[2017] UKFTT 0484 (TC)

TC05937

Appeal number: TC/2015/2089

EXCISE DUTY – intra-EU movement of duty suspended alcohol goods – transporter providing movement guarantee – Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593) – whether movements of goods discharged – whether irregularity occurred outside UK - discretion of HMRC to accept alternative evidence of discharge – Excise Notice 197 – whether discretion exercised reasonably – whether assessments out of time

FIRST-TIER TRIBUNAL
TAX CHAMBER

LOGFRET (UK) LIMITED **Appellant**

- and -

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

TRIBUNAL: Judge Peter Kempster
Mr Terence Bayliss

Sitting in public at Centre City Tower, Birmingham on 5-7 July 2016

Ms Charlotte Brown of counsel, instructed by Freeths LLP, for the Appellant

Ms Joanna Vicary of counsel, instructed by the General Counsel and Solicitor to HM Revenue & Customs, for the Respondents

DECISION

1. The Appellant ("Logfret") appeals against two excise duty assessments issued by the Respondents ("HMRC"):

(1) An assessment issued on 6 October 2014 for £135,558 excise duty on three movements of alcoholic goods ("Movement One", "Movement Two" and "Movement Three"), which was upheld on formal internal review on 28 January 2015 ("the First Assessment").

(2) An assessment issued on 9 February 2015 for £40,749 excise duty on a single movement of alcoholic goods ("Movement Four"), which was upheld on formal internal review on 8 May 2015 ("the Second Assessment").

2. The four movements covered by the two disputed assessments are detailed in the table in the Appendix to this decision notice.

Intra-EU movement of duty-suspended excise goods

3. Alcoholic goods may be transported between bonded warehouses in the EU with duty suspension, provided certain conditions are satisfied. The regime is stated in EU Directive 2008/118/EEC ("the Directive") and transposed into UK legislation by the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593) ("the Regulations").

4. The movements of the goods must be recorded on the Excise Movement and Control System ("EMCS") – an EU-wide electronic system. EMCS is not publicly available; authorised warehouse keepers, registered consignors and registered consignees must register and enrol to use EMCS, and only those persons (and the fiscal authorities) can access EMCS.

5. The consignor of the goods (ie the despatching warehouse) records the details of a movement on EMCS: consignor, consignee (ie the destination warehouse), goods details, transporter, transport vehicle registration, expected journey time, and guarantor. The role of the guarantor is discussed below. Upon entry of the above details, EMCS generates an Electronic Administrative Document ("EAD") and allocates a unique Administrative Reference Code ("ARC") for the movement. The EAD is sent electronically to the consignee, so they are aware the goods are being despatched to them.

6. If EMCS is not available – eg because of an IT problem – then there is an alternative procedure whereby the consignor prepares a "Fallback Accompanying Document" to cover the goods being despatched, and then enters the movement on EMCS as soon as the system is available.

7. Per art 21 and reg 41, duty suspended movements must take place under cover of an EAD, and the EAD (or another commercial document on which the ARC is clearly stated) must be provided to the transporter, and must be made available for presentation when requested by the fiscal authorities during the course of the movement. Per art 21 and reg 42, the consignor may during the movement use EMCS to amend the destination shown on the EAD, subject to certain requirements. Where there is a change of destination entered on EMCS, the EAD is sent electronically to the new receiving warehouse.

8. Article 18 and reg 39 require the provision of a guarantee of "the risks inherent in the movement" by one of the consignor, the transporter, the owner, or the consignee of the goods.

9. Per art 20 of the Directive, the movement ends when the consignee has taken delivery of the goods. Per art 28 and reg 49 a report of receipt shall constitute proof that the movement of the goods has ended, and when HMRC receive a report of receipt they must send a copy to the consignor via EMCS.

10. Article 10 concerns irregularities and art 10(4) and reg 81 govern the situation where no report of receipt is provided.

Evidence

11. We had a trial bundle consisting of several binders of documents. We took oral evidence from the following witnesses:

(1) Mr Andrew Cousins, the HMRC officer who issued the First Assessment.

(2) Mr Simon Huntley, Logfret's Airfreight Development Manager since 2009.

(3) Mr Steven Simonette, a customs consultant with SKS (GB) Limited who prepared a report on Movements One to Three.

12. We also had witness statements from the following witnesses, who did not give oral evidence:

(1) A statement dated 11 March 2016 of Mrs Kim Howard, the HMRC officer who issued the Second Assessment. At the commencement of the hearing Ms Vicary stated that Mrs Howard would not be attending the hearing, but that Mr Cousins should be in a position to answer any questions raised on Mrs Howard's evidence. Ms Brown objected that Mrs Howard's non-attendance had not been communicated previously, and her client reserved its position concerning any matter that could not be adequately addressed by Mr Cousins.

(2) A statement dated 11 March 2016 of Mr Tom Webb, managing director of Logfret.

Mr Cousins's evidence

13. Mr Cousins confirmed and adopted two witness statements dated 11 March 2016 and 24 June 2016.

14. On 9 May 2014 Mr Cousins conducted a monitoring inspection at Medway Bond & Storage Co Ltd ("Medway") in Rochester. Medway had a registered warehouse approval under Customs & Excise Management Act 1979. The day prior to the visit he printed from EMCS a report of undischarged movements of duty suspended goods despatched by Medway since 1 January 2010. The report showed 139 undischarged movements, including 19 that had not been receipted. These included three movements for which Logfret had provided the movement guarantee: Movement One, Movement Two, and Movement Three,

15. A warehouse keeper is required to make to HMRC regular returns on Form W1, which form includes a statement of any duty suspended movements that have been outstanding for more than two months. Medway had not notified any undischarged movements since 2009.

16. At the 9 May meeting and a further visit on 16 May Mr Cousins (together with a colleague) discussed matters with Mr Bramley, a director of Medway. Mr Bramley confirmed he was aware of the W1 procedures but claimed he had only became aware in the last month that outstanding EADs had not been reported.

17. On 20 May 2014 Mr Cousins prepared Excise Mutual Assistance requests ("EMA") for each of the receiving warehouses. An EMA is a mutual assistance request to the fiscal authority in another member state for them to visit the reviving warehouse and respond to HMRC's request – in this case, to confirm that the goods had physically arrived at the stated destination.

18. On 23 May 2014 Mr Cousins was informed by a colleague that Care Distribution was under investigation by the French authorities. Mr Cousins asked that the EMA to the French authorities still be sent, as they may be in a position to respond.

19. On 3 June 2014 Mr Cousins wrote to Logfret detailing the three relevant movements and requesting suitable alternative evidence of receipt of goods, within one month, and providing a copy of the relevant parts of Notice 197. He explained that without suitable alternative evidence a notice of assessment would be issued to Logfret as movements guarantor.

20. On 9 June he spoke with Mr Huntley at Logfret and discussed what alternative evidence would be suitable. Mr Huntley said that Logfret would have stamped CMR documents to show that the goods had been received – the CMR is the standard form document for cross-border transport of cargo by road. Mr Cousins said that for intra-EU movements HMRC would also require a letter from the fiscal authority in the other member state to confirm the goods had arrived.

21. They spoke again on 27 June and emails were exchanged, and on 23 July 2014 Mr Cousins received the documentation. This included correspondence with Medway, CMRs, authority from Logfret allowing Medway to quote Logfret's movement guarantee, and subcontractor forms. Although Logfret was the transporter, it subcontracted the haulage to Insight Logistics Ltd and Masons Logistics Ltd. There were no letters from the foreign fiscal authorities to show that the goods had actually arrived.

22. On 5 August 2014 Mr Cousins received a reply from the Belgian authorities concerning Magellan Distribution which stated:

> "Concerning the former Belgian economic operator Magellan …, an investigation has been started in Belgium. The authorisation of Magellan was withdrawn in December 2011, nevertheless a number of (mainly outgoing) e-AD's were left in an open status. In order to investigate and resolve the situation, instructions have been given to the competent local excise services.
>
> The e-AD [Movement One] mentioned in your request is one of the limited amount of incoming e-AD's toward Magellan distribution and is part of the

> abovementioned investigation. However at this point, it is not yet possible to give any information about the reception of the goods.
>
> As soon as we receive feedback from our local control services involved, we will provide you the requested information."

23. On 15 September 2014 Mr Cousins (together with Mrs Howard) requested that colleagues visit Insight Logistics (one of the subcontracted hauliers).

24. On 6 October 2014, when no further evidence had been produced, Mr Cousins issued the First Assessment. He referred to previous correspondence and acknowledged the provision of copy commercial documentation, and said,

> "… you did not provide an official letter from the fiscal authorities in the consignee's Member State confirming that the goods covered by the relevant eAD (with ARC quoted) have been received by the consignee. Without the letter from the fiscal authorities confirming receipt of the goods, I am unable to accept that the goods arrived at their destination.
>
> …
>
> … where you provide the movement guarantee it covers the whole movement from the despatching bond until the goods arrive at their final destination. It does not matter how many changes of destination there are in the movement, your movement guarantee covers the whole movement."

He outlined the legal position and stated the taxpayer's appeal and review rights.

25. Logfret and its advisers contacted Mr Cousins and he agreed an extension of time to the appeal period, to 16 December 2014.

26. On 20 November 2014 the Belgian authorities made a further reply to the EMA stating:

> "Awaiting responses of other services, I would like to inform your services, briefly about the known facts thanks to our control services.
>
> It all started in July 2013 with an analysis in EMCS of outstanding e-AD's in an open status. Magellan Distribution was one of the 'giants' within this analysis with 1797 outgoing e-AD's and 2 incoming e-AD's (one of them is [Movement One]), all in an open status. A plan was elaborated in view of closing all these movements.
>
> Concerning Magellan, we have sent a note with instructions to our competent local office in March 2014. The answer to this note contained, among other things, the following information:
>
> - Magellan has changed their headquarters at the end of 2011 without informing our Customs Administration;
> - The representatives of Magellan Distribution were situated in France;

- Bankruptcy was declared in July 2012 while the debts to the Belgian Customs Administration were over € 3 000 000 euros, the guarantee only covers for € 63 000;

- There were no invoices found linked to the e-AD's;

- Abuse of the emergency procedure has been reported;

- There are declarations of representatives of MAGELLAN in which they claim only to have received, in some cases stocked and then again sent the goods;

- E-AD's would have been distributed on parkings

All these findings were reported to our legal services. I have tried to contact them in several ways in order to receive information regarding your request. Unfortunately, up until now, I don't have any information about the consequences of the findings. I hope to be able to inform you soon."

27. On 17 December 2014 Logfret's solicitors wrote a detailed letter setting out the company's position on the three movements covered by the First Assessment. It was agreed that should be taken as a request for a formal review. On 28 January 2015 that review upheld the First Assessment.

28. On 4 February 2015 Mr Cousins was informed by a colleague that the French authorities had replied to the EMA stating that MT Manutention was under judicial proceedings and they were unable to answer queries.

29. On 7 March 2016 Mr Cousins received a further reply to the EMA from the Belgian authorities stating:

"*Report of investigation*

The company ESS KEY has been searched on February 19th 2014.

The managers have been heard on March 7th 2014 and a first report of questioning has been drawn up on June 3rd 2014 whose copy you have received. The company ESS KEY has carried out fictitious receipts and deliveries of products under excise duty suspension arrangement.

The authorisation "authorised warehouse keeper …" issued to the company ESS KEY has been suspended on July 7th 2004. This, authorisation "authorised warehouse keeper …" has afterwards been permanently withdrawn on August 13th 2014.

As regards especially the EAD documents [Movements Three & Four]:

1. The EMCS system mentions that the status of the aforementioned EAD documents is "diverted" (see enclosed document No 2), which means that the consignee has been changed and that therefore the company ESS KEY has not received the goods covered by these EAD documents. According to your information, the final consignee is Mr. Palmieri Giovanni.

2. The stamp affixed on the two consignment notes CMR established by MEDWAY BOND does not correspond to the stamp on the documents established by the company ESS KEY in Belgium. Indeed, the address stamped on the business records established by the managers of the company ESS KEY includes a typing error, that is to say "BLEGIUM" (see enclosed document No 3). However, the stamp on the two CMR documents does not include this error and clearly mentions "BELGIUM".

3. The two signatures do not seem to be these of the managers of the company ESS KEY KULWINDER SINGH and SATINDER SINGH. You will find in the enclosed document No.4 a copy of these signatures.

4. The consignee of the goods is not the company ESS KEY.

Conclusion

Although it concerns a fictitious movement, we do not have any element allowing to determine the true destination of the goods."

30. On 16 March 2016 Mr Cousins received a further reply to the EMA from the French authorities stating: "Care Distribution has been closed by a judicial decision. Any e-AD's has been cleared in our EMCS system." Mr Cousins's understanding was that this did not mean that the goods had arrived at Care Distribution; fiscal authorities could manually close EADs if, for example, a warehouse was closed down or where a vehicle was intercepted and goods seized.

