[2016] UKFTT 0140 (TC)

TC04925

Appeal number: TC/2014/02739

VAT – goods zero-rated by appellant – whether entitled to zero-rating because sold to Belgian company – Belgian company sold to another UK trader before export to Australia – whether appellant entitled to zero-rating on basis of export to Australia – VATA s 30(8) and* Teleos *considered – whether evidentiary requirements in Notice 703 satisfied – whether assessment in time – whether assessment for correct period – interaction between assessment period and VATA s 30(8) – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

KJ SERVICES LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE REDSTON
MS SANDI O'NEILL

Sitting in public at the Royal Courts of Justice on 10 December 2015

Mr Michele Fasolino of the Proactive Consultancy Group, for the Appellant

Mr Martin Priest, of HM Revenue and Customs' Appeals and Reviews Unit, for the Respondents

DECISION

Introduction and summary

1. This was the appeal of KJ Services Limited ("KJSL") against the review decision of HM Revenue & Customs ("HMRC") upholding an assessment for £62,500 of output tax on the supply of a Komatsu hydraulic excavator ("the Komatsu").

2. KJSL had supplied the Komatsu to a Belgian company, Conesco BVBA ("Conesco") and zero-rated the sale as an export. However, before the Komatsu left the UK, Conesco sold it to Waller Construction Equipment Limited ("WCEL"). WCEL then exported the Komatsu to an Australian company.

3. KJSL submitted that it should be entitled to zero-rating on the basis that it knew nothing about Conesco's sale to WCEL and had provided the evidence of export required by Notice 703 "Export of Goods from the United Kingdom" ("Notice 703").

4. HMRC accepted that KJSL did not know of the further sale, and did not allege impropriety. However, it assessed KJSL to VAT on the basis that the supply did not meet the statutory conditions for zero-rating.

5. There are four issues, all of which were decided in favour of HMRC:

(1) whether KJSL was entitled to zero-rate the supply on the basis that it understood the Komatsu was to be exported to Belgium;

(2) whether KJSL was entitled to zero-rate the supply on the basis that it understood the Komatsu was to be exported to Australia;

(3) if the answer to both these questions is no, whether the assessment was made in time; and

(4) if the answer to question (3) is yes, whether the assessment is for the correct period.

6. As more fully explained in the main body of the decision, Issues 2 and 4 interact. Issue 2 required us to consider whether the UK provisions for zero-rating are compatible with EU law, as explained by the Court of Justice of the European Union ("the CJEU") in *R (oao Teleos) v R&C Commrs* [2008] (Case C 409-04) STC 706 ("*Teleos*"). KJSL relied on *Teleos* to support its submission that zero-rating should be allowed.

7. The relevant UK provisions are the Value Added Taxes Act 1994 ("VATA") s 30(8) and Regulation 129 of the VAT Regulations 1995. Before an export can be zero-rated, those provisions require that (a) HMRC be satisfied that the supply is an export, and (b) certain other conditions specified by regulation or imposed by HMRC are complied with. HMRC sets out those conditions in Notice 703.

8. We found those UK provisions to be consistent with EU law. We further found that HMRC had never been satisfied that KJSL's supply was an export. As a result, the conditions specified in Notice 703 did not fall to be considered. It was in any event also clear on the facts that KJSL had failed to satisfy those conditions.

9. Issue 4 asked whether the assessment was for the correct period. Notice 703 allows a person three months to obtain evidence of export; if the evidence is not provided within that period, the VAT for that following period must be adjusted.

10. HMRC had assessed KJSL to VAT in period 6/11, when the supply was made, and not in period 9/11. It had therefore not assessed KJSL at the end of that further three months.

11. We found that this extended three month time limit is only relevant where the issue in question is the meeting of the evidential conditions. Here, zero-rating did not apply because HMRC had never been satisfied that KJSL had exported the Komatsu. In other words, although KJSL had failed to meet the evidential conditions, that was not the primary reason why the supply was ineligible for zero-rating. It followed that the assessment had been properly made for period 6/11.

The evidence

12. HMRC provided a helpful bundle of documents which included:

(1) the correspondence between the parties and between the parties and the Tribunal;

(2) two emails dated 1 March 2011 between Mr John Pearman of Conesco and Mr Luke Stephens of KJSL;

(3) an email dated 10 June 2011 between Mr David Lewis of KJSL and Mr Dave Waller of WCEL;

(4) a "breaker parts sales" document and a "pro-forma invoice" for the Komatsu, both dated 10 June 2011 and addressed to Conesco;

(5) an invoice from mcl logistics, for the cost of moving the Komatsu from KJSL's site on 15 June 2011;

(6) an invoice dated 27 June 2011 addressed to Conesco;

(7) a Bill of Lading dated 21 July 2011 and an export movement departure advice (Goods Departed Message) dated 25 July 2011; and

(8) an email exchange between Mr Usman Hashmi of the Proactive Consultancy Group ("PACG"), KJSL's representative in this case, and Mr Waller, dated 19 February 2014.

13. KJSL provided a supplementary bundle of documents, all of which were also contained in the HMRC bundle. In addition, Mr Lewis, an employee of KJSL, provided two brief statements, one dated 3 March 2014 and one dated 21 April 2015, both of which he confirmed were witness statements. Mr Lewis gave further evidence on oath, was cross-examined by Mr Priest and answered questions from the Tribunal. He said he was unable to remember some of the details, but where he gave evidence of facts, we accepted that evidence.

14. The Tribunal was also provided with a very brief witness statement from Mr WK Thomas ("Mr Thomas"), KJSL's managing director. On 2 April 2015, the Tribunal had given Directions to the parties, which included a direction that a party seeking to rely on a witness statement:

> "must call that witness to be available for cross-examination by the other party (unless notified in advance by the other party that the evidence of the witness is not in dispute)."

15. Mr Thomas was not at the hearing. Mr Priest confirmed that HMRC had not notified KJSL that Mr Thomas's witness statement was not in dispute. The Tribunal asked Mr Fasolino why one of KJSL's witnesses was not present, despite the Tribunal's direction. Mr Fasolino did not know, but over the lunch adjournment established that Mr Thomas "could not attend for personal reasons," without further elaboration. He added that PACG had "wrongly advised" Mr Thomas that there was no need to attend, because he had provided a witness statement.

16. Mr Fasolino did not ask that the hearing be adjourned in the absence of one of KJSL's witnesses. We nevertheless considered the matter of our own motion, but decided it was in the interests of justice to continue with the hearing. This was because the parties' representatives were present and ready to proceed; we had a significant number of documents as well as legal submissions; Mr Lewis was available to give evidence for KJSL and no explanation was provided for Mr Thomas's absence until half way through the proceedings. The interests of other tribunal users are also relevant, as the adjournment and relisting of this case would have a consequential effect on other hearings.

