Appellant**

**Nigel Bird, BL, instructed by the Solicitors Office of HM Revenue & Customs for the Respondents**

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## DECISION

1. This is an appeal against a Notice of Assessment issued pursuant to Section 73A  
5 of the Value Added Tax Act 1994 ("the Act") in the sum of £215,754, plus interest, in  
respect of the VAT periods 06/05 and 12/05 to 09/06 (inclusive).

### Summary of Facts

2. Kenco Spares Limited ("the Appellant") at the operative time, traded as a  
wholesaler of batteries and pharmaceutical products (mostly razor blades) operating  
10 from premises at 47 Earlswood Road, Belfast, BT4 3EA, premises at Castlereagh  
Street and at commercial premises at Dargan Crescent, all Belfast.

3. The Appellant has been registered for VAT since the 1 July 1999 under  
registration number 740 1051 88.

4. On 13 September 2006 Officers from HMRC visited the Appellant to inspect its  
15 records.

5. From those records it was apparent that the Appellant had treated a large number  
of supplies to a Spanish company Enkay Marketing SL ("Enkay") as zero rated.

6. In support of that treatment the Appellant produced the following information:

- (1) faxed purchase orders from Enkay;
- 20 (2) CMR transportation documents – purporting to show the transportation of  
the goods;
- (3) shipping release notes purporting to be from P&O Irish Sea Ferries (to be  
read in conjunction with the CMRs)

7. The visiting Officers were told that Alan Brown, a director of Enkay, had  
25 contacted the Appellant following meetings at a trade show in Birmingham and  
placed the orders by fax.

8. The Appellant's director, Mr. Kenneth Kinnear, had carried out credit checks on  
Enkay through his bank, HSBC, and, in relation to the initial transaction, had ensured  
that the purchase money was transferred by telegraphic transfer into the Appellant's  
30 bank account prior to the goods being released. Enkay had then (and on each  
subsequent occasion) organised the collection and transportation of the goods from  
the Appellant's warehouse in Dargan Crescent.

9. HMRC carried out an inspection, through their Officer Miss. G. Jackson on 14  
February 2006. The sales to Enkay were noted and a repayment return authorised.

35 10. HMRC carried out a subsequent visit on 13 September 2006. On that occasion  
the visiting Officers informed the Appellant's representative that they did not consider

that the evidence then available was sufficient to support zero rating, and invited the Appellant to provide further documentation.

11. Over the following period, further checks were made by HMRC which revealed the following:

- 5 (1) neither Enkay, nor its director Alan Brown, could be traced, and it subsequently transpired that Enkay was de-registered in Spain in October 2006;
- (2) the documentation from P&O could not be relied upon. There were a number of defects with it:
- 10 (a) in the first place, the release notes, relating as they did to the Dover to Calais sailings, would not have been issued by P&O Irish Sea Ferries;
- (b) the sailing times were incompatible with the actual schedule of sailings operated by P&O on the Channel route;
- (c) the references on the release notes did not accord with the P&O internal accounting systems;
- 15 (3) the Appellant had indicated that it would seek further information from P&O but, in the circumstances no additional information was available.

12. HMRC, therefore, concluded that the Appellant could not rely upon the zero rating provisions relating to intra-community trade, and issued the assessment which is under appeal.

20 13. In due course further additional enquiries in relation to the suppliers to the Appellant were carried out. Those enquiries also resulted in a number of inconsistencies:

- (1) a supplier (Aqua Wholesale Limited) had asked to be paid for goods supplied to the First Curacao International Bank in the Dutch Antilles. It only had an accommodation address, subsequently went missing, and was compulsorily de-registered;
- 25 (2) Glenarvan Limited and Food Line Limited, two other suppliers, had been implicated in missing trader fraud;
- (3) a further supplier, Yib Limited, was de-registered in February 2006;
- 30 (4) Pre-Glaze Limited, yet another supplier, could not be contacted – its address being an accommodation address with telephones being directed through to a telephone answering service.