31. The visit to Insight Logistics had taken place on 5 April 2016 (by Ms Gibson) and a director Mr Davis was interviewed. Mr Cousins was provided with copies of Ms Gibson's visit report, a note prepared by Mr Davis, and various documentation. Mr Cousins noted the following points:

(1) Insight's transport operator's licence had been revoked on 1 May 2013.

(2) Mr Davis's HGV licence was suspended in June 2013.

(3) The vehicle shown on the EAD for Movement Four was EU07OVP, which Mr Davis had told Ms Gibson was a vehicle that did not travel abroad.

(4) Certain apparent discrepancies in the trailer descriptions on some of the CMRs.

(5) Mr Davis appeared unclear whether his customer was Medway or Logfret.

Having considered the above, he remained of the view that there was insufficient evidence that the goods had been received by the consignee warehouses.

32. In response to questions:

(1) He had conducted visits to Medway before May 2014 but had not previously run an EMCS report.

(2) He accepted that, as Logfret did not have access to EMCS, his letter dated 3 June 2014 would have been its first indication of any problem. Thus reg 81(4) was

relevant. Mr Huntley had provided the company's documentation within the extended deadline.

(3) He accepted that Logfret was unaware of the changes of destination input on EMCS by Medway. HMRC did not suggest that Logfret was aware of the forged Ess Key stamp, or the suspicion that some signatures were forged.

(4) Logfret had provided its movement guarantee for all three movements covered by the First Assessment. The guarantee covered all legs of the journey making up the movement. It was not restricted by any agreement made by Logfret with, for example, Medway; that was a commercial matter between those companies but did not restrict the guarantee.

(5) Notice 197 set out the documents HMRC would accept if a receipted discharge is not available.

(6) There did appear to have been a problem with accessing the Belgian EMCS at the relevant time. However, Medway had entered the movements and so they would have been visible once the system was running again. Even if the movement could not be receipted immediately, there was no reason why this could not be done later, once EMCS was up again. In fact that was never done for any of Movements One to Three.

(7) He confirmed that he saw and considered the signed CMRs provided on all of Movements One to Three. At the time of issuing the First Assessment he was unaware of the concerns of the foreign fiscal authorities. Information he had received from the foreign fiscal authorities after issuing the First Assessment had caused him to doubt some of the stamps on the CMRs.

(8) He accepted that Medway had attempted to contact the receiving warehouses but not all emails had been answered, and the movements remained unreceipted. Medway (not Logfret) had contacted the consignees. This was not onerous; Logfret could have obtained the consignee details from Medway.

(9) In relation to evidence that the price for the goods in Movement Three had been paid by Fleximo to Bramley Ferry Supplies, and then on to Bramley's supplier (Superior Import Export Limited) – There was no specification of which invoices and which movements were being paid; further, in the event of a concerted plan of home market evasion there would not be a complaint about nonpayment for the goods. This did not constitute evidence that the goods had been received.

(10) The reason why the First Assessment was issued was because Logfret had failed to provide the necessary letters from the foreign fiscal authorities. He considered the bullet points at 12.10 of Notice 197 were cumulative, not alternatives; in the current case the first two were the relevant ones. He accepted that the CMR was a commercial document accompanying the goods for the purposes of the first bullet point. He considered that for intra-EU movements a letter from the foreign fiscal authority was required.

(11) He would also have accepted evidence that the goods in the movement had been entered into the consignee's duty-suspended stock management records. This was an

electronic system maintained by the consignee; the warehouse would likely contain goods belonging to a number of different owners; so it was essential that the warehouse keeper had a record for each item as to whose account they were held; the information would include a batch rotation number that was unique for the type of goods. The batch rotation number was also on the commercial documentation (eg the delivery notes) and so would provide evidence that those particular goods had been received into that warehouse.

(12) He did not accept that Logfret could not have obtained letters from the foreign fiscal authorities. Notice 197 gives two telephone numbers to contact if a trader has concerns over undischarged movements: a general advice line and the EMCS helpdesk. Mr Cousins had asked his colleagues on the EMCS helpdesk what advice they would give to a person reporting problems receipting an ARC and how to contact a foreign fiscal authority. Their first advice would be to keep trying to obtain a report of receipt from the consignee. Secondly, that the helpdesk could generate their own EMA to the foreign fiscal authority. Third, the helpdesk has details of the excise office of each EU member state (including fax and emails details), which in any event are available on the EU Commission tax website.

(13) He accepted that it took HMRC 18 months to get a reply from the Belgian fiscal authorities and 24 months to get a reply from the French fiscal authorities on inter-fisc EMAs. He accepted that it could be difficult for Logfret to get a response within one month. However, he would have expected Logfret to have made some attempt to contact the fiscal authorities. The contact details were available on the website. If more than one month had been required to get a response then extra time would have been considered; in fact there had been no request at all. If a request had been made and the reply received only after the assessment was issued then the assessment would have been amended accordingly – as it would have had the responses to the EMAs revealed that goods had been received (that situation had occurred on other taxpayer enquiries).

(14) He accepted that the EMA response in August 2014 indicated that the Belgian fiscal authorities were at that time already investigating Magellan and were aware of the First Movement. He received the information about Magellan from the Belgian authorities after the formal review of his decision; if the authorities had confirmed receipt of the goods then he would have reconsidered the First Assessment.

Mrs Howard's evidence

33. In relation to an enquiry unconnected with the current proceedings Mrs Howard had made an EMA request of the Italian authorities in respect of a company DAB Di Aruzzoli Bruno. In the reply she received on 19 March 2014 there was mention of Movement Four:

> "On 29th November 2013 the bound warehouse D.A.B. di Arruzzoli Bruno was checked and found empty of goods, no documents were found and on the warehouse stock report was not registered any movement of goods.
>
> D.A.B. di Arruzzoli Bruno has never paid the excise duty.

> Actually we are investigating on such kind of fraud involving DAB di ArruzzoIi Bruno and more Italian and others European companies. During our investigation we found out that some people, involved in the criminal organization, is living in UK or anyway is using English phone numbers.
>
> There are also n. 2 EMCS movements sent from Medway Bond and Storage Co Ltd:
>
> [Movement Four] issued on 10/06/2013 diverted to DAB di Arruzzoli Bruno on 15/10/2013.
>
> [Details of another EAD unconnected with the current appeal]
>
> On 29th November 2013, when the tax warehouse was closed, the two consignments were in the state of "accepted" and they are still in the same state."

34. On 9 April 2014 she checked the position on EMCS and noted (a) the report of receipt was outstanding; and (b) there had been registered changes of destination: originally Ess Key, then Care Distribution, then MT Manutention, then DAB. On 30 April 2014 she checked again and the report of receipt was still outstanding. On 28 May 2014 she checked again: (a) there had been a further registered change of destination - Palmeri Giovanni registered on 7 May 2014; and (b) the report of receipt was received on 16 May 2014.

35. Mrs Howard requested documentation relating to Movement Four from Medway. She compared notes with Mr Cousins.

36. On 1 July 2014 Mrs Howard wrote to Logfret concerning Movement Four and requesting suitable alternative evidence of receipt of goods, within one month, and providing a copy of the relevant parts of Notice 197. She explained that without suitable alternative evidence a notice of assessment would be issued to Logfret as movement guarantor. The details of Movement Four in this letter were incorrect; the date, consignee and goods were all those for Movement One.

37. On 22 July 2014 Mrs Howard spoke with Mr Huntley of Logfret. He confirmed that he did not have access to EMCS. She explained to him that the consignee details could be changed on EMCS by the consignor to enter a change of destination. He stated he considered the movement guarantee would cover only the movement to the original consignee; Mrs Howard disagreed.

38. In July 2014 Logfret supplied various documentation.

39. On 7 August 2014 Mrs Howard issued an EMA request to the Italian authorities. A reply was received on 31 March 2015 stating that Servizi Logistici di Palmeri Giovanni was subject to criminal investigations and its licence had been withdrawn for irregularity, thus no further information could be supplied.

40. On 15 September 2014 Mrs Howard issued an EMA request to the Belgian authorities. A reply was received on 7 March 2016, as quoted at [29] above.

41. On 19 February 2015 Mrs Howard issued the Second Assessment, stating:

(1) She apologised that the details in the pre-assessment letter were incorrect, and stated the correct details for Movement Four.

(2) "… where you provide the movement guarantee it covers the whole movement from the despatching bond until the goods arrive at their final destination. It does not matter how many changes of destination there are in the movement; your movement guarantee covers the whole movement."

(3) "HMRC does not have any discretion as to whether an assessment should be issued when the Report of Receipt remains outstanding after 4 months, as is the case with [Movement Four]. This movement had failed to reach the tax warehouse within a 4 month period from the date of dispatch from Medway Bond & Storage Co Ltd (10.06.13). The Report of Receipt was completed on EMCS on 16.05.14. The fact that the journey exceeded 4 months indicates that an irregularity occurred during the movement and it is therefore considered that the goods have been released for consumption. It is also noted that an official letter from the fiscal authorities in the consignee's Member State confirming that the goods covered by the relevant eAD (with ARC quoted) have been received by the consignee has not been provided to HM Revenue & Customs – previously referred to in my letter dated 01.07.14."

(4) She outlined the legal position and stated the taxpayer's appeal and review rights.

42. The Second Assessment was upheld on formal review on 25 June 2015.

Mr Huntley's evidence

43. Mr Huntley confirmed and adopted a witness statement dated 24 February 2016.

44. Logfret is a logistics company providing international freight forwarding services.

45. Mr Huntley obtained for Logfret from HMRC its movement guarantee in September 2009, to enable it to transport alcoholic goods by air and ground, in the amount of £167,443. An HMRC visit shortly afterwards complimented the company on its procedures for sending loads to overseas bonds.

46. Logfret's internal systems included requesting that receiving bonds stamp a letter to confirm receipt of loads. If the consignee failed to stamp then Logfret would not send another shipment until the stamped letter was received.

47. In June 2014 Mr Huntley received Mr Cousins's letter concerning certain movements from Medway Bond ([19] above) – ie Movements One, Two and Three. During a telephone conversation with Mr Cousins ([20] above) he explained that the stamped CRs would prove that the goods were received at their destination; Mr Cousins mentioned that evidence may be needed from the foreign fiscal authority.

48. Mr Huntley researched the three questioned movements. Logfret had a file of documentation for each movement, including correspondence, CMRs, subcontractor agreements and delivery notes. He sent the documents to Mr Cousins.

49. In July 2014 he received the letter from Mrs Howard concerning Movement Four ([36] above). Again, he collated and sent the relevant documentation.

50. Mr Cousins or Mrs Howard had referred to Logfret potentially being liable under its movement guarantee. Mr Huntley confirmed that Logfret had never authorised movements except for the export of goods from the UK; if a receiving bond was unable to accept the goods then Logfret would authorise a change of destination, which would take place immediately and the vehicle transporting the goods should travel straight to the new bond with seal intact.

51. He was surprised to receive the First Assessment, as he considered he had supplied acceptable evidence of receipt of goods. He instructed solicitors, and they appointed Mr Simmonite to prepare an investigation report.

52. He was also surprised to receive the Second Assessment as the goods in Movement Four had clearly been receipted at a bond warehouse. He requested formal reviews of both assessments and, when those were upheld, appealed them to the Tribunal.

53. The documentation provided by Mr Huntley to HMRC for each of the four movements was as follows.

(1) Movement One

(a) On 2 August 2011 Medway issued a purchase order to Logfret for movement under bond of 26 pallets of wine to Magellan. As Medway was a new customer, payment in advance was required.

(b) Logfret provided the movement guarantee for the movement.

(c) On 3 August 2011 Logfret subcontracted the haulage to Transport World Limited ("TWL"), who in turn subcontracted to Masons Logistics. At that time Logfret was unaware of the provision in the movement guarantee forbidding more than one level of subcontracting; Logfret was aware that TWL did sometimes subcontract but did not know the identity of the other parties. TWL confirmed the load would be collected by vehicle DX57 BYW with trailer number M101.

(d) Logfret did not have access to EMCS. From the information gathered by Mr Simonette in his investigation: EMCS showed the details entered by Medway with customer Rishta Trade UK Limited, Logfret as transporter, and goods and vehicle details as above.

(e) Mr Simonette obtained from Medway a CMR stamped by Magellan dated 4 August 2011, with sender Medway and transporter Mason Logistics. The vehicle details are as above and the ARC is correct.

(f) Mr Simonette obtained from Medway an email from Medway (Chris Price) to the EMCS helpdesk dated 12 August 2011 saying Medway could not see nine listed ARCs on EMCS, including the ARC for Movement One, and asking for assistance. On 16 August the helpdesk (Kerry) replied confirming all the listed ARCs were on the system with no rejections, and requested Magellan's registration number. On 17 August the helpdesk (Gill) recommended to Medway that it ask Magellan to contact the Belgian fiscal authority as the problem appeared to be on the Belgian system.

