Appeal number: TC/2012/08250

VAT – preliminary issue – whether a warehousekeeper which is jointly and severally liable for import VAT under Art 203(3), Community Customs Code (EC Regulation 2913/92/EEC) by reason of a breach of Art 101(a) has a right to a deduction of that import VAT as input tax – VATA 1994, s 24(1) – Principal VAT Directive (2006/112/EC), Art 168(e)

FIRST-TIER TRIBUNAL
TAX CHAMBER

ASSOCIATED BRITISH PORTS **Appellant**

- and -

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

TRIBUNAL: JUDGE ROGER BERNER

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 10 March 2016

Roderick Cordara QC and Lyndsey Frawley for the Appellant

Nigel Pleming QC and Christiaan Zwart, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

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DECISION

1. The appellant, Associated British Ports ("ABP"), has appealed against a review decision of HMRC dated 27 July 2012, as subsequently revised, to issue a post-clearance demand note (C18) in the revised sums of £394,052.58 of customs duty and £1,204,675.03 of import VAT to ABP pursuant to Article 101(a) of EC Regulation 2913/92 on the basis that ABP is jointly and severally liable for the unlawful removal of certain timber products from an authorised public Type A Customs Warehouse of which ABP was the warehousekeeper.

2. This decision is on a preliminary issue concerning whether, on the assumption that ABP is liable for import VAT as determined by HMRC, it has an equal and opposite right of deduction in respect of that VAT. Were that to be the case, no net liability would arise.

Preliminary issue

3. The parties have agreed the following question as the preliminary issue:

> "Is the Appellant entitled (in principle) to an input tax credit in respect of import VAT paid (or payable) to the Respondents under section 24(1) of the Value Added Tax Act 1994, in the circumstances limited to those described in the Statement of Agreed Facts and Assumptions, where:
>
> (a) a customs debt has been incurred under Article 203(1) of EC Regulation 2913/92 ("the Community Customs Code"); and
>
> (b) the Appellant has incurred joint and several liability for that debt, by virtue of Article 203(3) of the Community Customs Code, when read with Article 101(a)."

Statement of Agreed Facts and Assumptions

4. The parties were unable to reach agreement on the basis of a statement of agreed facts. Accordingly, only certain items have been agreed as a matter of fact. Other items are included as facts which are assumed, but only for the purpose of determination of the preliminary issue.

5. The following is the parties' statement of agreed and assumed facts. Save where expressly described as agreed, the facts set out below are assumed. I have included the statement as it was agreed; the references to the "bundle" is to the trial bundle.

> ABP's Business
>
> 1. The following is agreed: ABP is a company incorporated under the Transport Act 1981; its principal office is at Aldwych House, 71-91 Aldwych, London WC2B 4HN; it is one of the UK's largest commercial port operators; it owns and operates 21 ports in England,

Scotland, and Wales, together with other transport-related business; including rail terminal operations, ship's agency services and dredging.

2. It is agreed that ABP is registered for VAT through a group registration in the UK and is fully taxable for VAT purposes in relation to its operations in Swansea, i.e. ABP does not make any exempt supplies for VAT purposes and is not therefore a ‘partially exempt’ business. It is agreed that ABP does not engage in any non-business activities in relation to its operations at Swansea. Historically, ABP has recovered all its input tax and has not encountered any issues with HMRC about its recovery of input tax as a fully taxable business.

Sheds and Warehouses at ABP’s Ports

3. At all material times, as part of its port operations, ABP had a number of sheds and warehouses. It is agreed that such sheds and warehouses are and were (at the material times) used for the handling and storage of cargo destined for import, export or transit through the ports.

4. It is agreed that some of the sheds and warehouses in the port of Swansea (or sections thereof) were (at the material times) authorised by HMRC as ‘customs warehouses’ in respect of goods imported into the UK from outside the EU. (See bundle pp 150-154 and 163-190 for the customs authorisations issued on 17 December 1999 and 23 February 2007 respectively (the ‘**Customs Authorisations’**).)

Warehouse used by F G Hawkes (Western) Limited (‘**Hawkes**’) at Swansea

5. It is agreed that, at the material times, ABP was authorised to operate a Type A public warehouse in Swansea, which included A and B sheds at Swansea and later an extension to those sheds. (See bundle p 191 for the site plan of the port at Swansea) (the ‘**Customs Warehouse’**).

6. It is agreed that as the authorised warehousekeeper, ABP also had certain duties and responsibilities under the Customs Authorisations.

7. It is agreed that between January 2000 and October 2011, the Customs Warehouse was used by a local company, Hawkes, to store timber and similar goods imported into the UK from outside the EU for the purposes of its wholesale business in building materials and building supplies, pursuant to the agreements as next described. The exact dates and knowledge of HMRC in respect of such dates and the use of the Customs Warehouse by Hawkes are not agreed.

8. It is agreed [that] the arrangements between ABP and Hawkes for the use of the Customs Warehouse and provision of other services to Hawkes were recorded under the terms of a Commercial Agreement dated 17 November 1999, which took effect from 1 January 2000. (See bundle pp 133-149 for a copy of the Commercial Agreement.)

9. It is agreed that on 3 February 2005, ABP and Hawkes varied the November 1999 agreement to incorporate ABP’s Standard Terms and Conditions. It is agreed [that] those terms and conditions included provision for a lien and power of sale over such of Hawkes’ goods and

plant in ABP's possession at the port of Swansea, and, to the extent it applied in the circumstances of this case, the lien provided security for payment of charges outstanding to ABP and any other liabilities arising to ABP out of its commercial arrangements with Hawkes. (See bundle pp 160-162 for the full terms of the lien included within ABP's standard terms and conditions and pp 156-159 for a copy of the Memorandum of Agreement dated 3 February 2005 varying the Commercial Agreement.) It is agreed that Hawkes also provided an indemnity to ABP in respect of any potential liability to customs duty and VAT that may arise as a result of the agreement and the use of the Customs Warehouse (see bundle p 155).

10. Timber would arrive at the docks in Swansea on vessels chartered by Hawkes. ABP was responsible for discharging the vessels on behalf of Hawkes, generally using subcontractor stevedores from Newport. The stevedores would unload cargo and place it into the Customs Warehouse used by Hawkes.

11. It is agreed that, during that period, the Customs Warehouse was used by Hawkes and that it is recorded in a number of documents that the accounts and records of the warehouse were kept, within that period, by Hawkes and/or RKL Plywood.

12. Cargo would later be moved out of the Customs Warehouse and taken by trucks out of the port by vehicles under the control of Hawkes.

13. It is agreed that Hawkes used a Customs Agent, Graypen Group Limited, to deal with customs formalities and declarations on its behalf in respect of the importation of goods.

14. Such goods, unless misappropriated or applied for private purposes by Hawkes, would then be used to make onward taxable supplies for VAT purposes. Hawkes was fully taxable for VAT purposes, made no exempt supplies and was not a '*partially exempt'* business.

Unlawful removal of timber from the Customs Warehouse

15. It is agreed that during a period of time (not before January 2000 and not after 23 October 2011) relevant goods relevant goods, consisting of timber, were unlawfully removed from the Customs Warehouse (the '**Missing Timber**'), thus giving rise to a joint and several liability of ABP and Hawkes to customs duty and import VAT.