14. It would appear that this series of investigations had led HMRC to the view that the Appellant was implicated in a wider series of fraud. It is important to say at the outset that that allegation was not brought forward by HMRC during the conduct of the case and that at no stage in the Appeal was it suggested other than that the Appellant was an innocent victim in relation to a wider series of fraudulent endeavour carried out by third parties.

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15. Mr. Kinnear, subsequent to the September visit, and now having been appraised of HMRC's position, travelled to Spain in an unsuccessful attempt to contact Mr. Brown and obtain additional evidence of the transportation of the goods in question.

### **The Appellant's Case**

5 16. The Appellant's case, as disclosed by its supplemental Notice of Appeal dated 7 March 2008 is that:

(1) "the goods were despatched to Enkay and were made available for collection;

10 (2) CMRs and other travel documents were subsequently made available to the Appellant and provided to HMRC;

(3) the Appellant [has] provided sufficient documentary evidence to show that the goods have been removed from the UK."

### **Issues**

17. The issues in this appeal are:

15 (1) whether the Appellant complied with the legislative requirements for zero rating of supplies, in particular Regulation 134 of the VAT Regulations 1994 and HMRC Public Notice 725, parts of which have the force of law;

20 (2) if there is non-compliance with the legislative requirements whether, in the alternative, the Appellant took every step which could reasonably be required of it to satisfy itself that the transaction which it was effecting did not result in its participation in tax evasion.

### **Legislation**

18. Section 30(8) of the VAT Act 1994 enacts the provisions of the Sixth Directive which are in point in relation to this appeal:

25 (1) Section 30(8) – "*Regulations may provide for the zero rating of supplies of goods or of such goods as may be specified in the Regulations in cases where:*

(a) *the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member state, or that the supply in question involves both:*

30 (i) *the removal of the goods from the United Kingdom; and*

(ii) *their acquisition in another member state by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that member state corresponding, in relation to that member state, to the provisions of Section 10; and*

35 (b) *such other conditions (if any) as may be specified in the Regulations or the Commissioners may impose are fulfilled."*

(2) Regulation 134 of the VAT Regulations 1994 [1995 2518] provides as follows:

*"Where the Commissioners are satisfied that:*

- 5 (a) *a supply of goods by a taxable person involves their removal from the United Kingdom;*
- (b) *the supply is to a person taxable in another member state;*
- (c) *the goods have been removed to another member state;*
- 10 (d) *the goods are not goods in relation to whose supply the taxable person has opted pursuant to Section 50A of the Act for VAT to be charged by reference to the profit margin on the supply*
- the supply, subject to such conditions as they may impose, shall be zero rated."*

19. Additional conditions for zero rating are to be found in HMRC Public Notice 725:

15 (1) Paragraph 4.3 provides (inter alia) that the trader must *"obtain and keep valid commercial evidence that the goods have been removed from the UK within the time limits set out at paragraph 4.4 [(ie. 3 months)]"*. That provision has force of law;

20 (2) Paragraph 4.6, which does not have force of law, provides that where the conditions cannot be met that the trader ought to consider taking a deposit for the VAT where the trader has *"reasonable doubt that the goods will not be removed"*. The paragraph continues:

*"Extra caution may be advisable if your customer:*

- 25 ○ *is not previously known to you;*
- *arranges to collect and transport the goods, or their transport arrives without advance correspondence or notice;*
- *pays in cash; or*
- *purchases types or quantities of goods inconsistent with their normal commercial practice."*

30 (3) Paragraph 4.10 provides for the following:

*"Will I have to account for VAT if my customer's VAT number turns out to be invalid?"*

- *No. But only if you have:*
- 35     ▪ *taken all reasonable steps to ensure that your customer is registered for VAT in the EEC;*
- *have obtained and shown your customer's EC VAT Number on your VAT sales invoice;*

- ***hold valid documentary evidence that the goods have left the UK.***

(4) In relation to the appropriate commercial evidence that the goods have been removed from the UK, Notice 725 provides (per paragraph 4.5) that a trader's record must show:

- (a) the name, address and VAT number of the customer in the EC;
- (b) the invoice number and date;
- (c) the description, quantity and value of the goods;
- (d) the name and address of the third party in the UK to whom the goods were delivered;
- (e) the date by which the goods must be removed;
- (f) proof of removal obtained from the person responsible for transporting the goods out of the UK; and
- (g) the date the goods were actually removed from the UK.

