TC04901

Appeal number: TC/2013/05339
TC/2013/06530

AIR PASSENGER DUTY – whether appellant airline's "premium eco" passengers were travelling in the "lowest class of travel available on the aircraft" and therefore subject to air passenger duty at reduced rate – various factors considered including – seats same type as in economy – positioning behind business section – thin moveable curtain between premium eco seats and economy seats

Time limits - whether time limits in s12(4)(b) Finance Act 1994 meant HMRC's assessments of underpaid APD were out of time– approach in Pegasus Birds Ltd applied – whether enough to know facts establishing liability to duty but not necessarily the amount in order for making of assessment to be "justified" - no –assessments made in time – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

SOCIETE AIR FRANCE **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN

Sitting in public at the Royal Courts of Justice, London on 15 and 16 April 2015 Further representations in relation to Respondents' application to amend their statement of case on 16 April 2015 received from the appellant in accordance with the Tribunal's directions on 1 May 2015.

David Ewart QC, instructed by Edwin Coe LLP Solicitors, for the Appellant

James Eadie QC and Simon Pritchard, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant, a French registered company, which carries on business in the UK, runs the well known commercial airline Air France. This appeal concerns its liability to Air Passenger Duty (APD) which is payable by commercial aircraft operators such as the appellant in respect of each passenger travelling from a UK airport. The duty varies according to the class of travel. The reduced rate of duty applies to the "lowest class of travel available on the aircraft" and the particular issue in this appeal is whether those customers travelling on short/medium haul flights in Air France's premium economy seating were travelling in the "lowest class" in circumstances where travel in economy was also available on the aircraft. Air France argues that, when viewed objectively, the minimal differences between travelling in premium economy and economy were immaterial and that a person travelling in premium economy was travelling in the lowest class. HMRC's position is that premium economy was not the lowest class and that the relevant seats did not therefore attract a reduced rate of duty.

2. Air France's appeals are against two decisions. The first is a decision dated 27 June 2013 issuing assessments in the sum of £2,122,378 (including interest) for underpaid APD incurred in the period 1 April 2010 to 30 September 2012 in relation to Premium Economy ("PE") on the ground that it had paid the correct amount of APD and in the alternative that the assessment was out of time. They also appeal against a decision dated 9 April 2013 issuing assessments in the sum of £2,867,121 (including interest) to account for underpaid APD for the period 1 April 2010 to 30 September 2012 in relation to passengers travelling in Premium Voyageur ("PV") seating on longer haul flights. The appellant now accepts that PV was not the lowest class; the appeal in relation to this decision is on the ground the assessments to duty cannot stand as they were made outside of the relevant statutory time limits.

Evidence

3. On behalf of the appellant I heard evidence from Mr Bruno Jayer, Air France's Financial and Purchasing Director for UK and Ireland, Mr Nicholas Jenin, Air France's commercial director for UK and Ireland, and on behalf of HMRC, the officer who was principally involved in investigating the appellant's liability to APD and who issued the assessments under appeal, Ms Jane Smith.

4. All three witnesses served witness statements in advance with exhibits and were made available for cross-examination by the other party. They assisted the tribunal with its questions and I found all to be credible witnesses. I was also referred to various documents including correspondence between the parties, notes of meetings and phone calls, marketing materials, diagrams of aircraft configurations and tables showing how fare prices varied as between different types of tickets.

Law

5. Section 28 of Finance Act 1994 ("FA 1994") imposes the basic charge to APD as follows:

> "28 Air passenger duty
>
> (1) A duty to be known as air passenger duty shall be charged in accordance with this Chapter on the carriage on a chargeable aircraft of any chargeable passenger.
>
> (2) Subject to the provisions of this Chapter about accounting and payment, the duty in respect of any carriage on an aircraft of a chargeable passenger—
>
> (a) becomes due when the aircraft first takes off on the passenger's flight, and
>
> (b) shall be paid by the operator of the aircraft.
>
> (3) Subject to section 29 below, every aircraft designed or adapted to carry persons in addition to the flight crew is a chargeable aircraft for the purposes of this Chapter.
>
> (4) Subject to sections 31 and 32 below, every passenger on an aircraft is a chargeable passenger for the purposes of this Chapter if his flight begins at an airport in the United Kingdom.
>
> (5) In this Chapter, "flight", in relation to any person, means his carriage on an aircraft; and for the purposes of this Chapter, a person's flight is to be treated as beginning when he first boards the aircraft and ending when he finally disembarks from the aircraft…"

6. Section 30 deals with rate at which APD is charged:

> "30 The rate of duty
>
> (1) Air passenger duty is chargeable on the carriage of each chargeable passenger at the rate determined as follows.
>
> (2) If the passenger's journey ends at a place in the United Kingdom or a territory specified in Part 1 of Schedule 5A—
>
> (a) if the passenger's agreement for carriage provides for standard class travel in relation to every flight on the passenger's journey, the rate is £13, and
>
> (b) in any other case, the rate is £26.
>
> (3) If the passenger's journey ends at a place in a territory specified in Part 2 of Schedule 5A—
>
> (a) if the passenger's agreement for carriage provides for standard class travel in relation to every flight on the passenger's journey, the rate is £69, and
>
> (b) in any other case, the rate is £130.
>
> (4) If the passenger's journey ends at a place in a territory specified in Part 3 of Schedule 5A—

(a) if the passenger's agreement for carriage provides for standard class travel in relation to every flight on the passenger's journey, the rate is £81, and

(b) in any other case, the rate is £162.

(4A) If the passenger's journey ends at any other place—

(a) if the passenger's agreement for carriage provides for standard class travel in relation to every flight on the passenger's journey, the rate is [£92], and

(b) in any other case, the rate is [£184].

…

(5) Subject to subsection (6) below, the journey of a passenger whose agreement for carriage is evidenced by a ticket ends for the purposes of this section at his final place of destination.

(6) Where in the case of such a passenger—

(a) his journey includes two or more flights, and

(b) any of those flights is not followed by a connected flight,

his journey ends for those purposes where the first flight not followed by a connected flight ends.

(7) The journey of any passenger whose agreement for carriage is not evidenced by a ticket ends for those purposes where his flight ends.

(8) For the purposes of this Chapter, successive flights are connected if (and only if) they are treated under an order as connected.

…"

7. The term "standard class travel" is defined at s30(10) as follows:

"(10) In this section "standard class travel", in relation to carriage on an aircraft, means—

(a) in the case of an aircraft on which only one class of travel is available, that class of travel;

(b) in any other case, the lowest class of travel available on the aircraft.

(11) But a class of travel is not standard class travel if the seats for passengers whose agreement for carriage provides for that class of travel have a pitch exceeding 1.016 metres (40 inches).

(12) For this purpose "pitch", in relation to a seat, means the distance between a fixed point on the seat and the same point on the seat immediately in front of it; but where there is no seat immediately in front of the seat, the seat is to be treated as having the same pitch as the seat immediately behind it."

8. In this appeal it is the reference to "the lowest class of travel available on the aircraft" in s30(10)(b) which is of particular relevance. Section 30(10)(a) is not relevant as it is not in dispute that there was more than one class of travel (business or

"affaires" class) on the relevant routes. Also as the Premium Economy seat pitches did not exceed 1.016 metres (40 inches) the exception in s30(11) did not apply either.

Facts

What do PE customers get?

9. PE customers have the same baggage weight allowance as those in economy but can check two items instead of one. They can use Air France's business class check in lane, baggage drop and boarding lane. This facility is also available to those economy customers who have certain loyalty cards (Sky and Air France Elite Plus) and economy customers can use the business check in when it is not busy. PE customers cannot use the business lounges at their departure airport in the UK but they are entitled to access the Affaires (business) lounge at Charles de Gaulle airport (CDG) in Paris (e.g. if they have a connecting flight there).

10. Once on board PE customers sit in seat rows behind the Premium Affaires (business) customers, who are seated towards the front of the aircraft, and in front of the economy customers. There is no physical structural separation between the economy, premium economy and business sections apart from a thin moveable curtain divider which is placed between the front of economy and the rear of premium economy. This consists of side curtains which are clipped from the ceiling into the desired position and an aisle curtain which may be rolled forward and back on runners. The curtains, which are drawn back during take-off and landing may be moved up and down the plane to different rows depending on how many customers are booked into economy on the one hand and premium economy and business on the other. Mr Jenin told the Tribunal how certain routes and times were particularly popular with customers booking certain products and that some flights were so busy with business and PE customers that there might only be two to three rows of economy passengers.

