TC02343

Appeal number: TC/2011/00603

VAT – tax warehouse – assessment relating to goods considered to be missing – corresponding excise duty assessment withdrawn as out of time – whether VAT liability affected – no – whether assessment should have been made by reason of allegedly incomplete or incorrect return rather than under s 73(7B) VATA 1994 – no – whether a supply of goods at or before the duty point – held, on facts, goods delivered to warehouse and removed in circumstances constituting supplies – subject to adjustment, assessment confirmed and appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

AABSOLUTE BOND LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JOHN CLARK
REBECCA NEWNS

Sitting in public at 45 Bedford Square London WC1B 3DN on 10 and 11 September 2012

Marc Glover of Counsel, instructed by Rainer Hughes, Solicitors, for the Appellant

Sarabjit Singh of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The Appellant ("ABL") appeals against the decision of the Respondents ("HMRC") on review to uphold a decision to issue a VAT assessment in respect of the removal of goods from ABL's bonded warehouse without payment of VAT on such removal. ABL had also appealed against HMRC's decision on review to uphold a decision to issue an assessment to excise duty in respect of the removal of those goods. HMRC subsequently withdrew the excise duty assessment on the grounds that it was made out of time. ABL's appeal therefore now relates only to the decision by HMRC to uphold the VAT assessment.

The background facts

2. The evidence consisted of two large lever-arched files containing documents and correspondence, and also witness statements given on ABL's behalf by Mohammed Hanif Rafiq, Shahid Chaudry and Marcin Kubas, and on HMRC's behalf by Alan Donnachie of HMRC's Excise Appeals and Review Unit. Oral evidence was also given by Mr Rafiq and by Mr Donnachie.

3. From the evidence we find the following background facts. We consider disputed matters later in this decision.

4. Mr Rafiq set up ABL in May 2007. Although we were not provided with documentary evidence of the shareholding arrangements, our understanding is that Mr Rafiq was, and continues to be, the sole shareholder in ABL. His initial roles were director and company secretary.

5. In January 2008 ABL received authorisation as an excise warehousekeeper and commenced trading as a bonded warehouse. On 18 February 2008, Shahid Chaudry was appointed as a director of ABL. Over the period during which ABL traded, it had between 50 and 70 account holders and dealt with between 25 and 30 bonds.

6. From July 2009 onwards, HMRC began to investigate certain movements of duty suspended spirits which they considered had been received by ABL into its warehouse. We consider below the issue of these alleged movements.

7. In August 2009 Mr Rafiq decided to close ABL's business, as he had been receiving threatening telephone calls from an anonymous caller; the number was always withheld. Mr Rafiq found these threats disturbing. He did not know who was making the calls, as he had no known enemies. He did not recognise the voices. He informed Mr Murray, the HMRC officer designated to deal with ABL's warehousing operation. Mr Murray suggested that Mr Rafiq should contact the police, but Mr Rafiq decided that as there were no physical threats or violence, he would not do so. He arrived at his decision to close the business as he had become anxious and stressed about the anonymous calls and worried that someone was "out to ruin my business".

8. On 24 August 2009 Mr Rafiq wrote to Mr Murray, stating that as Mr Murray was aware, Mr Rafiq (ie ABL) no longer wished to trade as a bonded warehouse. He asked Mr Murray to take any necessary steps to cancel the premises guarantee which Mr Rafiq had provided to HMRC.

9. The date of ABL's cessation of trade in respect of the bonded warehouse was 27 August 2009, and Mr Rafiq resigned as a director of ABL shortly after that time. (No evidence was provided to show the exact date of his resignation.)

10. In HMRC's Statement of Case, they stated that arrangements were made between HMRC and ABL for HMRC to access ABL's warehouse records on 26 August 2009, but that on 25 August 2009 Mr Rafiq cancelled this arrangement and told HMRC that he would contact them on 1 September 2009; Mr Rafiq then contacted them to state that ABL's records had been removed from its warehouse and that he was out of the country for two weeks.

11. Mr Rafiq's evidence in cross-examination was that no such arrangements had been made with HMRC; he had heard the next day that a team of HMRC officers had arrived. He had made a complaint about this. His evidence in his examination in chief was as follows. At the time of closure of the warehouse, Mr Rafiq asked Mr Murray whether he wished to see ABL's business records. Mr Murray indicated that he did not need them at that stage, but advised Mr Rafiq to keep them in a safe place. Mr Rafiq had removed ABL's records from its warehouse put them in a safe place in a friend's house; they were in a box from the warehouse. This box had contained a printer or computer, and had a picture of the equipment on the outside. Following his decision to close ABL's business, Mr Rafiq had taken a short holiday.

12. We do not find it necessary to resolve the issue of the differing accounts of the respective parties concerning the question of arrangements for a visit by HMRC. We are unable to establish from the evidence the precise date on which the team of HMRC officers inspected the warehouse, but we are satisfied that this inspection took place shortly after the warehouse was closed. As a result of their inspection, HMRC concluded that various consignments of spirits which they considered had arrived at the warehouse were not present at the time of its closure.

13. When the warehouse had closed, Mr Rafiq had spoken to Steve Murray, the designated officer of HMRC, about the production of ABL's records. Mr Murray indicated that he did not need the records, but that they should be kept safe. Mr Rafiq put them in a safe place in a friend's house; they were in a box from the warehouse, with a picture of a printer or computer on the outside.

14. On 24 September 2009, Mr Rafiq spoke to Rosie Buckley, another HMRC officer. We are unable to establish from the evidence what was discussed, or in particular whether the discussion referred to the production of ABL's records to HMRC. At some point between 19.30 and 19.34 on that day, Mr Rafiq's Mercedes Benz was broken into. He had left in the car the box containing ABL's manual records, which were together with a computer.

15. He had contacted the police to report the incident to them at 21.45 on 24 September. The police report showed that the value of the goods stolen was reported as £400, with damage to the vehicle amounting to £100. Although the vehicle had an alarm, it had not gone off as Mr Rafiq had never used the alarm supplied with the vehicle. Mr Rafiq had stated that his occupation was not relevant to the offence. The report indicated that he had been the victim of crime reported to the police within the previous twelve months. The two items shown in the "Property Summary" and following pages as having been stolen were a Dell computer (without screen), and business documents for ABL. The latter were specified as: "Receipts, invoices, delivery notes all documents relating to this business." The damage to the vehicle was described as "LW Window smashed". The method of crime was described in the following terms: "Suspects smashed the rear nearside quarter light window and opened the door grabbing two boxes and making off in direction unknown. No witnesses."

16. The circumstances as described under "Details of Investigation" were:

> "Mr Mohammed Rafiq left his vehicle secure and unattended in Fairholme Road junction with Beehive Lane Ilford for approx four minutes to go into a shop to buy some cigaretts [*sic*] when he returned he found the rear near side quarter light window smashed and two boxes had been stolen one containing a Dell computor [*sic*] and the other box a dell [*sic*] screen computer box containing documents relating to Absolute [*sic*] Bond Ltd. He did not witness the incident drove around and found nothing."