16 It is agreed that on 8 and 9 February 2012, liability to customs duty of £535,907.85 and import VAT of £1,610,072.79 was notified to ABP and Hawkes by a C18 post clearance demand note, and that a revised C18 was issued on 5 November 2012 to ABP and Hawkes in the sum of £394,052.58 (customs duty) and £1,204,675.03 (import VAT) (see bundle pp 192-199 and 202-204 for copies of the C18s).

17. It is agreed that neither ABP nor Hawkes has (as yet) paid the import VAT to HMRC and therefore no import VAT certificate (C79) has been issued. It is agreed that the full amount of customs duty and import VAT assessed on the revised C18 has been deposited by ABP into an escrow account (pending the determination of this appeal) under terms agreed between HMRC and ABP (see bundle pp 223-234).

18. It is agreed that at no time did ABP itself make a supply of the Missing Timber or any goods into which the Missing Timber had been incorporated.

Hawkes Insolvency and ABP's Lien

5 19. On 3 October 2011, Hawkes went into administration (Grant Thornton LLP ('**GT**') are the appointed administrators). On the same day, ABP sought to exercise its lien over all the goods and plant then in its possession at the port of Swansea that had belonged to Hawkes (see bundle pp 191(a)-(c)).

10 20. In November 2011, ABP appointed marine cargo surveyors and adjusters, E L Johnson's Sons and Mowat Limited, to undertake a valuation exercise in order to determine the realisable value of the goods that were in ABP's possession and were subject to the lien.

21. In the meantime, GT had reached an agreement with a third party, 15 Premier Forest Products Limited ('**PFP**'), for the sale of all the timber remaining in the Customs Warehouse at the date of its appointment as administrators. As the timber remained subject to ABP's lien, GT could not take possession of the timber and supply it to PFP until the lien was discharged. On 2 January 2013, ABP entered into a settlement 20 agreement with GT and PFP for the release of the timber subject to both those parties paying to ABP the agreed sum of £450,000 and £199,000 respectively for the timber. (See bundle pp 191(a)-(c); 200 and 205-222 for the terms agreed between ABP, GT and PFP and other correspondence regarding the lien.)

25 General

22. No other assumptions are to be made in connection with the preliminary issue.

23. No document shall be put in evidence unless expressly referred to herein.

30 **The law**

6. This preliminary issue concerns the deductibility of input tax in the circumstances at issue in this case where ABP has incurred import VAT by reason of being jointly and severally liable, as the warehousekeeper of a warehouse from which goods were unlawfully removed, for that import VAT.

35 7. However, although the question concerns VAT, in the context of import VAT there is a material overlap between that VAT and the customs duty paid on importation of the goods. The charge to import VAT is provided for by Articles 70 and 71 of the Principal VAT Directive (2006/112/EC) ("PVD") as follows:

"**Importation of goods**

40 **Article 70**

The chargeable event shall occur and VAT shall become chargeable when the goods are imported.

Article 71

> 1. Where, on entry into the Community, goods are placed under one of the arrangements or situations referred to in Articles 156, 276 and 277, or under temporary importation arrangements with total exemption from import duty, or under external transit arrangements, the chargeable event shall occur and VAT shall become chargeable only when the goods cease to be covered by those arrangements or situations.
>
> However, where imported goods are subject to customs duties, to agricultural levies or to charges having equivalent effect established under a common policy, the chargeable event shall occur and VAT shall become chargeable when the chargeable event in respect of those duties occurs and those duties become chargeable.
>
> 2. Where imported goods are not subject to any of the duties referred to in the second subparagraph of paragraph 1, Member States shall, as regards the chargeable event and the moment when VAT becomes chargeable, apply the provisions in force governing customs duties."

8. In UK domestic law, s 1(4) of the Value Added Tax Act 1994 ("VATA") provides that "VAT on the importation of goods from places outside the Member States shall be charged and payable as if it were a duty of customs." Section 96(3) VATA provides:

> "…
>
> (a) the question whether or not goods have entered the territory of the Community;
>
> (b) the time when any Community customs debt in respect of duty on the entry of any goods into the territory of the Community would be incurred; and
>
> (c) the person by whom any such debt would fall to be discharged,
>
> shall for the purposes of this Act be determined (whether or not the goods in question are themselves subject to any such duties) according to the Community legislation applicable to goods which are in fact subject to such duties."

9. It is accordingly necessary, for an understanding of the circumstances in which a liability to import VAT may arise, to have regard to the EU law on customs duty and in particular to the Community Customs Code (EC Regulation 2913/92/EEC). A liability to customs duty and import VAT may arise where there is a breach by the warehousekeeper of Article 101(a) of the Community Customs Code. Article 101(a) provides that the warehousekeeper is "responsible for … ensuring that while the goods are in the customs warehouse they are not removed from customs supervision".

10. Article 203 of the Community Customs Code provides that a customs debt on importation, which for this purpose includes import VAT as a charge "having an effect equivalent to customs duties payable on the importation of goods" (see the definitions of "customs debt" and "import duties" in Article 4), is incurred through "the unlawful removal from customs supervision of goods liable to import duties". The customs debt is incurred at the moment when the goods are removed from

customs supervision. The debtors, who are jointly and severally liable for the customs debt, are described by Article 203(3) as follows:

> - the person who removed the goods from customs supervision,
> - any persons who participated in such removal and who were aware or should reasonably have been aware that the goods were being removed from customs supervision,
> - any persons who acquired or held the goods in question and who were aware or should reasonably have been aware at the time of acquiring or receiving the goods that they had been removed from customs supervision, and
> - where appropriate, the person required to fulfil the obligations arising from temporary storage of the goods or from the use of the customs procedure under which those goods are placed.

11. A customs debt may be incurred in a number of other ways, including on release of goods for free circulation (Article 201), unlawful introduction into a customs territory (Article 202) and non-fulfilment of conditions arising from their temporary storage or from the use of a customs procedure under which they are placed and non-compliance with relevant conditions (Article 204).

12. In relation to the charge to import VAT, s 15 and s 16 VATA relevantly provide:

> "**15 General provisions relating to imported goods**
>
> (1) For the purposes of this Act goods are imported from a place outside the member States where—
>
> (a) having been removed from a place outside the member States, they enter the territory of the Community;
>
> (b) they enter that territory by being removed to the United Kingdom or are removed to the United Kingdom after entering that territory; and
>
> (c) the circumstances are such that it is on their removal to the United Kingdom or subsequently while they are in the United Kingdom that any Community customs debt in respect of duty on their entry into the territory of the Community would be incurred.
>
> (2) Accordingly—
>
> (a) goods shall not be treated for the purposes of this Act as imported at any time before a Community customs debt in respect of duty on their entry into the territory of the Community would be incurred, and
>
> (b) the person who is to be treated for the purposes of this Act as importing any goods from a place outside the member States is the person who would be liable to discharge any such Community customs debt.