11. The seats used by PE customers are the same dimensions and type as those in economy. Their seat pitch is less than 40 inches (the dimension referred to in s30(12) FA 1994). The business seats are also the same type but in the business class rows the middle seat between the aisle and window seats are folded down or "neutralised" (as Mr Jayer put it) with the effect that there is an unoccupied space between the aisle and window passengers. The folded down seat may also be used as a table.

12. PE customers are offered the same drinks choices as those offered to customers in economy but are offered a different snack which Mr Jayer described as "slightly improved". He explained that this meant that for instance in economy the sandwich contents would be ham or cheese whereas in premium economy it would be salmon. There were no extra staff dedicated to serving the PE customers.

Background to creation of PE class and how the appellant viewed product

13. Mr Jenin's evidence explained the structure of Air France's tariffs. The PV and PE products were launched in April 2010. The "New European Offer" as it was called

was divided into "Premium Affaires", Premium Economy" and "Voyageur" (referred to now as "Economy"). Mr Jayer's evidence was that the new premium products were already in existence; the previous fully-flexible economy fares had essentially been rebranded under premium economy. While the fares were marketed in a different manner, it was never Air France's intention to create a separate class of travel or a highly distinctive class of travel from economy only a product which was "enhanced for marketing purposes". As far as the appellant's revenue management systems were concerned both Voyageur and PE were considered as economy cabins. The numbers of passengers were not tracked internally by Air France because through the organisation none of the premium products were considered to be a separate class of travel: PE kept the same baggage allowance that economy passengers with fully flexible conditions previously had of two pieces of luggage. The baggage allowance in economy was downgraded to one piece instead of two. PE customers would in addition receive priority boarding, and access to Air France's "Affaires" (business) lounge at CDG airport, Paris.

14. Mr Jayer's evidence was the additional services around PE were meant to give the impression to the customer that he or she had "business" class but the reality was that the passenger was paying for extra fare flexibility with very little difference in terms of the comfort compared with those travelling in economy. In contrast to business class passengers PE customers were not given access to lounges available in the UK (the appellant would have had to pay a fee per passenger entering the lounge), or to the fast track security when available. He explained that this was because this would involve a real cost to the airline. In contrast, access to Air France's business lounge in CDG represented a low marginal cost. The great majority of PE customers were in transit at CDG and would not have time to use the lounge as transit times were kept to a minimum.

Passenger / customer perceptions

15. Mr Jenin's evidence gave a sample of customer comments received from corporate contract passengers provided to him by the appellant's sales team in the UK and from its archives together with details of their business customer travel policies as understood by the appellant. It was reported that two major investment banks who were big customers tended to book in PE but that this was driven by availability as their bookings were often only made three days in advance. Another bank was reported as having a policy of booking in economy but also booking in PE if that was all that was available as it was not considered by them to be out of their travel policy of booking economy travel.

Marketing / advertising

16. An excerpt from Air France's website under the heading "Premium" stated the following:

> "For your trips within Europe, choose the Premium cabin and benefit from our dedicated services, with optimal comfort, efficiency and

> access to Air France lounges. We do everything possible to make your trip a smooth one, both at the airport and on board.
>
> Situated at the front of the aircraft, the Premium cabin is ideal for your business trips. Depending on your needs you can choose one of 2 offers:
>
> – Premium Affaires for optimal comfort
>
> – Premium Eco, for efficiency and flexibility at the best price
>
> A dedicated cabin at the front of the aircraft
>
> The cabin's first rows each comprise 4 seats (a tray table replaces the middle seat) reserved for Premium Affaires customers. These seats provide ample comfort for work or relaxation.
>
> Premium Eco customers are seated in the next rows within the cabin, containing 6 seats per row.
>
> Discover the Premium cabin.
>
> …
>
> Benefit from Premium advantages:
>
> –Modify or have your tickets reimbursed without paying a fee
>
> – Take advantage of automatic check-in and receive your boarding pass via e-mail 30 hours prior to departure
>
> – Enjoy a higher baggage allowance. To know the number and weight limits of the baggage items that you may transport free of charge please visit our baggage section*[hyperlink]*."

Pricing

17. There are on average 35 existing "structural" economy tariffs for each of the UK-CDG routes and around 40 for the LHR-CDG route. Tickets vary as to whether they are refundable or not, the level of restriction, the length of passenger stay before a return journey, the time of departure and the extent to which the booking is made in advance of the journey. There are currently eight PE tariffs which are considered by the appellant to be part of the economy offering.

18. The price differential between PE and business got closer the nearer the departure date and Mr Jenin's evidence was that that 75% of passengers booked within the last two weeks before departure. He explained how the business / PE split varied according to the time of day and the particular route.

19. Mr Jayer explained there was large difference in various economy fares due their level of flexibility. The lowest fare of £88 would require a Sunday night or three day minimum stay with no refund and a £60 change fee. A mid-range ticket of £174 would still have the change fee and no refund but no minimum stay and the most expensive economy ticket at £461 would have no minimum stay and would be refundable less £100. As referred to above his evidence was that the previous fully flexible economy fares had essentially been rebranded by the introduction of the PE fare. By way of comparison the most expensive fully flexible economy fare offered

by British Airways on the route was £621 whereas the equivalent Air France PE fare was £589.

20. Mr Jenin's evidence gave examples of screenshots from Air France's website on fares as at 4 April 2014. On a flight between Paris and London the difference in price between economy and premium economy was £21.

21. Ms Smith's evidence gave the example from Air France's booking site on 23 December 2013 of an outbound flight from Paris to London on 22 January 2014 costing £52 in economy and £230 in PE, and of an inbound on 29 January 2014 costing £36 in economy and £215 in PE.

Discussion (substantive issue)

Legal interpretation and approach

22. The substantive issue in this case turns on the construction of the words "the lowest class of travel available on the aircraft". While the parties have not put their suggested approaches to interpretation in precisely the same way there is in my view broad agreement as to the general approach. Mr Ewart, for the appellant, says the tribunal should look at the matter objectively, evaluating the evidence, looking at what is provided in fact to reach an "impressionistic" decision. Mr Eadie, for HMRC, refers to the dicta of Mummery LJ in *HMRC v Procter & Gamble* [2009] EWCA Civ 407 by way of emphasis for the importance of interpreting provisions that use plain English in a sensible way. In that case, which famously concerned whether Pringles were "similar to" potato crisps and "made from" potato for the purposes of deciding whether they were zero-rated for VAT, Mummery LJ stated in the concluding paragraph of his judgment:

> "…VAT legislation uses everyday English words, which ought to be interpreted in a sensible way according to their ordinary and natural meaning. The "made from" question would probably be answered in a more relevant and sensible way by a child consumer of crisps than by a food scientist or a culinary pedant…"

23. Mr Eadie invites the tribunal to take a "sensible stand back view". While HMRC's arguments then posit asking a passenger sitting in the PE seats in front of the curtain whether he or she was in the same class as those behind the curtain and suggest that such a passenger would undoubtedly say "no", I do not understand this as an argument that the test is limited to looking at what the customer considers to be the case but rather that it is the broader one that statutory words should be given their ordinary and natural meaning.

24. I would also note that the although the duty is charged in respect of each chargeable passenger, the term "class of travel" is linked, as set out in s30(10) to the availability of classes of travel on an aircraft. This confirms that the question of what amounts to a "class of travel" must be answered before the issue of whether a particular passenger's agreement for carriage provides for "standard class travel" under e.g. s30(2)(a). The question of whether a particular package of features will

amount to a "class of travel" will not therefore vary according to the subjective views of the particular passenger in respect of whom the duty is levied on the airline.

25. Although there is consensus on the general approach, namely that the task of the tribunal is to consider all the particular facts and circumstances relating to the appellant's PE product and to come to a view on whether it constitutes a different "class of travel", there are some points of interpretation and points as to the weight and relevance of particular kinds of factors that need to be resolved before evaluating the facts.

Impact of APD rate differential?