The facts

17. On the basis of the evidence provided, we make the following findings of fact. As will be clear from what follows, there were a number of gaps in the evidence about which we were not able to make findings. Our decision is based on the facts we have been able to find, and we have drawn no inferences from these lacunae.

The background

18. KJSL is a company based in Rhymney, Gwent, with a turnover of over £10m per year. It hires out plant and equipment; when items can no longer be hired out, they are sold, sometimes as a whole item and sometimes as parts. These sales are described as "breaker parts sales."

19. KJSL sells overseas regularly, with around 40-50 items a year going to Australia. Other items go to auction in Belgium and some are shipped to the USA.

20. Mr Lewis has worked for KJSL as a salesman for 35 years. When he sells an item of plant, he raises a breaker parts sales sheet and gives it to Mr Gregory or Mr Stephens, the two people who make up KJSL's accounts team.

21. Mr Gregory or Mr Stephens then raises a pro-forma invoice and sends it to the buyer or the buyer's agent; this is followed by an actual invoice once the buyer or his agent has agreed that the details on the proforma are correct.

The sale of the Komatsu

22. On 1 March 2011, Mr Pearman of Conesco contacted KJSL via a website called machinery.trader.co.uk. The email asked for further information about the Komatsu which KJSL had for sale. Mr Stephens replied to Mr Pearman, saying that the machine would be available from the end of March and that its price was £425,000.

23. Mr Lewis was subsequently contacted by Mr Waller, the owner and director of WCEL, a UK based business. Mr Lewis had known Mr Waller for around 15 years, but KJSL had not previously done business with Mr Waller or WCEL.

24. Mr Waller asked if KJSL would reduce the £425,000 price quoted to Conesco. Mr Lewis discussed his request with Mr Thomas, who agreed to sell the Komatsu for £375,000. Mr Lewis informed Mr Waller of the reduced price; Mr Waller told Mr Lewis to invoice Conesco and provided him with that company's billing address, email address and VAT number.

25. On 10 June 2011, Mr Lewis wrote out a breaker parts sale sheet. This stated that the Komatsu had been "sold to" Conesco and included that company's Belgian address and Belgian VAT number. The price was recorded as £375,000 and there was no mention of VAT.

26. On the same day, Mr Gregory or Mr Stephens issued a pro-forma invoice and gave it Mr Lewis, who emailed it to "Steve Waller." Next to "name" is written "Conesco" and its Belgian address; there is no Belgian VAT number and the VAT box is completed "N/A." The pro-forma invoice is marked "FTAO Steve" which we find means "for the attention of Steve Waller."

27. Mr Lewis then asked Mr Waller, "do I have to cover you something" which he told the Tribunal meant "do I need to give you commission for this sale." Mr Waller replied, "no I am being covered at the other end" and "I am getting sorted at the other end." From this Mr Lewis understood that Mr Waller was acting as an intermediary for Conesco and would be paid a commission by that company because he had secured a reduction in the Komatsu's price. In his witness statement dated 3 March 2014 Mr Lewis said "the transaction was brokered by Stephen Waller." We find that Mr Lewis understood that Mr Waller's role was to act as a broker for Conesco in its purchase of the Komatsu.

28. Although KJSL's Grounds of Appeal say that "the sale was brokered by WCEL" and this is repeated in its skeleton argument, the contemporaneous evidence relating to the supply from KJSL to Conesco refers to "Steve Waller" or to "Steve." We find that KJSL knew they were dealing with Mr Waller but we make no finding as to whether he was acting on his company's behalf.

29. Mr Lewis told the Tribunal that he knew that the buyer was based in "Holland or Belgium" but he "knew all along it was going to Australia." He had also been told by Mr Waller that the machine was to be collected and taken to the Komatsu head office in Redditch, where it would be carefully washed. This was necessary because Australia has very strict import controls and requires imported machines to be free of possible environmental contaminants. The washing is labour intensive, taking two people considerable time. KJSL sometimes washes its sold machines before export, but because the price of the Komatsu had been reduced, KJSL refused to wash the Komatsu.

30. Mr Gregory or Mr Stephens sent out the final invoice. It is dated 27 June 2011 and beside "order no" is written "Steve." Next to "invoice to" is printed "Conesco" together with its Belgian address; under "deliver to" is written "same as invoice address." The price is £375,000 and the Komatsu is briefly described. Conesco's VAT number is not given and no VAT is shown. The document states "sold as seen,

delivered to Marubeni Komatsu Ltd in Redditch." KJSL zero-rated the sale on its VAT return for period 6/11 on the basis that the Komatsu was being exported.

31. It is clear from the above that there is a conflict between the invoice on the one hand, which states that the Komatsu is to be delivered to the invoice address in Belgium, and evidence given by Mr Lewis that it was to be delivered to Australia. Mr Priest told the Tribunal that HMRC had been unaware, before Mr Lewis's evidence, that anyone at KJSL had known of the Komatsu's Australian destination. However, after the hearing we identified a letter from KJSL's previous representatives, Broomfield Alexander, dated 13 May 2013 and addressed to Ms Owen, the HMRC Officer responsible for the case, which stated that "the company had been aware that the ultimate destination of the machine was Australia."

32. We find, based on the clear particularised evidence of Mr Lewis and the letter from Broomfield Alexander, that KJSL had always known that the Komatsu was to be exported to Australia and not to Belgium. It follows that the delivery address on the invoice was incorrect.

33. KJSL's consistent understanding, confirmed by Mr Lewis and evidenced in the documents, was that the Komatsu had been supplied by KJSL to Conesco. Both parties accepted that payment was made from Conesco's bank account in Belgium by Swift Bank transfer to KJSL's bank account.

34. It is therefore not in dispute, and we find as a fact, that the Komatsu was supplied by KJSL to Conesco in return for a payment of £375,000.

Whether the sale was "ex-works"

35. On 15 June 2011 a transport company called mcl logistics collected the Komatsu from the KJSL site and moved it to the Komatsu head office in Redditch. The £1,000 cost of moving the Komatsu was invoiced to KJSL, and the invoice is stamped "payment authorised." We find that KJSL paid mcl logistics to move the Komatsu to Redditch.

36. KJSL say in their Grounds of Appeal that this was an "ex-works sale." At paragraph 6.6 of Notice 703 HMRC refer to an ex-works sale as one where "your overseas customer arranges for the goods to be collected from your premises and exported." This is also our understanding of the term.

37. Although KJSL paid for the Komatsu to be moved to Redditch, that transfer was at the direction of Mr Waller. We find that responsibility for the export did not rest with KJSL, and that the sale can properly be described as "ex-works."