(3) Subsections (1) and (2) above shall not apply, except in so far as the context otherwise requires or provision to the contrary is contained in regulations under section 16(1), for construing any references to importation or to an importer in any enactment or subordinate legislation applied for the purposes of this Act by section 16(1).

16 Application of customs enactments

(1) Subject to such exceptions and adaptations as the Commissioners may by regulations prescribe and except where the contrary intention appears—

(a) the provision made by or under the Customs and Excise Acts 1979 and the other enactments and subordinate legislation for the time being having effect generally in relation to duties of customs and excise charged on the importation of goods into the United Kingdom; and

(b) the Community legislation for the time being having effect in relation to Community customs duties charged on goods entering the territory of the Community,

shall apply (so far as relevant) in relation to any VAT chargeable on the importation of goods from places outside the member States as they apply in relation to any such duty of customs or excise or, as the case may be, Community customs duties."

13. The Customs and Excise Acts 1979 include the Customs and Excise Management Act 1979 ("CEMA") (s 1(1) CEMA). The definition of "importer" in CEMA, which is also in s 1(1), is as follows:

"'importer', in relation to any goods at any time between their importation and the time when they are delivered out of charge, includes any owner or other person for the time being possessed of or beneficially interested in the goods …"

Section 1(1) also includes the following definition of "warehouse":

"'warehouse', except in the expressions 'Queen's warehouse' and 'distiller's warehouse', means a place of security approved by the Commissioners under subsection (1) or (2) or subsections (1) and (2) of section 92 below and, except in that section, also includes a distiller's warehouse; and 'warehoused' and cognate expressions shall, subject to subsection (4) of that section and any regulations made by virtue of section 93(2)(da)(i) or (ee) or (4) below, be construed accordingly"

14. Approval of customs warehouses is, in relation to VAT, provided for by s 92(2) CEMA:

"The Commissioners may approve, for such periods and subject to such conditions as they think fit, places of security for the deposit, keeping and securing –

(a) of imported goods chargeable with customs duty or otherwise not for the time being in free circulation in member States (whether

> or not also chargeable with excise duty) without payment of the customs duty …
>
> subject to and in accordance with warehousing regulations; and any place of security so approved is referred to in this Act as a 'customs warehouse'."

15. The right to a deduction for input VAT is provided for, as a matter of Community law, by Article 168 of the PVD:

> "In so far as the goods and services are used for the purposes of the taxed transactions of a taxable person, the taxable person shall be entitled, in the Member State in which he carries out these transactions, to deduct the following from the VAT which he is liable to pay:
>
> (a) the VAT due or paid in that Member State in respect of supplies to him of goods or services, carried out or to be carried out by another taxable person;
>
> (b) the VAT due in respect of transactions treated as supplies of goods or services pursuant to Article 18(a) and Article 27;
>
> (c) the VAT due in respect of intra-Community acquisitions of goods pursuant to Article 2(1)(b)(i);
>
> (d) the VAT due on transactions treated as intra-Community acquisitions in accordance with Articles 21 and 22;
>
> (e) the VAT due or paid in respect of the importation of goods into that Member State."

16. In relation to the exercise of the right of deduction, Article 178 of the PVD relevantly provides:

> "In order to exercise the right of deduction, a taxable person must meet the following conditions:
>
> …
>
> (e) for the purposes of deductions pursuant to Article 168(e), in respect of the importation of goods, he must hold an import document specifying him as consignee or importer, and stating the amount of VAT due or enabling that amount to be calculated;
>
> …"

17. The UK domestic provisions which correspond to Article 168 are those in s 24, s 25 and s 26 VATA, which materially provide as follows:

> **"24 Input tax and output tax**
>
> (1) Subject to the following provisions of this section, "input tax", in relation to a taxable person, means the following tax, that is to say—
>
> (a) VAT on the supply to him of any goods or services;
>
> (b) VAT on the acquisition by him from another member State of any goods; and

(c) VAT paid or payable by him on the importation of any goods from a place outside the member States,

being (in each case) goods or services used or to be used for the purpose of any business carried on or to be carried on by him …

25 Payment by reference to accounting periods and credit for input tax against output tax

(1) A taxable person shall—

(a) in respect of supplies made by him, and

(b) in respect of the acquisition by him from other member States of any goods,

account for and pay VAT by reference to such periods (in this Act referred to as "prescribed accounting periods") at such time and in such manner as may be determined by or under regulations and regulations may make different provision for different circumstances.

(2) Subject to the provisions of this section, he is entitled at the end of each prescribed accounting period to credit for so much of his input tax as is allowable under section 26, and then to deduct that amount from any output tax that is due from him …

26 Input tax allowable under section 25

(1) The amount of input tax for which a taxable person is entitled to credit at the end of any period shall be so much of the input tax for the period (that is input tax on supplies, acquisitions and importations in the period) as is allowable by or under regulations as being attributable to supplies within subsection (2) below.

(2) The supplies within this subsection are the following supplies made or to be made by the taxable person in the course or furtherance of his business—

(a) taxable supplies;

(b) supplies outside the United Kingdom which would be taxable supplies if made in the United Kingdom;

(c) such other supplies outside the United Kingdom and such exempt supplies as the Treasury may by order specify for the purposes of this subsection.

(3) The Commissioners shall make regulations for securing a fair and reasonable attribution of input tax to supplies within subsection (2) above …"

Discussion

18. The preliminary issue for determination is whether, on the assumption that ABP has incurred a liability to import VAT in the circumstances of the unlawful removal of goods from its Swansea warehouse, that import VAT is input tax for which ABP is entitled to a deduction or credit. That is a question of principle unrelated to the status for VAT purposes of ABP; it is assumed to be a fully taxable business so that, if input tax is in principle deductible, it will be deductible in full.

19. ABP's case, in essence, is that it is entitled to an input tax credit by reason of the fact that the liability to import VAT has arisen entirely as a result of its taxable business activities in the Port of Swansea. It is submitted that ABP would not be able to operate a customs warehouse (and therefore offer such a facility to its customers) if it were not to have obtained authorisation to do so from HMRC. In order to obtain authorisation, HMRC required ABP to accept joint and several liability for any import VAT which would become due and payable on the importation of goods from outside the EU into the UK. If ABP had refused to accept potential liability to import VAT, it would not have been able to operate a customs warehouse and would not have been able to make taxable supplies of warehousing services to its customers.

20. It is thus ABP's simple case that the import VAT is attributable to its operation of a customs warehouse and that, although the customs value of the goods imported into the UK determines the amount of VAT for which a liability arises on importation, it nonetheless represents a charge to VAT which, in the ordinary course, is deductible as an input tax credit.

21. This, submitted Mr Cordara, is a matter of principle. His case was, in large part, based on an asserted overarching principle that "sticking VAT", that is to say VAT which has been incurred by a fully taxable trader but not recovered by him is offensive to the policy of VAT, and that the authorities have indicated that this is to be avoided, even if a literal reading of the Directive would suggest otherwise.