17. In his witness statement, he stated that his windscreen was damaged as a result of the break-in, and was repaired by Autoglass on 25 September 2009. The invoice for the repair was timed at 11.58 on 25 September. The copies in evidence of the Autoglass advice note are not complete photocopies, but the "Appointment Date and Time" box appears to show the date and time as 25 September 2009 at 17.30. In the light of the completion time, this appears to be an error. The work is recorded as "Door glass replacement" and not "Windscreen repair".

18. Mr Rafiq referred in his witness statement to his belief that the break-in and theft may have had something to do with the threatening telephone calls which he had been receiving before closing ABL. He did not hold any records for ABL, all trading having been recorded manually. The records in his car had been the only copy. The police had not investigated the matter further, and the case had been closed.

19. As a result of the theft of the documents from his car, he had no records of the loads received at ABL's warehouse.

20. On 29 September 2009, Mr Rafiq wrote to Rosie Buckley, referring to a conversation the previous day. He gave her the crime reference number, and mentioned the advice note from Autoglass. He apologised for not contacting her on the evening of 28 September; it had been late. He indicated that he was extremely busy, and therefore unable to see her that week. He asked whether questions could be put to him in written form.

21. Mr Rafiq's letter appears to have been overtaken by events. In a much later letter dated 10 June 2010, Mr Gowrea, another officer of HMRC, referred to Mr Rafiq having attended the HMRC office on 29 September 2009 and having been interviewed by two officers, Rosie Buckley and Rowland Jefferys. Based on information received by HMRC, in relation to which Mr Rafiq had not been able to recall much and could not confirm the transactions concerned, Mr Gowrea considered that there was evidence that the duty point had been created in the UK. He was therefore sending the letter to Mr Rafiq as a pre-notification of excise duty and VAT assessments on the import of spirits from the EU.

22. Mr Rafiq responded on 21 June 2010. He questioned why he had not been made aware of the assessment at an earlier stage. He asked for the notification or assessment to be withdrawn, and indicated that he would challenge it.

23. On the same date Mr Gowrea notified Mr Rafiq of the liability to excise duty and VAT. The amount of duty was £565,324.72, and the amount of VAT was £182,217.45.

24. On 19 July 2010 Mr Rafiq notified to HMRC his wish to make a formal appeal and to have the case reviewed by a different officer. He set out detailed arguments against the assessment. He referred to the loss of the ABL documents;

> "I lost all my documents and my computer and this was made aware to Mrs Buckley, The crime was reported and I forwarded the crime reference number to Mrs Buckley. Please note when my car was broken into, this was a time of a lot of crime in the Redbridge area."

25. On 14 September 2010, Mr McCann, a Review Officer of HMRC, wrote to Mr Rafiq to explain the results of his review. He stated:

> "I have now examined all the information relating to this case and advise that both the excise duty and VAT assessment are being withdrawn, This decision is **"without prejudice"** to any further action that the Commissioners of HM Revenue & Customs may consider."

26. On 10 November 2010 Mr Gowrea wrote to ABL at Mr Rafiq's address, referring to the earlier correspondence, and in particular to the decision to withdraw the assessments having been without prejudice to any further action that HMRC might consider. He referred to s 12(1)(b) of the Finance Act 1994, and to further evidence having come to light as to the transportation of the excise goods from the supplier Square Dranken BV to ABL. As a result of this finding, Mr Gowrea was sending ABL further assessments for excise duty and VAT. He referred to s 94(1) of the Customs and Excise Management Act 1979 and to s 73(7B) of the VAT Act 1994 ("VATA 1994"). The amounts assessed were identical to those previously assessed by the withdrawn assessments.

27. In a separate letter of the same date, Mr Gowrea set out details of the assessments, together with an "Assessment Schedule" setting out the duty and VAT due by reference to the individual transactions.

28. On 11 November 2010 HMRC's Financial Securities Centre wrote to ABL to inform it of a demand for payment sent to its guarantor. The amount demanded was £250,000.

29. On 17 November 2010 Mr Rafiq responded to the letter from HMRC's Financial Securities Centre. He explained that he had been the director of ABL when it was trading as a bonded warehouse. It had ceased trading as such on 27 August 2009, and he had resigned as a director soon after this period. He had forwarded his resignation letter to Mr Murray, the acting HMRC officer for the bonded warehouse. Mr Rafiq referred to his only concern being that he had personally loaned £250,000 to ABL; he wanted the money back as it had been borrowed on the security of his house, and he wished to stop paying the interest on it. The assessment had been withdrawn, as shown in Mr McCann's letter. Up to 17 November 2010, neither Mr Rafiq nor ABL had received any notification or assessment of any amount. He had contacted Mr Gowrea on 8 and 10 November 2010 and there had been no mention of any assessment being raised or any claim being made on the guarantee. Mr Rafiq maintained that the guarantee had expired on 12 November 2010.

30. On 22 November 2010 Mr Rafiq wrote to Mr Jefferys of HMRC stating that he had not received any letter informing him of any assessment prior to the claim on the premises guarantee. He had received the assessment by second class post about a week later than the date of the guarantee claim. He wished to have the case reviewed by the independent review and appeals team, and asked for their contact details.

31. On 13 December 2010 he wrote to Mr Donnachie setting out the reasons why he considered that the assessment to excise duty and VAT should be withdrawn.

32. Mr Donnachie wrote to ABL on 21 December 2010, for Mr Rafiq's attention, setting out the results of the formal Departmental Review. Mr Donnachie referred to Mr Rafiq's letters of 22 November 2010 to Mr Gowrea and of 13 December 2010 to Mr Donnachie. The conclusion was that the decision in the assessment letters and Ex601 letter dated 10 November 2010 should be maintained. Mr Donnachie set out the history of the matter as seen by HMRC; an extract from his letter appears below. After explaining the basis for the excise duty assessment, Mr Donnachie referred to the VAT assessment:

> "I have reviewed the issue of the VAT assessment during this review of the Excise assessment as the VAT assessment is completely contingent on the Excise assessment and they are so closely linked that it does not make sense to review one without the other."

He explained that the VAT assessment had been issued under s 73(7B) VATA 1994.

33. Mr Donnachie's description of the history was as follows:

> "Between 22nd February 2008 and 16th July 2008 [ABL] received 13 loads of Excise duty suspended alcohol into their tax warehouse premises.

12 loads came from Square Dranken BV ("SD"), a tax warehouse based in the Netherlands, the information for which was detailed on Administrative Accompanying Documents ("AADs") and one load came from London City Bond ("LCB") using the W8 procedure for an internal duty suspended movement within the United Kingdom.

For the remainder of this letter I will refer to those consignments as "the goods".

HMRC holds copies of the certified copy 3s for each of the AADs which have been endorsed by either LCB to show initial receipt at their tax warehouse, or certified by ABL to show direct receipt into ABL UK tax warehouse.

Neither LCB nor ABL has advised that they consider that the certification or stamps used in these endorsements are false.

Square Dranken BV has therefore been advised that each of the duty suspended movements, covered by their AADs related to then [*sic*] goods in this assessment, has been discharged as required in Article 19 of EC Directive 92/12.

Examination of e-mail correspondence and invoices raised by SD shows that for the goods that were despatched from their tax warehouse in the Netherlands to the ABL tax warehouse, that charges were made by SD for UK tax stamps to be affixed to the alcohol products before they were shipped to the UK.