The three supplies

38. KJSL has explicitly accepted, both in correspondence and in its skeleton argument, that Conesco sold the Komatsu to WCEL and that company then exported the Komatsu to Australia. This is also HMRC's position, so those facts are not in dispute.

39. There were therefore three supplies:

(1) the first from KJSL to Conesco;

(2) the second from Conesco to WCEL; and

(3) the third from WCEL to a customer in Australia.

40. Both parties also accepted that KJSL did not know, when selling the Komatsu to Conesco, that it would be on-sold to WCEL before it was exported to Australia, so that too is an agreed fact.

Ms Owen's visits to KJSL

41. At some point before 31 January 2013, one or more HMRC officers visited WCEL and identified evidence indicating that WCEL had purchased the Komatsu from Conesco, exported it to Australia and zero-rated the sale.

42. Ms Owen visited KJSL on 31 January 2013 and enquired about the Komatsu. She spoke to Mr Gregory in the accounts department. Mr Gregory was unclear as to the details of the sale, other than that the Komatsu had been dismantled to be shipped abroad. He told Ms Owen that he and Mr Stephens did their best to obtain proof of export, but did not have a procedure to ensure this was obtained in all cases or within the 3 month time limit specified in Notice 703. He was unable to provide Ms Owen with any proof that the Komatsu had been exported following its sale to Conesco.

43. Mr Gregory also told Ms Owen that if the customer's address was overseas, KJSL's system generated an invoice showing nil VAT, on the basis that the sale was zero-rated as an export. He accepted that Conesco's VAT number had not been shown on the Komatsu invoice and said that KJSL only included the VAT number on supporting paperwork and not on the final invoice. In this case, Conesco's VAT number had been on the breaker parts sale sheet.

44. On the day of Ms Owen's visit, Mr Gregory received an email from a Mr Medley of NMT International Shipping Limited ("NMT") in Southampton, timed at 14.34, saying "Please find attached the B/L [Bill of Lading]. Hope it is enough for the tax man." We infer from this, and find as facts (a) that Mr Gregory contacted NMT following Ms Owen's question about evidence of export and (b) Mr Medley's email was a response to that contact.

45. On 7 February 2013, Ms Owen made a second visit to KJSL. Mr Gregory gave her a copy of the Bill of Lading. This states that the "shipper" was WCEL; the name and address of the consignee has been redacted, leaving only the last line, which is "Australia"; the box headed "Notify Party" has also been blanked out. again leaving only the word "Australia." The port of discharge is Brisbane and the goods are described as "1 x used Komatsu …hydraulic excavator," together with its serial number.

46. On 13 March 2013, Ms Owen wrote to KJSL, saying that the copy Bill of Lading did not satisfy the legal requirements. On 25 April 2013, she visited KJSL for a third time.

47. On 8 May 2013, KJSL appointed Broomfield Alexander to act as their agent in dealing with HMRC and on 13 May 2013, Mr Robert Preece of that company wrote to Ms Owen, saying that:

> "the sale of the equipment to Conesco…had been brokered by Steve Waller…who subsequently arranged the shipping and provided the company with the Bill of Lading which you have seen. As you are

> aware, the name of the ultimate customer has been redacted on the Bill of Lading, which the company assumed had been done to prevent it knowing the identity of, and subsequently seeking to do business directly with, the ultimate customer."

48. Despite Mr Preece's assertion that "the company assumed" that the Bill of Lading had been redacted to hide the identity of the ultimate customer, there was no evidence before the Tribunal to support that assertion. Mr Medley's email attaching the Bill of Lading made no reference to it having been redacted. We were not provided with any email from Mr Gregory to NMT or WCEL, asking either for an unredacted copy, or for the reasons behind the redactions. There was no witness evidence on this point. In a subsequent letter dated 18 June 2013, Ms Owen asked Mr Gregory "can you confirm that the Bill of Lading was passed on without clarification of the onward sale and on the basis that Waller were acting as brokers on behalf of KJSL." Mr Gregory did not provide that confirmation. We therefore make no finding as to who redacted the Bill of Lading, or why it was redacted.

49. Mr Preece's letter of 13 May 2013 went on to say that, like the applicants in *Teleos*, KJSL had taken "all reasonable steps" and had relied in good faith on the evidence of export. We return to *Teleos* later in our decision.

50. On 18 June 2013 Ms Owen sent KJSL a comprehensive letter to explain that she was raising an assessment. Her letter says "as the goods were not exported by Conesco, the sale by KJ Services does not qualify for zero-rating," and continues "I have, as requested in your letter, considered if the *Teleos* decision relating to export evidence is appropriate." She went on to distinguish the facts in KJSL's case from *Teleos*, saying that the company had not taken "all reasonable steps" because:

(1) the Bill of Lading was a photocopy and had not been authenticated with an original stamp and dated by an authorised official of the issuing office;

(2) details of the supplier, consignor and customer had all been redacted from the Bill of Lading;

(3) no system was in place to ensure that proof of export was obtained and tied back to the original invoices within the timescale;

(4) although the VAT numbers of overseas customers were obtained by KJSL, they were not shown on the sales invoices; and

(5) there was no evidence that WCEL was acting as broker; this had been raised for the first time in Broomfield Alexander's letter of 13 May 2013.

51. On 25 June 2013, Mr Gregory again emailed Mr Medley at NMT, saying "the VAT people are asking for the Bill of Lading to be stamped and dated by an authorised official of the issuing office. Can you do that for me."

52. Mr Medley replied five minutes later, saying:

> "don't believe it is possible. Only Original B/Ls are signed and date stamped and they would have been given to Waller Construction, or if done as an Express Release they would have been handed back to the shipping line. Have never seen the VAT people request this before."

53. Mr Gregory's reply simply says "Thanks Mike." KJSL did not assert that it then contacted WCEL to seek to locate the original GDM and we find as a fact that it did not. We make no finding as to the reason why no contact was made.

54. At some point before 21 August 2013, PACG was instructed to act for KJSL. On 23 September 2013, around nine months after Ms Owen's first visit, PACG sent her a copy of a "Goods Departed Message" ("GDM") dated 25 July 2011 from the Customs Handling of Import and Export Freight ("CHIEF") system. Simply put, the CHIEF system provides HMRC with a record of goods arriving and leaving the UK. The GDM now provided to Ms Owen shows that the Komatsu was accepted into the CHIEF system on 20 July 2011 and departed on 25 July 2011; the consignor is shown as WCEL and the consignee is blank. PACG's covering letter said:

> "there are only 2 people working in the [KJSL] accounts department…we must admit that the procedures carried out in there are somewhat haphazard. As a result of this we did an evidence search of the export and found that our client KJ services [sic] was supplied with a copy of 'Goods Departed message' in relation to this transaction and a copy of the same is enclosed here for your reference."