22. In support of this submission, Mr Cordara referred me to a number of well-known authorities on the deduction of input tax incurred on supplies to traders. Thus in *D A Rompelman and E A Rompelman-Deelen v Minister van Financiën* (Case C-268/83) [1985] CMLR 202, ECJ, the ability of fully taxable traders to recover VAT paid in the course of their economic activities was held by the Court of Justice to encompass VAT incurred on preparatory acts, such as the acquisition of assets; the preparatory acts themselves constituted economic activity. The principle that VAT should be neutral as regards the tax burden meant that the first investment expenditure incurred for the purpose of and with a view to commencing a business must be regarded as an economic activity.

23. There are limits to the application of formal requirements relating to the right to deduct. Those were explored, for example, in *Société Générale des Grandes Sources d'Eaux Minérales Françaises v Bundesamt für Finanzen* (Case C-361/96) [1998] STC 981, which concerned a claim for a refund of tax under EC Council Directive 79/1072 (the Eighth Directive) which had been refused on the ground that the claim had not been accompanied by the original invoice or import document but by a duplicate invoice. On a literal interpretation of Article 3(a) of the Directive, the submission of the original documents was a mandatory requirement. The Court held that Article 3(a) fell to be construed as a requirement in principle, but that member states could not be precluded, in exceptional circumstances, from accepting a claim where there was no doubt as to the basis of the claim and no risk of further applications for a refund, and the loss of the original invoice was not attributable to the taxpayer.

24. In the course of his opinion in *Grandes Sources d'Eaux*, the Advocate General (G Cosmas) referred, at [13], to *Rompelman* and to the essential element of the system of VAT which the right of deduction constitutes. There are limits both in relation to the adoption of new formal requirements and for the interpretation of the minimum requirements under the Community legislation. Those limits are intended to prevent the right of taxable persons to deduct input tax from being totally undermined. The Eighth Directive is founded on a balance between tax collection and prevention of evasion on the one hand and the principle of fiscal neutrality which provides the right of taxable persons to deduct input tax on the other. The principle of proportionality ensures that the balance is not tipped too far in one direction.

25. In *I/S Fini H v Skatteministeriet* (Case C-32/03) [2005] STC 903, the Court of Justice again placed emphasis on the intention of the deduction system to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. In contrast to *Rompelman*, the trader in question had ceased its restaurant business but remained liable for rent and related supplies in relation to the restaurant premises. The Court held, first, that the payments during the winding up of the business were to be regarded as forming part of its economic activity, and secondly, at [27], that the necessary direct and immediate link between a particular input transaction and a particular output transaction was established as between the restaurant business and the payment of rent and other charges until the normal expiry of the lease. At [28], the Court said:

> "Since Fini H entered into the lease in order to have the premises necessary for carrying on its restaurant business and given that the premises were actually used for that business, it must be conceded that the partnership's obligation to continue paying the rent and other charges after it had ceased that business was a direct consequence of the carrying on of that business."

26. In *Finanzamt Offenbach am Main-Land v Faxworld Vorgründungsgesellschaft Pater Hünninghausen und Wolfgang Klein GbR* ("*Faxworld*") (Case C-137/02) [2005] STC 1192, Faxworld was a civil partnership established under the German law on turnover tax with the sole object of setting up a limited company, AG. Faxworld incurred input tax on certain supplies to it prior to the establishment of AG. When AG was established, Faxworld ceased activities and transferred to AG all its assets at book value. Under German law in accordance with the Sixth Directive (77/388/EEC), that transfer of assets was not regarded as a supply of goods or services. It was nonetheless held by the Court of Justice that Faxworld was to be regarded as a taxable person carrying on economic activities and that Faxworld was entitled to take account of the taxable transactions of AG, as its successor, so as to be entitled to deduct the VAT paid on services procured for the purpose of AG's taxable activities.

27. In its judgment the Court of Justice referred, at [37], to the principle established by the case law, namely that "… the deduction scheme is meant to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT." The Court referred to its judgment in *Abbey*

National plc v Customs and Excise Commissioners (Case C-408/98) [2001] STC 297 in which deduction had been sought in respect of input tax incurred on services for the purpose of a transfer of a business which, as in *Faxworld*, had not constituted a taxable transaction. In that case the Court had rejected the argument that Abbey National should be entitled to rely on the transferee's taxable transactions in order to be entitled to deduct such input tax, but had found that the VAT was deductible because it formed part of the taxable person's overheads. In so holding, the Court had observed that otherwise an arbitrary distinction would be drawn between, on the one hand, expenditure incurred for the purpose of a business before it is actually operated (such as the preparatory acts in *Rompelman*) and that incurred during its operation and, on the other hand, the expenditure incurred in order to terminate its operation (*Abbey National*, at [35]).

28. In contrast to Abbey National, Faxworld did not intend to carry out any taxable transactions. Its sole object was to prepare the activities of AG. Nonetheless, in those circumstances, in order to ensure the neutrality of taxation, it was held that the VAT incurred by Faxworld on those preparatory activities related to the supplies of its successor company, AG, and was as such deductible.

29. The principles established in *Rompelman* and *Faxworld* were applied in *Kopalnia Odkrywkowa Polski Trawertyn P Granatowicz, M Wąsiewicz, spółka jawna v Dyrektor Izby Skarbowej w Poznaniu* (Case C-280/10) [2012] STC 1085. In that case VAT was incurred by individual partners who had contributed certain immoveable property to a partnership which was to use it for an economic activity. The Court of Justice held that the VAT incurred by the individual partners was to be deducted taking account of the investment transactions effected for the purpose of and with a view to the activity of the partnership. Accordingly, that VAT was deductible notwithstanding that the contribution of the immoveable property to the partnership was an exempt transaction. That intermediate transaction was in effect ignored in favour of the economic activity represented by the exploitation of the immoveable property by the partnership.

30. In *'Sveda' UAB v Valstybine mokesčių inspekcija prie Lietuvos Respublikos finansų ministerijos* (Case C-126/14) [2016] STC 447 a question arose as to the deductibility of input tax incurred on the acquisition of certain capital goods as part of the construction work on a Baltic mythology recreational and discovery path which was to be provided to the public free of charge. The Court of Justice found that, as the ultimate intention of the taxable person was to carry out an economic activity, users of the path being encouraged to buy goods and services subject to VAT, the immediate use of the capital goods free of charge did not affect the existence of a direct and immediate link between input and output transactions or with the taxable person's economic activities as a whole.

31. The Court in *Sveda* summarised the relevant principles in the following manner. First, at [16], it referred to the right of deduction, in that case in Article 168(a) of the PVD, as being an integral part of the VAT scheme which in principle may not be limited. It went on to describe the deduction system by reference to the principle of neutrality, at [17] – [18]:

> "17. The deduction system is intended to relieve the trader entirely of the burden of the VAT payable or paid in the course of all his economic activities. The common system of VAT consequently ensures neutrality of taxation of all economic activities, whatever their purpose or results, provided that they are themselves subject in principle to VAT (see, inter alia, judgment in *Aset Menidjmunt OOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto'—Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (Case C-118/11) [2012] STC 982, para 43 and the case law cited).
>
> 18. It follows from art 168 of the VAT Directive that, in so far as the taxable person, acting as such at the time when he acquires goods, uses the goods for the purposes of his taxed transactions, he is entitled to deduct the VAT paid or payable in respect of the goods (see, inter alia, judgment in *Klub OOD v Direktor na Direktsia 'Obzhalvane i upravlenie na izpalnenieto'—Varna pri Tsentralno upravlenie na Natsionalnata agentsia za prihodite* (Case C-153/11) [2012] STC 1129, para 36 and the case law cited)."