(g) Also on 17 August Medway emailed Magellan (Lionelle) asking if they had had any luck with the Belgian authorities. On 30 August Medway emailed Magellan asking if their system was receiving EMCS messages from Medway, as Medway had clients who wanted to send further orders. On 31 August Magellan replied "… we don't accept anymore goods from your bond. Sorry we have too much problem with our EMCS."

(h) On 9 December 2011 Medway emailed Magellan concerning three ARCs that were still outstanding, including that for Movement One.

(i) There had been no complaint of non-delivery by the owner (Rishta), which would be expected if the goods had not been received by their customer.

(2) Movement Two

(j) On 16 October 2012 Medway issued a purchase order to Logfret for movement under bond of 26 pallets of lager to Care Distribution in France, with collection on 18 October.

(k) Logfret provided the movement guarantee for the movement.

(l) On 17 October 2012 Logfret subcontracted the haulage to Insight Logistics Limited. Insight confirmed it would not further subcontract the work, and notified that the load would be collected by vehicle RX04 XFG with trailer number IS105.

(m) From the information gathered by Mr Simonette in his investigation: Medway's customer was Elbrook Cash & Carry Limited. Medway used the fallback procedure because EMCS was down; this was supported by emails from Medway to Care, and a copy of the relevant fallback document with Logfret as transporter and the above vehicle and goods details.

(n) On 19 October 2012 Medway (Ms Prescott) emailed Care requesting confirmation of receipt of Movement Two as the EAD was still open on EMCS. Medway chased this on 26 July 2013.

(o) The information gathered by Mr Simonette in his investigation included a CMR stamped by Care with sender Medway and transporter Insight; and a signed delivery note.

(p) Logfret produced a schedule of all movements to Care that took place in September to October 2012 (including Movement Two), which Care signed as confirming receipt of the stated loads.

(q) Movement Two had an internal order number of 12223. Orders 12222 and 12224 were also loads of beer despatched to Care from Medway on 18 October 2012 under Logfret's movement guarantee. The EADs for both the other two orders had been cleared from EMCS by Care on 23 October 2012.

(r) There had been no complaint of non-delivery by the owner (Elbrook), which would be expected if the goods had not been received by their customer.

(3) Movement Three

(s) On 10 June 2013 Medway issued a purchase order to Logfret for movement under bond of 26 pallets of beer to Ess Key in Belgium (for account of Fleximo), with collection the same day.

(t) Logfret provided the movement guarantee for the movement.

(u) Medway's customer was Bramley Ferry Supplies Limited, which is under the same ownership as Medway.

(v) On 10 June 2013 Logfret subcontracted the haulage to Insight Logistics Limited. Insight confirmed it would not further subcontract the work, and notified that the load would be collected by vehicles GN05 CJJ and FB55 ADB, with trailer number IS105. Insight later stated to Medway that vehicle GN05 CJJ was used up to Folkestone and vehicle FB55 ADB from Folkestone. Insight have provided a copy of a Eurotunnel receipt for FB55 ADB on 10 June.

(w) From the information gathered by Mr Simonette in his investigation: Medway twice changed the destination on EMCS. First on 26 June 2013 to Care in France, and then on 27 September 2013 to MT Manutention also in France. Logfret was previously unaware of these changes.

(x) The information gathered by Mr Simonette in his investigation included a CMR stamped by Ess Key with sender Medway and transporter Insight.

(y) Two other movements on 10 June 2013 from Medway under Logfret's movement guarantee were receipted on EMCS: a movement of wine to Care receipted on 11 June 2013 and a movement of beer to Ess Key receipted on 16 May 2014.

(z) There had been no complaint of non-delivery by the purchaser (Fleximo), which would be expected if the goods had not been received.

(4) Movement Four

(aa) On 10 June 2013 Medway issued a purchase order to Logfret for movement under bond of 26 pallets of beer to Ess Key in Belgium (for account of Fleximo), with collection the same day. These were the same details as for Movement Three, but was a separate movement.

(bb) Logfret provided the movement guarantee for the movement.

(cc) Medway's customer was again Bramley Ferry Supplies Limited.

(dd) On 10 June 2013 Logfret subcontracted the haulage to Insight Logistics Limited. Insight confirmed it would not further subcontract the work, and notified that the load would be collected by vehicles EU07 OVP and DK06 HWZ, with trailer number 107.

(ee) From the information gathered by Mr Simonette in his investigation: Medway changed the destination on EMCS four times. First to Care in France, then to MT Manutention also in France, then to DAB Di Arruzzoli Bruno in Italy, and finally to Palmeri Giovanni also in Italy. Logfret was previously unaware of these changes.

(ff) The load was receipted on 16 May 2014 by Palmeri Giovanni, and cleared on EMCS.

(gg) The information gathered by Mr Simonette in his investigation included a CMR stamped by Ess Key with sender Medway and transporter Insight.

(hh) As detailed in relation to Movement Three, two other movements on 10 June 2013 from Medway under Logfret's movement guarantee were receipted on EMCS.

(ii) There had been no complaint of non-delivery by the purchaser (Fleximo), which would be expected if the goods had not been received. Indeed, information supplied by HMRC indicated that Fleximo paid Bramley Ferry Supplies Limited for the goods.

54. Mr Huntley considered that there appeared to have been a problem with the EMCS system in Belgium in August 2011 which was preventing Magellan from receipting Movement One as it could not find the ARC on EMCS. In his opinion, the email dated 31 August 2011 from Magellan to Medway ([53(g)] above) demonstrates that EMCS had become too dysfunctional for operators to retain any confidence in it. He felt Logfret was being penalised for the failure of EMCS in Belgium.

55. Similarly, there was a problem with EMCS in October 2012 which caused issues with the receipt of Movement Two by Care. The fallback procedure had been correctly followed by Medway. Again, Logfret was being penalised for an EMCS failure.

56. Logfret do not have access to EMCS. Logfret is reliant on the consignor to inform and correctly update EMCS; thus Logfret was reliant on the integrity of Medway. He felt that Medway had abused Logfret's movement guarantee, but for what purpose he did not know.

57. Before Mr Simonette's investigation Logfret was unaware of the changes of destination of Movement Three; had not been consulted on them; and had not authorised them. There was a stamped CMR; although Ess Key had suggested the stamp was not genuine, if that was correct then the "irregularity" occurred in France and was a matter for the French fiscal authorities.

58. Similarly, before Mr Simonette's investigation Logfret was unaware of the changes of destination of Movement Four; had not been consulted on them; and had not authorised them. Movement Four had been cleared from EMCS by a receipt by Palmeri Giovanni on 16 May 2014. Thus there had been a completed journey to a bonded warehouse.

59. Logfret had provided information and documentation that in Mr Huntley's opinion constituted satisfactory alternative evidence that all the goods arrived at a bonded warehouse. HMRC's insistence on a letter from the overseas fiscal authorities was not in accordance with their own statements in Notice 197. Further, it was not reasonable or realistic to expect traders to obtain such confirmations, when HMRC themselves had problems getting information from their fellow fiscal authorities.

60. The monies demanded under the two assessments would have a devastating impact on the business of Logfret.

61. In response to questions:

(1) Although HMRC had referred to a letter from the foreign fiscal authorities in conversation, there had been no demand that these be produced; his reading of the Notice was that this was an alternative to other forms of evidence.

(2) He felt Logfret had provided everything that could reasonably be expected of it.

Mr Simonette's evidence

62. Mr Simonette confirmed and adopted a witness statement dated 24 February 2016, and adopted the report he prepared for Logfret in December 2014.

63. He advises on customs disputes. He was previously an HMRC investigator for 18 years, and then worked for large accountancy firms.

64. Mr Simonette's evidence described his investigation commissioned by Logfret. It supported the evidence of Mr Huntley. Mr Simonette also made the following points.

65. HMRC's own guidelines are stated in HMAG150500:

> "*HMDP Regulation 81 - Failure of excise goods to arrive at their destination*
>
> This regulation only applies to a 'deemed' irregularity which occurs when a movement is consigned from the UK but is not discharged at its stated destination (and no regulation 80 irregularity has occurred or been detected).
>
> It is not necessary to establish the precise nature of the irregularity; instead you need to demonstrate that the goods did not arrive at their stated destination (this includes non-receipt of the goods on EMCS). In these circumstances, regulation 81(2) applies and an irregularity is deemed to have occurred at the time the movement started. The excise duty point is the time when the goods left the UK warehouse or when the UK registered consignor released the goods. An assessment can be made if the movement is not discharged after four months.
>
> This regulation does not apply when the guarantor for that movement is able to provide satisfactory alternative evidence to show that the goods did arrive at their stated destination or is able to prove that the irregularity occurred in another Member State."

66. His investigation indicated there had been no irregularities in the UK.

67. At the relevant times the EMCS in the UK appeared to have been working properly. The problems seemed to be with the ability of the bonded warehouses in France and Belgium to access their own EMCS database.

68. On Movement One: The first indication of any problems was when on 12 August 2011 Magellan emailed Medway saying Magellan could not find the ARC on the system (ie EMCS) and asking Medway to contact HMRC. That led to Medway contacting the helpdesk with nine problem ARCs. Eventually all but two of those had been cleared off EMCS – those two were Movement One and another movement where the guarantee was provided by a third

party. In 2011 the EMCS was new in Belgium and there appeared to have been problems for warehouses accessing the system, so that Magellan could not see the ARC on their system. Magellan had never denied receiving the movement, but it was unable to receipt the movement on the Belgian EMCS. The owner of the goods, Rishta, had not complained that the goods were not delivered, and had continued to give further business to Medway. The signed CMR was a physical document proving delivery.

69. On Movement Two: Medway could not enter the details on EMCS as it was down at the time, so Medway correctly followed the official fallback procedure and created a "fall back accompanying document" which contains all the relevant information required by HMRC. When EMCS came back online, the movement was allocated an ARC. Medway had chased Care about receipting the deliveries but had not received any reply. However, Logfret had required Care to confirm a receipt schedule for October 2012 deliveries under Logfret's movement guarantee, which Care had signed. Again, there was a signed CMR.

70. On Movements Three & Four:

(1) Amending the destination on EMCS was straightforward; it was compulsory if a consignor wished to deliver to a consignee different from the one originally notified on EMCS.

(2) Although Movement Four was not receipted until May 2014 (having left the UK on 10 June 2013), it had been receipted and so there was no outstanding duty liability.

(3) On 19 June 2014 Logfret emailed Ess Key asking it to confirm receipt of named loads dating back to June 2013. Ess Key responded immediately asking "Who is sending the load? We never accepted or confirmed …". Logfret replied that the sender was Medway. Ess Key stated "We have not received any loads from Medway. Contact your client or transport.". Logfret sent a copy of the signed CMR. Ess Key responded "Its fabrication. Our customs authorities told us French customs authorities found 2 stamps of ESS KEY in the premises of MT Manuten. I found the bogus Signature." That information raised concerns about the validity of the stamp on the CMR, which Logfret had relied upon. It appeared that the French authorities had investigated matters and had uncovered information that the French company MT Manutention held an allegedly counterfeit stamp. Thus it appeared that the irregularity for Movement Three had been detected by the French authorities.

71. In response to questions:

(1) At the time the report was prepared, it appeared that Magellan, as an authorised warehouse keeper, was a bona fide bond. However, from the information gathered by the Belgian fiscal authorities it now appeared that Magellan was not a bona fide bond.

(2) He was aware that Care had now been closed down by the French authorities, but was not aware of the reasons for that closure.

(3) From the information gathered by the French authorities it would appear that MT Manutention had possessed forged stamps naming Ess Key.

(4) He had visited Medway and been assisted by the staff present, but Mr Bramley had been abroad and so not available. He had not visited any of Magellan, Care,

Elbrook or Insight. He had continued his enquiries but without any significant progress.

(5) He was very experienced in this field and had not before seen HMRC insist on a letter from a foreign fiscal authority as a requirement for alternative evidence of delivery. He was not aware of a fiscal authority responding to a request from a private person (rather than another fiscal authority) – certainly, during his 18 years service in HMRC he would never have responded to such a request to disclose confidential information. In his opinion, the practicalities created a very high barrier for the taxpayer to meet, such that it was practically impossible.

Mr Webb's evidence

72. Logfret is an international freight forwarding brand with 190 offices and agencies in over 65 countries. It commenced trading in 2001 and is a member of the British International Freight Association. It provides the full range of logistics services covering freight by road, sea or air. It does not own or lease any vehicles, carrying out its business via trusted subcontractors.

73. Logfret's French office operated a bonded warehouse and it was decided to enter the UK market for alcoholic goods exports. A movement guarantee was applied for and was granted in September 2009. The guarantee was used by third parties approximately 200 times per annum. Logfret now has a bonded warehouse in the UK.