55. PACG do not here say when KJSL obtained the GDM, or from whom, or what is meant by "an evidence search of the export." However, the Grounds of Appeal submitted on 13 May 2014 say that the GDM was supplied to KJSL "within the initial 90 days of the sale."

56. We do not accept this. During Ms Owen's first visit in January 2013 Mr Gregory, one of the two people working in the relevant department, was unable to find proof of export. When Ms Owen made her second visit, Mr Gregory gave her the Bill of Lading obtained from NMT; he provided nothing further when she made her third visit. On the balance of probabilities, we find as a fact that the GDM was not in KJSL's possession until after Ms Owen's third visit.

57. PACG's skeleton argument asserts that the GDM was provided to KJSL by WCEL, but we again had no evidence of this. We make no finding as to who gave the GDM to KJSL.

HMRC's assessments

58. On 25 October 2013, Ms Owen issued KJSL with an assessment charging VAT of £62,500 for period 6/11. This was the VAT period in which the Komatsu was sold to Conesco.

59. On 14 November 2013, Ms Owen withdrew that assessment and replaced it with one for period 9/11. This was because she understood from Notice 703 that an exporter was allowed a period of three months to obtain proof of export, and that if the necessary proof was not obtained within that period, the supply should be included in the period in which the three month time limit ended.

60. On 21 November 2013, KJSL asked for a statutory review of the decision to issue the assessment. HMRC's Review Officer determined that the assessment had been issued for the wrong period and that the correct period was 6/11. On 5 February 2014 Ms Owen withdrew the second assessment and issued a third, for period 6/11.

61. KJSL asked for a statutory review of Ms Owen's decision to issue the third assessment. On 16 April 2014, the decision was upheld on review. On 13 May 2014, KJSL appealed to the Tribunal.

PACG and Mr Waller

62. On 19 February 2014, Mr Hashmi of PACG sent an email to Mr Waller at WCEL, saying that Conesco had "gone out of business" and that KJSL had "telephone and email records" about the transaction and was considering taking legal action for breach of trust. He went on to assert that KJSL "were clearly acting on your verbal instructions during the entire transactions [sic] period," and asked Mr Waller to confirm "that you were acting as an agent of Conesco BV during this sale process and were involved in the process from the start."

63. Mr Waller replied, but only to ask for copies of the telephone and email records and to say he was taking legal advice.

64. Between Ms Owen's first visit to KJSL in January 2013 and these emails dated 19 February 2014, there was no evidence of any communication between KJSL and Mr Waller, whether by way of emails, letters, or otherwise. We have therefore made no findings as to the existence, nature or content of any such contact.

The Issues

65. We have taken the Issues in the order set out at the beginning of this decision. The legal provisions are cited only so far as relevant to those Issues. All regulations are from the VAT Regulations 1995. References to HMRC Notices are to those current at the relevant time, being the February 2011 version of Notice 725 and the August 2006 version of Notice 703.

Issue 1: Whether KJSL was entitled to zero-rate the supply on the basis that it understood the Komatsu was to be exported to Belgium.

The law

66. Article 138(1) of the PVD provides:

> "Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began."

67. Although the PVD says "exempt the supply of goods," the CJEU accepted in *EC v UK* [1988] (Case C-416/85) that UK system of zero-rating was equivalent to exemption with refund of the tax paid at the preceding stage.

68. VATA s 30 is headed "zero-rating." Subsection (8) provides:

> "Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where
>
> (a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member States or that the supply in question involves both
>
> (i) the removal of the goods from the United Kingdom; and

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

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

69. Reg 134 is headed "Supplies to persons taxable in another member State" and reads:

"Where the Commissioners are satisfied that:

(a) a supply of goods by a taxable person involves their removal from the United Kingdom,

(b) the supply is to a person taxable in another member State,

(c) the goods have been removed to another member State, and

(d) …,

the supply, subject to such conditions as they may impose, shall be zero-rated."

70. The subject of Notice 725 is "The Single Market." Paragraph 4.3 has the force of law, pursuant to VATA s 30(8) and Reg 134, and provides:

"A supply from the UK to a customer in another EC Member State is liable to the zero rate where:

- you obtain and show on your VAT sales invoice your customer's EC VAT registration number, including the 2-letter country prefix code, and
- the goods are sent or transported out of the UK to a destination in another EC Member State, and
- you obtain and keep valid commercial evidence that the goods have been removed from the UK within the time limits set out at paragraph 4.4."

Submissions and discussion

71. Mr Priest said that KJSL did not qualify for zero-rating under VATA s 30(8)(a) and Reg 134 because the Komatsu had not been removed from the UK to another Member State. The invoice which stated the contrary was incorrect.

72. Mr Fasolino sensibly did not seek to resist this, given Mr Lewis's clear evidence that KJSL had always known that the Komatsu was to be shipped from the UK to Australia.

73. The requirements in VATA s 30(8) and Reg 134 are clearly not met: HMRC was rightly not "satisfied" that the supply to Conesco involved both "the removal of the goods from the United Kingdom" and their acquisition in another Member State by a taxable person.

74. As we explain in relation to Issue 2, this means that the second requirement, namely whether the supplier met "such other conditions" as HMRC may specify, does not need to be considered. We note, however, that KJSL failed to include Conesco's VAT number on the invoice, despite this being required by Notice 725. Although that

failure is academic given that the Komatsu was not exported to another Member State, we record it here because HMRC refer to it in the context of Issue 4 (the assessment period).

Issue 2: Whether KJSL was entitled to zero-rate the supply on the basis that it understood the Komatsu was to be exported to Australia.

Further legal provisions

75. Article 14(1) of the PVD says: "Supply of goods shall mean the transfer of the right to dispose of tangible property as owner." That Article is transposed into UK law by VATA s 5 and Sch 4, para 1: the latter states that "Any transfer of the whole property in goods is a supply of goods."

76. Article 146(1) of the PVD reads:

> "Member States shall exempt the following transactions:
>
> (a) the supply of goods dispatched or transported to a destination outside the Community by or on behalf of the vendor;
>
> (b) the supply of goods dispatched or transported to a destination outside the Community by or on behalf of a customer not established within their respective territory…"

77. Article 273 of the PVD provides:

> "Member States may impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion, subject to the requirement of equal treatment as between domestic transactions and transactions carried out between Member States by taxable persons and provided that such obligations do not, in trade between Member States, give rise to formalities connected with the crossing of frontiers..."

78. VATA s 30 is headed "zero-rating." Subsection (6) provides:

> "A supply of goods is zero-rated by virtue of this subsection if the Commissioners are satisfied that the person supplying the goods
>
> (a) has exported them to a place outside the member States; or
>
> (b) …
>
> and in either case if such other conditions, if any, as may be specified in regulations or the Commissioners may impose are fulfilled."