There is no evidence that these tax stamps were obliterated after receipt of the alcohol products in the UK and the only possible reason for the tax stamps to be affixed is to allow the products to be sold in the UK.

HMRC has accepted the evidence that the goods received at LCB were despatched to ABL and LCB holds copies of W8s [equivalent of an AAD for an internal UK duty suspended movement] endorsed by ABL that confirm that the goods were received into the ABL bond.

This evidence indicates that ABL did receive these Excise Duty Suspended alcohol consignments.

In addition to the certified copy 3 AAD and certified W8 documents, [HMRC] have stamped CMRs provided by the transporter of these goods, Drenth Logistics BV, Industrieweg 4, 9601LJ Hoogezand, Netherlands that provide comprehensive evidence of receipt of these goods in the United Kingdom.

Examination of the ABL W1 warehousing returns submitted to [HMRC], show that 3063.9 litres of spirits were received into ABL in April 2008 and then nothing more was received until October 2008.

The consignments that are part of this assessment are not shown on the W1 returns as having been received by the ABL warehouse.

Unfortunately, before they could be examined by HMRC Officers, all of the warehouse records that had been kept by ABL were stolen from your car on 24th September 2009.

This assessment has been issued as there is no evidence in the ABL records available to [HMRC], that these alcohol products were

> acknowledged as received or that they were duty paid on their removal from the ABL tax warehouse.
>
> It seems that the goods were not recorded in any of the W1 warehouse returns submitted by ABL.
>
> As a result, these Excise duty suspended alcohol products have been found to be deficient in warehouse and the Customs and Excise Management Act 1979, section 94 applies in this case."

34. We examine in detail later in this decision the evidence relating to the alleged movements of goods which are the subject of this appeal; the account set out in the previous paragraph should not be taken as our finding of fact, which is merely that this was Mr Donnachie's description of the facts as seen by HMRC.

35. On 19 January 2011 Mr Rafiq wrote to Mr Donnachie disagreeing with his decision to uphold the assessment. Mr Rafiq requested Mr Donnachie to reconsider his decisions, as all of what he had stated was based on assumption and Mr Rafiq had not been provided with evidence of the goods being noted in the warehouse and removed. Mr Donnachie commented, in his response dated 27 January 2010, that with respect to Mr Rafiq's comments concerning the failure to provide evidence of receipt and removal of the spirits in question, HMRC's position had been fully explained in the review decision letter.

36. ABL gave Notice of Appeal to the Tribunals Service on 19 January 2011.

37. On 7 July 2011 Mr Gowrea wrote to ABL. He explained that HMRC had decided to cancel the excise duty assessment with immediate effect, as it was out of time. The decision was without prejudice to any further action that HMRC might consider appropriate. However, HMRC were upholding the VAT assessment dated 10 November 2010 on the basis that it was raised in time. Mr Gowrea referred to the different time limits applicable in respect of the two assessments, the VAT assessment having been raised under s 73(7B) VATA 1994. Mr Gowrea also referred to the power to raise an assessment under s 73(7B) against "the person removing the goods or other person liable"; he commented:

> "It may be that you did not personally remove the goods from the warehouse, however, the warehouse is under your control and you are therefore liable for the VAT assessment."

38. As a result of HMRC's decision to withdraw the excise duty assessment, ABL's appeal now relates only to the VAT assessment.

Arguments for ABL

39. Mr Glover made various submissions on the facts; we consider these later in this decision. His legal submissions fell under three headings:

(1) The assessment was not a proper s 73(7B) assessment;

(2) The VAT assessment should have been made under s 73(1) VATA 1994;

(3) The VAT and duty assessments were contingent on one another.

40. He referred to the construction of s 18(3) and (4) VATA 1994; it was necessary to take into account that individual words had particular meanings in their context. "Acquisition" or "supply" in s 18(4) could be very different from the duty point. All s 18 was doing was to indicate where and when an acquisition took place, as VAT and duty were to be accounted for by reference to a date, which would establish what was the applicable rate. The section was a "flow chart" for the latter purpose. Sub-section (4)(b)(ii) referred to the person removing the goods or the person required to pay the duty or levy.

41. He submitted that an assessment made under s 73(7B) VATA 1994 was made under the wrong section; there was no evidence of removal, although possibly some evidence of receipt. He questioned why the assessment had not been made under s 73(7A).

42. ABL's position was that it was not the person liable. Section 18(4)(b)(ii) referred to the person who was required to pay the duty or levy, whereas s 73(7B) did not read the same way; it was referring to the other person liable for removing the goods, for example a thief. He submitted that s 73(7B) did not need to refer to the person who was required to pay the duty or levy, as HMRC could use s 73(7A).

43. The case had started as an excise duty matter; this had been the major part of the liability assessed. In his review letter, Mr Donnachie had acknowledged that VAT was contingent on the excise duty liability.

44. In making the assessment under s 94 of the Customs and Excise Management Act 1979 "CEMA 1979") HMRC had not needed to make the positive averment that the goods had been removed; it was sufficient for that purpose merely to show that the goods had been missing or deficient. Section 73(7A) VATA 1994 referred to s 18E VATA 1994; s 18E(1) applied where goods had been found to be missing or deficient. Thus s 73(7A) imposed a stringent test; s 73(7B) had not been shown to apply.

45. HMRC had raised an assessment on the wrong path. Even if s 73(7B) were engaged, evidence of removal of the goods had not been produced. Even if it were shown that the goods had been received, it had not been shown that they had been removed. The reason was that the case had been all about excise duty. The Achilles heel of HMRC's case was on the facts, as they could not make out the removal evidentially.

46. The correct provision under which the assessment should have been made was s 73(1) VATA 1994. This related to the failure to make correct returns. The limitation period applicable to an assessment under s 73(1) was specified by s 73(6) as two years after the prescribed accounting period, or one year after evidence of facts sufficient in the opinion of HMRC to justify the making of the assessment came to their knowledge. Had the assessment been made under the correct provision, ABL would have been able to take advantage of the limitation period.

47. Section 73(7B) was usually used for wrongdoers who did not make returns or did not have a controlling officer to keep their operations under review. Mr Glover referred to a legitimate expectation that concerns should be raised by the designated HMRC officer.

48. In relation to the third argument, there was a lack of law on the subject. Mr Donnachie had indicated in his review letter that the VAT assessment was completely contingent on the excise duty assessment. Mr Glover commented that VAT was imposed at 17.5 per cent (the applicable rate at the relevant time) on the total of the value of the goods plus the excise duty. The resulting question was whether, if the excise duty was not recoverable, VAT could be charged on the amount of the duty. Mr Donnachie had acknowledged the relationship between the two. Mr Glover submitted that the VAT should not have been recoverable; it was not possible to have VAT on excise duty that was not recoverable.

49. Mr Glover's overriding submission was to raise the question whether it had been reasonable for these assessments to have been raised at all where there had been no wrongdoing, simply because ABL could not say categorically what had happened to the goods in respect of which those assessments had been made. (We consider this below, together with the factual issues to which Mr Glover referred in support of this submission.)