74. Logfret performed due diligence on new customers, including Medway.

75. Because of shortcomings in EMCS, Logfret devised a system to confirm delivery: co-ordination with the relevant bond to follow each movement and insistence on receiving CMRs bearing the stamp of the destination bond as evidence of delivery.

76. If the appeal was unsuccessful then Logfret's bonded business would be jeopardised, with consequent compulsory redundancies.

Appellant's case

77. Ms Brown submitted as follows for the Appellant.

No irregularity

78. Movement Four had been receipted on EMCS, thus there was no irregularity. HMRC were wrong to contend that an irregularity was deemed after four months. The four months time period in reg 81 related to the provision of alternative evidence of arrival at destination. The Regulations replaced (from April 2010) predecessor regulations in The Excise Duty Points (Duty Suspended Movements of Excise Goods) regulations 2001 (SI 2001/3022). Those 2001 regulations did (in old reg 4) specifically impose a four month time limit in imposing a duty point; that had not been re-enacted in the new Regulations and Parliament must be taken to have intended that the previous provision should be omitted. The movement was discharged by a report of receipt and therefore reg 81 was not applicable.

79. HMRC were wrong to insist on letters from the foreign fiscal authorities. That was not required by the Directive or the Regulations. It is not mentioned in the guidance in HMRC's own manual at HMAG150500. Notice 197 (which was public guidance that was not legally binding) referred to this, but only as one possible means of alternative evidence. Moreover, it was unreasonable to expect Logfret to obtain such letters in the one month timeframe permitted by reg 81(4); HMRC's own experience of obtaining information from its fellow fiscal authorities was clearly that there were long delays (up to 18 months) in obtaining a substantive response. Mr Simmonite's evidence was that the foreign authorities may not even reply to private (ie non-HMRC) requests for information about other taxpayers.

80. There were receipted CMRs for all four movements. Logfret was entitled to rely on those documents even if it subsequently transpired that they contained false information, provided Logfret knew nothing of the falsities and had exercised due care: *R (oao Teleos plc & others) v RCC* [2008] STC 706, *Netto Supermarket GmbH & Co OHG v Finanzamt Malchin* [2008] 3280, *CCE v SDM European Transport Ltd* [2015] UKUT 0625 (TCC). That was the situation here; the earliest date on which Logfret could have been put on notice of the forged stamps was Ess Key's email dated 19 June 2014 ([70(3)] above), which was one year after the despatch.

81. HMRC's concerns about the legitimacy of the consignees (and thus the CMRs) stemmed from the information received from the foreign fiscal authorities – all of which post-dated the disputed assessments, issued in October 2014 and February 2015.

82. There was further circumstantial evidence that the goods had reached their destinations. Magellan had first raised the problem of not being able to see a number of ARCs (including Movement One) on EMCS – it was looking for those because the deliveries had arrived and it wished to clear them off the system. None of the suppliers or customers on any of the movements had complained that the goods had not been delivered; indeed, HMRC held evidence that the purchase price had been paid on at least one movement.

83. The Tribunal should evaluate the "basket of acceptable evidence": *Harriet's House Limited* VATTR 16315.

84. HMRC's decisions to treat the alternative evidence as unsatisfactory were not reasonable.

85. Logfret did not have access to EMCS and so was unaware (i) that Movements One to Three had not been cleared off EMCS as expected from the stamped CMRs; and (ii) that the consignees on Movements Three & Four had been amended several times. Logfret's written permission to Medway to use Logfret's movement guarantee was explicitly for the original movement; it could not apply to subsequent changes made by Medway without Logfret's approval. It could not be the case that a guarantee could be construed as creating a liability without time limit covering circumstances outside the control of the guarantor.

Any irregularity occurred outside the UK

86. In relation to Movements Three and Four, if an irregularity did occur then it occurred outside the UK (and so is not a matter for assessment by HMRC). Article 10 looks to where and when the detection was made. The EMA information request responses show that the foreign fiscal authorities had prior investigations underway on those two Movements in the course of their investigation of Ess Key, MT Manutention, DAB Di Arruzzoli Bruno, and

Palmeri Giovanni. Ess Key were searched by the Belgian authorities in February 2014, who withdrew authorisation in August 2014. In March 2016 the Belgian authorities informed Mr Cousins they had discovered false stamps and questionable signatures, and concluded movements were fictitious but they did not know the true destination; they explicitly studied Movements Three and Four. There was no suggestion in the EMA responses that any actual irregularity had occurred in the UK. The false stamps were discovered in the possession of MT Manutention in France. There was also the information from the Italian authorities (received March 2014) concerning DAB Di Arruzzoli Bruno, which identified that its warehouse had closed and there was suspicion of fraud; again, they explicitly studied Movement Four. Further, the information from the Italian authorities (received March 2015) concerning Palmeri Giovanni stating that a criminal investigation was underway and its licence had been withdrawn. Therefore, the conclusion should be that any irregularities occurred outside the UK.

87. In relation to Movements One and Two Logfret accepted that the EMA responses do not provide sufficient indication that the authorities had tied those specific movements to their investigations into Magellan and Care respectively.

The assessments are out of time

88. Section 12A(4)(b) Finance Act 1994 set a twelve month deadline for raising an assessment, determined by when HMRC had knowledge of sufficient evidence. HMRC had raised the assessments outside the time limit.

89. The First Assessment was a single global assessment, and the time limit is to be calculated by reference to the end of the first matter included in the assessment: *SJ Grange Limited v CCE* [1979] STC 183 at 193. If any part of the assessment is out of time then the whole assessment is time barred: *John Cozens v HMRC* [2015] UKFTT 482 (TC) at [39].

90. Mr Cousins's evidence was that he first became aware of the uncleared movements when he ran a report from EMCS on 8 May 2014. However, HMRC were alert to the problems when Medway contacted the EMCS helpdesk in August 2011 to query a number of ARCs including Movement One, so HMRC were at that point aware that Movement One had not been receipted. Alternatively, HMRC's own case was that an irregularity occurred four months after despatch if a movement had not been receipted by then. Movement One was despatched on 4 August 2011, so HMRC considered there was an irregularity in December 2011 and thus the 12 month deadline expired in December 2012. The First Assessment was issued on 6 October 2014.

91. The Second Assessment concerns only Movement Four, which was despatched on 10 June 2013 so HMRC considered there was an irregularity in October 2013 ()ie four months later and thus the 12 month deadline expired in October 2014. The Second Assessment was issued on 19 February 2015.

Respondents' case

92. Ms Vicary submitted as follows for the Respondents.

Regulation 81

93. Regulation 81 (1) & (2) deemed an irregularity in the UK at time of despatch. Regulation 81(3) & (4) provided opportunities for a guarantor to provide evidence to satisfy HMRC that either (i) the goods arrived at their stated destination, or (ii) there had been an irregularity outside the UK.

94. Notice 197 required the taxpayer to obtain a letter from the foreign fiscal authorities stating that the goods were received in that state. The basis for the requirement was in reg 49 which stated that proof of end of movement of goods was (i) a report of receipt (reg 49(3)), or (ii) "an endorsement by the competent authorities of the member State to which the excise goods have been despatched that the goods have reached their stated destination" (reg 49(4)). Logfret's reliance on *SDM European Transport* was mistaken; that case concerned an earlier iteration of the Regulations which did not make reference to an endorsement by the overseas authorities. Thus the requirement for the letter was reasonable. Those letters had not been obtained by Logfret. Indeed, Logfret had not even attempted to obtain those letters, despite the requirement being made clear in the pre-assessment letters and despite Logfret having been professionally represented throughout.

95. However, in exercising their discretion HMRC had not confined their view to the absence of letters from the foreign fiscal authorities (and the failure even to attempt to obtain such letters). Mr Cousins and Mrs Howard had also considered the alternative documentation provided by Logfret. Both officers had concluded they were unable to be satisfied that he goods had reached their destinations.

96. Logfret had not contacted the consignees for information; it had stopped at the details gathered by Mr Simonette from Medway. No explanation had been provided as to why none of the first three movements have ever been receipted on EMCS, or why the fourth was not receipted until eleven months after leaving Kent. It was now clear that all the consignees were involved in excise fraud.

97. Logfret relied on the stamped CMRs. HMRC's position was that the CMR on its own was not sufficient to satisfy HMRC that the goods arrived at their stated destination. On Movement One the stamp on the CMR was by Magellan, whose integrity could not be relied upon as evidenced by the enquiries of the Belgian authorities. On Movement Two the stamp on the CMR was by Care, whose integrity could not be relied upon as evidenced by the enquiries of the French authorities. On Movements Three & Four the stamp on the CMR was "Ess Key" with "Belgium" spelled correctly; that indicated the stamp was one of the forgeries found in the possession of MT Manutention by the French authorities. Also, the integrity of Ess Key itself could not be relied upon as evidenced by the enquiries of the Belgian authorities. Further, the integrity of neither Palmeri Giovanni (who receipted Movement Four on EMCS) nor DAB Di Arruzzoli Bruno could be relied upon as evidenced by the enquiries of the Italian authorities.

98. The integrity of the transporter Insight Logistics could not be relied upon as the company had apparently had its transport licence revoked in May 2013 but then in June accepted the haulage subcontracts on Movements Three & Four. When interviewed by HMRC, Mr Davis at Insight provided some unsatisfactory answers and explanations.

99. Mr Bramley of Medway had not provided any explanation of the change of consignees on Movements Three and Four.

100. On the Second Movement:

(1) The consignor, Medway, had used the fallback procedure for despatch of the goods. That was of no consequence; Medway had operated the procedure correctly and had obtained an ARC when EMCS was back up running. The goods should still have been receipted on EMCS.

(2) Care had not responded to two separate emails from Medway asking about non-receipt.

(3) The paperwork contained signatures for different parties that appeared similar, which was suspicious.

101. On Movements Two to Four there were other despatches on the same day that were properly receipted on EMCS. That did not suggest that the missing movements was also received – instead it just raised the question of why they were left outstanding.

102. The fact that the sellers and buyers of the goods had not protested that their orders had not been completed was not evidence that the goods had been received. It appears that there was concerted excise fraud in operation and so it was predictable that no party would claim the transactions had not been carried through. The silence was consistent with fraudulent diversions of excise goods. The same reason explained why payments had passed between parties without complaint.

103. Logfret's acceptance in good faith of the stamped CMRs did not assist as to the reasonableness of HMRC's non-satisfaction with those documents.

(1) It might be relevant to contest a wrongdoing penalty but it did not avoid the liability for the excise duty.

(2) *Netto Supermarkets* was not relevant. There the question was whether Netto was entitled to rely in good faith on a stamp on receipts. Here the question is whether HMRC were reasonable in not being satisfied by the stamped CMRs.

(3) *Teleos* was also not relevant. There it was held that not being able to rely on CMRs might discourage people from exporting and so act as an obstacle to the free movement of goods. The purpose of the movement guarantee was to guard against excise duty loss in a high risk industry; the guarantee would be worthless if it could be invalidated simply by the guarantor being duped into fraudulent activity; that would lead to a deterrence of transport of duty suspended goods.

Movement Four was receipted on EMCS

104. Movement Four was not receipted on EMCS until eleven months after despatch. No explanation had been given as to where the goods had been in those eleven months. The EMCS receipt (by Palmeri Giovanni) did not correspond with the CMR (purportedly stamped by Ess Key). After four months there was an irregularity and thus a duty point: art 10(4) and reg 81(3).

Irregularities outside the UK

105. Logfret concentrated on the CMR documents for Movements Three & Four and where they were stamped. That was the wrong question. What was relevant was where the goods were "released for consumption", which (by art 7(2)(a)) was where there was "an irregular departure from a duty suspension arrangement".

106. Logfret faced evidential difficulties. It was known that the movements started in the UK, but not where any release for consumption occurred. None of the other member states appeared to have issued duty assessments, so did not seem to regard there having been a loss of duty in their territories.

Scope of movement guarantee

107. The position on movement guarantees was governed by arts 18-20. That was reflected in regs 39 and 49. Article 20 was clear as to when the movement began and ended, and thus when the guarantee was released.

108. On Movements Three and Four HMRC accepted that Logfret was unaware that the consignees had been changed by Medway, until informed by Mr Cousins. That was irrelevant to the provision of the movement guarantee. Logfret had agreed with Medway that Logfret's guarantee would be used on each of the four movements. That was recorded on EMCS. Any commercial dispute between Logfret and Medway was a matter between them only and did not affect the guarantee provided to the Treasury.

The out-of-time point

109. It was not accepted that the First Assessment was a single assessment. While that was a common practice in VAT assessments, it did not occur in this excuse duty assessment. The assessment should be split between the three ARCs comprising Movements One to Three.

110. The test for when HMRC had sufficient knowledge for the purposes of s 12A was given by the Court of Appeal in *Pegasus Birds v CCE* [1999] STC 95.