26. Mr Ewart, argues it is significant that the fact that the lower rate of APD set out in the statute is half the rate of the higher one and that this has consistently always been the case even if the rate amounts have varied. This is something, he submits, which should be taken account of in the statutory construction of "lowest class of travel". Construing the legislation purposively therefore this will mean that slight factual differences in a product will not be sufficient to take the product out of the definition of "lowest class of travel". Mr Eadie's response is that Parliament has decided the dividing line between APD rates is the term "lowest class" and that the extent of the difference between the rates cannot be used to say Parliament meant something different than "lowest" when it used that term.

27. Whether Mr Ewart's point involves taking a different interpretation of "lowest" is of course the point in question, no doubt he would say it is not a different interpretation but the correct purposive interpretation. However in my judgment the difficulty with such an argument is that there is no indication in the legislative scheme that the materiality of the difference between travel classes is to be linked according to the level of APD rate differential. Whether a rate differential which is twice as much or half as much (depending from which perspective the rates are looked) is a relative matter depending on what the starting point of comparison is. There is no mechanism for determining how a corresponding quantitative increase or decrease in the APD differential would translate into an inherently qualitative view of materiality. Nor is it clear on what basis it can be said that a differential factor of double or half the respective duty rates must correspond to a test of requiring the differences to be more than slight. Further if the appellant's point were correct there is no reason to suppose it would not apply just as much to colour the interpretation of the other provisions upon which a rate differential may hinge such s30(11) (pitch exceeding 1.016 metre (40 inches) and the definition of "pitch" in s30(12). While I would acknowledge that if the differences between the potential classes were trivial that this would then suggest the classes were not different this conclusion would, in my view, follow from applying the ordinary sensible meaning of "class of travel" not by having regard to the rate differential.

Relevance of services which are not available on aircraft / ticket conditions and other factors

28. The next area of potential legal ambiguity relates variously to the relevance of services which are not provided on board the aircraft, the marketing of the product, and the fare restrictions and terms and conditions of the tickets. The appellant suggests the focus, given the reference in s 30(10) to travel "in relation to travel on an aircraft" is on on-board benefits. HMRC's interpretation of that subsection is that it refers to "travel on an aircraft" because the following subsections need to distinguish between aircraft on which only one class of travel is available (subsection a) and other cases (subsection b). The significance of these points is first that the appellant argues that ticket flexibility (which they say is the most important differentiating feature and contributor to the difference in price of a PE ticket) is not part of carriage on an aircraft. HMRC say that if Parliament had wanted to restrict the analysis of class of travel to only on board benefits it would have said so. The tribunal must look at the overall package – what happens on the aircraft beforehand and afterwards and on the benefits conferred by the agreement. In support of this Mr Eadie referred to various subsections in s30 FA 1994 which set out the relevant APD rate according to whether "the passenger's *agreement for carriage* provides for standard class travel". In his submission that which is offered for sale and marketed as well as what is actually sold is relevant. The appellant says the tribunal must look at what is objectively provided in fact to see whether there is indeed a separate class of travel not at how the ticket is described or marketed in advance of the contract for carriage.

29. It is true that the references to "available on the aircraft" and s30(11), which refers to seat pitch, indicate that in considering what is a "class of travel" features which are made available on the aircraft will be highly relevant. However, in my view, and consistent with Mr Eadie's submissions on the point, a person tasked with reaching an objective conclusion on "what classes of travel are available on the aircraft?" even if they are directed to answer that question "in relation to carriage on an aircraft" would also be interested to know what services and benefits were available to the passenger both before and after they boarded and disembarked from the aircraft too. In fact given the way the parties have put their cases neither, in my view, seek to argue that pre-and post flight services such as the check in lanes, lounge access are to be ignored even if they differ as to the significance of such matters in the analysis of whether a different class of travel is constituted. Further there is nothing to suggest that by linking the words "class of travel" to "in relation to carriage on an aircraft" the factors of ticket price differentials and the attributes associated with the ticket such as conditions around refunds could not in principle be taken account of in the analysis of whether a different "class of travel" has been constituted; it being no stretch of language to say that such matters are "in relation to carriage on an aircraft".

30. As to the marketing in relation to the product, this factor, in my view, is one among the many which falls to be evaluated. The marketing is relevant firstly as evidence from which it might be inferred what actual benefits were provided e.g. in so far that an airline was holding itself out as providing certain features then (unless there were evidence to the contrary to suggest the marketing was misleading) the marketing evidence would be more consistent with the described facilities being provided than not. In this case the marketing is of less evidential importance because

we have other evidence of what else has actually been provided in the form of what the appellant's and respondents' witnesses have told the tribunal. Secondly, it may be of relevance in that a typical customer's perception as informed by marketing would be an element of the objective evaluation of whether the product constituted a different and higher class of travel.

31. Returning to the issue of how the term "lowest class of travel" is to be interpreted while HMRC have referred to a dictionary definition of "class" ("a set or category of things having some related properties or attributes in common, grouped together, and differentiated from others") they acknowledge, correctly in my view, that the mere provision of an additional service does not create a different class of travel. It will be a question of evaluating the particular package of facts to see whether they would amount to a "class of travel" according to an ordinary and sensible definition of that term. The fact the legislation goes on to refer to class of travel "available on an aircraft" emphasises the context for the term "class" is air travel. So although for instance passengers seated in the various exit row seats with extra legroom and additional safety responsibilities have related properties or attributes in common they would not be understood under an ordinary and sensible definition of "class of travel" in the context of air travel as being in a separate exit row travel class. Nor would the grouping together of customers who had bought tickets with common fare or refund conditions or restrictions such that they shared those attributes in common be enough to distinguish them as travelling in a different class of travel from others whose tickets had different conditions or restrictions.

32. Before moving on to evaluating the particular factors in this case it is worth pointing out that there are certain factors which are irrelevant or of low weight. The fact that various features have minimal or no marginal cost to the appellant is, as pointed out by HMRC, not relevant. It can hardly be surprising that airlines which are commercial bodies and which seek to maximise profits will want to generate revenue by attracting customers with various benefits but will also want to keep the marginal cost of those as low as possible. The fact an airline has created a benefit for customers in a commercially successful way does not make the benefit any less of a feature to be considered.

33. Another aspect which emerges from the statutory wording is that the question of what class or classes of travel are available on the aircraft is to be answered in relation to the time period when the relevant duty is in issue. This means that some of the factual background put forward by the appellant as to how PE compared with economy previously is irrelevant (e.g. that fully flexible economy tickets were rebranded as PE and the fact that the use of business check in lanes was a feature of the fully flexible economy ticket before PE which admittedly the appellant says is not an important factor).

34. In relation to the relevance of pricing, while price differentials are certainly a factor to be taken account of it is in my view the differentials as between different seats on the aircraft of the appellant which would be relevant given the need to look at the classes of travel which are available on the particular aircraft. Comparisons of

price with other airlines are unlikely to assist (particularly where no determinations have been settled in relation to the class structure on the comparator airline.)

35. Finally, the appellant has referred to HMRC's guidance on APD and various attributes in it which it says are of more significant benefit than the benefits in the current appeal but which have nevertheless not been accepted by HMRC as giving rise to a different class of travel. However such guidance, which by its nature amounts only to HMRC's understanding of the application of the legislation, is irrelevant to the question of whether the factual circumstances of this appeal constitute a different class of travel or not.

Submissions on facts

36. Mr Ewart, for the appellant, emphasises that the most important feature of the PE ticket is flexibility; the other features of difference are slight. The PE ticket is more expensive because it is fully flexible. He highlights that HMRC's comparison of the fare differential (£54 for economy and PE ticket of £300) is not like for like. One is to be booked a month in advance with a three night stay, no refund, no change, the other is fully refundable, changeable, and had no period of stay. The difference between Air France's lowest PE fare (£482) and the most flexible eco ticket (£461) is £21, £13 of which is made up by the APD. As for what happens on board PE customers sit in same type of seats as economy, there is no physically separate cabin, the curtains are drawn back only after take off and are opened before landing. The curtain which HMRC argue gives privacy gives just as much privacy to economy passengers. On some flights the economy passengers comprise only two or three rows. PE customers do not have the seat between them "neutralised" as is the case for business customers. They get a slightly better snack but this is a minimal difference and it is a matter of opinion whether someone prefers ham or cheese or salmon or indeed what they can have given dietary restrictions for instance if they are vegetarian. As for the lounge access at CDG this benefit was minimal because connection times at the airport were kept short. The use of business check in lanes was not an important or relevant fact; economy passengers were allowed to use these when they were available.