(5) Finally, paragraph 4.12 provides as follows:

*"Will VAT be chargeable if reasonable steps are not considered to have been taken?"*

- *Yes. You will have account for VAT at the appropriate rate on goods in the UK.*

20. Applying those legislative provisions and the principles in Notice 725 to the present situation led HMRC to conclude that the conditions for zero rating of the goods supplied by the Appellant to Enkay had not been met, and that therefore an assessment pursuant to Section 73A of the Act was appropriate. It is obviously that assessment which is now under appeal.

### **The Hearing**

21. The hearing was heard over 2 separate dates – 25 June 2009 and 4 April 2011.

22. HMRC called the following witnesses:

(1) Helen Corr, an Officer of HMRC who provided both an original and supplemental witness statement and oral evidence of the visit to the Appellant's premises and the rationale for raising the assessment based on:

- (a) the Appellant's failure to comply with PBN 725;
- (b) the fraudulent nature of the transportation documentation which had been supplied;
- (c) the trader's connections with the trade suppliers, most of whom had (by the time the assessment was raised) been de-registered for VAT for a variety of reasons;

(2) Mr. David McGarel, an Officer of HMRC, who provided a witness statement and gave oral evidence that:

5 (a) he had asked the Appellant for additional information evidencing removal of the goods from the United Kingdom prior to raising the assessment;

(b) that investigations had been carried out on the vehicle registration numbers which appeared in the CMR documentation – the vehicles cited being proven to be, in the main, domestic vehicles and therefore unsuitable for the carriage of commercial goods;

10 (3) Mr. B. Roland, a Finance Officer with P&O, who confirmed that the P&O release notes which had been furnished to HMRC as evidence of removal of the goods from the United Kingdom were forgeries.

15 23. Mr. Kenneth Kinnear, a Director in the Appellant Company, gave evidence on behalf of the Company, as did Mr. Michael Crooks, the company accountant, who had conducted the initial meetings with HMRC.

## **Evidence**

### **(a) Background**

20 24. Mr. Kinnear took over the company from his father in the late 1970's and during the intervening period changed the emphasis of the company into a retail distribution company focusing on pharmaceutical products and batteries. Evidence was given that the business was a low margin, high volume business. Mr. Kinnear operated the business from his home, 47 Earlswood Road, Belfast, and generally would order goods which would be delivered to his warehouse in Dargan Crescent, Belfast ("the Dargan Premises") from whence they would be distributed to onward purchasers.

25 25. The warehouse facility at the Dargan Premises was operated by a warehouse man who took control of both the receipt of supplies and their onward transportation. It is relevant to this appeal that the warehouse man died 18 months before the hearing of this case and that, therefore, little or no evidence was produced by the Appellant in relation to the circumstances around the uplifting of the goods which are the subject  
30 of this appeal by or on behalf of Enkay.

26. It is also relevant that the Appellant gave evidence that prior to his introduction to Mr. Brown / Enkay that the Appellant had done very little by way of European trade, and had focused mainly on the Northern Irish market.

35 27. In that regard the Appellant was one of two appointed distributors for Gillette products in Northern Ireland.

28. In terms of his initial dealings with Mr. Brown / Enkay, evidence was given that Mr. Kinnear met him at a number of successive trade fairs in Birmingham. After a period of association, Mr. Brown on behalf of Enkay placed an initial order with the Appellant.