111. On Assessment One, Mr Cousins was clear that he had no concerns until he ran the EMCS report on 8 May 2014; the assessment was issued within one year of that date. Logfret referred to the earlier call to the EMCS helpdesk; however, the content of that call was a reassurance given that the queried ARCs were indeed registered on EMCS – ie there was at that time no identified problem. Medway should have been filing regular Forms W1 which would notify outstanding EADs; it failed to do that, so HMRC did not have that information. It was not correct that the 12 month time limit should run from four months after despatch.

112. On Assessment Two, Mrs Howard was clear that she first became aware of the problem when she received information from the Italian authorities on 19 March 2014; the assessment was issued within one year of that date. Earlier entries on EMCS referring to "reminders" related to automatically generated items, which would not have been considered by an HMRC officer.

Consideration and Conclusions

General

113. At the outset we must state plainly that the liability of a movement guarantor is not dependent upon any fault on the part of the guarantor: see *Greenalls Management Ltd v CCE* [2005] 1 WLR 1754 (at [17]). Thus HMRC do not need to show that Logfret was complicit in any diversion or irregularity that may have taken place, or was in any other way blameworthy: *CCE v SDM European Transport Ltd* [2015] UKUT 0625 (TCC) (at [16]). Nor have HMRC made any such suggestion of fault in these proceedings.

114. We shall address Logfret's contentions in the following order:

(1) The scope of the movement guarantee.

(2) The out-of-time argument.

(3) The argument that Movement Four was receipted on EMCS on 16 May 2014 and therefore reg 81 is not applicable.

(4) The argument that for Movements Three and Four, an irregularity occurred outside the UK.

(5) The argument that HMRC's non-satisfaction with the alternative evidence provided was unreasonable.

The scope of the movement guarantee

115. Article 18 requires HMRC to "require that the risks inherent in the movement under suspension of excise be covered by a guarantee". Regulation 39 provides that "excise goods may not be moved under duty suspension arrangements unless the risks inherent in the movement are covered by an approved guarantee … which secures such amount of the duty chargeable on the goods as the Commissioners may require." Article 20(2) provides that "the movement of excise goods under a duty suspension arrangement shall end … when the consignee has taken delivery of the excise goods".

116. There is no dispute that Logfret was the guarantor stated on EMCS for all four Movements, and that Medway was authorised to make those entries. Logfret contends that in relation to Movements Three and Four its guarantee should cover only the part of the movement that was covered by the agreement made between itself and Medway – the transport to Ess Key in Belgium – and not any subsequent travels of the goods around Europe of which (HMRC accepts) Logfret was unaware until Mr Cousins enlightened it.

117. We do not accept Logfret's contention. The purpose of the guarantee is to cover "the risks inherent in the movement", and the movement ends only "when the consignee has taken delivery of the excise goods". Thus it is for Logfret to show that the goods were delivered to the consignee, which is the main dispute in this appeal. We do not accept that the terms of the guarantee should be constrained by restrictions agreed between Logfret and Medway – in effect restricting the availability of the guarantee to only the anticipated first leg of the journey. The movement guarantee stands in its own terms, and as used for a specific duty

suspended movement of goods. The obligee under the guarantee (ie HM Treasury) is not affected by any contractual agreement between the obligor (Logfret) and a third party (Medway), absent any consent thereto by the obligee, which is not the case here.

118. Accordingly, Logfret are bound by their movement guarantee on each of the four Movements.

119. We consider that Logfret's real objection here is that although its movement guarantee covers the entire movement of the duty suspended goods, Logfret cannot access EMCS to check the progress of the movement and, inter alia, satisfy itself that the movement has been receipted and cleared off EMCS, so ending its exposure under its guarantee. Such access would also enable it to see any change of destination logged by the consignor and, if necessary, challenge such amendments with the consignor. That predicament stems from the fact that, we are told, a "transporter or carrier" who provides the movement guarantee pursuant to reg 39(2)(a) is not granted access to EMCS – unlike the consignor. We can find nothing in the Regulations, the Directive, Excise Notice 197 or Notice 196 ("Excise goods - registration and approval of warehousekeepers, warehouse premises, owners of goods and registered consignors") which sets out any rules concerning access to EMCS by a transporter guarantor and, in the absence of any statutory provisions, we consider this is not a legal matter for the Tribunal but an administrative one – however, we would comment that the authorities might wish to consider whether provision for such access to EMCS could be made available so that a guarantor transporter can track the progress of duty suspended goods whose movement it has guaranteed.

The out-of-time argument

120. Logfret contends that both disputed assessments were issued late and thus are invalid.

121. Section 12A Finance Act 1994 provides (so far as relevant):

> "*Other assessment relating to excise duty matters*
>
> (1) This subsection applies where any relevant excise duty relief other than an excepted relief—
>
> (a) has been given but ought not to have been given, or
>
> (b) would not have been given had the facts been known or been as they later turn out to be.
>
> (2) Where subsection (1) above applies, the Commissioners may assess the amount of the relief given as being excise duty due from the liable person and notify him or his representative accordingly.
>
> (3) Where an amount has been assessed as due from any person under … subsection (2) above, … and notice has been given accordingly, that amount shall, subject to any appeal under section 16 below, be deemed to be an amount of excise duty due from that person and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced.

> (4) No assessment under any of the provisions referred to in subsection (3) above … shall be made at any time after whichever is the earlier of the following times, that is to say—
>
> (a) … the end of the period of 4 years beginning with the relevant time; and
>
> (b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge.
>
> (5) Subsection (4) above shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making the assessment concerned, to the making of a further assessment within the period applicable by virtue of that subsection in relation to that further assessment.
>
> …"

122. Section 12B(2)(h) FA 1994 provides ((so far as relevant) "For the purposes of section 12A above the relevant time is … in the case of an assessment under section 12A(2) above, the time when the relevant excise duty relief in question was given."

123. Thus, in the current circumstances, the deadline for assessment was "the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge". The First Assessment (covering Movements One to Three) was issued on 6 October 2014, and the Second Assessment (covering Movement Four) was issued on 19 February 2015.

Is the First Assessment a single assessment, or a single notification of a series of individual assessments?

124. The First Assessment covers three Movements. It is necessary to determine whether the First Assessment is a single, global assessment or, instead, a series of individual assessments contained in a single notification. In the VAT case of *CEE v Le Rififi* [1995] STC 103 Balcombe LJ stated (at 107):

> "It is undoubtedly permissible for the commissioners to make a single or 'global' assessment which covers more than one accounting period. In practice this may be necessary when it is impossible or impracticable for the commissioners to identify the specific accounting period or periods for which the tax claimed is due (see *S J Grange Ltd v Customs and Excise Comrs* [1979] STC 183 at 193, [1979] 1 WLR 239 at 242–243; *International Language Centres Ltd v Customs and Excise Comrs* [1983] STC 394 at 396). In such a case the six-year time limit prescribed by s 22(1) of the 1985 Act runs from the end of the first prescribed accounting period included in that assessment. The power for the commissioners to make a global assessment is, however, not confined to those cases where it is impossible or impracticable to identify the specific accounting period or periods for which the tax claimed is due.
>
> So it is a question of fact in any case whether there has been one global assessment or a number of assessments notified together."

125. We agree with the VAT & Duties Tribunal in *Keyes Transport Limited v HMRC* (LON/04/8011) that the same principles apply to excise duty assessments:

> "The next issue concerns whether there was a global assessment or series of individual assessments. The law in this area is clear. Whether the Commissioners have made a global assessment or a series of individual assessments is a question of fact, which is resolved by looking at the relevant documentation (*C&E Commissioners v. Le Rififi* [1995] STC 103 at 107). A global assessment is a single assessment for several excise points or, in the case of value added tax, for more than one accounting period. The Commissioners can choose whether to make a global assessment or a series of separate assessments (*House (t/a P&J Autos) v. C&E Commissioners* [1994] STC 211 at 233). In assessing the facts to decide if a global assessment was made one has to be objective and the state of mind of the person making the assessment is not relevant. It is important to look at what was done by the assessing officer, not what he intended to do (*Courts v. Commissioners of Customs & Excise* [2005] STC 227, per Jonathan Parker L.J. at para. 99). In our case, we shall need to look at the EX 601 Form, the Schedules attaching to that form and the Guidance Letter provided by HMCE … explaining the completion of the form. The Tribunal's role is to look at the facts and not to assist the Commissioners with any deficiencies in their work."

126. On the above principles and taking all the evidence together we conclude that the First Assessment was a single global assessment covering several excise points. The final page of the covering letter refers to "a notice of assessment" for a single amount; the Form EX501 lists six "period/default dates" on a single form; and the review decision dated 28 January 2015 refers throughout to the matter under review as one assessment. Accordingly, for the First Assessment the twelve month deadline in s 12A must be taking as relating to the earliest (alleged) default, which is to say Movement One.

When did evidence of facts sufficient to justify the making of the assessment come to HMRC's knowledge?

127. It is next necessary (for both assessments) to consider the phrase, "the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge". This has received judicial scrutiny in the context of VAT assessments and we consider that the same principles apply to excise duty assessments (and we note a similar conclusion was reached by this Tribunal in *John Cozens v HMRC* [2015] UKFTT 482 (TC)). The leading case is *Pegasus Birds v CCE* [1999] STC 95 where Dyson J (at 101) stated the relevant legal principles as being:

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

commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from the date in (ii) (see *Heyfordian Travel Ltd v Customs and Excise Comrs* [1979] VATTR 139 at 151, and *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10).

5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on *Wednesbury* principles, or principles analogous to *Wednesbury* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223) (see *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10–11, and more generally *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941 at 952 per Neill LJ).

6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in [the legislation]."

128. Dyson J (at p 102) elaborated on principles 4 & 5, stating that the test is a subjective rather than an objective one; the person whose opinion is to be imputed to HMRC is the person who decided to make the assessment, regardless of which person within HMRC acquired the knowledge of the facts in question. In relation to the circumstances in which it is possible to challenge the opinion of the assessing officer he stated:

"In my judgment, as a matter of statutory construction, it is not possible to read into s 73(6) (b) the qualification that the opinion of the commissioners as to the sufficiency of the evidence must be reasonable. If that had been the intention of Parliament, it would have been simple so to provide. If the test had been objective, there would have been no need to refer to the opinion of the commissioners at all. Nor is there any problem about identifying the person whose opinion is to be determined. The person whose opinion is imputed to the commissioners is the person who decided to make the assessment. It does not matter that he or she may not be the person who first acquired knowledge of the evidence of the facts which are considered to be sufficient to justify making the assessment. The knowledge of all officers who are authorised to receive information which is relevant to the decision to make an assessment is imputed to the commissioners.

Moreover, I do not accept that, if an objective approach is not adopted, the protection afforded by the subsection to the taxpayer is illusory. This raises the question of the circumstances in which it is possible to challenge the opinion of the commissioners. It is common ground that, in forming their opinion of what evidence of facts is sufficient to justify making the assessment, the commissioners must have regard to their obligations to act to the best of their judgment as explained in *Van Boeckel v CCE* [1981] STC 290. Thus, they must perform their function honestly and bona fide, and fairly consider all the material placed before them, and, on that material, come to a decision which is reasonable. In some cases, the taxpayer may complain that the commissioners have made an assessment on insufficient material. In other cases, the complaint of the taxpayer may be that, in the light of the evidence of which they were aware, it was wholly unreasonable for the commissioners to delay making the assessment. In both cases, an appeal will succeed if it is shown that the commissioners' approach was wholly unreasonable, and fails to pass a test akin to the *Wednesbury* test. I recognise that this is a high hurdle for the taxpayer to

> surmount, but Parliament has entrusted these matters to the judgment of the commissioners, and it is right that challenges to the exercise of judgment should only succeed when something has gone seriously wrong."

129. Dyson J (at 104) stated the test as follows:

> "The question for the tribunal on an appeal, therefore, is whether the commissioners' failure to make an earlier assessment was perverse or wholly unreasonable. In some cases, the position will be clear. Suppose that evidence of all the facts which in the opinion of the commissioners justified the making of the assessment was known to the commissioners at the beginning of year one, and the assessment was not made until the beginning of year three. Suppose further that the reason for the two-year delay is that the file was lost, or there was a change of staff with the result that the officer who had acquired the evidence did not pass it on to his successor. In those circumstances, the delay in making the assessment would be wholly unreasonable, and an appeal would succeed on the time-limits point."

130. That test was approved by the Court of Appeal, where Aldous LJ stated ([2000] STC 91 at [11-15]):

> "Subsection (6) is to protect the taxpayer from tardy assessment, not to penalise the commissioners for failing to spot some fact which, for example, may have become available to them in a document obtained during a raid.
>
> …
>
> An opinion as to what evidence justifies an assessment requires judgment and in that sense is subjective; but the existence of the opinion is a fact. From that it is possible to ascertain what was the evidence of facts which was thought to justify the making of the assessment. Once that evidence has been ascertained, then the date when the last piece of the puzzle fell into place can be ascertained. In most cases, the date will have been known to the taxpayer, as he will be the person who supplied the information."