50. He also put points which Mr Rafiq had raised in the course of the correspondence with HMRC. These were that the number of assessments originally raised demonstrated carelessness on HMRC's part, that ABL considered the assessments to have been made on the wrong basis, and that Mr Rafiq's reputation with HMRC had suffered.

Arguments for HMRC

51. Mr Singh's submissions on the facts are considered below. In relation to the applicable law, he submitted that ABL's skeleton argument was erroneous in saying that s 73(7B) VATA 1994 did not apply. He sought to show why s 73(7B) did apply.

52. The sub-section made a cross-reference to s 18(4) VATA 1994; the cross-reference to s 18D should be ignored. The primary provisions for deciding whether goods were supplied in the UK were in s 7(1) and (2) VATA 1994. In the absence in ABL's case of any evidence that the spirits in the warehouse were removed from the UK, the fact that they had been in the warehouse meant that the supply was treated as made in the UK.

53. Section 18(6) defined "the duty point" as the time when the requirement to pay the duty on the goods took effect. This was given by the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593) ("the 2010 Regulations"). Regulation 5 provided that there was an excise duty point at the time when excise goods were released for consumption in the UK. Regulation 6(1)(a) indicated that this event was treated as occurring when goods left a duty suspension arrangement. Regulation 7(1) specified the time at which goods were regarded as

leaving the duty suspension arrangement in circumstances where they were found to be deficient or missing from a tax warehouse. The effect of reg 7(1)(a) and (j) was that this was the earlier of the time when the goods left the warehouse or the time when they were found to be missing. In ABL's case, the fact that the goods had been found to be missing meant that they must have left the warehouse at an earlier point.

54. Under Reg 8(1) the liability to pay the duty payable by virtue of reg 6(1)(a) was imposed on "the authorised warehouse keeper", ie ABL.

55. Returning to s 18 VATA 1994, the effect of s 18(2) and (3) was that any supply of dutiable goods was ignored for VAT purposes if that supply was followed by another supply while the goods were in suspension. Section 18(4) treated the supply as taking place at the earlier of removal from the warehousing regime and the duty point. Mr Singh submitted that s 18(4) was not expressed in the most helpful way. Section 18(3) and (4) referred to the material time being while the goods were subject to a warehousing regime and before the duty point; the problem was that the supply would always be *at* the duty point. It was therefore necessary to read the provisions as meaning "at or before the duty point".

56. Another problem with s 18 VATA 1994 was sub-s (4)(a). This referred to the supply taking place at the earlier of the time when the goods were removed and the duty point; however, the removal of the goods might itself be the duty point. Thus these were perhaps cumbersome provisions.

57. It was really s 18(4)(b) VATA 1994 that was relevant here. This placed the liability for VAT in respect of the supply on the person who was required to pay the duty or levy. ABL was the authorised warehouse keeper and was therefore required to pay the duty by virtue of reg 8(1) of the 2010 Regulations. It followed that under s 18(4)(b) VATA 1994 was required to pay the VAT. Mr Singh referred to the cross-reference in the version of s 18 VATA 1994 printed in the Orange Tax Handbook to s 73(7B) VATA 1994. It had appeared to HMRC that the goods had been removed, and s 73(7B) permitted them to make an assessment to the best of their judgment.

58. Thus ABL was liable under s 18(4)(b) VATA 1994 as an authorised warehousekeeper. It was therefore wrong to say that the assessment had been incorrectly raised under s 73(7B); it had been correctly raised under that provision.

59. In relation to ABL's argument on time limits, Mr Singh submitted that there was no merit in its contention. ABL's suggestion was that HMRC could only have assessed under s 73(1) VATA 1994 and under no other provision. This was not correct; HMRC did not have to assess under s 73(1), as there were several independent grounds under s 73 pursuant to which they could raise an assessment.

60. If HMRC had raised an assessment under s 73(1) in November 2010, this would have been out of time, as a result of s 73(6). HMRC had had enough evidence of facts by July 2009 to justify making an assessment. Mr Singh emphasised that HMRC had not raised an assessment under s 73(1). Mr Gowrea's letter dated 10 November 2010 had specifically referred to s 73(7B) VATA 1994; his reference in that letter to "the

consignment of beer" had been incorrect. HMRC had not raised an assessment under s 73(1), (2) or (3).

61. The time limit for making an assessment under s 73(7B) was in s 77(1)(a) VATA 1994. The importations had been in 2008; the VAT assessment was in November 2010, well within four years of the importation.

62. Thus the assessment had been raised in time. It was also clear that HMRC had power to raise a VAT assessment independently of an excise duty assessment. Mr Singh submitted that ABL was still liable to excise duty, but HMRC were out of time to assess that duty. In relation to the VAT assessment, the time limit from 1 April 2009 was four years, having been three years before that date; the assessment in ABL's case had been made about two and a half years after the importations.

63. For all those reasons, he asked for ABL's appeal to be dismissed.

Points for HMRC made in reply

64. As Mr Glover's legal submissions and submissions on the evidence were all made in the course of his closing submissions, we permitted Mr Singh to respond to those submissions. The parties' submissions on evidence are considered below; Mr Singh made various responses in respect of Mr Glover's legal submissions.

65. Mr Singh described Mr Glover's construction of s 73(7B) VATA 1994 as a fairly novel interpretation. What s 73(7B) was driving at was a power to assess VAT. It had been for this reason that Mr Singh had explained in his submissions how liability fell on ABL to pay the VAT. He re-emphasised that ABL remained liable to the excise duty, even though HMRC were out of time to assess in respect of that duty.

66. Mr Glover had submitted that HMRC could have used s 73(7A) VATA 1994. The matter was not within judicial review territory. The assessment had been raised under s 73(7B); the question to be considered was whether it had been properly so raised. Other possibilities were of no consequence.

67. In relation to Mr Glover's submission that if duty was not recoverable, there was no law to cover the question whether a VAT assessment could be made, Mr Singh referred to his own earlier submissions showing that there was a framework for a VAT assessment to be made even where HMRC did not raise an excise duty assessment.

68. Mr Glover had questioned whether it was reasonable for assessments to be raised at all in circumstances where there had been no wrongdoing on ABL's part. Again, this was judicial review territory. The underlying question was that of the assessment itself.

69. Section 73(7B) gave HMRC the power to assess to the best of their judgment. If ABL was arguing that they had not done so, the test as shown by the relevant cases imposed an exceptionally high threshold. It was only possible to consider the reasonableness of Mr Donnachie's review by looking at the assessment.

Mr Glover's response to HMRC's points

70. The power to raise an assessment in respect of VAT where an excise duty assessment had fallen away was not clear. Mr Glover accepted that where duty had been validly assessed, there was a mechanism for making a VAT assessment. The question was whether VAT could be assessed where HMRC's ability to assess excise duty had fallen away.

71. In relation to s 73(7B) VATA 1994, he submitted that his interpretation could succeed; it was necessary to consider s 73(7A). It was a matter of statutory interpretation to establish why s 73(7B) was worded as it was and how it operated. Statutes did not need to duplicate powers; the sub-section was intended to catch a different category of person. Section 18(4)(ii) was useful for interpretation purposes; s 73(7B) did not use that language. It was not necessary to have a more difficult power under s 73(7B). Parliament must have intended to provide power, and had done so in s 73(7A).