29. At that point, evidence was given that the Appellant undertook the following due diligence:

5 (1) he checked the veracity of the VAT registration number which was given by reference to the EU website - a copy of the search that had been carried out, confirming the validity of Enkay's VAT number as at the 19 October 2005 was produced to the Tribunal;

(2) the Appellant also obtained a copy of Enkay's VAT registration certificate;

10 (3) finally Mr. Kinnear, through his bankers, HSBC, carried out a credit check on Enkay and, prior to actually releasing the goods which were the subject of the first order, insisted upon advance payment. It was only when that payment was received into the Appellant's HSBC account that the first goods were released.

30. It probably should be noted at this stage that the documentation available in respect of the first order consisted only of the invoice provided by the Appellant. There was no formal purchase order, CMR documentation or delivery dockets.

15 31. Mr. Kinnear confirmed in his evidence to the Tribunal that part of his approach at this stage was to establish some degree of trust in the trading relationship with Enkay.

#### **(b) Transactions**

20 32. The Appellant's case (as pleaded in the amended Notice of Appeal) and in submissions from Appellant's Counsel was essentially (and here I summarise) that the Appellant had undertaken sufficient reasonable enquiries, to which the evidence referred to above was adduced, namely the Appellant's check on the EU website, its obtaining of the Certificate of Registration of Enkay as a VAT registered entity, and the credit checks undertaken on the Appellant's behalf by HSBC. The Tribunal agrees that in relation to the initial stage of investigation, these all are appropriate, but these  
25 investigations, of themselves, obviously do not entitle a trader to zero rate the supply of goods. That entitlement focuses entirely upon the evidence of the removal of those goods from the relevant member state. It is not surprising, therefore, that in the main both the evidence of Mr. Kinnear, and Mr. Crooks on behalf of the company – both in chief and in cross examination – focused on the available documentation which had  
30 been produced in support of the Appellant's case and, in particular, the evidence of transportation.

#### **(c) Transportation Documentation**

35 33. The documents relevant to the transactions in question largely divide into purchase orders, the CMRs / release notes (collectively the "transportation documentation") and, finally, delivery information as supplied to the Appellant by the purported carrier of the goods, Hansa Cargo Transport GmbH, based in Hamburg.

#### **(d) The Purchase Orders**

34. The evidence to the Tribunal was that in most cases the purchase orders were supplied by fax from Enkay Marketing. It was noted that the typescript was

individualistic and, in most cases, the purchase orders were faxed from a Spanish fax number. The details normally included in a purchase order included:

- (1) the date;
- (2) Kenco's order reference;
- 5 (3) an instruction to supply identified goods (generally either pharmaceutical supplies and/or batteries);
- (4) the cash purchase price.

In most cases the collection details were described as "T.B.A." but otherwise that the goods were "Ex Ireland".

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35. During the course of cross examination HMRC brought out their principal objections to the purchase orders, not by reference to the purchase orders by themselves, but by reference to the fact, that when related to the remaining transactional documents, inconsistencies arose.

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36. For example, in some cases it appeared from the documentation that the purchase orders themselves post dated the despatch of goods. For example, in one case (a purchase order for 192 cases of Braun brush heads (value £13,363.20)) the purchase order itself was dated the 12 January 2006, but purportedly had been faxed from Enkay Marketing on the 7 January 2006 (at 22.57).

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37. For the same transaction it appeared, from the documentation presented to the Tribunal, that the invoice which Kenco had raised in respect of those goods was, in fact, dated the 9 December 2005 and that the goods themselves had actually been despatched on the 12 December 2005 – ie. a month before the purchase order was created. Again, in that particular case, the CMR recorded a transportation date of the

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12 December 2005, which was purportedly stamped by P&O Ferries on the 9 December 2005 (at Dover, Kent) and bore the receipt stamp of Enkay Marketing as acknowledging that the "goods were received" on the 16 December 2005.