79. Reg 129 is headed "Supplies to overseas persons" and provides:

> "(1) Where the Commissioners are satisfied that
>
> (a) goods intended for export to a place outside the member States have been supplied to
>
> (i) a person not resident in the United Kingdom…
>
> the supply, subject to such conditions as they may impose, shall be zero-rated."

80. Notice 703 contains certain detailed conditions which have the force of law pursuant to VATA s 30(6) and (8) and Reg 129. These include, at paragraph 3.4:

> "A supply of goods to an overseas customer (see paragraph 2.4) sent to a destination outside the EC is liable to the zero rate as an indirect export where:
>
> your overseas customer:
>
> - exports the goods from the EC within the specified time limits (see paragraph 3.5), and
> - obtains and gives you valid official or commercial evidence of export as appropriate (see paragraphs 6.2 and 6.3) within the specified time limits,
>
> and you:
>
> - keep supplementary evidence of export transactions (see paragraph 6.4), and
> - comply with the law and the conditions of this notice,
>
> and the goods are not used between the time of leaving your premises and export, except where specifically authorised elsewhere in this notice or any other VAT notice."

81. Paragraph 6.1 says:

> "For VAT zero-rating purposes you must produce either official evidence as described in paragraph 6.2 or commercial evidence as described in paragraph 6.3. Equal weight is put on official and commercial transport evidence but both must be supported by supplementary evidence to show that a transaction has taken place, and that the transaction relates to the goods physically exported."

82. Paragraph 6.2 states that "official evidence" of export includes GDMs. Paragraph 6.3 lists acceptable "commercial evidence" as including "authenticated sea-waybills" and "bills of lading." The paragraph ends by saying

> "Photocopy certificates of shipment are not normally acceptable as evidence of export, nor are photocopy bills of lading, sea-waybills or air-waybills (unless authenticated by the shipping or air line)."

83. Paragraph 3.5 says that the specified time limits for that evidence to be provided is three months from the date of supply; that time limit, has the force of law.

84. Paragraph 6.5 also has the force of law. It is headed "what must be shown on export evidence" and reads (emphasis in original):

> "The evidence you obtain as proof of export, whether official or commercial, or supporting must clearly identify:
>
> - the supplier
> - the consignor (where different from the supplier)
> - the customer
> - the goods
> - an accurate value
> - the export destination, **and**
> - the mode of transport and route of the export movement."

85. Paragraph 6.6 is headed "What evidence will I need to obtain to substantiate VAT zero-rating when I do not arrange shipment of the goods?" The text reads (original emphases):

> "Typically this occurs when goods are supplied ex-works. If your overseas customer arranges for the goods to be collected from your premises and exported to a place outside the EC Member States it can be difficult for you, as the supplier, to obtain adequate proof of export as the carrier is contracted to your overseas customer. For this type of transaction the standard of evidence required to substantiate VAT zero-rating is high.
>
> Before zero-rating the supply and releasing the goods to your customer, you must confirm what evidence of export is to be provided.
>
> If the evidence of export:
>
> - does not show that the goods have left the EC within the appropriate time limits, or
> - is found, upon examination, to be unsatisfactory, you, the supplier, **will** become liable for payment of the VAT.
>
> **Evidence must show the goods you supplied have left the EC**. Copies of transport documents alone will not be sufficient. Information held must identify the date and route of the movement and the mode of transport involved. It should include the following:
>
> - a written order from your customer which shows their name and address, and the address where the goods are to be delivered
> - copy sales invoice showing the invoice number, customer's name and a description of the goods."

Submissions on behalf of KJSL

86. Mr Fasolino said that as the Komatsu had been exported to Australia, the supply should be zero-rated. He also relied on paragraph 3.4 of Notice 703, which states that "official *or* commercial evidence" must be provided, and this is reiterated at paragraph 6.2. Since KJSL had provided HMRC with the GDM, which constituted "official evidence," that was sufficient.

87. In relation to the Bill of Lading, Mr Fasolino said that Mr Lewis's evidence showed that he had understood Mr Waller to be acting as a broker for Conesco, and thus KJSL would not have thought there was anything untoward in seeing the name WCEL as the consignor on the GDM or as the "shipper" on the Bill of Lading

88. Mr Fasolino also submitted that KJSL had no way of detecting the subsequent sale from Conesco to WCEL, and that the CJEU decision in *Teleos* applied on the facts of this case. In *Teleos* the applicants had provided HMRC with consignment notes ("CMRs") issued by their customers as evidence that the goods had been exported to Spain. HMRC had accepted that the supplies were zero-rated on the basis of that evidence, but subsequently realised that some of the CMRs were fake and the goods had never left the UK. The applicants were assessed to VAT. Four questions were referred to the CJEU by the High Court (Moses J).

89. KJSL relied on the CJEU's answer to the third question, given at [68] of its judgment, where the Court said:

> "Article 28c(A)(a) of the Sixth Directive [now rewritten as Article 138(1) of the PVD] is to be interpreted as precluding the competent authorities of the member state of supply from requiring a supplier, who acted in good faith and submitted evidence establishing, at first sight, his right to the exemption of an intra-Community supply of goods, subsequently to account for VAT on those goods where that evidence is found to be false, without, however, the supplier's involvement in the tax evasion being established, provided that the supplier took every reasonable measure in his power to ensure that the intra-Community supply he was effecting did not lead to his participation in such evasion."

90. Although *Teleos* related to intra-EU supplies, it was common ground that the same principles must apply to supplies to non-member states.

91. Mr Fasolino said that KJSL had acted in good faith and had submitted evidence establishing its right to zero-rating; that it was not involved in tax evasion; and if there was any evasion here, KJSL had taken every reasonable measure in its power to ensure that the supply of the Komatsu did not lead to participation in that evasion. As a result, like the applicants in *Teleos,* KJSL was entitled to zero-rate the supply.

Submissions on behalf of HMRC

92. Mr Priest said HMRC was not alleging that KJSL was involved in evasion or that it knew about the further sale between Conesco and Waller Limited. HMRC's position was that KJSL was not entitled to zero rating because:

(1) the supply was not a direct export qualifying for zero-rating under VATA s 30(6) because KJSL, being "the person supplying the goods," had not exported the Komatsu to "a place outside the Member States." Instead, KJSL had sold the Komatsu to Conesco, which had on-sold it to WCEL, another UK company, before the machine had left the UK;

(2) the supply was not an indirect export qualifying for zero-rating under VATA s 30(8) because the Komatsu had been exported by WCEL acting as principal rather than as agent for Conesco or KJSL;

(3) the supply was therefore standard rated from inception;

(4) it follows that the GDM and the Bill of Lading cannot be used as evidence to support the zero-rating of the supply; and

(5) in any event, the Bill of Lading did not meet the requirements contained in paragraph 6.5 of Notice 703, because it did not identify the name of the customer or the export destination.