Discussion and conclusions

72. Before considering the evidence, we need to deal with the issues of law. For convenience, we set out relevant extracts from the legislation in the following paragraphs.

73. Section 73(7A) and (7B) VATA 1994 provides:

> "(7A) Where a fiscal warehousekeeper has failed to pay VAT required by the Commissioners under section 18E(2), the Commissioners may assess to the best of their judgment the amount of that VAT due from him and notify it to him.
>
> (7B) Where it appears to the Commissioners that goods have been removed from a warehouse or fiscal warehouse without payment of the VAT payable under section 18(4) or section 18D on that removal, they may assess to the best of their judgment the amount of VAT due from the person removing the goods or other person liable and notify it to him."

74. Section 18(4) VATA is as follows:

> "(4) Where the material time for any acquisition or supply of any goods in relation to which subsection (3) above applies is while the goods are subject to a warehousing regime and before the duty point but the acquisition or supply nevertheless falls, for the purposes of this Act, to be treated as taking place in the United Kingdom—
>
> (a) that acquisition or supply shall be treated for the purposes of this Act as taking place at the earlier of the following times, that is to say, the time when the goods are removed from the warehousing regime and the duty point; and
>
> (b) in the case of a supply, any VAT payable on the supply shall be paid (subject to any regulations under subsection (5) below)—

> (i) at the time when the supply is treated as taking place under paragraph (a) above; and
>
> (ii) by the person by whom the goods are so removed or, as the case may be, together with the duty or agricultural levy, by the person who is required to pay the duty or levy."

75. Mr Glover questioned why HMRC had not chosen to assess ABL under s 73(7A) VATA 1994, rather than s 73(7B). We do not consider that s 73(7A) was the appropriate provision under which to seek to assess ABL. Section 73(7A) refers to a "fiscal warehousekeeper". The VAT legislation makes a clear distinction between a fiscal warehousekeeper and other categories of warehousekeeper, as well as between a warehouse and a fiscal warehouse; for example, s 73(7B) refers to removal of goods "from a warehouse or fiscal warehouse".

76. The fiscal warehouse regime is contained in ss 18A to 18F and Schedule 5A VATA 1994. Under s 18B VATA 1994, it applies to "eligible goods", which are defined in s 18B(6) as goods "of a description falling within Schedule 5A". The goods listed in Sch 5A VATA 1994 do not include alcoholic beverages. It follows that none of the legislation concerning fiscal warehouses is relevant to ABL's appeal. Whether any assistance can be derived from that legislation in construing the legislation applicable to other categories of warehouse may be a different question.

77. Mr Glover submitted that the words "or other person liable" in s 73(7B) VATA 1994 qualified the words "the person removing the goods". We consider this to be an unnatural stretched construction of the sub-section. In our view, the final words of s 73(7B) should be construed as:

> ". . . they may assess to the best of their judgment the amount of VAT due from the person removing the goods or from the other person liable and notify it to him."

The sub-section is referring to liability to VAT, not to "liability" or responsibility for removal of the goods.

78. Thus s 73(7B) permits HMRC to make an assessment on the person who removes the goods or on the "other person liable". The latter words require an investigation into what categories of "other person" may be made liable, and on what basis.

79. In referring to s 18 VATA 1994, Mr Glover submitted that all it was doing was to indicate when and where an acquisition was to be treated as taking place. It appears to us that s 18 is doing more than this, in various respects. First, it is dealing with the place (ie whether outside or inside the UK) and time at which an acquisition or supply is to be treated as taking place. Thus it is establishing the position for supplies as well as acquisitions. Secondly, it is imposing obligations. Section 18(4)(b)(ii) requires any VAT payable on the supply to be paid by the person removing the goods, or by the person who is required to pay the duty. Section 18(5) refers to the power to make regulations to make "provision for enabling a person for enabling a taxable person to pay the VAT he is required to pay by virtue of paragraph (b) of sub-section (4) above

at a time later than that provided by that paragraph"; this is a further confirmation that s 18 is imposing obligations as well as identifying where and when an acquisition or supply is to be treated as taking place.

80. The effect of s 18(3) VATA 1994 is that where dutiable goods have been acquired from another member State, they have throughout been subject to a warehousing regime, and the duty point has not yet occurred, the acquisition is treated as having been made outside the UK if there is a subsequent supply of those goods while the goods remain subject to the warehousing regime, if the material time for that supply is before the duty point.

81. Thus if s 18(4) applies in circumstances where there is a supply falling within its terms, s 18(3) will mean that the acquisition will be treated as having been made outside the UK. As a result, s 1(1)(b) VATA 1994, which imposes a charge to VAT on acquisitions, will not apply.

82. Whether or not there was a supply of the goods in question in ABL's appeal is a question of the evidence, which we consider below, together with the relevant law.

83. As Mr Singh mentioned, there is a difficulty with both s 18(3) and s 18(4) VATA 1994, as the circumstances which they specify are "while the goods are subject to a warehousing regime and before the duty point". Under the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593) ("the 2010 Regulations"), the duty point is established by regulations 5 to 7 inclusive. There is an excise duty point when excise goods are released for consumption in the UK. A particular occasion when this is regarded as occurring is when the goods leave a duty suspension arrangement. Regulation 7(1) specifies the time at which excise goods leave a duty suspension arrangement. Ignoring other circumstances not relevant to ABL's appeal, this is the earlier of the time when the goods leave any tax warehouse in the UK or are otherwise made available for consumption, or they are found to be deficient or missing from a tax warehouse. Regulation 8 provides that the person liable to pay the duty where goods leave a duty suspension arrangement is the authorised warehousekeeper.

84. If the duty point occurs by reference to either of the relevant events specified in regulation 7(1), and the supply of goods is treated as made because the goods cease to be within the warehousing regime, that supply will be *at* the duty point rather than *before* the duty point as required by s 18(3) and (4) VATA 1994. If those sub-sections are read as not applying in circumstances where the duty point and the time of supply coincide, the effect is to limit their scope and to remove any specific provision for cases where the supply and the duty point occur at the same time by reason of the same event. We accept Mr Singh's submission that in order to avoid this anomalous position, both sub-sections should be read as if worded: ". . . while the goods are subject to the warehousing regime and at or before the duty point".

85. Although we were referred to the 2010 Regulations, these were not in force at the time of HMRC becoming aware of the apparent deficiency in the goods in ABL's warehouse in August 2009. The 2010 Regulations were in force by the time of the

excise duty and VAT assessments made on 10 November 2010. It appears to us that the applicable Regulations are more likely to be the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992 (SI 1992/3135) ("the 1992 Regulations"). As the 1992 Regulations were revoked by the 2010 Regulations, we have only been able to see the original version of the 1992 Regulations, before any amendments.

86. Regulation 4 of the 1992 Regulations specifies the time at which the excise duty point is treated as occurring. The circumstances mentioned are similar to, but not identical to, those mentioned in the 2010 Regulations. For the purposes of ABL's appeal, we base our decision on the assumption that there is no practical difference between the effect of the 1992 Regulations and that of the 2010 Regulations, as we have heard no submissions on which of these applies to ABL.