Is there a deemed irregularity four months after despatch?

131. Turning to the facts of the current case, Logfret's first contention on this point rather neatly turns in Logfret's favour one of HMRC's own arguments. Logfret contends that if, as HMRC maintain, a movement that has not been discharged on EMCS after four months indicates that an irregularity has occurred then that should justify the making of an assessment, and, as HMRC are the UK stewards of EMCS, that evidence comes to their knowledge at that time; accordingly the assessment deadline is 16 months (ie twelve months after four months) after the despatch of the goods. Thus we must first examine whether it is the case that there is a deemed irregularity four months after despatch, if the movement is still unreceipted at that time.

132. There is no express provision to that effect in the Directive. What the Directive states is:

> (1) Excise duty becomes payable when and where goods are released for consumption (art 7(1)) and that includes the departure, including irregular departure, of goods from a duty suspension arrangement (art 7(2)(a)).

(2) In the case of an "irregularity" (ie a situation due to which a movement has not ended by delivery to the consignee – arts 10(6) and 20(2)) the release for consumption takes place in the Member State where the irregularity occurred (and when it occurred) (art 10(1)).

(3) If an irregularity is detected during a movement but it is not possible to determine where the detected irregularity occurred, then it is deemed to have occurred in the Member State in which (and when) it was detected (art 10(2)).

(4) If no irregularity is detected during a movement but the goods do not arrive at their destination then an irregularity is deemed to have occurred in the Member State of despatch (and at the time of despatch) (art 10(4)).

133. Having carefully considered the relevant provisions, on balance we consider that art 10(4) (and thus reg 81(3)) does not impute or deem an irregularity to have occurred four months after despatch. The reference there to four months is a time period within which a person (the guarantor or consignor) may submit to HMRC satisfactory evidence of end of movement, or place of (actual) irregularity. Regulation 10(4) is by way of a relieving provision, to enable a guarantor or consignor a reasonable time to collect and submit alternative evidence of delivery or an actual irregularity outside the Member State of despatch. If the Council had intended there to be a deemed irregularity four months after despatch then that could have been stated and achieved easily and clearly. Instead, Recital (11) to the Directive states "Where excise goods do not arrive at their destination and no irregularity has been detected, the irregularity shall be deemed to have occurred in the Member State of dispatch." There is no time limit or longstop date specified.

134. The Directive does provide other specific deadlines in relation to movements of duty suspended goods:

(1) First, art 24(1) provides that the consignee must submit using EMCS a report of receipt "on receipt of excise goods ... without delay, and no later than five working days after the end of the movement …". That five business day stipulation is repeated in the Regulations in relation to imports into the UK (reg 54(1)) and transports within the UK (reg 59(1)), but is not stated in relation to exports from the UK (reg 49) – presumably because with an export the duty to report falls on a person outside the UK and so HMRC do not consider the matter falls within their jurisdiction under the Regulations. In any event, the requirement of the legislation, both EU and domestic, is that a movement be receipted (and cleared from EMCS) within five working days of the end of the movement.

(2) Secondly, art 10(5) sets a deadline of three years after despatch for the competent authorities to finally ascertain in which Member State any actual irregularity occurred (and make appropriate levies, reimbursements and remittances).

The fact that the Directive does specify clear deadlines for some events reinforces our view that there is not a deadline in relation to a deemed irregularity for failure to arrive at destination.

Are HMRC fixed with knowledge of all events on EMCS?

135. Logfret's second contention on the out-of-time submission is that, regardless of the four month point discussed above, as HMRC are the UK stewards of EMCS, when non-delivery of goods becomes apparent from the information on EMCS then that evidence comes to HMRC's knowledge at that time; accordingly the assessment deadline is twelve months later. Logfret highlights the fact that Medway contacted the EMCS helpdesk in August 2011 to query a number of ARCs including Movement One; Logfret argues that HMRC were at that point aware that Movement One had not been receipted.

136. We do not accept that contention. When Medway raised its query the helpdesk confirmed that the ARCs were showing on EMCS; thus in HMRC's eyes the information available was that there was a movement still in progress at that point, and no suggestion that there was any irregularity (actual or deemed).

137. It is clear from the caselaw cited above that the purpose of the time limit is to protect the taxpayer from tardy assessment, and not to penalise HMRC for failing to spot some relevant fact. Also, the question for this Tribunal is whether any delay by HMRC was perverse or wholly unreasonable. In the circumstances of the current case, we consider that the mere fact that movements remained open on EMCS does not raise a reasonable expectation that HMRC were justified in raising an assessment at that point. It might prompt HMRC to question matters further and gather more information – as they did when Mr Cousins ran a report in May 2014 and visited Medway – but until they engage in that process they do not have sufficient evidence of facts to justify the making of an assessment.

138. Regulation 81(4) (which derives from art 10(4)) provides that where "at the time [the guarantor] is informed by the Commissioners that the excise goods have not arrived at their stated destination, [the guarantor] does not know, or could not reasonably have known, that the goods have not so arrived, [the guarantor] may, no later than one month after that time, provide evidence to satisfy the Commissioners that (a) the goods have arrived at their stated destination; or (b) there has been an irregularity in another Member State." That is the circumstance in the present case; HMRC accept that Logfret did not, at the time the company was informed by HMRC, know that the movements had not arrived at their destinations, so Logfret was given the opportunity to provide satisfactory evidence.

139. Furthermore, it is not the case that HMRC should be expected to have decided to issue the assessment after the one month period for information provision has expired. As clearly stated in *Pegasus Birds*, it is necessary to determine "when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from [that] date." Our finding on the evidence is that in relation to the First Assessment Mr Cousins wished to give Logfret full opportunity to provide such information as the company could provide, and to compare that evidence with the information he had received from the various overseas authorities in response to the EMAs; the earliest date on which the *Pegasus Birds* test was met was 23 July 2014 (when Mr Cousins received the documentation from Mr Huntley). On the Second Assessment, the same circumstances apply in that Mrs Howard properly waited until Logfret had been able to provide its alternative evidence and the earliest date on which the *Pegasus Birds* test was met was 23 July 2014, when Mr Huntley's bundle of documentation was received. Both assessments were issued within twelve months after 23 July 2014.

140. Accordingly, for the reasons stated above, our conclusion on the out-of-time argument is that both disputed assessments were issued with the time limit provided by s 12A.

Contention that Movement 4 was receipted on EMCS on 16 May 2014 and therefore reg 81 is not applicable

141. HMRC contend there is a four month deadline for making a report of receipt, failing which reg 81 deems an irregularity. We have already dismissed the contention that there is a four month time limit from despatch after which a deemed irregularity occurs – see [133-134] above – and, for the same reasons, we conclude that there is no deadline imposed by art 10(4) and reg 81(3) except as to the time permitted for provision of alternative evidence.

142. We have already referred ([134(1)] above) to the five working day deadline for submission of the report of receipt *after the movement has ended*, in art 24(1). We can find nothing in the Directive to say how long a movement is permitted to take. At the hearing we expressed some surprise that there seemed to be no stated requirement (or at least, expectation) that a movement should be completed within a certain time, even if it was expressed only relatively such as "within a reasonable time after despatch". Counsel helpfully directed us to Regulation 684/2009/EC which stipulates the information to be submitted to EMCS for the EAD, and includes (reg 3 thereof and annex table 1 thereof) "Journey Time - Provide the normal period of time necessary for the journey taking into account the means of transport and the distance involved, expressed in hours (H) or days (D) followed by a two digit number (examples: H12, or D04). Indication for 'H' should be less or equal to 24. Indication for 'D' should be less or equal to 92." That implies that the Commission anticipates a movement will arrive at its destination within 92 days. However, that is only an anticipation; there could be circumstances where transport of a movement is delayed for a lengthy period for completely legitimate reasons – for example, cargo aboard a ship owned by a transporter whose assets are frozen due to insolvency (as recently occurred with the vessels of Hanjin line). Our conclusion is that the legislation deliberately does not place a time limit on the length of a duty suspended movement; instead it requires the consignor to state the expected journey time and the consignee to notify receipt promptly, and both parties to alert the authorities of any anomalies such as expected deliveries failing to arrive. The authorities in both the Member State of despatch and the Member State of destination then have the information needed to audit and challenge any movements that appear to them to be taking an unusual time to arrive, or which otherwise raise concerns that the goods have not arrived.

143. On the specific facts of Movement Four, this movement left Medway on 10 June 2013 and was receipted on EMCS on 16 May 2014 by Palmeri Giovanni. Palmeri Giovanni was the consignee notified on EMCS on 7 May 2014 by the consignor (Medway) by an amendment of destination (there were also previous amendments of destination by Medway, all notified on EMCS). Palmeri Giovanni's report of receipt would/should have been electronically verified by the Italian authorities (art 24(3)) and the fact that the receipt was cleared off EMCS confirmed that the data were valid (ibid). The report of receipt constitutes "proof that a movement of excise goods has ended, in accordance with Article 20(2)": art 28(1) – ie that "the consignee has taken delivery of the excise goods" (art 20(2)). Article 10(4) is then not applicable because it only applies where the goods have not arrived at their destination.

144. HMRC protest that it is not credible (or at least, is suspicious) that a trailer load of lager should take eleven months to travel from Kent to Rome. We understand that protest

and we turn in the next section to the matter of actual irregularities. However, in the absence (as we have found) of any specific time limit for notification of receipt, the fact that the Italian authorities verified the report of receipt and cleared the EAD off EMCS means that art 10(4) (and thus reg 81) cannot deem an irregularity in the country of despatch (ie the UK).

145. Accordingly, our conclusion is that for Movement Four the report of receipt by Palmeri Giovanni is proof of end of movement by delivery of the excise goods, and art 81 is not applicable.

146. In case this dispute should go further, we will also address below the other contentions concerning Movement Four.

Contention that for Movements 3 & 4, any irregularity occurred outside the UK

147. Article 7 of the Directive provides (so far as relevant):

> " 1. Excise duty shall become chargeable at the time, and in the member State, of release for consumption.
>
> 2. For the purposes of this Directive, 'release for consumption' shall mean any of the following:
>
> (a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;
>
> (b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;
>
> (c) the production of excise goods, including irregular production, outside a duty suspension arrangement;
>
> (d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement.
>
> ..."

148. Article 10 of the Directive provides:

> "1. Where an irregularity has occurred during a movement of excise goods under a duty suspension arrangement, giving rise to their release for consumption in accordance with Article 7(2)(a), the release for consumption shall take place in the Member State where the irregularity occurred.
>
> 2. Where an irregularity has been detected during a movement of excise goods under a duty suspension arrangement, giving rise to their release for consumption in accordance with Article 7(2)(a), and it is not possible to determine where the irregularity occurred, it shall be deemed to have occurred in the Member State in which and at the time when the irregularity was detected.
>
> 3. In the situations referred to in paragraphs 1 and 2, the competent authorities of the Member States where the goods have been or are deemed to

have been released for consumption shall inform the competent authorities of the Member State of dispatch.

4. Where excise goods moving under a duty suspension arrangement have not arrived at their destination and no irregularity giving rise to their release for consumption in accordance with Article 7(2)(a) has been detected during the movement, an irregularity shall be deemed to have occurred in the Member State of dispatch and at the time when the movement began, unless, within a period of four months from the start of the movement in accordance with Article 20(1), evidence is provided to the satisfaction of the competent authorities of the Member State of dispatch of the end of the movement in accordance with Article 20(2), or of the place where the irregularity occurred.

Where the person who guaranteed the payment in accordance with Article 18 has not been, or could not have been, informed that the goods have not arrived at their destination, a period of one month from the date of communication of this information by the competent authorities of the Member State of dispatch shall be granted to enable him to provide evidence of the end of the movement in accordance with Article 20(2), or of the place where the irregularity occurred.

5. However, in the situations referred to in paragraphs 2 and 4, if, before the expiry of a period of three years from the date on which the movement began, in accordance with Article 20(1), it is ascertained in which Member State the irregularity actually occurred, the provisions of paragraph 1 shall apply.

In these situations, the competent authorities of the Member State where the irregularity occurred shall inform the competent authorities of the Member State where the excise duty was levied, which shall reimburse or remit it as soon as evidence of the levying of the excise duty in the other Member State has been provided.

6. For the purposes of this Article, 'irregularity' shall mean a situation occurring during a movement of excise goods under a duty suspension arrangement, other than the one referred to in Article 7(4), due to which a movement, or a part of a movement of excise goods, has not ended in accordance with Article 20(2)."