37. Mr Eadie, for HMRC, highlights the following features. Those in PE are seated in one location together between business and economy. They sit near the front of the plane. They are separated by a curtain from economy and they get an improved snack. Although the seats are the same as economy this is also true of business (except that in business the middle seat is folded down). Air France use the phrase "premium economy" to describe the seating. The curtain is not just to differentiate but for privacy. The PE passengers do receive enhanced benefits: even if other passengers can use business check in when it is not busy the point of having a business check in is that it will have shorter queues at busy times, furthermore PE customers can check two bags instead of one. Being able to access the CDG business lounge is a benefit and customers can use this on their return journey.

38. In terms of price PE is always more expensive even if the differential shrinks closer to the departure date. Mr Eadie highlights that the appellant has gone out of its

way to market the benefits as a different class, and that the marketing refers to seating within its own cabin. It is unsustainable to say the enhancements are immaterial given what is being suggested to public.

Tribunal's views

39. In my judgment, it is quite clear, having considered all the various factors as set out below, that the appellant's PE customers were travelling in a different and higher class of travel to those travelling in economy. The PE product was not the "lowest class of travel available on the aircraft". In my view this conclusion is readily sustainable on the basis of the positioning of the PE seating behind the business section and in front of the economy seats with a curtain separating the PE and economy sections, and the improved snack made available to PE customers.

40. While I agree with Mr Ewart that the function of the thin moveable curtain divider cannot be about privacy (if it were it might be expected that on flights where there was a very large contingent of business and PE customers that curtain dividers would be placed at regular intervals to break the cabin space up, and as Mr Ewart pointed out the divider gives just as much privacy to economy customers), it would be wrong to assess the significance of the curtain divider purely in physical terms. To do so would be to ignore what, in my view, an objective person familiar with air travel would readily appreciate. He or she would know that curtain dividers such as those described in this appeal however thin or flimsy are deployed for symbolic reasons as a sort of "marketing theatre" to differentiate who is travelling in which travel class; so much so that the act of having them drawn shut with a flourish after take off has become a cliché in the world of commercial air travel. The curtain divider provides visible reassurance to those in front of them that they are not an economy passenger and that others will appreciate this fact too. The fact the curtains are drawn back at take off and landing is not significant – it would readily be understood that this is done to facilitate heightened safety during those parts of the flight.

41. The positioning of the PE passengers in front of the curtain with the business passengers is consistent with the marketing in relation to PE which suggests that PE customers are in their own cabin with the business class passengers. Given the layout of the business seats (with a maximum of four passengers per row as opposed to six), the passenger density in the separated area is also more likely to be lower.

42. As to the snack which PE customers receive there is nothing in the appellant's point that it is a matter of opinion as to what kind of sandwich filling is to be preferred. PE customers receive a different snack choice and it is clear that the kind of sandwich contents they are offered (the example Mr Jayer gave was salmon) is widely acknowledged to be superior to that offered in economy (ham or cheese).

43. While I take into account that the type of seats the PE customers sit in are essentially the same as those which economy customers occupy when this fact is viewed together with the other facts I do not think it is significant enough to point towards PE and economy being the same "class of travel".

44. I would therefore reach the conclusion that PE is a different and higher class than economy even if, as a matter of statutory construction and contrary to my view at [29] the tribunal were not able to take account of pre and post flight benefits. In relation to the question of whether it is relevant to take into account whether differential features are minimal or slight my view as set out above at [27] is that it is not. If I were wrong in that conclusion I would not in any case agree the differences were slight. This is all the more clear when the context in which the question arises is taken account of namely that of short /medium haul flights where the impact or absence of certain features is concentrated over a shorter period of time and takes on greater significance. I would therefore come to the same conclusion that PE is not the lowest class of travel even if I were to accept the argument that the differential in APD between the two rates affected the statutory construction of the "lowest class of travel".

45. The other factors (the naming of the product, its marketing, the various pre and post flight features and different baggage piece allowance) in my view all point towards PE being a different and higher class of travel. As to the pricing of the tickets, the fact that (even if the level of differential varied) PE tickets were always more expensive than the economy tickets is consistent with PE being a different class but I accept it is not an especially strong indicator one way or the other (given there are price differentials within economy depending on what type of ticket is bought). In that regard the question of the extent to which the price differential arises because of ticket flexibility is not material in the analysis. Little therefore turns on the factual dispute between the parties as to whether during the time period at issue there was available a fully flexible economy ticket which was differentiated from the PE ticket. (HMRC rely on material set out in the appellant's statement of case to that effect however such evidence as there was on the various fares provided to which I was referred to did not enable me to make such a finding.) I do not rule out that there may be situations where ticket flexibility is relevant to class of travel (for instance when that feature is assigned only to a particular kind of seat which is differentiated by other characteristics from others) but I agree with the appellant that ticket flexibility is not something which assists on the question of "class of travel".

46. While the appellant argues in relation to the marketing of the product that the focus must be on what is provided in fact I find that in this case the marketing in relation to PE was consistent with what was provided in fact. To the extent the marketing is relevant in its own right to the question of whether a class of travel is constituted then the naming of the offering as "premium economy" and the references in marketing to a "dedicated cabin" and "higher baggage allowance" positively put forward the impression that PE customers will be travelling in a class of travel which is not the lowest available on the aircraft.

47. The various pre and post flight benefits (business check-in, priority boarding, two pieces of checked luggage instead of one, access to the CDG lounge), are distinctive benefits provided to PE customers and are consistent with PE being a different and higher class of travel. The fact some of these benefits are accessible to economy passengers by virtue of their status as loyalty card holders only serves to

confirm that these features, even if they have minimal marginal cost, are viewed as distinctive benefits.

48. The fact that the appellant did not treat PE separately from economy in its internal revenue management systems reveals its subjective views on the issue and does not affect the analysis that objectively PE is a different and higher class of travel. For the same reason the views of certain businesses who bought travel for their employees do not assist.

Conclusion on substantive issue

49. For the reasons set out above, in my judgment the appellant's PE product was not the "lowest class of travel available on the aircraft". The appellant was therefore liable in respect of chargeable passengers who travelled in this class at the higher "standard class" rate rather than the reduced rate APD for passengers travelling in the "lowest class".

Time limits issue: Whether assessments in relation to underpayment of APD for Premium Economy (PE) and Premium Voyageur (PV) classes were out of time

50. Section 40(1) of FA 1994 provides that "Air passenger duty shall be a duty of excise…" The relevant statutory provisions on time limits are set out in s12(4) FA 1994:

> "(4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say—
>
> (a)… the end of the period of 4 years beginning with the time when his liability to the duty arose; and
>
> (b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;…"

51. The particular time limit in issue in this appeal is that set out in s 12(4)(b) in relation to which there is Court of Appeal authority (*Pegasus Birds Ltd v CCE* [2000] STC 91). This case is considered in more detail below as are the various communications between the parties in the period which preceded the making of the assessments for underpaid APD in respect of PV and PE customers.

52. The appellant's case in relation to the PV assessments (which were made on 9 April 2013) is that the one year time limit in s12(4)(b) started to run by January 2012 because at that point HMRC were clear that PV was subject to the higher rate of APD. In relation to the PE assessments (which were made on 27 June 2013) the one year time limit was breached because HMRC had the requisite sufficient evidence by April 2012 that PE was liable to the higher rate of APD. HMRC's failure to make an earlier assessment was unreasonable.

53. HMRC's case is that they were only provided with sufficient information to assess the amount of duty in December 2012 (the passenger numbers or the data from which they could be derived /estimated) and that both assessments were therefore raised in time. The appellant's response to this is that HMRC had sufficient evidence of facts to *justify* assessments being made without necessarily knowing the numbers of passengers travelling in the relevant classes.