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38. The specific inconsistencies in relation to this particular order, and others of a similar ilk, were put to Mr. Kinnear, whose explanation was that in some cases the goods were despatched based on telephone orders which did not necessarily always follow the exact chain of documentation. He also accepted that his documentary records may not have been very well or systematically kept.

#### **(e) Transportation Documents (CMR and Release Notes)**

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39. During the Appeal, some considerable time was spent in examining the transportation documentation. The CMR documentation, in virtually all of the instances where CMR documentation existed, was incomplete. In general terms:

- (1) the sender's details were included as Kenco;
- (2) the consignee's details were included as Enkay;
- (3) the place of delivery was generally given as Malaga, Spain;

- (4) the place of loading (generally given as Belfast, plus relevant date); and
- (5) including the (purported) stamp of P&O Ferries and a stamp of Enkay – the latter purporting to acknowledge receipt of the various goods;
- (6) in some but not all cases the trailer number and lorry / tractor number were included (the lorry / tractor numbers themselves subsequently proving to be fraudulent);
- (7) in none of the CMRs produced to the Tribunal were the boxes completed which disclosed details of the transporter; the route; or the final destination.

40. The CMRs themselves obviously did not evidence the actual transportation of goods but they, together with valid release notes, could obviously perform that function and it is they upon which the Appellant relies.

41. In terms of the release notes (as already indicated) it subsequently transpired that these had been created fraudulently. As Mr. Roland's evidence confirmed, there were deficiencies in relation to the documents:

- (1) in the first place, the sailings quoted – Dover to Calais – were not consistent with the scheduled timings of P&O Ferries;
- (2) the release notes were given on documents headed "P&O **Irish Sea**" and purportedly given by "P&O European Ferries (**Irish Sea**) Limited of Channel House, Channel View Road, Dover". It was Mr. Roland's evidence that any such documentation would not be relevant to transportation in the English Channel between Dover and Calais;
- (3) the documents included a vehicle registration number and a driver's name and were purportedly signed, but no confirmation was available to confirm that those details were consistent with those included in the CMR;
- (4) the reference numbers quoted on the release notes were generally intended to accord with those quoted on the CMR, but in none of the cases were they consistent with the reference numbers adopted by P&O in relation to its internal accounting procedures or computer systems.

**(f) Vehicle Registrations**

42. Whilst certain of the CMRs purported to include the details of the collecting vehicles (example ILZ 2749 or ILZ 9643) the evidence before the Tribunal (as provided by both Ms. Corr and Mr. D. McGarel on behalf of HMRC) confirmed that in each case where vehicle registration numbers were checked by reference to the records held by DVLA that the vehicle in question was not of a type appropriate to the carriage of commercial goods. In most cases, in fact, the registration numbers quoted were actually linked to ordinary domestic vehicles.

43. As these details had been included on the CMRs provided by the Appellant, the point was put to Mr. Kinnear.

44. Mr. Kinnear explained that all of the deliveries had been generally operated by his now deceased warehouse man and, therefore, he could not provide any

explanation as to the vehicles which had actually uplifted the goods in question or as to why there were inconsistencies with the vehicle registration numbers which appeared on the CMRs.

**(g) The HANSA Documentation**

5 45. The Appellant had also been provided, via Enkay, with documents purporting to  
be delivery invoices raised by Hansa Cargo Transport GmbH based in Hamburg. In  
most cases these were invoices raised against Enkay Marketing and referred to goods  
generally "Ex Kenco, Belfast" cross referencing to a particular delivery note. In all  
cases the appropriate fee was indicated on the face of the invoice and an instruction  
10 that the delivery was to "Antwerpen, Belgium".

46. It became apparent from the evidence provided to the Tribunal that these had  
been made available by Enkay to the Appellant after the HMRC assessment had been  
raised. Indeed, the fax transmission details which appeared on most of the relevant  
Hansa documentation was the 30 November 2006 – not only after the assessment but  
15 also after Enkay had been compulsorily de-registered for VAT by the Spanish  
authorities.