149. The interpretation of very similar provisions has been considered by this Tribunal and the Upper Tribunal in the case of *SDM European Transport Ltd*. That case had a chequered history in that the First-tier Tribunal's decision ([2011] UKFTT 211 (TC)) was considered twice by the Upper Tribunal and eventually reversed ([2015] UKUT 0625 (TCC)) but only on the casting vote of the presiding member of a two judge panel. Also, the Directive in force at the relevant time was the predecessor (Dir 92/12/EEC) to that pertinent to these proceedings, and had some differences in wording. Nevertheless, we consider that some valuable guidance can be gained from the comments of both Tribunals in that case, insofar as they concern matters that were not the subject of differences between and within the Tribunals.

150. In the Upper Tribunal Judge Bishopp summarised matters as follows:

"9. … The Directive provides that various goods, among them alcoholic drinks, become chargeable to duty on manufacture within, or on import into, the European Union. The obligation to pay the duty may, however, be suspended as long as the goods are held in a suspension arrangement - either a holding arrangement, within a warehouse approved for the purpose by the fiscal

> authorities of the Member State in which the warehouse is situated, or a movement arrangement, which meets various conditions, by which the goods are transported from one approved warehouse to another, in the same or a different Member State. The duty becomes payable when the goods leave the suspension arrangement (are "released for consumption"), and it is payable in, and at the rate specified by, the Member State in which the release occurs.
>
> 10. Thus art 6 of the Directive [now art 7] provided that:
>
> "1. Excise duty shall become chargeable at the time of release for consumption ... Release for consumption of products subject to excise duty shall mean: (a) any departure, including irregular departure, from a suspension arrangement ...."
>
> 11. Article 4(c) [now art 4(7)] defined a "suspension arrangement" as "a tax arrangement applied to the production, processing, holding and movement of products, excise duty being suspended". …
>
> 12. In some cases of irregular departure from a duty suspended movement between one Member State and another there may be evidence of the place where the departure occurred (and correspondingly the Member State in which duty is payable) but when … the goods have been fraudulently diverted the place of diversion will often be unknown. The Directive provided for that difficulty by art 20.2 and 20.3 [now art 10] …"

151. In relation to the words "detected during a movement" in art 10(2) & (3), we agree with the views of the First-tier Tribunal:

> "429. The words "in the course of movement" show that the time of detection was limited to the movement. While they may cover a shortage or irregularity being discovered on arrival at the destination, the words did not in our judgment cover a situation where an irregularity was discovered as a result of later enquiries. Although a movement clearly starts with goods leaving a warehouse under duty suspension, such movement does not continue indefinitely. …
>
> 431. The word "detected" is as a matter of language clearly capable of applying to discovering the existence of a fact, or, as Mr Barlow [taxpayer's counsel] put it, finding out that something has happened, or indeed that something is happening. It is not confined to sensory perception and can extend to the receipt or collection of information."

152. Logfret make this contention in respect of both Movement Three and Movement Four. Our conclusion on Logfret's earlier contention on Movement Four ([145] above) means that we strictly need only consider the further contention in relation to Movement Three. However, as the primary fact-finding Tribunal we consider we should make the appropriate findings to dispose of the contentions made, in case this dispute should go further. Accordingly, we consider the contention for both movements but our conclusions in relation to Movement Four are obiter.

153. Our findings on the relevant evidence in relation to Movements Three and Four are:

> (1) Both Movements were of around 26,000 litres of beer and were despatched from Medway's warehouse in Kent on 10 June 2013. Logfret subcontracted the haulage to Insight Logistics.

(2) The original consignee was Ess Key in Belgium. Logfret received stamped CMRs for both movements, stamped "Ess Key".

(3) Unknown to Logfret, Medway changed the consignee details on EMCS for both loads. On both Movements the consignee was changed from Ess Key to Care Distribution (France), and then again to MT Manutention (also France). Movement Four had two further changes, to DAB di Arruzzoli Bruno (Italy) and then to Palmeri Giovanni (also Italy). Movement Four was receipted by Palmeri Giovanni on 16 May 2014.

(4) On 19 March 2014 the Italian authorities filed an EMA reply concerning DAB stating DAB's warehouse was empty, no records were found, and there was unpaid excise duty; fraud was suspected. ([33] above.)

(5) On 19 June 2014 Ess Key stated to Logfret:

i. it had never received any deliveries from Medway;

ii. the stamped CMRs were fabrications; the French authorities had found false Ess Key stamps at MT Manutention; and signatures had been forged. ([70(3)] above.)

(6) On 7 August 2014 the Italian authorities filed an EMA reply concerning Palmeri Giovanni stating the company was under criminal investigation and its warehouse licence had been withdrawn for irregularity. ([39] above.)

(7) On 4 February 2015 the French authorities filed an EMA reply concerning MT Manutention stating the company was under judicial proceedings. ([28] above.)

(8) On 7 March 2016 the Belgian authorities filed an EMA reply concerning Ess Key stating:

iii. Ess Key had carried out fictitious receipts and deliveries of excise goods, and its warehouse authorisation was withdrawn on 13 August 2014.

iv. The stamps on the CMRs for Movements Three & Four were false, as identified by a spelling error.

v. The signatures on the CMRs for Movements Three & Four appeared to be forged.

vi. Ess Key did not receive the goods. The Belgian authorities could not determine the true destination of the goods. ([29] above.)

(9) On 16 March 2016 the French authorities filed an EMA reply concerning Care Distribution stating the company had been closed by a judicial decision. ([30] above.)

154. Concerning art 10 (and thus art 81) we consider there are four questions for us to answer on each of Movement Three and Movement Four:

(1) Was an irregularity detected? If so:

(2) Was the irregularity detected during a movement?

(3) Where did the irregularity occur?

(4) If it is not possible to determine where the irregularity occurred then where was it detected?

155. For Movement Three:

(1) We are satisfied that an irregularity was detected. The Belgian authorities established that the Ess Key stamp applied to the CMR was a forgery, and the signatures appeared to be forgeries. The forged stamp was found in the possession of MT Manutention (the final consignee of the goods). Ess Key (the original consignee) was suspected of involvement in excise fraud. Both substituted consignees (Care Distribution and MT Manutention) were subject to judicial actions.

(2) We are satisfied that the irregularity was discovered during a movement. The goods have never been receipted and there is no reliable evidence that the goods ever reached their destination. Thus the movement remined open under art 20.

(3) On the evidence available to us we conclude on the balance of probabilities that the irregularity occurred in France. The forged stamp was discovered in France and it is reasonable to assume that the stamp was applied to the CMR in France.

(4) Given the limited background information available to us, we do not speculate as to the involvement of the consignor (Medway), haulier (Insight) or driver in the irregularity.

(5) For completeness, we add that if we had been unable to determine where the irregularity occurred then we would have concluded that the irregularity was detected in France, where the forged stamp was discovered.

(6) Accordingly, pursuant to art 10(1) the release for consumption took place in France. Further, art 10(4) is not applicable.

156. For Movement Four:

(1) We are satisfied that an irregularity was detected. First, for the same reasons as given above in relation to Movement Three. Secondly, both DAB and Palmeri Giovanni are suspected of excise fraud.

(2) We consider that the irregularity was not discovered "during a movement". The goods were receipted by Palmeri Giovanni and thus the movement concluded on 16 May 2014. As the Tribunal stated in *SDM European Transport* ([151] above), the words do not cover a situation where an irregularity is discovered as a result of later enquiries. From the chronology of the EMA replies, we conclude that on the balance of probabilities the discovery was made after Palmeri Giovanni had receipted the goods on EMCS.

(3) In case we are later found to be wrong in that conclusion, we also address (obiter to an obiter, as it were) the question of where the irregularity occurred. For the same reasons as given in relation to Movement Three, we conclude on the balance of

probabilities that the irregularity occurred in France. Again, and for the same reasons, if we had been unable to determine where the irregularity occurred then we would have concluded that the irregularity was detected in France.

(4) Accordingly, if we had not already determined this point on different grounds, we would conclude that no irregularity was detected during the movement. That would take us to art 10(4) but, for the reasons already given, we consider the goods had "arrived at their destination" in the sense required by art 10, in that Palmeri Giovanni had submitted a report of receipt that had been verified by the Italian authorities and confirmed on EMCS (all pursuant to art 24). Thus we conclude that art 10(4) is not applicable.

Contention that HMRC's non-satisfaction with the alternative evidence provided was unreasonable

157. From our conclusions on the earlier contentions, we would allow the appeal in relation to Movements Three and Four without needing to address this alternative contention. This contention is determinative of the appeal in relation to Movements One and Two. In case this dispute goes further, we also express our conclusions in relation to Movements Three and Four.

158. As already stated ([138] above), HMRC accept that Logfret did not, at the time the company was informed by HMRC, know that some or all of the movements had not arrived at their destinations. Regulation 81(4) (which derives from art 10(4)) provides that where "at the time [the guarantor] is informed by the Commissioners that the excise goods have not arrived at their stated destination, [the guarantor] does not know, or could not reasonably have known, that the goods have not so arrived, [the guarantor] may, no later than one month after that time, provide evidence to satisfy the Commissioners that (a) the goods have arrived at their stated destination; or (b) there has been an irregularity in another Member State."

159. Logfret was given the opportunity to provide satisfactory evidence and did provide documents, which we consider later. HMRC state that they fully considered all the evidence provided by Logfret but decided to issue the two disputed assessments. Logfret contend that those decisions were unreasonable.

160. We stated at the outset of the hearing that we considered our jurisdiction over that contention was what is usually described as a supervisory jurisdiction. Ms Brown for Logfret stated that she wished to reserve her client's position on that point; no specific challenge was made during the hearing but we note the point for the record. From the caselaw in *Customs and Excise Comrs v J H Corbitt* (*Numismatists*) *Ltd* [1980] STC 231, *Customs and Excise Comrs v Peachtree Enterprises Ltd* [1994] STC 747 and *Kohanzad v Customs and Excise Commissioners* [1994] STC 967 we derive the following approach:

(1) The jurisdiction of the Tribunal in this matter is only supervisory.

(2) The Tribunal cannot substitute its own discretion for that of HMRC.

(3) The question for the Tribunal is whether HMRC's decision was unreasonable in the sense that no reasonable HMRC officer properly directing themselves could reasonably reach that decision.

(4) To enable the Tribunal to interfere with HMRC's decision it would have to be shown that HMRC took into account some irrelevant matter or had disregarded something to which they should have given weight.

(5) In exercising its supervisory jurisdiction the Tribunal must limit itself to considering facts and matters which existed at the time the challenged decision of HMRC was taken. Facts and matters which arise after that time cannot in law vitiate an exercise of discretion which was reasonable and lawful at the time that it was effected.

(6) The burden of proof lies on an appellant to satisfy the Tribunal that the decision of HMRC was unreasonable.

161. Excise Notice 197 states HMRC's policy on alternative evidence for the purposes of reg 81:

> "12.10 *Alternative evidence of discharge of a movement*
>
> HMRC accepts that it may not always be possible for a report of receipt to be returned to the warehousekeeper and we may, in exceptional circumstances, allow alternative evidence to be provided. However, alternative evidence will only be accepted where it can be shown that the warehousekeeper or provider of the movement guarantee has made every reasonable effort to obtain the report of receipt from the consignee.
>
> Where every effort has been made, and the report of receipt is not available, we will accept the following documents as alternative evidence to discharge the movement. This evidence must be produced to us within 4 months of the start of the movement.
>
> The documents are:
>
> - a receipted copy of the eAD or commercial document which accompanied the goods (applies to intra-UK and intra-EU movements)
> - for intra-EU movements, an official letter from the fiscal authorities in the consignee's member state confirming that the goods covered by the relevant eAD (with ARC quoted) have been received by the consignee - find contact details for the fiscal authorities in other member states by searching Customs Office Information on the Europa website
> - for intra-UK movements alternative commercial evidence
>
> In some very exceptional circumstances, the consignor may be unable to obtain any of the accepted forms of evidence showing that the goods have arrived at their intended destination. In such cases we will consider other evidence on a case-by-case basis. However, the person who provides the movement guarantee must be able to demonstrate that he has tried to obtain the alternative evidence listed above. This other evidence, as a minimum, must show not only that all the goods were received at the consignee's premises, but also that they were entered into the receiving warehouse's duty-suspended stock records.
>
> If no report of receipt is received, we will issue an assessment to the person providing the guarantee for the outstanding duty 4 months after the date of

> dispatch. If necessary, we may ask the guarantor to meet any liability. You may be entitled to reimbursement of the paid duty if you can subsequently prove that the irregularity occurred outside the UK, that the duty was due to another member state and you have paid any duty due to that member state. In such circumstances you should contact the NVC."

162. We consider that the assessment decisions should be taken together with their respective formal review decisions. We will deal separately with the First Assessment and the Second Assessment.