54. As has become clear from HMRC's application to amend its statement of case, which was not opposed by the appellant and which I allow, and further to the appellant's representations that were received after the hearing, the issue of whether the PV and PE assessments were each individual global assessments or a series of separate or individual assessments does not arise. It is accepted that separate assessments were made in respect of each monthly duty period. The significance of this is that it is accepted by the appellant that even if it is successful in its argument on time limits, the periods which were within one year of the date of the assessments (after April 2012 (in relation to PV) and after June 2012 in relation (PE)) would not be out of time under s12(4). As HMRC set out in their amended statement of case the assessments in relation to a duty period which fell within the year preceding the date of assessment must be in time because the liability to pay the duty would not have arrived.

55. Both parties referred in detail to the Court of Appeal and High Court decisions in *Pegasus Birds Ltd v CCE* ([2000] STC 91 and [1999] STC 95). The appellant in that case, a retailer of exotic birds, had evaded VAT on its sales. The appeal considered how the time limit for the VAT assessment that had been made on the appellant was to be approached under the relevant VAT legislation which, for present purposes, was identical to the duty time limits at issue in this appeal.

56. In the Court of Appeal, Aldous LJ giving the lead judgment which was agreed by the other judges on the panel, upheld the conclusion and the reasoning of the High Court's decision. Dyson J's judgment in the High Court, having set out the submissions the parties made on the relevant case law put forward (at 101g) the following legal principles which were to be applied:

> "1.The commissioners' opinion referred to in s 73(6) (b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.
>
> 2. The evidence in question must be sufficient to justify the making of the assessment in question (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 754 per Potts J).
>
> 3. The knowledge referred to in s 73(6) (b) is actual, and not constructive knowledge (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 755). In this context, I understand constructive knowledge to mean knowledge of evidence which the commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.
>
> 4. The correct approach for a tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the

> assessment on behalf of the commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from the date in (ii) (see *Heyfordian Travel Ltd v Customs and Excise Comrs* [1979] VATTR 139 at 151, and *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10).
>
> 5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on *Wednesbury* principles, or principles analogous to *Wednesbury* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223) (see *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10–11, and more generally *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941 at 952 per Neill LJ).
>
> 6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s 73(6) (b) of the 1994 Act."

57. The appellant also referred to *Keyes Transport Ltd v Customs and Exicise Comrs* (decision number E00878 (2005)) which was a decision of the VAT and Duties Tribunal. Amongst other matters this decision considered the identical time limit in s 12(4) FA 1994 for making excise duty assessments. This decision, the appellant suggests, supports its argument that for there to be sufficient evidence of facts justifying the assessment it is not required that the Commissioners must be able to quantify the assessment. I come on to discuss the case in more detail later when dealing with that issue.

58. In order to put the parties' further submissions into context, and with the principles extracted by Dyson J above in mind, it is helpful at this point to set out the chronology of communications and information which passed between the parties in some detail.

HMRC's enquiries into the appellant's PV and PE products

59. In October 2010 HMRC commissioned an APD audit. One of the objectives was stated as being "To ensure that the Air France "New Premium Voyager Seat" configuration has been correctly declared at the standard rate of APD". The audit began on 18 January 2011. Philip Hazell, who worked in HMRC Large Business Auditor function and Ms Smith, who had been a tax specialist in HMRC's Air Passenger Duty Central Assurance Team since 5 October 2009, met with Air France's Chief Accountant at Air France's office. As reported in the visit note HMRC requested information on the treatment of Premium Voyageur Seat.

60. On 31 January 2011 the Chief Accountant of the appellant copied Ms Smith in to an e-mail which provided a schedule of flights from January 2008 to January 2011 (the context for this was an issue to do with declarations of passengers carried on routes operated by Air France by a franchise airline). Meetings between the appellant and HMRC ensued on 18 September 2011 and 19 October 2011 and on 27 October

2011 Mr Hazell e-mailed the appellant "to look into the APD situation surrounding the PV seating, as discussed on 19 October, as soon as possible."

61. On 1 November 2011 HMRC began its enquiries into the premium products offered by Air France and its group of companies. Ms Smith researched Air France's products, looking at its website and the seat planner site Seat Guru downloading descriptions of the products and aircraft configuration details. She compiled a schedule setting out various different aircraft (24) which included details of the seat pitch and width of seats in columns she labelled as "premium affaires", Premium Eco" and "Voyageur". With the exception of four aircraft where the seat dimensions were recorded as being the same, the seat dimensions in "Premium Eco" were recorded as being greater than those in "Voyageur". (While those more generous seats were referred to as being "Premium Eco" it clear now that they were what is now referred to as PV).

62. In response to Ms Smith's query on 12 December 2011 as to whether premium economy passengers had been declared at the lower or the standard rate of APD, Mr Jayer e-mailed Ms Smith back later that day explaining that the PV seat had been "progressively launched in the Air France network from CDG since April 2010". He set out that it represented a "moderate improvement" in ground facilities, travelling conditions and in-flight service levels when compared with other Voyageur seats and the appellant's belief that none of the advantages were sufficient to justify treatment as a separate class. The e-mail mentioned that the PV seat pitch was below the 40 inch criteria in the APD rules (it was 38 inches) and that the appellant had declared the new seat for reduced rate or equivalent in its various European jurisdictions. Ms Smith suggested discussing the issue at a meeting. This took place on 12 January 2012.

63. Following the meeting on 12 January 2012 when Ms Smith picked up various brochures and looked at Air France's website she established the PV cabin was partitioned off at both ends, the seats had 40% more space than in Voyageur with a almost a metre between rows, that there was a meal service with complimentary champagne, amenity kit, pillows blankets and bottled water.

64. From Ms Smith's evidence it is apparent that she would have had confirmed to her by Mr Jayer that, as regards PV, the services included ticket flexibility, business lane check in, free of charge catering, access to Air France lounges, a different seat to economy but the same meals and the same staff to passenger ratio as economy. From the Air France literature she looked at subsequently which included diagrams of aircraft configurations she saw that the PV cabin was positioned midway between Business and Voyageur, that it was partitioned at both ends and that a rigid shell seat provided 40% more space than the Voyageur seats. In cross examination she accepted, and I find as fact, that her opinion by the time of the meeting was that PV was not liable to the reduced rate (and this accorded with the impression that Mr Jayer reported in his note of the meeting). Her consideration of the various materials subsequently served to reinforce her view that PV was not the lowest class of travel available on the aircraft.

65. In relation to PE, Ms Smith who had been under the impression from materials she had printed out from seatguru.com that the PE and economy seats were different found out that the seats were the same. She was also told the services booked from the UK included the same as described above for PV. The issue of the moveable curtain was raised and Ms Smith wanted more details on this as it was an important issue from HMRC's point of view.

66. On 28 March 2012 Mr Jayer e-mailed Ms Smith attaching a spreadsheet dated 25 March 2012 identifying the type of aircraft operated by the appellant and its franchisees from UK airports and the seat pitches for each class of travel operated on the aircraft listed. This showed the seat pitches for economy and PE on aircraft for short and medium haul flights being operated from the UK to be the same. The e-mail referred to a moveable curtain which separated Premium Economy and Economy and the fact that PE customers received a relatively modest snack different from the rest of economy. As to ground facilities it mentioned that PE customers had access to the dedicated business class check-in lane, baggage drop and boarding lane, that this did not represent any extra cost and that economy passengers could also use them when they were under-utilised. PE customers could not use lounges in the UK (they could use the lounge at CDG but in practice such passengers seldom used the lounge) and they could not use fast track in the UK or overseas. In relation to PV passengers the e-mail outlined that apart from the seat which was different the position as regards facilities offered was the same as for PE.

67. On 26 April 2012 Ms Smith e-mailed Mr Jayer point out that one of the factors to be considered in whether there was a different class of travel was the configuration of the aircraft and that from the appellant's website it appeared that different configurations were used for Europe, long haul and French regional flights Ms Smith wanted to know which configuration was used for flights operating from the UK. She also stated HMRC's view that from the description of the Premium Economy and Business Class seating on medium/long haul flights those were different classes of travel to economy.

68. On 21 May 2012 Ms Smith chased for a response regarding configuration of flights operating from the UK and on 22 May 2012 she e-mailed details of a comparison between the aircraft types according to the appellant's website and those operating from the UK as set out in Mr Jayer's e-mail of 25 March 2012. She also compared seat pitch details from Mr Jayer's previous spreadsheet and that extracted from Seatguru.com and enquired why, assuming the configuration for flights was that referred to as "Europe", there was a discrepancy between Seatguru and Mr Jayer's e-mail on how the seating in each class of travel was separated asking "is it by for example a moveable curtain divider?". In each of the Airbus Europe configurations Ms Smith's schedule showed that the pitch was between 2 to 8.5 inches greater for premium economy according to Seatguru.