47. Mr. Kinnear could not explain the mandating of the goods to Antwerp on the face  
of the documents.

**(h) Banking Transactions**

20 48. It had been Mr. Kinnear's evidence that in relation to the first transaction he had  
insisted upon pre-payment of the total value of the invoice, prior to despatching  
goods.

49. The Tribunal was furnished with a number of bank statements in respect of the  
relevant period through which the trading relationship between the Appellant and  
25 Enkay existed.

50. It appeared from the evidence that certain of the payments in respect of the goods  
supplied to Enkay were paid through an HSBC branch in Eccles, Manchester. It was  
suggested by HMRC, firstly, that this was unusual given the nature and location of the  
transactions and, secondly, that the timing of some of the payments did not accord  
30 with Mr. Kinnear's evidence, namely that in some cases the lodgements were a  
number of weeks after the shipment of goods took place and not in advance as he  
suggested.

51. The Tribunal was not particularly convinced regarding the suggestion that this  
disclosed an irregular pattern of payments, such as would put any trader on alert. In  
35 the first place, Mr. Kinnear gave evidence that cheques often arrived by post and it  
may have been the case (he could not quite recall) that he had retained the cheques for  
some time before actually lodging them. Another explanation for the lodgements in  
Manchester was that he himself could have lodged them in Manchester, although he  
did not discount the possibility that Mr. Brown could have made the lodgements as,

although he was based primarily in Spain, he was originally from the Manchester area.

52. In totality, however, the Tribunal did not consider the payment profile to provide any helpful evidence to advance either party's argument.

5 **(i) Interaction with HMRC**

53. Part of the Appellant's case was that HMRC had conducted a site visit on the 14 February 2006, that the then inspector, Gillian Jackson, had conducted a review and that the audit report for that visit did not disclose any notable issues and, indeed, payment was made in respect of VAT reclaimed on purchases which, in turn had been the subject of zero rated supplies.

54. The Appellant, based on that, tried to make the case that the documentation provided must then, objectively, be sufficient to have justified the zero rating. That assertion, however, does not appear to have a correct basis in either fact or in law and indeed, in the evidence provided by Helen Corr, the point was made that in the subsequent visit to the Appellant's premises it was made quite clear that HMRC did not consider that the documentation which was uplifted was sufficient to justify the zero rating which the Appellant had applied. Indeed, it was based on that subsequent visit that the Appellant then proceeded to go to Spain to attempt to contact Mr. Brown to see if additional information could be made available.

20 **Finding of Facts**

55. The Tribunal finds the following facts:

(1) the Tribunal finds that Enkay did not account for VAT in Spain on the goods supplied by the Appellant. In reality the documents provided by or on behalf of Enkay to demonstrate removal of the goods from the United Kingdom were forgeries. In those circumstances, the Tribunal finds that on the evidence before it the Appellant's transactions with Enkay formed part of a scheme of tax avoidance, most likely perpetrated by Mr. Brown of Enkay, and that the goods never reached Spain. It is important, at this point obviously, to record that the Tribunal found no evidence of the Appellant's knowing involvement in that scheme of avoidance;

(2) that the Appellant only truly became aware of the position after the HMRC inspection visits in September 2006 at which point the Appellant sought further evidence of the removal of the goods from the United Kingdom;

(3) the Appellant carried out limited checks on Enkay. At the beginning of its trading relationship the Tribunal finds that, as one might have expected, the Appellant did check the veracity of Enkay's VAT registration. Equally, but more importantly to the Appellant, the Appellant did take certain measures to protect itself in terms of insisting on advance payments for goods supplied. It was apparent from Mr. Kinnear's evidence, however, that solvency issues were uppermost in his mind at that stage and that once a degree of trust had been

established, then the Appellant, broadly speaking, relied on his personal dealings with Mr. Brown;

(4) the Tribunal finds that the Appellant did not carry out sufficient due diligence in relation to the overall transactions – particularly where, as Mr. Kinnear acknowledged, the Appellant was inexperienced in cross border trade arrangements. There was limited or no evidence put before the Tribunal to establish what advance preparation the Appellant undertook to satisfy itself as to what detailed documentation or evidence would be required to satisfy HMRC that goods supplied to Enkay could be the subject of zero rating.