32. In relation to the question whether, in the particular case before it, the capital goods were being used by Sveda for the purposes of its taxed transactions, in accordance with Article 168, the Court said (at [27] – [28]):

> "27. According to settled case law, the existence of a direct and immediate link between a particular input transaction and a particular output transaction or transactions giving rise to entitlement to deduct is, in principle, necessary before the taxable person is entitled to deduct input VAT and in order to determine the extent of such entitlement. The right to deduct VAT charged on the acquisition of input goods or services presupposes that the expenditure incurred in acquiring them was a component of the cost of the output transactions that gave rise to the right to deduct (see, inter alia, judgment in *SKF*, para 57).
>
> 28. Nevertheless, as the Advocate General observed in points 33 and 34 of her opinion, the court has held that a taxable person also has a right to deduct even where there is no direct and immediate link between a particular input transaction and an output transaction or transactions giving rise to the right to deduct, where the expenditure incurred is part of his general costs and are, as such, components of the price of the goods or services which he supplies. Such expenditure does have a direct and immediate link with the taxable person's economic activity as a whole (see, to that effect, judgments in *Investrand BV v Staatssecretaris van Financiën* (Case C-435/05) [2008] STC 518, [2007] ECR I-1315, para 24, and *SKF*, para 58)."

33. Mr Cordara submitted that examination of the case law of the Court of Justice shows a trend of wide construction where it is necessary to avoid what he described as "cascading" in taxable businesses, by which I understand the elimination of "sticking VAT", in pursuit of fiscal neutrality. Absent exemption or private use, Mr Cordara argued, a way must be found to get the VAT lawfully borne by a fully taxable business, including on its overheads, back into the hands of the paying party, so that it is VAT neutral. He submitted that in the cases cited, the Court of Justice had rejected

technical objections by the member states, based on a literal reading of the pre-conditions for recovery in the Directive, in favour of a broad, policy-driven, approach. That literal approach, he submitted, was what HMRC was arguing for in this case.

34. Mr Cordara argued that the same trend could be identified in UK domestic cases. He referred to the emphasis placed in *St Helen's School Northwood Ltd v Revenue and Customs Commissioners* [2007] STC 633 on economic use, as distinct from mere physical use, of relevant assets in the context of determining a fair and reasonable attribution for partial exemption purposes. He argued by reference to cases such as *Customs and Excise Commissioners v Redrow Group plc* [1999] STC 161 and *Revenue and Customs Commissioners v Loyalty Management UK Ltd* ("*LMUK*") [2013] STC 784, in the House of Lords and Supreme Court respectively, and *British Airways Plc* (No 16446; 14 January 2000) in the VAT Tribunal that input tax on supplies of goods and services consumed by others can nonetheless be treated as deductible by the paying party if its business has obtained a tangible advantage out of incurring the input tax. Mr Cordara submitted that there was an obvious parallel with ABP's liability to import VAT: ABP had to incur such a liability as a necessary part of its taxable trade.

35. In my judgment, agreeing with the submissions of Mr Pleming for HMRC in this respect, none of this case law, whether of the Court of Justice or domestic, provides support for Mr Cordara's argument in this case. It is not applying an over-literal approach to have regard to the clear requirement in Article 168 of the PVD that it is the goods and services giving rise to the liability to VAT which must be used for the purpose of the relevant economic activity and it is that which provides the necessary direct and immediate link between the input and output transactions. However widely that requirement has been construed by the Court of Justice or the UK courts, it has always been in the context of a link between those transactions.

36. Taking *LMUK* as an example, Mr Cordara sought to rely on the conclusion reached by the Supreme Court in that case as illustrating the proposition that there may be recovery of VAT in respect of goods to which the taxable person never acquires title. LMUK ran the Nectar points loyalty programme. It provided collectors of points with a contractual right to obtain goods and services from redeemers in exchange for points and made a taxable supply to sponsoring retailers (sponsors) in that respect. LMUK paid other retailers (redeemers) a service charge, in part for the provision by redeemers to collectors of goods and services on redemption of the points. The question, put very shortly, was whether the redeemers made a supply to the collectors, in which case LMUK would not be entitled to a deduction for input tax, or to LMUK, which would give rise to a deduction.

37. The Supreme Court held, by a majority, that LMUK was entitled to a deduction. Mr Cordara sought to rely on the finding of Lord Reed, at [79], that: "As a matter of economic reality, the payments [made by LMUK] to redeemers are an essential cost of its business" and were part of its business model. But Lord Reed did not reach his conclusion in favour of LMUK on the basis that the payment was a cost of the business. That would have been the case too if the payment had simply been a payment of third party consideration for the supply by the redeemers of the

redemption goods and services to the collectors (which would not have given a right to a deduction). A further step was required. The basis for the deduction was not the payment itself, but the fact that, as Lord Reed found at [81], consistently with the fundamental principles flowing through the case law of the Court of Justice, the payment was for a service provided by the redeemers to LMUK, which service was used by LMUK in the course or furtherance of its business.

38. In *LMUK*, therefore, there was established a link between the output supply made by LMUK to the sponsors and the input transactions, namely the services provided to LMUK, for consideration, by the redeemers. Mr Cordara's argument cannot be based on any such link. He sought instead to establish a link between the VAT borne by ABP and ABP's own taxable business. I agree with Mr Pleming that this confuses the liability to pay import VAT on the goods with the costs of the goods themselves. The link which Mr Cordara seeks to establish has no basis in EU law. The reference, for example, to "expenditure incurred" in [28] of the Court's judgment in *Sveda* is not a reference to any expenditure, such as in respect of a liability to import VAT, but to expenditure on the particular input transaction, that is to say the goods or services supplied.

39. Mr Cordara's argument placed emphasis on the difference between input tax which is incurred on a taxable supply of goods or services and import VAT which is payable directly by reason of the importation of goods in respect of which fiscal obligations have been assumed, in ABP's case as warehousekeeper. That distinction is of course recognised in Articles 70 and 71 of the PVD. But where the right to deduct input tax is concerned, there is no such distinction; Article 168 is quite plain that in every case a deduction is available only in so far as goods and services are used for the purpose of an applicable economic activity and not simply to the extent any import VAT is incurred absent the use of the related goods. It is not the distinction between "supply VAT" and import VAT that matters; it is the common factor of the VAT being related to goods and the requirement in every case that the goods are used for the purposes of taxed transactions of the taxable person.

40. I accept therefore Mr Pleming's submission that there is no absolute entitlement to deduct import VAT simply on the basis that the payment of such VAT arises from, or is connected with, the economic activity carried on by the person liable to the customs debt. It is not the payment of the VAT which is material for this purpose, but the use of the goods or services by reference to which the liability to VAT has been incurred. Even if, as Mr Cordara submitted, a VAT cost arising in respect of such import VAT as ABP may incur as a consequence of its joint and several liability is part on ABP's business model as an assumed cost of it retaining its warehousekeeper authorisation, that is not sufficient to give ABP a right to deduction of that import VAT.