69. Mr Jayer replied on 24 May 2012 seeking clarification as to whether HMRC did think PV was a separate class. In relation to short haul flight his e-mail attached cabin maps relating to the operation of aircraft from the UK, reiterating that the PE and economy seats were the same seats and same pitches. He explained there was no

physical separation between these two types of seats except for a moveable curtain which was adjusted from one row to another according to the level of bookings per fare. An e-mail from him shortly thereafter that same evening suggested times for a phone call to discuss. On 28 May 2012 Ms Smith suggested it would be more beneficial for her and her colleague Ian Berry to visit. The visit took place on 27 June 2012 at Heathrow but Mr Berry carried out the visit alone as Ms Smith did not have her passport and was not able to get airside. Mr Berry made a note on 28 June 2012 and recorded the purpose of the visit was to examine a typical aircraft on the route to Paris and "all aspects of the passenger's experience from arrival at the airport to departure of the flight. The aircraft inspected was an Airbus A321 configured in "short haul" mode being prepared to operate an outbound flight to CDG Paris". The note set out that all seats were identical, that rows 1-9 were spaced at 32" intervals and from row 10 backwards spacing was at 30". Business seats were allocated from the front and the middle seat "neutralised" i.e. folded down to create a table between the outer seats. The note stated that if there were more than nine rows of business seats some would sit in 32" seats and some in 30" seats but that there was no compensation for that. If there were few business and PE passengers some Voyageur passengers would get 32" seats. PE passengers sat behind the business class passengers and there was a moveable curtain. Mr Berry explained in the note that on the flight from LHR to CDG this had been placed at Row 15 whereas for the outbound flight it was placed at row 11 and described it as follows:

> "The side curtains are unclipped from the ceiling and clipped in at the desired position. The aisle curtain is rolled forwards on runners, this process was observed and took only a couple of minutes to complete."

70. On 21 August 2012 Ms Smith wrote to Mr Jayer. She informed him that following the APD audit, of PV (launched in 2008) and PE (launched in 2010), Air France was reported as agreeing that PV attracted standard rate and that despite Air France's views to the contrary HMRC's view was that the PE seating was standard rate. Her letter stated:

> "…My policy colleagues and I have considered the matter very carefully. We accept that Premium Economy and Economy are similar but we have come to the conclusion that there is a material distinction nonetheless. In particular, we feel that, in most people's minds, the curtain would mark a separation between the Economy class passengers and those more privileged (or it would not be there). We note in that regard that your website advertises that the Premium Cabin in which the Premium Economy seats are situated "benefits from our dedicated services with optimal comfort efficiency and Air France lounges.
>
> It follows that, in our view, the standard rate of APD is payable in respect of Premium Economy passengers."

71. The letter concluded with a request to let her know:

> "the amount of APD underpaid (on [HMRC's] view of the applicable rate) in respect Premium Voyageur and Premium Economy passengers since the launch of those two products."

72. On 17 September 2012 Ms Smith sent Mr Jayer a chaser letter asking when he would be in a position to supply the information requested which elicited a telephone call on 19 September 2012 in which Mr Jayer expressed his surprise at the decision and told Ms Smith that Air France had not been able to change its systems to enable standard APD to be collected.

73. On 20 September 2012 Ms Smith rang Mr Jayer to advise him about the review process, that he put forward any additional information that he thought should be considered and that, while she could not comment on what a review officer's decision might be, all facts would be taken into consideration.

74. On 1 October 2012 Mr Jayer wrote to Ms Smith setting out that it had not been accepted that PV should attract standard rate, and making arguments as to why PE was not standard rate and to take issue with HMRC's expectation that APD should be accounted for the period from the introduction of PV (which he stated to be April 2010 rather than April 2008). The letter set out a proposal to charge standard rate from 1 January 2013 on PV and PE. The proposal was rejected by HMRC in a letter dated 7 November 2012 in which HMRC reiterated the request for information for the amount of APD underpaid and made the point that APD is a self assessed tax and that "the taxpayer bears the responsibility for accounting for and paying it at the correct rate."

75. On 14 December 2012 Mr Jayer wrote to Ms Smith. In relation to the data he explained that as PV was treated as a data sub-class in Air France's systems they did have figures for transported PV customers going back to April 2010 but that they did not begin tracking PE customers until February 2012 and could not provide that information for the period April 2010 to January 2012. In summary the information provided was described as i) the number of PV passengers and the amount of APD that would be due since April 2010 if standard APD applied to PV from that date ii) the relevant ratio of PV passengers versus total passengers iii) the number of PE passengers and amount of APD due since February 2012 if standard APD applied. In the period where PE was recorded the enclosed schedule also set out the percentages of PE passengers vs total medium haul passengers by month (ranging from 4.4% (August) to 10.5% (March)).

76. HMRC responded on 14 February 2013 – Ms Smith explained that for the periods April 2010 to January 2012 where the appellant had been unable to provide the numbers of PE passengers HMRC had calculated an average percentage of PE passengers (8% of the total passengers on medium haul flights) using the monthly percentages that had been provided for the periods February 2012 to November 2012. HMRC invited the appellant the review the calculations to see if they disagreed or if they could provide more accurate figures. The letter stated that in the absence of further figures or calculations by 1 March 2013 HMRC would raise an assessment for PE for £2,017,421.00 (£1,154,978 calculated using the average percentage plus the £862,443.00 the appellant had provided) for the period April 2010 to September 2012. The letter also informed the appellant that HMRC would be raising an assessment for PV for periods April 2010 to September 2012 for £2,855,551 using the figures that had been provided.

77. On 5 March 2013 the appellant was given an extension to agree assessment figures and on 12 March 2013 it asked HMRC to amend the July 2012 figure. On 8 April 2013 Ms Smith wrote to say that HMRC were issuing the assessment for PV but were considering the PE assessment further with senior policy colleagues. HMRC notified an assessment of £2,845,551 for PV on 9 April 2013.

78. On 2 May 2013 the appellant e-mailed flight schedules from January 2008 to January 2011 and the day after it asked for an extension of time for requesting a review of the PV assessment which it then submitted on 23 May 2013. On 26 June 2013 HMRC wrote expressing its intention to issue assessments for under-declared APD in relation to PE which it did on 27 June 2013.

Discussion

79. I did not understand there to be any dispute between the parties as to the applicability of the approach suggested by Dyson J's judgment in *Pegasus Birds Ltd* which was as follows: i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the Commissioners, justified the making of the assessment and ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the Commissioners. The one year time limit would run from the date in ii) and the relevant opinion was that of the officer making the assessment.

80. HMRC emphasise that the relevant facts are those which are necessary to justify *the* assessment that was made as opposed to the facts which would justify an assessment. I agree this is correct; it follows from principles 2 and 4(i) in Dyson J's judgment referred to above at [56] and is consistent with how the Court of Appeal articulated the operation of the provision at [11] of its decision ("The relevant evidence of facts is that which was considered, in the opinion of the commissioners, to justify the making of the assessment").

81. The appellant also referred me to [18] of the Court of Appeal's decision which quoted an excerpt from Dyson J's judgment at [104B] which stated that:

> "The question for the tribunal on an appeal, therefore, is whether the Commissioners' failure to make an earlier assessment was perverse or wholly unreasonable."

82. This question does not in my view amount to an additional or alternative question to the approach of answering the two questions posed by Dyson J above at [80]. Rather, it is a question which reflects the outcome of that approach (as confirmed by the way Dyson J set out his fifth principle "An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and *accordingly*, his failure to make an earlier assessment, can only be challenged…"(emphasis added). If there was evidence of the fact (which completes the "last piece of the puzzle" as Aldous LJ put it at [15] of his decision) and the officer was wholly unreasonable or perverse not to have been satisfied as to the evidence constituting the relevant fact at that point then it follows that if HMRC do not make an assessment within the one year time limit they will have been wholly

unreasonable or perverse in failing to make the assessment sooner. The passage quoted in any case must be read in the context of the arguments which preceded it in Dyson J's decision. These were as to the scope of a challenge before a tribunal on the ground of a failure to make an earlier assessment and the standard of scrutiny to which the Commissioners' decision would be held when making such challenge. Having referred to VAT case law which referred to *Wednesbury*-like grounds of challenge his statement was therefore confirming the hurdle an appellant had to surmount in order to challenge the Commissioners' failure to make an assessment.