93. Mr Priest said that *Teleos* was distinguishable from the facts of this case, because in *Teleos* the applicants had received what was, on its face, valid evidence of the goods' removal from the UK which had satisfied HMRC; they had also met the requirements of Notice 703. The position here was entirely different.

Discussion

94. We start with the basic principle that the "supply" of goods is the transfer of the property in the goods (Article 14(1) of the PVD and VATA Sch 4(1)). KJSL's supply was to Conesco, and that supply was not an export, because Conesco on-sold the

Komatsu to WCEL while the machine was still in the UK. It follows that VATA s 30(6) cannot apply as that subsection covers only direct exports by the supplier.

95. Zero-rating of indirect exports to locations outside the EU is provided for by Article 146(1), while Article 273 allows HMRC to "impose other obligations which they deem necessary to ensure the correct collection of VAT and to prevent evasion."

96. In reliance on those two Articles, VATA s 30(8) allows regulations to be made allowing zero-rating where:

(a) HMRC is satisfied that the goods supplied have been or are to be exported to a place outside the Member States; and

(b) such other conditions as set out in regulations or otherwise imposed by HMRC are fulfilled.

97. On a straightforward reading, the requirement in VATA s 30(8)(a) is met once HMRC is satisfied that the goods have been exported; the requirement in s 30(8)(b) is met once the supplier has provided the required evidence. Thus, if HMRC has never been satisfied, the evidentiary conditions do not need to be considered. Similarly, Reg 129 provides that the supply is only zero-rated "where the Commissioners are satisfied" that the goods have been exported, and then only where the conditions imposed by HMRC have been met.

98. We note, however, that the CJEU's answer to Question 3 in *Teleos* states that HMRC is precluded from requiring a supplier to account for VAT where he has "acted in good faith and submitted evidence establishing, at first sight, his right to the exemption." KJSL relies on that answer to say that:

(1) there is a single test, so that if the requisite evidence is supplied, HMRC cannot refuse to be "satisfied" that the goods have been exported; and

(2) KJSL have met that test because of the evidence it has provided.

99. These are, in terms, submissions that:

(1) VATA s 30(8) and Reg 129 go beyond EU law as interpreted by *Teleos;* and

(2) KJSL met the legal requirements as explained by the CJEU in its answer to Question 3 of *Teleos.*

100. When considering KJSL's first submission, it is important to read Question 3 in context. In *Teleos* the CJEU answered four questions, of which Questions 1 and 2 are also relevant. Those questions concerned what is now Article 138(1), which provides that Member States "shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community." The phrase "dispatched or transported" is also used in Article 146(1), so the CJEU's answer to the first two *Teleos* questions applies to all exports.

101. By Questions 1 and 2 the CJEU was asked whether a supplier could zero rate goods "despatched and transported" to a customer in the same Member State who was contractually obliged to export them from that Member State. The CJEU replied at [42] of the judgment, saying:

> "…having regard to the term 'dispatched' in those two provisions, to be interpreted as meaning that the intra-Community acquisition of goods is effected and the exemption of the intra-Community supply of goods becomes applicable only when the right to dispose of the goods as owner has been transferred to the purchaser and the supplier establishes that those goods have been dispatched or transported to another member state and that, as a result of that dispatch or that transport, they have physically left the territory of the member state of supply."

102. In other words, zero-rating only applies where goods have actually left the supplier's Member State. It follows that HMRC must refuse zero-rating if it is not satisfied that the goods have been exported. This is exactly what VATA s 30(8)(a) and Reg 129 say, so those provisions are entirely compatible with the CJEU's answers to Questions 1 and 2 in *Teleos.*

103. KJSL's second submission is that the facts of this case come within the CJEU's answer to Question 3 in *Teleos.* However, it is important to consider, not only that answer, but the question to which it is a response. This reads as follows (emphasis added):

> "In the relevant circumstances [of the main proceedings], where a supplier acting in good faith has *tendered to the competent authorities in his member state, after submission of a repayment claim, objective evidence* which at the time of its receipt apparently supported his right to exempt goods under art 28c(A)(a) [of the Sixth Directive] *and the competent authorities initially accepted that evidence for the purpose of exemption*, in what circumstances (if any) may the competent authorities in the member state of supply nevertheless subsequently require the supplier to account for VAT on those goods where further evidence comes to their attention that either (a) casts doubt upon the validity of the earlier evidence or (b) demonstrates that the evidence submitted was materially false, but without the knowledge or the involvement of the supplier?"

104. Question 3 therefore asks what happens if, after HMRC have been provided with, and accepted, evidence of export, HMRC subsequently *changes its mind* and refuses zero-rating.

105. This is underlined by the factual introduction at [16] of the judgment, which reads:

> "Initially, the Commissioners accepted those documents as evidence that the goods had been exported from the United Kingdom, so that those supplies were exempt from VAT, by virtue of the zero-rating, and Teleos and others were entitled to be refunded the input tax paid. However, on subsequent checks, the Commissioners discovered that, in certain cases, the destination stated on the CMR notes was false…"

106. The CJEU's answer to Question 3 is that, once HMRC have accepted the evidence submitted by suppliers, it cannot change its position if that evidence is subsequently discovered to be false. Question 3 thus deals with a specific scenario, namely whether HMRC can change its mind after having previously been satisfied that the goods were exported. It is therefore not authority for KJSL's proposition that HMRC must allow zero-rating if the evidentiary conditions in Notice 703 are satisfied.

107. Of course, it will often be the case that the only evidence which allows HMRC to decide whether it is "satisfied" that goods have been exported is that provided by the supplier. The "satisfying HMRC" requirement then goes hand in hand with meeting the evidentiary conditions. But that is not always the position. It may be that HMRC has received third party information before any evidence, or purported evidence, of export has been provided by the supplier, and in that situation HMRC has never been satisfied as to the objective reality of the export.

108. This is such a case. KJSL did not possess any evidence of export until after Ms Owen asked Mr Gregory, on her first visit, whether it existed. Mr Gregory contacted NMT the same day, and obtained a copy of the Bill of Lading. The GDM was not provided until after Ms Owen's third visit, in April 2013.

109. There is no change of mind here: rather, HMRC was never "satisfied" that the supply from KJSL to Conesco was an export. Instead, Ms Owen decided, in the light of all the evidence, that the Komatsu did not leave the UK until after it had been on-supplied by Conesco to WCEL, and that it was WCEL which exported the Komatsu to an unidentified Australian buyer. As a result, KJSL's supply did not meet the requirement for zero-rating in VATA s 30(8)(a) or in the opening words of Reg 129.