41. The Court of Justice has examined the question of deductibility of such import VAT in the context of a carrier of goods in *Skatteministeriet v DSV Road A/S* (Case C-187/14) [2015] All ER (D) 253 (Jun). In that case DSV was a Danish transport and logistics undertaking. It initiated, as principal, two external Community transit procedures for the transport of packages of electronic goods. The packages were not

accepted by the consignee and DSV brought them back to the free port of Copenhagen without there having been presented to the free port customs offices and without the transit documents having been cancelled.

42. The Danish authorities considered that DSV was liable for both customs duties and import VAT. The Østre Landsret referred a number of questions to the Court of Justice, the fourth of which relevantly concerned the deduction of import VAT:

> "Can the first Member State into which the goods were imported refuse the taxable person designated by the Member State a deduction of the import VAT pursuant to Article 168(e) of the VAT Directive, where the import VAT is charged to a carrier of the goods in question who is not the importer and owner of the goods but has simply transported and been in charge of the customs dispatch of the consignment as part of its freight forwarding operations, which are subject to VAT?"

43. In responding to this question, the Court drew attention to the requirement that it was the goods that had been imported that must be used for the purposes of the relevant economic activities. The Court said, at [49] – [50]:

> "49. In that regard, it must be noted that, under the wording of Article 168(e) of the VAT Directive, a right to deduct exists only in so far as the goods imported are used for the purposes of the taxed transactions of a taxable person. In accordance with the settled case-law of the Court concerning the right to deduct VAT on the acquisition of goods or services, that condition is satisfied only where the cost of the input services is incorporated either in the cost of particular output transactions or in the cost of goods or services supplied by the taxable person as part of his economic activities (see judgments in *SKF*, C-29/08, EU:C:2009:665, paragraph 60, and *Eon Aset Menidjmunt*, C-118/11, EU:C:2012:97, paragraph 48).
>
> 50. Since the value of the goods transported does not form part of the costs making up the prices invoiced by a transporter whose activity is limited to transporting those goods for consideration, the conditions for application of Article 168(e) of the VAT Directive are not satisfied in the present case."

44. The Court accordingly ruled in this respect that:

> "Article 168(e) of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax must be interpreted as not precluding national legislation which excludes the deduction of VAT on import which the carrier, who is neither the importer nor the owner of the goods in question and has merely carried out the transport and customs formalities as part of its activity as a transporter of freight subject to VAT, is required to pay."

45. I accept that *DSV* was concerned with a carrier of goods and not with a warehousekeeper. But the analogy is nonetheless a close one. In both cases, leaving aside for the moment ABP's argument on the effect of its contractual lien over the goods, the liability to import VAT was imposed on a person who had not acquired the goods for the purpose of its own economic activity. There was no direct and

immediate link between the input transaction and any output transaction or, as an overhead cost, with the overall economic activity of the payer. The value of the goods, as opposed to the import VAT itself, was not a costs component, actual or deemed, of the taxable supplies made by the payer. Although the case concerned the compatibility of an aspect of Danish law with the Directive, the judgment of the Court turned on EU law, with specific regard to Article 168(e), and not, as Mr Cordara sought to argue, the terms of the Danish legislation. *DSV* is an application of the principle that mere payment of VAT is not enough to found a right to deduction; the VAT must be paid in respect of goods and services used for the purpose of the economic activity.

46. In the joined cases of *Eurogate Distribution GmbH v Hauptzollamt Hamburg-Stadt* (C-226/14) and *DHL Hub Leipzig GmbH v Hauptzollamt Braunschweig* (C-228/14) (ECLI:EU:C:2016:405), DHL was, like DSV, a carrier. Eurogate, on the other hand, was a warehousekeeper. Eurogate had entered goods in transit from its clients into its customs warehouse before grouping them together for despatch to various Eastern European countries. A customs check revealed that certain customs warehouse removals had been recorded late in the stock records laid down by the customs regulations. A customs debt was accordingly incurred (see the earlier case of *Eurogate Distribution GmbH v Hauptzollamt Hamburg-Stadt* (C-28/11) [2012] All ER (D) 159 (Sep)). The question then arose whether Eurogate was liable to import VAT in respect of the same matter.

47. That issue resolved itself into three questions before the Court of Justice. The first (Question 1) was whether it was contrary to the provisions of the Sixth directive to impose import VAT in the circumstances where the goods had been re-exported as non-Community goods and a customs debt had been incurred only on the basis of non-fulfilment of obligations. The second and third questions, which arose only if the answer to question 1 was in the negative, were whether member states had a discretion in such cases to levy import VAT (Question 2) and whether a customs warehousekeeper, with no right of disposal of the goods, was liable for import VAT in the circumstances at issue, even though the goods were not used for the purpose of his taxable transactions (Question 3).

48. At the hearing I was provided with an unofficial translation (no official English translation was then available, although one has now been published) of the opinion of the Advocate General in the case (M Campos Sànchez-Bordona). In that opinion, discussing Question 3, the Advocate General referred to DSV, and reasoned that as there was no objection to a carrier being liable to import VAT and being unable to recover it, so too a warehousekeeper could be made liable to import VAT even though there would be no entitlement to deduct it (at [113] – [115]).

49. No distinction was drawn between a carrier and a warehousekeeper for this purpose. I do not, however, consider that the Advocate General's opinion in *Eurogate* adds anything to the general principle applied in *DSV*. The question in *Eurogate* concerned liability to import VAT on the assumption that it was not deductible; that is a different question from whether the import VAT is deductible in the first place.

50. Nonetheless, because it was possible that the Court of Justice might make some helpful observations on *DSV* in the context of a warehousekeeper, I deferred the finalisation of this decision pending representations from the parties following the issue of the Court's judgment. That judgment was issued on 2 June 2016, and I am grateful to the parties for considering it, even though in the event it added nothing. The Court decided, in relation to Question 1, that in the circumstances import VAT was not due, and that rendered it unnecessary for the Court to address Question 3.

51. My conclusion is that it is clear, as a matter of EU law, that ABP does not in principle have a right to deduct the import VAT for which, for present purposes, it is assumed to be liable in respect of the missing timber. That is apparent from the proper construction of Article 168 of the PVD, and the case law of the Court of Justice to which I have referred. Although Mr Cordara urged me, were I to be minded to find against ABP in this respect, to refer the question myself to the Court of Justice, in my view there is no need to do so. The position under EU law is, in my judgment, clear, and I can with confidence determine the question without a reference.

52. ABP cannot succeed by reference to fiscal neutrality as a stand-alone principle. As the case law of the Court of Justice makes clear, the basis for the input tax deduction and Article 168 is that very principle. The Court of Justice has construed Article 168 accordingly. The principle of fiscal neutrality, both as to its effects and limitations, is embodied in the construction of Article 168. There is no breach either of that principle or, as was alluded to by ABP, the principle of legal certainty. The position is clear as a matter of law; no uncertainty arises.