87. Assuming for the present that there was a supply within the terms of s 18(4) VATA 1994, the effect of s 18(4)(b)(ii) is that the obligation to pay the VAT in respect of that supply falls on "the person who is required to pay the duty". As a result of the combination of the excise duty legislation and s 18(4)(b)(ii), the responsibility for paying the VAT is placed on the warehousekeeper. We consider separately below Mr Glover's argument as to the VAT assessment being contingent on the excise duty assessment.

88. Section 73(7B) VATA 1994 applies a different test from that applicable under the excise duty provisions (s 94 CEMA 1979 and the relevant Regulations), as the precondition to the making of an assessment is that it must appear to HMRC that goods have been removed from a warehouse without payment of the VAT payable under s 18(4) VATA 1994. This requires examination of the evidence available to HMRC at the time of making the assessment; we consider this below.

89. Mr Glover's second argument on the law was that HMRC should have raised a VAT assessment under s 73(1) VATA 1994. He contended that s 73(7B) was usually used for wrongdoers who did not make returns or have supervision by a controlling HMRC officer. We do not accept his argument. Section 73(7B) is a specific provision which was added to s 73 to deal with non-payment of VAT on removal of goods from a warehouse. In contrast, s 73(1) applies to all taxable persons and, in relation to returns, covers both failure to make returns and the submission of incomplete or incorrect returns. We see no reason why HMRC should have been expected to use the generalised provisions of s 73(1) when specific and appropriate assessment powers were available to them pursuant to s 73(7B). In relation to Mr Glover's reference to a legitimate expectation that the HMRC controlling officer dealing with ABL would have expressed any concerns, our view is that this is beyond the scope of our jurisdiction, whether or not as a matter of evidence the officer had any information forming a basis for raising any concerns.

90. The third argument put by Mr Glover was that the VAT and duty assessments were contingent on one another. He argued that there was a lack of law to establish the position, and submitted that it was not possible to have a VAT liability on excise duty that was not recoverable. Mr Singh's response to that submission was that

HMRC clearly had the power to raise a VAT assessment independently of the excise duty assessment; in any event, ABL remained liable to the excise duty, despite HMRC being out of time to make an assessment in respect of that duty.

91. Section 73(7B) VATA 1994 is expressed purely in terms of VAT, and cross-refers to s 18(4) VATA 1994. Section 18(4)(b)(ii) provides that the VAT on the supply is to be paid ". . . together with the duty . . . , by the person who is required to pay the duty . . ."

92. This leaves open two questions. First, what is the position where no duty is paid? In such circumstances, the VAT cannot be paid "together with the duty". The second is what is meant by the words "required to pay the duty"; are they to be construed as imposing a condition that an assessment to duty must be made?

93. We do not consider that payment of the duty is an essential pre-requisite to liability to VAT. Under s 18(5) and (5A) VATA 1994, HMRC may make regulations for enabling a taxable person to pay the VAT which he is required to pay under s 18(4)(b) at a time later than that provided for by that paragraph. Regulation 43 of the VAT Regulations 1995 (SI 1995/2518) permits the warehousekeeper to pay the VAT "at or before" the time when he is required to pay the excise duty. Thus the VAT can be paid independently of the duty.

94. Although s 18(4)(b)(ii) uses the words "is required to pay the duty", the expression used in regulations 8 and 9 of the 2010 Regulations is "the person liable to pay the duty". The wording used in regulation 5 of the 1992 Regulations is similar. Both sets of Regulations provide (according to the circumstances) for a range of persons to be jointly and severally liable to pay the duty. In that sense, those persons are all "required" to pay the duty. However, does s 18(4)(b)(ii) imply that some formal step must be taken to "require" the relevant "liable person" to pay the duty? We do not think so. The obligation to pay the duty is imposed by the Regulations; in our view, this is sufficient to show that the person in question is required to pay the duty, without taking the step of making an assessment on that person. An assessment is a means of seeking payment from a person on whom a liability falls; the assessment does not create the liability, but merely demands fulfilment of that person's obligation pursuant to the legislation concerned. Section 73(7B) permits HMRC to assess to the best of their judgment "the amount of VAT due"; in the context of excise duty, s 94(3)(B) CEMA 1979 permits HMRC to "assess, as being excise duty due from the occupier of the warehouse . . . , the excise duty chargeable or deemed under warehousing regulations to be chargeable on the relevant goods . . ." The liability or requirement to pay exists before an assessment is made; the assessment is the means of enforcing the obligation. The obligation does not disappear as a result of the assessment being withdrawn, even though the enforcement mechanism has been removed.

95. Although he raised various matters relating to the evidence forming the basis of the VAT assessment, Mr Glover did not seek to argue that the assessment was not made to the best of HMRC's judgment. As indicated by Carnwath J in *Rahman*

(trading as Khayam Restaurant) v Revenue and Customs Commissioners [1998] STC 826:

> "The debate before the tribunal should be concentrated on seeing whether the amount of the assessment should be sustained in the light of the material then available."

96. Our overall conclusions on the issues of law are that it is open to HMRC to make an assessment under s 73(7B) VATA 1994 on a warehousekeeper, that there is nothing to preclude HMRC from making an assessment under that sub-section rather than s 73(1), s 73(7B) being the more appropriate provision, and that liability under s 18(4)(b) VATA 1994 is not affected by the withdrawal of the relevant assessment to excise duty. Whether the assessment made on ABL under s 73(7B) can stand in the amount assessed depends on a series of factual issues; were the goods in question delivered to ABL's warehouse, were those goods removed from that warehouse, and were supplies of the goods made at the earlier of the time of removal and the duty point (or at the same time as the duty point)? We now consider the evidence in the context of those and any other relevant factual issues.

The factual issues

97. As the second and third of the issues referred to in the preceding paragraph depend on the first, we examine the evidence relating to delivery of the goods.

98. Mr Donnachie's description in his witness statement of the transactions relating to the goods differed in certain respects from that in his review letter dated 21 December 2010 (see paragraph 32 above). In his witness statement he referred to three out of the 13 excise duty suspended movements from SD, although addressed to ABL, having for some unknown reason been delivered to LCB's UK tax warehouse, with the remaining ten being sent to ABL.

99. The AADs relating to the three movements were numbered 87632, 87634 and 87916, the first two being dated 14 March 2008 and the other dated 26 May 2008. The consignee is shown as ABL at its Hainault address, and the delivery address being in Barking, headed "Acc. of Square (Aabsol)". The latter address corresponded to that of LCB.

100. In his witness statement, Mr Donnachie referred to these three AADs showing stamps from ABL certifying receipt of the goods. In cross-examination he accepted that there were no such stamps shown on these AADs. He accepted that AADs were important documents. CMRs could potentially provide away of looking at the position if AADs were not complete, but the CMRs in evidence relating to ABL were not in a form which could definitively link them to the AADs in question.

101. Although we accept Mr Glover's point put to Mr Donnachie in cross-examination that complete stamped and signed AADs are a means of providing certainty as to the movement of goods, we do not think that it necessarily follows from the absence of complete AADs that the movements have not taken place. If there is a sufficient matrix of other evidence to establish on the balance of probabilities that

there have been movements of goods, the lack of direct evidence through AADs is merely a factor to balance against the weight of that other evidence.