110. Because HMRC was never "satisfied" that the Komatsu had been exported, it is not necessary for us to consider whether KJSL's evidentiary material met the conditions in Notice 703. However, as we had full submissions on the point, we have gone on to consider it.

111. KJSL relied on paragraph 3.4 of Notice 703, which stated that the overseas customer must obtain and give the supplier "valid official or commercial evidence of export as appropriate (see paragraphs 6.2 and 6.3) within the specified time limits." PACG submitted that, as the GDM is official evidence, it provides sufficient proof that the Komatsu left the UK.

112. It is true that paragraph 6.2 of Notice 703 lists GDMs as valid "official evidence." However, paragraph 6.5, which has the force of law, requires that official evidence "must clearly identify" the name of the consignee. The consignee box on the GDM for the export of the Komatsu is blank, because the consignee name has been redacted.

113. The second document on which KJSL relies is the Bill of Lading, from which the name of the consignee and the name of the customer have been redacted. Both are mandatory under paragraph 6.5. Furthermore, the Bill of Lading is a printout from an email attachment, not an authenticated original, and so does not satisfy paragraph 6.3 of Notice 703.

114. Leaving aside for these purposes our finding that HMRC was not satisfied that the Komatsu had been exported, we asked ourselves whether HMRC could deny zero-rating simply because of KJSL's failure to comply with particular conditions in paragraph 6.5. Our starting point is *Moss C&E Commrs* [1981] STC 139 ("*Moss*"), where the Court of Appeal (Lord Denning MR, Shaw and Templeman LJJ) decided unanimously that the Commissioners were entitled to make any conditions which are *bona fide* directed to ensuring that zero-rating is not abused.

115. More recent CJEU decisions have held that the tax authority cannot refuse zero-rating where (a) genuine evidence of export is provided after the time limit set in the conditions, see for example *Collée v Finanzamt Limburg an der Lahn* (Case C-146/05) [2008] STC 757 ("*Collée*") at [41] or (b) where the tax authority has evidence to prove that the substantive requirement, namely the export, has occurred, but the formal requirements set in the conditions are not satisfied, unless "non-compliance with such formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied," see *Collée* at [31] and *EMS-Bulgaria Transport OOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto' Plovdiv* (Case C-284/11) [2012] STC 2229 at [71].

116. In the light of that case law and the facts of this case, we find as follows:

(1) the conditions applying to GDMs and Bills of Lading are *bona fide* directed to ensuring that zero-rating is not abused, and KJSL has not sought to argue otherwise;

(2) KJSL's appeal is not about its failure to provide evidence within the three month time limit set by Notice 703; and

(3) it is also not a case where HMRC, despite having evidence that the supplier exported the goods, has nevertheless refused zero-rating because a formal requirement set out in the conditions has not been met.

117. We therefore find that KJSL's supply cannot be zero-rated, not only because HMRC was never satisfied that the goods were exported, but for the further reason that neither the GDM nor the Bill of Lading met the mandatory conditions laid down by paragraph 6.5 of Notice 703.

118. KJSL has also failed to comply with Paragraph 6.6 of Notice 703, which sets out detailed requirements to be followed by traders supplying goods "ex-works." The paragraph specifies that the supplier must "before zero-rating the supply and releasing the goods…, confirm what evidence of export is to be provided." At the relevant time, KJSL had no procedures for obtaining evidence of export in all cases, even *after* goods had left the premises. Paragraph 6.6 also requires that the supplier provide "the address where the goods are to be delivered." KJSL still does not know the address in Australia to which the Komatsu was being sent. It is clear that the supply did not satisfy the requirements set out in paragraph 6.6.

119. That paragraph does not, however, have the force of law, and we had no submissions on whether it, too, is a "condition" within the meaning of VATA s 30(8) and Reg 129. We observe that Notice 700, the VAT Guide, indicates that HMRC's view is that it is not a "condition": paragraph 2.4 of that Guide reads:

> "Generally speaking, this notice and the other VAT notices explain how HMRC interpret the VAT law. However, sometimes the law says that the detailed rules on a particular matter will be set out in a notice or leaflet published by HMRC rather than in a Statutory Instrument. When this is done, that part of the notice or leaflet has legal force, and that fact will be clearly shown at the relevant point in the publication."

120. We do not need to decide whether HMRC is right that paragraph 6.6 is not a "condition," because KJSL has, in any event, failed to meet the requirements in paragraph 6.5, which do have the force of law.

121. For completeness we also find that the evidential position here is far removed from that in *Teleos*, where the applicants had provided HMRC with CMRs which met the requirements of Notice 703. In KJSL's case, the GDM and the Bill of Lading fail to satisfy the requirements specified in mandatory paragraph 6.5 as well those in paragraph 6.6.

Decision on Issue 2

122. We find that KJSL's supply of the Komatsu was not eligible for zero-rating, because HMRC was not "satisfied" that the supply was an indirect export. This was because the Komatsu was supplied to a Belgian company which did not export it, but instead sold it to WCEL; that company exported it to Australia as principal, not as agent for Conesco. HMRC's decision is consistent with the facts we have found.

123. KJSL did not meet the evidentiary conditions set out in Booklet 703, so for that reason too the supply cannot be zero-rated.

Whether the assessment was made in time

124. The assessment under appeal was made under VATA s 73(1), which provides:

> "Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him."

125. VATA s 73(6) reads:

> "An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following–
>
> (a) 2 years after the end of the prescribed accounting period; or
>
> (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge…"

126. The Tribunal asked Mr Priest when, in HMRC's submission, Ms Owen had "sufficient evidence of facts…to justify the making of the assessment."

127. Mr Priest said that this was on 7 February 2013, when she made her second visit to KJSL and was provided with the redacted copy Bill of Lading as evidence of export. Although HMRC had previously visited WCEL, there was a conflict between the information provided by that company and the position as put forward by KJSL. It was only when Ms Owen received the Bill of Lading, which showed WCEL as the consignor, that she had sufficient evidence to decide that the Komatsu had been exported by WCEL as principal, so that zero-rating did not apply to KJSL's supply to Conesco. We asked Mr Fasolino if he had any submissions on this point, but he did not.

128. We agree with Mr Priest and find that the assessment dated 5 February 2014 was issued within a year of 7 February 2013, the date on which sufficient "evidence of facts" etc had been obtained by Ms Owen. It was therefore in time.