56. In the main, the documents which would have supported the Appellant's argued that the goods validly exported from the United Kingdom were, in this case, essentially the CMR documentation read together with the release notes. The Appellant argues that applying the "first sight test" (per *Teleos* – see below) the documents do not alert concerns. The Tribunal does not agree, and finds that on a visual inspection of those documents, either looked at on their own or, indeed, in conjunction with the purchase orders etc., there are certainly a good number of inconsistencies (see paragraphs 33 to 40 above above). The Tribunal was given evidence as to those inconsistencies by Mr. Roland, the officer of P&O. The Tribunal finds that a reasonable person looking at those series of CMR documents and release notes would certainly have been on notice of inconsistencies – not least because of the obviously omissions when one considers the legal requirements to which such documents should conform by virtue of the Carriage of Goods Act 1965. It is plainly clear that a good proportion of the essential information which one might expect in the CMR documentation was absent. In short, therefore, the transportation documentation relied upon by the Appellant was either incomplete or, where it had been completed, would, the Tribunal finds, have been sufficient to raise suspicion on the "first sight" test as referred to in *Teleos* (commented on below) and subsequent cases.

57. Had the Appellant, in the initial stages, made itself aware of the essential requirements of the transportation documentation required to establish the entitlement to zero rating, the Tribunal finds that it would have been possibly more alert to the detail that would have been required to satisfy HMRC. Failure to appraise itself of those requirements, however, clearly does not excuse the Appellant.

58. To avail of the argument that the Appellant took all reasonable steps to avoid participation in the tax avoidance which has occurred would, in the Tribunal's opinion, have necessitated a clear explanation of what the Appellant did to inform itself as to the actual requirements and evidence needed to establish zero rating, and then to both devise and adhere to a plan by which that documentation was collated; reviewed and checked against events – such as the collection of the goods by the actual vehicles cited on the documentation. The Appellant, by his own evidence, conceded that his own record keeping was disorganised and that with the benefit of hindsight that he would have been more proactive in terms of his due diligence and administrative processes. The Tribunal can do no more than take those comments at face value.

59. The Tribunal finds that the contrary position existed, and for whatever reason, the Appellant was sufficiently comfortable, given the initial trades that had been conducted with Enkay, to rely upon Enkay and its representative Mr. Brown almost entirely. A method of business, on a largely informal basis, arose between the two entities and regrettably it would appear to have been that trust which Enkay was then able to exploit.

### Decision

60. **First Issue** – has the Appellant complied with Section 30, Regulation 134 and Notice 725?

61. It will be apparent from the findings of fact immediately above that the Tribunal finds lack of sufficient evidence of compliance with the legislative requirements which were in place to justify the Appellant's attempt to zero rate the supply of goods to Enkay.

62. The reality was that there is no cogent evidence that the goods were transported out of the United Kingdom and, on a balance of probabilities, it would seem that they were diverted before the purported transportation could have occurred.

63. **Second Issue** – did the Appellant take every reasonable measure in its power to ensure the transactions were not connection with fraud?

64. Mr. Young, for the Appellant, argued that, when viewed objectively, the Appellant had taken proper care in relation to the documentation which it was able to present to HMRC and relied, to some extent, on the fact that on the first visit of Miss G. Anderson from HMRC that no issue was raised in relation to the documentation which had been available for inspection. In essence, Mr. Young argued that the "first sight" test as has been referred to in cases following after *Teleos* had been satisfied.

65. In the Tribunal's view, however, that is not correct. In reality, as will have been apparent above, the Tribunal takes the view that the Appellant relied upon Mr. Brown and Enkay to supply the information which would justify the entitlement to zero rate.