102. In the case of these three movements, the other evidence to be considered consists of invoices from SD, email correspondence, entries shown on bank statements, and other documentation.

103. We deal first with AADs 87632 and 87634. SD issued two invoices dated 14 March 2008 and numbered respectively 41445 and 41455 to ABL at its Hainault address. Both showed the destination of goods as "Acc. of SQUARE (Aabsol)" at the Barking address corresponding to that of LCB. Although the order in which the goods were listed was not identical, the quantities of the respective brands of spirits were exactly the same. The first invoice was shown as "Order # 1" and the second as "Order # 2". The cost of duty stamps was also invoiced in each case. The quantities of the respective brands of spirits referred to in the invoices correspond exactly to those shown in AADs 87632 and 87634 respectively.

104. A bank statement for 27 March 2008, which does not carry the name of the account holder, shows a credit of €19,889.40. The narrative entry shows its origin to be a payment of £15,609.20, the details being "Mohammed Rafiq Payment your invoice 41445/41455 AA Bsolute [*sic*] Bond Ltd". Although the details of the account holder are not shown, we find on the balance of probabilities that this is SD; in July 2009 HMRC were provided with documents relating to SD by the Netherlands authorities pursuant to an exchange of information request.

105. By an email message dated 31 March 2008, Erik van Voorst of SD instructed "Goods In & Orders" at LCB to prepare 22 lots of 20 cases of a series of different types of spirits for immediate transport under bond to ABL at its Hainault address. The other addressees of the message were Mark Taylor and Sarah Newland. At the end of the message, Mr van Voorst requested:

> "Please advise Mr Han from Aabsolute bond when he will be getting his goods."

We find that the reference to "Mr Han" is to Mr Rafiq.

106. The items listed in that email correspond to items in a list of goods prepared by LCB of goods held at location 80 in its warehouse, but do not constitute all the items held at that location. The customer name is shown as "Square Dranken (a/c Aabsol)". One page of the list carries the date "26/8/08", the other pages showing the date "26/3/08". The former date appears to be an error, as the details under "Warrant" include AADs 87632 and what appears from the indistinct copy in evidence to be 87634, as well as two other numbers (87617 and 87636). The "Booking Ref." for each page is 150573. We are satisfied from the surrounding evidence that all three pages should be dated 26 March 2008.

107. Although there is no specific documentation, either in the form of a stamped AAD or a form W8, to show receipt of the goods, we find on the balance of probabilities that on the basis of the other evidence relating to the goods shown in

AADs 87632 and 87634, those goods were delivered to ABL's warehouse as requested by Mr van Voorst in his email dated 31 March 2008. We make no finding as to the date on which this occurred, as on the copy of that email received by Sarah Newland (the only copy in evidence) there is an annotation: "Waiting for stocks". We have no evidence to show who made this annotation, or the precise time and date on which it was made.

108. AAD 87916 is dated 26 May 2008. The consignor is SD. The consignee is ABL at its Hainault address, but the place of delivery is shown as "Acc. of Square (Aabsol)" at LCB's Barking address. The goods are shown as 6,120 x 0.700 Jack Daniels at 40.00%. The reverse is stamped with an LCB printed stamp, the signature above this being shown as that of M Taylor.

109. In an exchange of emails dated 5 June 2008 Mr van Vorst commented:

> "Goods were unloaded Tuesday 10.00 I am very much aware that we on our side have made the mistake but please can somebody svp inform me on the proceedings of getting these 10 pallets to Aabsolute Bond."

110. Following the response that these goods were on the system under a reference number, Mr van Vorst requested LCB to transfer the 1020 cases of Jack Daniels on AAD to ABL at Hainault. On 9 June 2008 Mr Rafiq signed a form W8 stamped with ABL's printed stamp. The copy of this form in evidence is poor, but we are satisfied that it is evidence of receipt.

111. The SD invoice number shown on AAD 87916 is 42788. The invoice exhibited to the relevant part of Mr Donnachie's witness statement carries a different number (41091) and is dated "22/02/08". We find that this invoice is not the correct one; although it relates to a quantity of Jack Daniels, that quantity does not correspond to the details referred to in Mr van Voorst's email. The correct invoice, dated 26 May 2008, is among the documentation provided to HMRC by the Netherlands authorities as enclosures to their "exchange of information" letter dated 20 July 2009. That documentation also includes a copy of SD's bank statement showing a credit on 33 June 2008 of €57,172.8? [last digit lost in copying] from ABL, the sterling amount being £45,441.00 (with a €57.20 charge being incorporated in the conversion rate); the invoice reference is "Aabsolute Bond Ltd invoice no 42788".

112. We find that the goods referred to in SD's invoice number 42788 and in AAD 87916 were delivered to ABL's warehouse on 9 June 2008.

113. Mr Donnachie stated in his witness statement that the remaining ten consignments of spirits were delivered direct from SD to ABL's warehouse. He indicated that HMRC had certified "copy 3s" of eight of the AADs endorsed by ABL to show safe receipt into its warehouse. It emerged during his cross-examination that HMRC had seven such copies, rather than the eight to which he had referred. The seven AADs concerned are numbered 87798, 87851, 87958, 87980, 88028, 88053 and 87731. The parties agreed that this was correct.

114. Of these seven AADs, numbers 87980 and 88053 were signed by Mr Rafiq and the remainder by Mr Chaudry. Mr Glover did not challenge any of the seven AADs, or any of the other evidence concerning the movement of, and payment for, the goods covered by these documents. We find that those movements into ABL's warehouse took place as evidenced primarily by the AADs, and as corroborated by the supporting evidence, which we do not set out in detail in this decision.

115. Mr Donnachie referred to a total of ten consignments; after taking account of the seven considered above, three alleged movements need to be considered.

116. AAD number 87819 is dated 2 May 2008. The copy in evidence is of the first page only, although somewhat indistinct reversed images of two printed stamps show through from what would have been the second obverse page of the double-sided document. The consignor is SD and the consignee ABL, at its Hainault address. The entry under "invoice number" is 42353. SD's invoice showing that number is also dated 2 May 2008. The quantities of the respective brands of spirits shown in the invoice appear to correspond with those appearing in the AAD, although some of the details shown in the AAD are obscured by one of the images of the printed stamps from the reverse.

117. Although there is no copy of the second page, the reversed images showing through include the HMRC stamp corresponding to that on the other copy signed second pages of the seven AADs considered above, the ABL stamp in the same form as on those other AADs, and a signature. When examined from the reverse against the light or in a mirror, that signature reads: "Shahid Chaudry 31/05/08".

118. There is no copy of any bank statement entry, and no other supporting evidence concerning this AAD. However, we are satisfied that this AAD was signed by Mr Chaudry on behalf of ABL; the journey time entry in box 17 is "4 weken" (ie 4 weeks), which is consistent with the date of the invoice, and the invoice and AAD are consistent in their form with the other documents relating to other transactions involving ABL and SD.

119. AAD number 88137 is dated 16 July 2008. Again, the copy in evidence consists of a single page, with images from the second obverse page showing through in reverse. The consignor is SD, and the consignee ABL. The invoice number to which the document refers is 43783. A copy of SD's invoice carrying that number is also included in the evidence; this shows quantities and brands of spirits corresponding to those in the AAD.