53. Nor can a different result be obtained by reference to the domestic legislation. Section 24(1) VATA clearly expresses the same requirement in relation to VAT paid on the importation of goods from outside the EU as appears in Article 168, namely that such VAT – alongside VAT on supplies or acquisition from another member state – is "input tax" and thus allowable under s 25 and corresponding regulations only to the extent that the goods are used or to be used for the purpose of any business carried on or to be carried on by him. ABP does not satisfy that requirement, and so the import duty cannot qualify under UK law as input tax and cannot be allowable.

ABP's lien

54. This analysis is unaffected by the contractual lien to which ABP was entitled under its agreement with Hawkes.

55. It is an agreed fact that ABP had a contractual lien against Hawkes which provided security for payment of charges outstanding to ABP and other liabilities arising to ABP out of its commercial arrangements with Hawkes. That included liabilities under an indemnity provided by Hawkes to ABP in respect of any liability to customs duty and VAT that might arise as a result of the agreement and the use of the customs warehouse.

56. It was argued for ABP that it had an interest in the timber by virtue of the lien, such that those goods were used in the course or furtherance of ABP's business. I do

not agree. Whatever interest ABP might have had in the timber by virtue of the lien, it is not the case that the timber was used by ABP for its own economic activity. That activity comprised the services provided by ABP which enabled the timber to be stored in the warehouse. The timber was the object of those services; it was not used in the provision of them, or for any other economic activity of ABP.

57. There is no evidence that ABP exercised its lien over the missing timber in order to acquire a power of sale in that respect. It is an agreed fact that the lien was sought to be exercised over all the goods and plant in ABP's possession on the date, 3 October 2011, that Hawkes went into administration. Although the date on which the timber was unlawfully removed is unclear, ABP cannot show that the lien was ever exercised in relation to that timber. It was exercised in relation to other goods purported to have been sold by the Hawkes' administrators to a third party, but there is nothing to suggest that the exercise of the lien was at a time when the missing timber was present in the warehouse.

58. In any event, I conclude that the lien does not alter the position of ABP as not using the timber for the purpose of its economic activity, and so as not being entitled to deduct the import VAT by virtue of Article 168 of the PVD.

Whether ABP was the "importer"

59. My conclusion that ABP is not entitled, either by virtue of Article 168 of the PVD or its domestic counterpart in s 24(1) VATA, to deduct the import VAT means that it is not necessary to resolve the question whether ABP is an "importer" for VAT purposes. The issue appears to have arisen for two reasons. First, in the course of correspondence between the parties prior to ABP's appeals to the tribunal a number of statements were made by HMRC with respect to requirements they regarded as having to be satisfied in order that a deduction for import VAT might be made. Thus in a letter from HMRC to ABP dated 7 February 2012:

> "In respect of the recoverability of import VAT by any party other than the importer … in order for an input tax claim to be valid, the claim must be made by the person to whom the supply was made. This is a fundamental principle and overrides the question of who may have paid for the supply in question or who may have possession of the relevant invoice or other evidence.
>
> The only person eligible to treat import VAT as input tax is the person who has imported the goods to be used in the course or furtherance of his business. It is my understanding that in this case, ABP are not the importer and therefore have no entitlement to Import VAT deduction."

The review letter from HMRC dated 1 May 2013, which addressed the question of the deductibility of import VAT contained the following:

> "Finally, ABP is not the importer, consignee or owner of the goods for VAT purposes. The 'proper document' referred to in the VAT regulations 1995, reg 29(2)(c), Form C79, an authenticated copy of the import entry (Form C88) or a customs authenticated invoice, would not

> show them as such. The C18 is not a 'proper document'; nor can it give a trader the status of an importer, consignee or owner of the goods for VAT purposes."

60. Secondly, as I have described, the ruling given by the Court of Justice in *DSV*, that deduction of import VAT could be excluded in relation to a carrier, was qualified in the sense that such a carrier was said to be "neither the importer nor the owner of the goods in question."

61. Turning first to the statements made in the HMRC correspondence, those cannot be taken as describing the test which has to be met for the purpose of Article 168(e). The question is not whether ABP is the importer, but whether ABP has used the relevant goods for the purpose of its economic activity. Once that question has been answered, the status of ABP can make no difference to the outcome.

62. Nor are procedural questions in point. Once the question of deductibility has been determined against a claimant as a matter of principle, no additional question of process can arise. Although it is the case, as illustrated by *Grandes Sources d'Eaux*, that formal, or procedural, requirements must not undermine the fundamental right to deduction of input tax, before any such question can arise it is first necessary for that fundamental right to be established in principle. Different issues would fall to be considered if a claim for deduction that should be allowed in principle was denied for lack of compliance with procedural requirements. Those issues do not arise in this case.

63. Nor can the reference by the Court in *DSV* to the fact that DSV was a carrier and not an importer (or owner) affect the position. The ruling of the Court merely reflected the form in which the question was referred by the referring court in that case. Deductibility of input tax, including import VAT, does not depend on the particular status or identity of the taxable person, but on satisfying the requirement that the goods or services on which the liability to VAT has been incurred have been used for the purposes of the taxed transactions of the taxable person, as set out in Article 168 as construed by the Court in the case law, as discussed above. In *DSV*, the Court's decision was based, not on the particular description of the carrier, but on the fact, as described by the Court at [50], that the carrier's activity was limited to transporting the goods, and thus could not satisfy the requirement that the goods were used for the purposes of its taxed transactions. That, I have decided, is the position of ABP, however ABP might be described.

64. VAT on the importation of goods from outside the EU is charged as if it were a duty of customs (VATA, s 1(4)). Section 15(2)(b) VATA provides that for the purposes of the VATA it is the person who is liable to discharge the customs debt who is to be treated as importing the goods, in other words as the "importer". However, that deeming provision extends only to the VATA; it does not affect the "customs enactments", including CEMA, and the definition of "importer" in s 1(1) CEMA (VATA, s 15(3)). Those customs enactments in turn apply, without regard to s 15(2)(b), in relation to any VAT chargeable on the importation of goods from places outside the EU as they apply to Community customs duties.

65. ABP submits that it is an importer. It relies on both s 15(2)(b) VATA, on the accepted basis for present purposes that it is liable to discharge the customs debt, and also on the definition of "importer" in s 1(1) CEMA, on the basis, as it argues, it had possession of the goods within its warehouse, and it was beneficially interested in the goods by virtue of its lien.

66. HMRC's case is that ABP is not the importer. They say that the CEMA definition of "importer" makes it quite clear that it was not intended to include the warehousekeeper merely on the basis that (as will always be the case as a matter of fact) the stored goods are in the custody of the warehousekeeper. The regime, say HMRC, is based on the existence of warehouses as "places of security for the deposit, keeping and securing of imported goods (CEMA, s 92(2), in the form in which it applies for VAT purposes). It would, HMRC assert, make a nonsense of the regime if as soon as goods are deposited into a warehouse, the warehousekeeper was instantly translated into the importer merely because the goods were kept by him, or merely because, on a contractual basis (or implied by common law in the case of a common carrier or a wharfinger) the warehousekeeper had a lien which it could exercise.