Whether the assessment was for the correct period

The legislation, regulations and Notice 703

129. VATA s 1(2) provides that VAT "becomes due at the time of supply" but this is "subject to provisions about accounting and payment." VATA s 58 and Sch 11, para 2(10) provide that regulations may make provision "for treating VAT chargeable in one prescribed accounting period as chargeable in another such period." Reg 25(5), made under those powers, says that "the Commissioners may allow VAT chargeable in any period to be treated as being chargeable in such later period as they may specify."

130. Paragraph 3.5 of Notice 703 says that the time limit for obtaining evidence of direct or indirect exports is three months from the time of supply. The paragraph ends as follows:

> "If you…do not hold the necessary evidence to show that the goods have been physically exported, you must not zero-rate the supply and must account for VAT at the appropriate UK rate (see paragraphs 11.2 and 11.3)."

131. Paragraph 11.2 reads:

> **"How do I adjust my accounts if I do not receive evidence of export or if goods are not exported?**
>
> If you make an export you can zero-rate the supply in your records when the goods are supplied to your customer. But if you do not:
>
> - obtain and hold the required evidence of export…
>
> and the supply would normally be standard-rated in the UK, you must account for VAT accordingly.
>
> You must amend your VAT records and account for VAT on the taxable proportion of the invoiced amount or consideration you have received...
>
> When you amend your VAT records, you must make an entry equal to the tax on the supplies concerned on the "VAT PAYABLE" side of your VAT account. You must include this amount in Box 1 of your VAT return for the period in which the relevant time limit expires."

Facts and submissions

132. As already set out earlier in this decision, Ms Owen made three assessments: the first for period 6/11, the second for period 9/11 and third (once again) for period 6/11.

133. The Tribunal asked Mr Priest for his comments on the legal position, with particular reference to Ms Owen's two previous assessments.

134. Mr Priest referred briefly to *C&E Commrs v Musashi* [2004] STC 220 ("*Musashi*"). He added that KJSL's failure to include Conesco's VAT number on the invoice meant, in any event, that the assessment was properly made in the period 6/11.

135. Mr Fasolino said that although Ms Owen had noted the absence of a VAT number on the invoice, the correspondence between KJSL and HMRC indicated that she would have been satisfied by the alternative evidence, namely the inclusion of

Conesco's VAT number on the breaker parts sale sheet. Mr Fasolino had no other submissions on Issue 4.

The absence of the VAT number

136. We deal first with the absence of the VAT number on the invoice. It is true that Notice 725 requires that, for zero-rating to apply to exports to another Member State, the supplier must "obtain and show on your VAT sales invoice your customer's EC VAT registration number, including the 2-letter country prefix code."

137. However, the Komatsu was not exported to another Member State, so the supply could not be zero-rated on that basis. We agree with Mr Fasolino that Ms Owen did not place any weight on the absence of Conesco's VAT number. This was because Ms Owen was not considering whether the supply was a direct export to Belgium, but rather whether it should be zero-rated as an indirect export to Australia.

138. Although it is true that, in her letter of 18 June 2013, Ms Owen listed the absence of the customer's VAT number as a failure, she did so in the context of whether KJSL could rely on *Teleos.* KJSL's systemic failures to deal properly with exports meant, she said, that KJSL had not taken "every reasonable measure in [its] power" as required by the CJEU in *Teleos.* The lack of the customer VAT numbers on invoices was one example of those systemic failures, but it played no part in the making of any of the assessments. These were raised because Ms Owen had decided KJSL was not entitled to zero-rate the supply as an indirect export to Australia.

The correct period of assessment

139. The more important question is whether the correct period of assessment was:

(1) the period in which the sale was made, being 6/11; or

(2) the following period, being 9/11, on the basis that paragraph 11.2 of Notice 703 allows three further months to obtain evidence of export, and specifically provides that the supplier "must include this amount in Box 1 of your VAT return for the period in which the relevant time limit expires."

140. If the correct answer is (2), the assessment is for the wrong period and so cannot be upheld. This is not a case where HMRC made assessments in the alternative, as they did in *University Court of the University of Glasgow v C & E Commrs* CS [2003] STC 495.

141. We first consider the legal basis for three month extension in paragraph 11.2. Is this discretionary, or is it an example of HMRC exercising their power under Reg 25(5) to "allow VAT chargeable in any period to be treated as being chargeable in such later period as they may specify"?

142. We had no submissions on this point, and identified no case law of direct relevance, although we considered Stephen Oliver QC's helpful discussion as Chairman of the VAT Tribunal in *Inchcape Management Services Ltd v C & E Comrs* (1999) VATTR 16256.

143. The wording of paragraph 11.2 is mandatory: "must include." This leads us to conclude, albeit with some hesitation given the lack of authority, that it is an example of HMRC exercising its power under Reg 25(5).

144. We note that this conclusion is consistent with *Musashi*. In that case the appellant had provided evidence of export after the end of the three month period, and HMRC had charged interest, even though the assessment itself had fallen as a result of the evidence subsequently provided. The company appealed against the interest charge, on the basis that interest cannot be detached from the underlying assessment.

145. The Court of Appeal upheld the High Court decision (under reference [2003] STC 449) that HMRC could charge interest. Although the date from which HMRC could make that charge was not in dispute between the parties, it appears from [11] of the VAT Tribunal decision (under reference [2002] VATTR 17771) that the assessment was not raised from the end of the VAT period in which the supply was made, but at the end of the following three month period, in accordance with Notice 703.

146. At [25] of the High Court decision, Lightman J sets out his conclusion (emphasis added):

> "(1) If the taxable person complies with those paragraphs [in Notice 703], he will include the supplies as standard-rated supplies in his VAT return and pay the appropriate VAT on this basis no later than the last date on which he is required to make his return…(2) If the taxable person fails to reflect the supplies as standard rated in his VAT return, the commissioners *can make assessments for VAT* and interest payable *from the due date for the return which should have so reflected the supplies*."

147. Of course, the highlighted words are *obiter*, because neither party in *Musashi* suggested that the assessment which triggered the interest charge should have been made in respect of the previous VAT period. But *Musashi* supports our analysis that, where the supplier fails to provide evidence of export within the three months following the supply, VAT is due in the quarter following that in which the supply was made.

148. Despite that conclusion, we nevertheless find that the assessment on KJSL was correctly made for period 6/11. This is because the three month time limit extension referred to in Notice 703 relates entirely to the gathering of evidence. Where, as here, HMRC has never been "satisfied" that the supply is an export at all, those evidentiary conditions are not in issue, and there is no extended time limit.

Decision and appeal rights

149. For the reasons set out above, we dismiss KJSL's appeal and confirm HMRC's decision to uphold the assessment of £62,500 for VAT period 6/11.

150. 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.

ANNE REDSTON
TRIBUNAL JUDGE

RELEASE DATE: 24 FEBRUARY 2016