83. As regards the applicable law, the main issue of interpretation between the parties to resolve is whether, in order to be justified in making an assessment, the HMRC officer needs to be satisfied not only as to the issue of liability but also as to amount. The appellant argues the term "justify" does not require the officer to necessarily know the amount and refers to the tribunal decision in *Keyes.* HMRC highlight the requirement in s 12(4) refers to sufficient evidence to assess *the amount* of excise duty.

84. *Keyes* concerned an assessment on the appellant transport business to excise duty in relation to diesel imported into the UK from Belgium where it was cheaper by the appellant's lorry fleet using tanks that had been modified so they could carry more fuel than standard tanks. The appellant highlights that, as far as the application of the relevant time limits is concerned, the case is very similar to the present one in that HMCE knew fuel had been brought back but not how much. The tribunal held HMCE had evidence much earlier to make an assessment but they did not have the actual amounts (see para 14 pg 38 line 20). The appellant's argument in that case was that a single global assessment had been made on 7 October 2003 (although this was a matter of dispute, this was accepted by the tribunal). Their argument was that HMCE had had sufficient information to justify the making of an assessment from July 2002 whereas HMCE's argument was that although they were aware of diesel runs made by the appellant on three occasions in July/August 2002 it was not until the appellant had provided HMCE with fuel invoices on 16 September 2003 that HMCE had had sufficient information to raise the assessments. The tribunal found the assessments were out of time despite the fact that they were made less than a year after the Commissioners obtained the fuel purchase invoices (which were only relevant to arithmetical computation of the assessments and which could have been requested much earlier).

85. At paragraph 12 and 13 on pg 12 of the decision the tribunal recorded the appellant's argument that there was sufficient evidence to raise a best judgement assessment from at least July 2002. The Tribunal set out various facts relating to liability (diesel run, tank capacity exceeding 2000 litres, fuel being decanted into other vehicles). At pg 13 the Tribunal found that (my insertions in italics):

> "…HMCE knew the vehicle was on a fuel run, contained 2015 litres of fuel and was travelling "unit only" i.e. no load. This would fasten HMCE with actual knowledge on that date and when taken with the supporting evidence of Mr Keyes [*the director /shareholder of the appellant and also one its drivers*] and Ms Bastow [*Mr Keyes' partner*

> *who had accompanied him on diesel runs*], HMCE had the requisite information to justify the making of an assessment. They could have requested fuel invoices from the Appellant at that time in order to complete the assessment form if they so wished. They did not have to wait until September 2004 [*it appears given the date of assessment in October 2003 and how HMCE's arguments were recorded this date should be 2003*] to make such a request…"

86. At para 15 on the same page the Tribunal went on to say:

> "HMCE had records of trips, litres of fuel contained in the tanks of the vehicle and the fact that the vehicle carried no load and was on a diesel run".

87. HMRC argues *Keyes* is illustrative simply of principle and fact specific. On those facts the Commissioners had sufficient information from May 2002 (referring to the numbered paragraphs 1, 13 and 15 which start at pg 9 of the decision).

88. In my judgment, HMRC are correct to highlight the reference to "amount" in s12(4). The assessment, the making of which is referred to in s12(4)(b), is the "assessment of the amount of any duty of excise due". The application of the time limit in s12(4)(b) will only arise once an assessment to the amount of duty has been made. It will be a question of fact for the tribunal, having considered the evidence, as to which facts justified the assessment that was made from the point of view of the officer who made the assessment, which if any of those facts underpinned the amount of the assessment, and which facts emerged when. Applying point ii) of Dyson J's approach (assuming the fact relating to amount was the last to emerge) there will then be a question of when the last piece of evidence of sufficient weight in relation to the fact came before the Commissioners. There is nothing on the face of the legislation or in the case law which suggests facts pertinent to the amount of the assessment are to be excluded from the analysis and that once there is evidence of sufficient weight in relation to facts to do with liability alone then it is at this point when the time limit in s12(4)(b) starts to run.

89. The tribunal's decision *Keyes* does not assist the appellant's argument on the point. When Mr Keyes was stopped on 9 May 2002 (pg 9 of the decision) HMCE were aware of the larger tank on the vehicle and that he provided a receipt for the amount bought in Belgium. At [14] on pg 13 of the decision it is recorded that HMCE knew how much fuel the vehicle contained and at [15] it was stated that HMCE had records of trips, litres of fuel contained in the tanks of the vehicle, the fact the vehicle carried no load and was on a diesel run. Given those matters it can be seen how the tribunal thought, taking account that the relevant fact was the amount of diesel fuel imported, that there was sufficient evidence of that fact before receipt of the fuel invoices on 16 September 2003 and that an assessment could have been made earlier. Although the tribunal in *Keyes* made a point of saying that HMCE could have asked for the fuel invoices earlier, as set out below, the question of whether information could have been asked for sooner is not consistent with the legal principles extracted by Dyson J in *Pegasus Birds Ltd*. It must also be acknowledged I think that *Keyes* was a case where arguably the tribunal was apparently asking itself the question could *a* best judgment assessment be raised rather than was it wholly unreasonable or

perverse for the officer not to have been satisfied that there was sufficient evidence of the relevant fact which justified *the* assessment in question. *Keyes* does not support there being any general point of principle, as the appellant appears to suggest, that it is not necessary for HMRC to establish the amount of the assessment in order for the clock to start running on the time limit in s12(4)(b).

90. The absence of any discussion on the point in the Court of Appeal and High Court decisions in *Pegasus Birds Ltd.* the facts of which would have provided fertile ground in which to plant such a principle provide further reassurance for the above conclusion. As set out at [16] of the Court of Appeal's decision the court accepted that the Commissioners needed to establish the value of the birds sold and that the Commissioners had concluded that the correct figure could best be arrived at by estimating the cost of the purchases made, and after allowing for mortalities, arriving at the sale price by deciding what would be an appropriate mark up. The fact which in the opinion of the Commissioners justified the making of the assessments was the sale price. The particular factual background ((set out [3] of the Court of Appeal's decision) was that the persons involved with the appellant company and an associated business had been subjected to investigation, surveillance and raids and committed to trial for offences which included failure to account for and pay the Commissioners VAT on the sale of birds and concealment of the true nature an scale of their business activities. In the High Court, Dyson J (first paragraph of pg 8 of decision), accepted the appellant's challenge to the tribunal's finding that a guilty plea of the person controlling the appellant influenced the Commissioners; the Commissioners' earlier decision to prosecute must have meant they were satisfied at an earlier point to the guilty plea that some fraudulent under-declaration had taken place. Dyson J's view was that the Commissioners had not delayed assessing because they had doubts about the fact of the controlling person's involvement but as to the extent of that involvement "and above all about the amount of VAT that had been evaded." This was a situation therefore where it was clear that the Commissioners were satisfied at an earlier stage as to liability to VAT but not as to its amount.

91. Before applying the legal principles Dyson J put forward to the facts I need to deal with various submissions which both parties have made which, broadly speaking, are to the effect that issues of fairness are relevant in considering whether the time limit has been breached and that it is relevant also to consider delays in the request of information by HMRC and the supply of it by the taxpayer. In particular the appellant criticises HMRC for not asking for the information (relating to the number of passengers flying in PE and PV) sooner. (Mr Ewart contrasted the facts of *Pegasus Birds Ltd.* where it could well be seen that information would not be obtained by asking for it from the taxpayer given the backdrop of fraud and lack of co-operation with the present case). HMRC, for their part, say the appellant cannot pray in aid the time during which it failed to provide the information sought.