67. The interraction of these provisions is not without its difficulties. It may be necessary, in a given case, to determine whether a person is, or is not, to be treated as an importer for particular VAT purposes. It is not, however, necessary to do so in this case. Whether or not ABP is, or could be treated as, an "importer" cannot affect the conclusion that ABP did not use the timber in question for the purpose of its economic activity and could not, therefore, have a right to a deduction for import VAT for which it is liable. Even if ABP were right, and that it was to be regarded, under VATA or CEMA, as the importer or as the person importing the goods for VAT purposes, that would not deem it to have used the goods for the purpose of its economic activity so as to be entitled to a deduction for the import VAT.

Other arguments raised by ABP

68. ABP made a number of further submissions which I can deal with quite shortly.

69. The first is that, as a person making only taxable supplies, ABP should be entitled to recover all VAT charged to it in the course or furtherance of its business. It should not be the outcome, as ABP submits, that ABP is treated as if it is making exempt supplies or is blocked from recovering input tax. The short answer is that there is no such principle of VAT recovery as submitted by ABP. The principles are those contained in Article 168 of the PVD and the case law of the Court of Justice. According to those principles, as I have found, ABP is not entitled to a deduction for the import VAT. That is not to treat ABP as having made exempt supplies. It is simply that ABP has failed to satisfy the condition for use of the relevant goods in its economic activities.

70. The second argument is that ABP has been discriminated against by being refused recovery of the import VAT. In argument, Mr Cordara referred me to the extra statutory concession in para 3.13 of *VAT Notice 48: extra statutory concessions*, which is as follows:

> "**3.13 VAT: repayment of import VAT to shipping agents and freight forwarders**
>
> Import VAT may be paid directly to shipping agents and freight forwarders where importers go into liquidation, or where an administrator or administrative receiver has been appointed who certifies that, in his or her opinion, ordinary unsecured creditors would receive nothing in liquidation, leaving the agents unable to recover VAT paid on their behalf. The importers must have gone into a formal state of insolvency or receivership within 6 months of the date of lodgement of the Customs entry, and the goods must have remained under the agents control throughout their stay in the UK and have been re-exported unused from the European Community."

71. The argument for ABP in this respect is that this concession recognises that HMRC should not, in circumstances where the importer has gone into liquidation, retain a windfall in the form of import VAT which has been paid by the tax representatives or agents. HMRC should be left in a neutral position. ABP argues that it is in an analogous position, given the insolvency of Hawkes.

72. The argument for ABP is not that a concession should be applied in its case. Such an argument would be outside the jurisdiction of this tribunal. But the application of a concession cannot in any event support an argument that ABP should be entitled to an input tax credit as of right; the concession is required, in the circumstances in which it applies, only because there is no right of recovery or deduction under the VAT law.

73. ABP's third argument is that the outcome of ABP not being entitled to a deduction, an outcome described by ABP as perverse, would be that a secondary debtor in respect of the import VAT (that is, ABP) would be subject to a greater net liability than the principal debtor (Hawkes) would have had if Hawkes had paid the import VAT (it being assumed that Hawkes would have been entitled to a corresponding input tax deduction).

74. It is argued that the purpose and intention of joint and several liability is so as to protect the revenue in the event of a breach of the terms of the customs authorisation. In the event of a breach, the only loss in revenue is that in respect of customs duties that would have been payable by Hawkes. The overall VAT position would have been neutral.

75. Two points are made in support of this submission. Mr Cordara referred me to the decision of the VAT Tribunal in *FFG Hillebrand* (No C00242; 20 September 2007). The case concerned a question of liability to customs duty and import VAT. FFGH was the agent for two associated companies, one in the US and the other in the UK. The US company shipped wine to the UK company. FFGH made the customs declaration. Subsequently, because the wine had become contaminated, it was destroyed. However, certain warehousing regulations were not complied with and HMRC assessed FFGH to customs duty and import VAT.

76. The tribunal dismissed FFGH's appeal. However, at [74] the tribunal said:

"The consequence of that failure [to ensure that the arrangements for destruction of the wine were dealt with in accordance with the customs supervision regime] is that FFGH has incurred a customs debt on importation, and is thus liable to customs duty and import VAT in the amounts assessed by Customs. In his review letter, Mr Palmer referred to the VAT as being "reclaimable"; we assume that FFGH is a fully taxable person for VAT purposes, and that this amount of VAT has been treated as input tax and thus fully offset. Significantly, Customs have confirmed that it is not their intention to seek excise duty in respect of the wine, so the only economic effect of the events described above is that FFGH has suffered customs duty of £1,975.65."

77. Mr Cordara argued that this supported the view that it would be quite reasonable for a taxpayer to assume that the net liability arising to a fully taxable person in the event of a breach of Article 101 of the Community Customs Code would be the customs duties, but not the VAT. It is submitted that it cannot be correct that ABP is subject to a higher financial liability than the principal debtor, that the result otherwise would be a windfall for HMRC and a penalty rather than an indemnity.

78. Further support was sought from a particular statutory provision addressing a different issue, that of VAT unpaid in supply chain, where a taxable person to whom a supply has been made knew or had reasonable grounds to suspect that some or all of the VAT payable in respect of that supply, or on any previous or subsequent supply of those goods, would go unpaid. In those circumstances, s 77A VATA enables HMRC to serve a notice imposing joint and several liability for the unpaid VAT on the taxable person and on the person primarily liable for the VAT. The amount payable is the lesser of the amount of the unpaid VAT and the amount shown as due (in other words the net amount after deduction of input tax) on the supplier's return, plus any assessed VAT.

79. Neither of these arguments can assist ABP. The basis for the view taken by the HMRC officer in *FFG Hillebrand* is unclear. It cannot, as I have described, be regarded as representing the true position in law. ABP cannot rely on it either as a matter of law, or by reference to any claimed legitimate expectation. This tribunal has no jurisdiction in that respect, but in any event there can be no legitimate expectation based on statements made by an HMRC officer in the particular context of an individual tribunal case. Nor can a statutory provision imposing joint and several liability in different circumstances offer any support to an argument that the liability of ABP should be net of any input tax which, it is said, would have been deductible by Hawkes. Absent any basis for ABP itself being entitled, as a matter of law, to a deduction for the import VAT, which I have found not to be the case, there is no means by which ABP's liability can be reduced by any netting process.

Decision

80. For the reasons I have given, my conclusion in relation to the preliminary issue is that ABP is not entitled in principle to an input tax credit in respect of import VAT paid or payable to HMRC under s 24(1) VATA, in the circumstances limited to those described in the Statement of Agreed Facts and Assumptions, where:

(a) a customs debt has been incurred under Article 203(1) of the Community Customs Code; and

(b) ABP has incurred joint and several liability for that debt, by virtue of Article 203(3) of the Community Customs Code, when read with article 101(a).

Application for permission to appeal

81. This document contains full findings of fact and reasons for this decision on the preliminary issue. 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.

ROGER BERNER
TRIBUNAL JUDGE

RELEASE DATE: 12 JULY 2016