66. There is little or no evidence before the Tribunal suggesting that the Appellant took many, if indeed, any precautions to satisfy itself independently as to what requirements would need to have been satisfied. It did this at risk, bearing in mind that it had little or no experience of intra member state trade. At the same time, and as against that, there is a very clear guidance which is available to guide traders in this position - not least Public Notice 725.

67. On the issue of the test of "first sight", as highlighted above the Tribunal takes the view that it is eminently transparent from the CMR documentation and, indeed, the release notes, that they were incomplete – not least the fact that significant boxes showing details of the transporter, consignee and route of the journey were very obviously left blank in all of the CMRs. Where details were completed they ought, in the Tribunal's view, to have raised some degree of concern. It must surely be questionable to have a document which purports to be with P&O Irish Ferries on a

crossing between Dover and Calais? Even on an initial examination of the CMRs that must objectively raise some suspicion.

5 68. In terms of the Hansa documentation, whilst Mr. Kinnear was able to procure that, it obviously was procured largely after a point when he had become aware that  
10 HMRC did not find the documentation in his possession to be sufficient to evidence the transportation of the goods. HMRC's position led Mr. Kinnear to travel to Spain to see if he could locate the whereabouts of Mr. Brown. That resulted in the production of the Hansa but, in reality, that series of purported invoices did no more than raise further queries as to the consistency between those documents and the rest of the transport documentation that had been produced by the Appellant.

15 69. It was the European Court of Justice in *Teleos plc and Others v Customs and Excise Commissioners* [2008] QB 600-633 which established a defence for bona fide traders against a requirement by tax authorities to account for VAT on transactions which were vitiated by fraud. The defence was considered by Lewison J as  
20 *Commissioners v Livewire Telecom Limited* [2009] EWHC 15 (Ch) where he examined the Teleos test of "taking every reasonable step which could be reasonably required" – albeit in a context of whether the tax payer knew or should have known about a tax fraud. In that case Lewison J indicated that the test required the supplier to be of good faith and to have taken every reasonable measure to ensure that his supply was not participating in VAT evasion. At paragraph 23 of his Judgment he states that:

25 *"The test does not require the taxable person to take every possible precaution: merely every precaution reasonably required. This test gives the Tribunal sufficient flexibility to decide, on particular facts, that a suggested precaution would have gone beyond what could reasonably have been expected."*

30 70. To put the point simply, the Tribunal does not feel that the Appellant did take every precaution reasonably required on the facts of this case. As we have indicated before, the Appellant too readily relied upon the assertions and, indeed, documentation, supplied by Enkay. There was no evidence to suggest that the Appellant sought to satisfy itself on what exactly was required, much less the detail that would be expected when that documentation was fully completed.

35 71. The fact that the Appellant's warehouse man died eighteen months before the hearing is obviously unfortunate on many levels, but even then one wonders if the warehouse man would have been alive to the comparison of the vehicle numbers which had appeared, as forgeries, in the CMR documentation. If Mr. Kinnear had not been aware of the exact requirements, how likely would it have been that the warehouse man would have been alert to details of that type? In any event, the Tribunal does not need to consider that point and it is certainly not part of the judgment in this case.

40 72. It necessarily follows that the Appeal is dismissed.

73. No order as to costs.

74. The Tribunal was referred to and considered the following cases:

- (1) *Appleyard Vehicle Contracts Limited and HMRC [20891]*;
- (2) *N2J Limited and HMRC [20895]*;
- (3) *JP Commodities Limited v Revenue & Customs Commissioners [2008] STC816*;
- (4) *Euro Tyre Holding BV v Staat Ssercrtaris Van Financiën*;
- (5) *General Bundesanwalt Veim v Bundesgerichtshof*

75. 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.

**IAN WILLIAM HUDDLESTON**

**TRIBUNAL JUDGE**

**RELEASE DATE: 8 March 2012**