92. Dealing first with the criticism that HMRC ought to have asked for information sooner the difficulty with this argument is that it amounts to saying that HMRC ought to have known the information at an earlier point in time. This would fall foul of the principle, as set out by Dyson J, that the relevant knowledge for the purposes of s 12(4)(b) is actual knowledge not constructive knowledge (the third principle above at

[56]). The time limit is breached in situations where HMRC actually had the requisite evidence earlier not where it ought to have asked for it earlier. While the implication that HMRC might prolong their window of time to assess by not asking for information might seem surprising the words of s12(4)(b) refer to evidence of knowledge which "comes to" the Commissioners knowledge and there is no hook elsewhere in the provision to hang an argument that the time limit is breached by an omission by them to ask for information.

93. As to HMRC's complaint that an appellant cannot properly pray in aid the time in which they failed to provide the information sought in a similar way there is nothing in the relevant legal principles or the wording of s 12(4)(b) to suggest that this would provide a separate factor which would affect the start point of the time limit or the application of the one year period set out in the legislation once time had began to run. The only significance of a delay is the one that one follows indirectly; if an appellant has not provided the requested relevant information them it foregoes the opportunity to equip HMRC with actual knowledge and runs the risk of prolonging the start point for HMRC's time to assess.

94. In relation to HMRC's submissions that it dealt with the appellant fairly, this is disputed by the appellant; as APD was borne by the passenger, it was important for the appellant to know whether tax charged at higher rate, but HMRC did not respond to appellant's letter in May 2012 until 21 August 2012. However echoing the points on the approach to be taken above, s 12(4)(b) as interpreted in *Pegasus Birds* does not envisage a generalised assessment of the fairness of dealings between HMRC and the taxpayer but a focussed enquiry into the questions summarised by Dyson J.

95. HMRC invite the tribunal to further note that (1) Parliament has given lee-way for the Commissioners to make reasonable and rational decisions as to whether have enough facts and evidence to raise an assessment (2) it is appropriate for HMRC to explore, and investigate, discuss matters with the taxpayer and it would be odd if 12(4) had the result of disincentivising engagement. I accept the first proposition follows from the reference to "in the opinion" of the officer and the lee-way emerges from the application of interfering only where the officer's approach is one which is wholly unreasonable or perverse. I am not persuaded however that the wording of the section has anything to say one way or the other on HMRC's manner of engagement with the taxpayer. As described by the Court of Appeal in *Pegasus Birds* the provision's function is "to protect the taxpayer from a tardy assessment…" In any case as the appellant highlights in its submissions HMRC do not have to make the assessment straightaway after the "last piece of the puzzle falls into place" but have 12 months thereafter to do so which affords adequate time for any engagement.

96. I turn therefore to the two questions posed by Dyson J with respect to the particular circumstances of this appeal.

Application of law to facts

What were the facts in Ms Smith's opinion which justified making the assessment?

97. Having considered Ms Smith's evidence, the evidence of Mr Jayer in relation to what took place at his meeting with her, and the correspondence which passed between Ms Smith and the appellant I find that her opinion that customers travelling in PV were to be accounted for at standard rate was based on combination of the following various facts: the differential in pricing, the positioning of PV seats in relation to other seats on the aircraft, the fact they were a different kind of seat, their greater seat pitch as compared with economy passengers, the way in which PV was marketed, and the differences in pre and post flight services.

98. A further fact in her view (and one which following from what I say above at [88] is not discounted in the analysis) was the number of passengers flown in PV to the destination band for their final destination. Ms Smith required this fact to establish the amount of the assessment.

When was the last piece of evidence of these facts of sufficient weight to justify making the assessment communicated to the Commissioners?

99. The last piece of evidence of sufficient weight to justify making the assessment in relation to PV was received by the Commissioners on 14 December 2012 when Ms Smith received Mr Jayer's letter with the figures supplied. There was no evidence to suggest that the Commissioners had received evidence of sufficient weight in relation to passenger numbers before that point. Ms Smith's evidence was while she had access to total passenger numbers as recorded by the Civil Aviation Authority (CAA) this data did not split passengers by class or by whether the passenger was an inbound connecting passenger who may be exempt, an adult or an infant.

100. Mr Ewart, for the appellant, highlights that HMRC did not ask the appellant to provide passenger numbers but in fact asked it to compute the amount of APD underpaid (referring to the letter of 21 August 2012, 17 September 2012 and the note of telephone call of 19 September 2012). As set out by Dyson J in *Pegasus Birds* at *104f* HMRC cannot delegate their duty to fix the amount of an assessment to best judgment.

101. This passage from Dyson J's judgment referred, in the context of cases where the Commissioners delay making the assessment because they consider they need more evidence, to the tribunal decision in *Lazard Brothers v CCE* (1995) VAT Decision 13476 where it was held that the officer in that case had knowledge of the evidence of facts sufficient to justify making an assessment even though the officer wanted the taxpayer to "classify that evidence and to provide schedule and further calculations on it". Dyson J explained that these "were not further evidence of facts". I do not agree that there is anything in the point that what HMRC asked for was a computation. The situation raised in *Lazard Brothers* was one essentially where HMCE had the raw figures from which an assessment could be calculated but was asking the taxpayer to do the further work in relation to the processing of them so that an assessment amount could be arrived at. By contrast in this appeal HMRC lacked

the PV passenger numbers or a suitably reliable means of deriving them. It was not insisting that the appellant to do the job of calculating the APD calculations when it was capable of doing that itself but asking for new information that was relevant to quantifying the amount of the assessment which it did not have already.

102. While the point was not raised by the parties I have considered the possibility that the seating configuration diagrams which Ms Smith saw around January 2012 might have enabled an estimated percentage proportion of PV passengers to be calculated. But, even if this was possible, I would certainly not regard a decision by an officer that this information was of insufficient weight as to the number of passengers flown as susceptible to the challenge of being an unreasonable or perverse one. In assessing the sufficiency of weight I think it would have been open to the officer to have taken account of the reasonable likelihood that the appellant would have access to and be able to provide weightier evidence of actual passenger numbers flown in PV.

103. It can be seen from Ms Smith's later letter of 14 February 2013 that she did in fact regard Air France's figures split by class together with ratios and total passengers as sufficient evidence of the facts relating to the number of passengers the appellant flew in PV.

104. The appellant queries why the issue of air passenger numbers was not explored earlier. As explained above at [92] a criticism of this sort is not relevant to the application of the time limit. In any case Ms Smith's explanation, which was to the effect that the inquiries into the liability for PV were being run in tandem with those for PE and that rather than asking the appellant to produce passenger figures separately for PV and PE she had decided to consider the liability of PE first and then ask for them both together, did not strike me as unreasonable.

105. The one year time limit started to run on 12 December 2012. The assessments under appeal relating to underpaid APD in respect of the appellant's PV passengers were in time.

PE: What were the facts in Ms Smith's opinion which justified making the assessment?

106. In a similar way to the facts which justified PV, it was a combination of facts which together justified the view that PE customers were liable to APD at the standard rate rather than the reduced rate. These facts comprised variously: the seat positioning behind business class and in front of economy and the moveable curtain behind the PE passengers and economy passengers, the difference in pre and post flight services, the fare differential and the way in which PE was marketed. As with the assessment of PV a key fact that needed in her view to be established in order to know the amount of the assessment was the number of actual passengers flown in PE.

When was the last piece of evidence of these facts of sufficient weight to justify making the assessment communicated to the Commissioners?

107. As with analysis above on PV the last piece of evidence of sufficient weight in relation to the fact of the actual passengers flown in PE arrived with the receipt of Mr Jayer's letter and the information that was contained on 14 December 2012. There was no evidence of sufficient weight in relation to that fact which came in before then and indeed there could not be any assistance on the issue that could be derived from the aircraft diagrams as might potentially have been the case with PV because the numbers of PE seats could be varied as reflected by the use of the moveable curtain. There is no issue arising from the fact that HMRC asked for an APD calculation in terms of any impermissible delegation of duty to assess for the reasons that have already been explained above.

108. The one year time limit therefore started to run from 14 December 2012 and HMRC's assessment of 27 June 2013 was made in time.

Conclusion

109. The appellant's PE product was not the "lowest class available on the aircraft" and therefore was not subject to the reduced rate of APD. Both the assessments made in relation to PV and those made in relation to PE were made within the relevant time limits and are upheld. The appeals are dismissed.

110. 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.

SWAMI RAGHAVAN
TRIBUNAL JUDGE

RELEASE DATE: 23 FEBRUARY 2016