120. The copy bank statement exhibited to Mr Donnachie's witness statement does not assist in establishing the position. There is a narrative entry showing a sterling amount of £38,885.00, but no date is specified (although the other entries on that page are dated 25 July 2008), nor is there any indication whether the transaction is a credit entry or a debit entry. The narrative continues:

> "Sqaure [*sic*] PO Box 19976 Dubai UAE
>
> Import of electronics products ref: Invoice No; 43783"

121. We do not consider that this copy bank statement is of any persuasive value; although it may relate to the time corresponding to the placing of an order, the reference to that invoice number may be completely coincidental. Further, there is nothing to indicate any connection between the sterling amount concerned and ABL; this is not consistent with the format of the other bank entries in relation to the other consignments where we are satisfied that they relate to ABL.

122. As with AAD 87819, the reversed images showing on the copy of AAD 88137 provide some evidence of what the missing second page contains. The printed stamps are those, respectively, of HMRC and ABL, and are in the same form as on the second pages of the complete copy AADs relating to other consignments. Again, there is an image (on what would be the right hand side of the missing page) of a signature, together with the printed name of the signatory; in this case, this is "MH Rafiq". There is another similar image of the same signature on what would be the left hand side of the missing page. The form of these images of the signature is similar to, and consistent with, Mr Rafiq's signature and details showing on each page of AAD number 88053 relating to one of the seven movements which we have found to have taken place.

123. We find that AAD 88137 was signed on behalf of ABL by Mr Rafiq, and that the goods were acknowledged to have been received in ABL's warehouse. Although there is no clear evidence that SD's invoice was paid by ABL, we are satisfied on the basis of all the similar transactions undertaken by ABL with SD that the goods were ordered and delivered to ABL's warehouse.

124. Mr Donnachie's witness statement was intended to exhibit the details of 13 transactions. In the course of cross-examination, he accepted that he had made a mistake in duplicating the details of AAD number 87916. These details appear in exhibits AD6 and AD10. The duplication is not complete, as AD6 consists of nine pages, whereas AD10 consists of four pages. AD10 omits the copies of the email exchange between Erik van Voorst of SD and LCB and certain other documents, but contains the copy bank statement page relating to the credit received by SD from ABL in respect of the payment of invoice number 42788.

125. In the previous version of this decision released on 26 October 2012, we concluded that the result of this duplication was that there were no details in evidence relating to the other transaction to which Mr Donnachie had intended to refer. Subsequently to the release of that previous version, HMRC made an application for review and correction or amendment of that decision. As a result of that review, we are now satisfied that we were in error in arriving at that conclusion.

126. In re-examination, Mr Singh took Mr Donnachie to various documents within the two bundles; these documents were in various separately tabbed sections of the bundles, and thus not part of the exhibits appended to Mr Donnachie's witness statement. Although Mr Singh asked Mr Donnachie where in the chronology this order came, and Mr Donnachie responded that it appeared to have been at the beginning, our notes do not show any record of an express reference to this having

been the transaction erroneously omitted from Mr Donnachie's witness statement as a result of the duplication referred to above.

127. Although Mr Singh referred in his submissions to 13 consignments of goods being received in ABL's warehouse, and specifically to the movement of goods on 28 February 2008, together with the documentary records evidencing invoicing and payment and email exchanges between Mr Rafiq and SD, our notes do not record any mention of this being the "missing" transaction.

128. We have now re-examined the evidence relating to the ordering, payment for, supply and movement of the goods covered by SD's invoice to ABL dated 26 February 2008 and numbered 41108, which related to 600 bottles of Jack Daniels Bourbon. The total amount invoiced was 5784 Euros. On the basis of that evidence, we are satisfied that these goods were supplied to ABL, having been delivered initially to LCB and subsequently moved to ABL's warehouse. We would also comment that HMRC's Assessment Schedule attached to Mr Gowrea's letter dated 10 November 2010 appears to be incorrect in referring to the value of the consignment as being £5,784, as this clearly cannot have been the sterling equivalent of 5,784 Euros. As a result, the calculation of the VAT liability may have produced a figure in excess of the amount properly assessable. This may require a minor correction to be made to the total VAT liability assessed.

129. The circumstances of the loss of ABL's records and computer led to some controversy between the parties at the hearing. We do not find it necessary to go into the question, and therefore make no findings on the subject. In our view, the only relevance of the loss of the records is that it has not been possible to check the details of the transactions considered in this appeal against ABL's own records; this has necessitated close examination of a range of other material in order to establish what movements of goods into ABL's warehouse can be found to have taken place.

130. We have found that the goods which were the subject of 13 AADs were delivered to ABL's warehouse. Section 73(7B) VATA 1994 requires, as a precondition to HMRC making an assessment to the best of their judgment, that it must appear to HMRC that goods have been removed from a warehouse without payment of the VAT payable under s 18(4). Due to the loss of ABL's records, there is nothing to show whether the goods which had arrived at its warehouse had left those premises without the requirement to account for VAT. When HMRC inspected the warehouse, they found that the goods were not there. In the absence of any explanation for the goods not being present, we consider it reasonable to draw the inference that they had been removed from the warehouse without payment of any VAT under s 18(4).

131. The next question is whether VAT was payable under s 18(4) VATA 1994. Section 18(4)(b)(ii) applies "in the case of a supply". Did ABL make a supply? There is no suggestion that ABL made sales of the goods concerned. However, there are other circumstances in which a supply may be regarded as taking place. Paragraph 5(1) of Sch 4 VATA 1994 provides:

> "(1) . . . , where goods forming part of the assets of a business are transferred or disposed of by or under the directions of the person carrying on the business so as no longer to form part of those assets, whether or not for a consideration, that is a supply by him of goods."

132. As the relevant goods were not present in ABL's warehouse at the time of the HMRC inspection, and cannot be accounted for, we draw the inference that they were transferred or disposed of by or under the directions of ABL so as no longer to form part of its assets. We agree with the HMRC view set out by Mr Donnachie in his review letter:

> "There is very strong evidence that the goods were received at the ABL tax warehouse and as these goods were not present in the warehouse when it was closed, the only possible conclusion that can be reached is that these goods had been removed from the ABL tax warehouse at some point after receipt although there is no documentary evidence that such removals took place."

133. As a consequence, we find that ABL made supplies of the relevant goods, and that the resulting VAT payable on those supplies falls within s 18(4)(b(ii) VATA 1994. We re-emphasise that the test for VAT purposes is entirely distinct from that applicable for excise duty; in relation to VAT, it is not sufficient to show that the goods are found to be deficient or missing from a tax warehouse.

134. In the light of all our above findings, we hold that the VAT assessment on ABL dated 10 November 2010 was properly made to HMRC's best judgment under s 73(7B) VATA 1994 and, subject to adjustment of the assessment to take account of the minor correction referred to above in relation to Invoice 41108 in order to take account of the Euro designation of the amount invoiced, which we leave to be agreed between the parties, we confirm the assessment and dismiss ABL's appeal.

Right to apply for permission to appeal

135. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JOHN CLARK
TRIBUNAL JUDGE

RELEASE DATE: 26 October 2012

Amended decision following review pursuant to rules 40 and 41 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 on 14 March 2013.