The First Assessment

163. The reason given by Mr Cousins for his decision to issue the First Assessment is stated in his letter dated 6 October 2014 (the covering letter to the First Assessment):

> "… you did not provide an official letter from the fiscal authorities in the consignee's Member State confirming that the goods covered by the relevant eAD (with ARC quoted) have been received by the consignee. Without the letter from the fiscal authorities confirming receipt of the goods, I am unable to accept that the goods arrived at their destination."

164. In the formal review confirming Mr Cousins's decision (HMRC letter dated 28 January 2015) the review officer (Ms Loughridge) goes slightly wider:

> "You have not provided any evidence from the fiscal authorities to confirm that the goods arrived at their destination. You have provided copies of the commercial documentation regarding the movements; stamped CMR's and various e-mails. You also rely on the balance of probabilities. Satisfactory evidence that the goods in question were received at the consignee warehouses has therefore not been produced to HMRC.
>
> In relation to [Movement One] the review request letter refers to Medway's contact with the EMCS Helpdesk in terms of the receiving warehouse not being able to see the movement on the system. The EMCS helpdesk responded that the e-AD was on the UK system, and that it might be a problem with the member states system. Medway did take this up with the receiving warehouse however no reply was received. Medway did not notify the EMCS Helpdesk that the e-AD had not been receipted. HMRC therefore did not have the information to be able to issue an Assessment, in relation to the movement, at that time.
>
> With reference to the statement that the Fiscal authorities cannot assist if there has been a system failure. The Belgium authorities can visit the bond and confirm by physical examination the bonds records that the goods have arrived. No attempt would appear to have been made to contact the Belgium authorities to establish if they can confirm the arrival of the goods.
>
> In relation to [Movement Three] an assumption has been made, on the balance of Probabilities, that because order 13562, and 13563 arrived and have been receipted that it should follow that this movement also arrived at the destination. This however cannot be accepted in the absence of satisfactory alternative evidence.

> The review request letter states that if any irregularities occurred with the movements, that they have occurred outside of the UK in another member state. No evidence has been provided to confirm that an irregularity occurred in another member state."

165. Mr Cousins confirmed in his evidence ([32(10)] above) that the reason why the First Assessment was issued was because Logfret had failed to provide the necessary letters from the foreign fiscal authorities. He considered the bullet points at 12.10 of Notice 197 were cumulative, not alternatives; in the current case the first two were the relevant ones. He considered that for intra-EU movements a letter from the foreign fiscal authority was required.

166. We have concluded that the three bullet points in 12.10 of Notice 197 are alternatives. Article 28(2) provides, so far as relevant:

> "… in the absence of the report of receipt …, alternative proof of the end of a movement of excise goods under a duty suspension arrangement may be provided, …, through an endorsement by the competent authorities of the Member State of destination, based on appropriate evidence, that the excise goods dispatched have reached their stated destination ...
>
> A document submitted by the consignee containing the same data as the report of … shall constitute appropriate evidence for the purposes of the first subparagraph."

Thus an endorsement by the foreign authorities is, by art 28(2), by itself sufficient evidence of receipt. Notice 197 should not state, or be taken as stating, that if such an endorsement is provided (ie the second bullet point in 12.10) then there is an additional requirement to provide a receipted EAD or commercial document (ie the first bullet point in 12.10). The three bullet points are alternatives. It then follows that a taxpayer is entitled to provide evidence within the first bullet point, without an endorsement from the foreign authorities.

167. We conclude that:

(1) If Mr Cousins correctly interpreted Notice 197 then the policy stated in Notice 197 is unreasonable because it requires, rather than permits, an endorsement from the foreign authorities as alternative evidence.

(2) Alternatively, if Notice 197 correctly intended the three bullet points in 12.10 to be alternatives, then Mr Cousins misinterpreted Notice 197 and thus made a decision which was unreasonable because it did not follow HMRC's policy stated in Notice 197.

(3) Whichever of the alternatives above applies, the decision to require the endorsement from the foreign authorities was unreasonable.

168. Although the review letter addresses some other points, we consider its effect is to refuse to consider the other commercial evidence provided by Logfret because Logfret has failed to provide endorsements from the foreign authorities – the provision of the stamped CMRs and commercial documentation is acknowledged but is stated to be unsatisfactory. Again, either the review officer correctly interpreted an unreasonable policy, or incorrectly interpreted HMRC's policy and thus reached an unreasonable conclusion.

169. For those reasons we are satisfied that HMRC's decision to refuse to accept the alternative commercial evidence provided by Logfret was unreasonable, and thus the decision to issue the First Assessment was flawed.

170. We deal with the Second Assessment before considering the implications of our above finding.

The Second Assessment

171. The reasons given by Mrs Howard for her decision to issue the Second Assessment are stated in her letter dated 19 February 2015 (the covering letter to the Second Assessment):

> "HMRC does not have any discretion as to whether an assessment should be issued when the Report of Receipt remains outstanding after 4 months, as is the case with [Movement Four]. This movement had failed to reach the tax warehouse within a 4 month period from the date of dispatch from Medway Bond & Storage Co Ltd (10.06.13). The Report of Receipt was completed on EMCS on 16.05.14. The fact that the journey exceeded 4 months indicates that an irregularity occurred during the movement and it is therefore considered that the goods have been released for consumption. It is also noted that an official letter from the fiscal authorities in the consignee's Member State confirming that the goods covered by the relevant eAD (with ARC quoted) have been received by the consignee has not been provided to HM Revenue & Customs – previously referred to in my letter dated 01.07.14."

We take that as being two reasons: (i) failure to provide the confirmation from the foreign authorities; and (ii) the movement had been unreceipted four months after despatch.

172. In the formal review confirming Mrs Howard's decision (HMRC letter dated 25 June 2015) the review officer (Mr Donnachie) addresses a number of points raised by Logfret in its review request mainly relating to the out-of-time point which we have already determined; in relation to the reasons given in the decision letter he concludes that:

> "The intention of the regulations clearly considers that no journey within the territory of the EU should take longer than four months. If the journey exceeds that period, while no duty point is created by this fact, it is an indication that an irregularity has occurred during the movement.
>
> There has to be in law a time when it is considered that the goods have been released for consumption and this has been set at four months. It was therefore the intention of Parliament that after a period of four months a duty point is created.
>
> HMRC does not have any discretion as to whether an assessment should therefore be issued and it is not for HMRC to not issue an assessment on what might happen, HMRC have to apply the law. The purported receipt of the goods in question took place more than 11 months after the goods were despatched from the UK Tax warehouse. This does not provide HMRC with any assurance that the movement was completed in accordance with the relevant legislation."

173. We have already dealt with the first reason concerning the absence of an endorsement from the foreign authorities in our discussion of the First Assessment. As stated there, the decision to require the endorsement from the foreign authorities was unreasonable. On the

second reason given, from our consideration of the earlier contention concerning whether there is a deemed irregularity four months after despatch ([133-134] above) it follows that we consider this reason was based on a misunderstanding of the law and, therefore, was unreasonable. For those reasons we are satisfied that HMRC's decision to refuse to accept the alternative commercial evidence provided by Logfret was unreasonable, and thus the decision to issue the Second Assessment was flawed.

Implications of the findings of unreasonableness

174. Having concluded that the decisions to refuse to accept the alternative commercial evidence provided by Logfret were unreasonable, for the reasons given, what is the outcome? The question arises because of the Court of Appeal decision in *John Dee Ltd v Customs and Excise Commissioners* [1995] STC 941 where it was held (at 953) "that where it is shown that, had the additional material been taken into account, the decision would *inevitably* have been the same, a tribunal can dismiss [the taxpayer's] appeal." That case has recently been considered and elucidated by the Court of Appeal in *GB Housley Ltd v Revenue and Customs Commissioners* [2017] STC 508.

175. In *Housley* Gloster LJ (at [77]) summarised the point in *John Dee* thus:

> "… save in circumstances where the Commissioners could show that, had the additional material which should have been taken into account, in fact been taken into account, the decision would *inevitably* have been the same, where a tribunal could nonetheless dismiss the taxpayer's appeal against a wrongly made decision of the Commissioners, the taxpayer's appeal should be allowed and that it was not for the tribunal to re-exercise the discretion. The tribunal should have allowed the taxpayer's appeal and 'left it to the commissioners to take a fresh decision if they thought fit on the facts as they had become by the date of the fresh decision'."

176. *Housley* concerned an appeal against a VAT assessment raised because the trader did not hold valid VAT invoices to support input tax claims, and HMRC had (it was found) failed to consider whether to exercise their discretion to allow alternative satisfactory evidence. The First-tier Tribunal allowed the taxpayer's appeal on that basis. The Upper Tribunal (after two hearings and judgments) set aside the First-tier Tribunal's decision and (at [63]) remitted the case to the First-tier Tribunal "to decide whether HMRC would be acting within the proper exercise of their powers to decide not to exercise their discretion … in favour of the [taxpayer]".

177. In the Court of Appeal Gloster LJ stated:

> **"[79]** In my judgment a similar approach to that adopted by this court in *John Dee* is applicable to a case such as the present, where the relevant decision was a failure by HMRC, as a result of a misapprehension as to the necessity of a billing agreement, to consider the exercise of their discretion under reg 29(2) to allow input tax. The present case was one where, on the findings of fact by the FtT, HMRC clearly could not have suggested that, if they had properly considered or re-considered the exercise of their discretion under reg 29, they would have *inevitably* have come to the same result—ie to have refused to allow the credit for the input tax. Indeed, Mr Mandalia [HMRC counsel] did not seek so to argue.

[80] Now, of course, in *John Dee* the appeal was not, as in the present case, against an actual assessment or in respect of the amount of any input tax which might have been credited to the taxpayer. But, in my judgment, it follows from the approach in *John Dee* that, if the appellant's appeal against the assessment is to be allowed, on the grounds that HMRC wrongly failed even to consider the exercise of the reg 29(2) discretion, then necessarily—since the appeal is against the assessment itself—the assessment falls to be discharged, leaving HMRC, if they wish to do so, to consider the proper exercise of their discretion on the correct legal basis and, if they are able (given the statutory time constraints), to issue a new assessment if so advised. It follows that, in my judgment, the Upper Tribunal was wrong to have *allowed HMRC's appeal* against the FtT's decision, and, effectively, to have given HMRC a further opportunity retrospectively to have justified their assessment.

[81] The directions given by the [Upper Tribunal] judge (viz allowing HMRC's appeal and remitting the appellant's appeal against the assessment to be further considered by the FtT, once HMRC had considered or re-considered the exercise of its discretion, potentially on the basis of further materials), in my judgment and as Mr Thomas [taxpayer's counsel] correctly submitted, wrongly preserved the existence of what had been found to have been a flawed assessment; it wrongly placed the burden of challenging any revised assessment on the appellant, without affording the latter the opportunity to raise the time bar possibly available to challenge any new assessment raised by HMRC. It also wrongly enabled HMRC to support the correctness of their earlier July 2009 decision by reference to subsequent factual materials, which in itself was not legitimate: see *Customs and Excise Comrs v Peachtree Enterprises* and *Kohanzad* supra. Once the earlier decision to raise the assessment had been found to be flawed, then the appeal against the assessment should have been allowed, the assessment should have been discharged and HMRC—if they were so minded and entitled—should have started again.

[82] Thus I do not, with respect, agree with the judge's 'starting point' that 'the assessment is valid unless and until it is shown that the taxpayer is entitled to have the discretion exercised in his favour'. Moreover, why, in the event that HMRC declined to revisit the exercise of its discretion at all, as the judge envisaged in para [48] of the second judgment, should the appellant be required to continue with the appeal proceedings and to surmount the further hurdle (after all these years) of demonstrating at a yet further hearing that on the materials no reasonable body of Commissioners could refuse to exercise the discretion in its favour?

[83] But even if I am wrong in my conclusion that, since the appeal was against the assessment itself, the outcome was necessarily that the appeal should have been allowed and the existing assessment discharged, then it seems to me that the alternative analysis is that the FtT had a *discretion* as to whether to allow the appeal and to discharge the assessment, or to adjourn the proceedings pending the exercise or re-exercise of HMRC's discretion. I would base this view on the dictum of Neill LJ in *John Dee* at 952 that:

> 'the function and powers of a tribunal in each case will depend in large measure on the nature of the decision appealed against and of course on any special statutory provisions.'

If that were the position, then, in my judgment, in the circumstances of this case, and on the basis of the facts found by the FtT as summarised eg at paras

> [55]–[58] of its judgment (to the effect that HMRC had accepted that all the other invoices were compliant and that Mr Day accordingly could not deny the validity of the invoices, other than for the lack of the self-billing agreement), the FtT was clearly right to take the course which it did, namely allow the appeal against the assessment and discharge the latter. Such a course was clearly within the reasonable scope of its discretion. And, likewise, it follows that in my view the judge was clearly wrong in principle to have taken the course which he did, in particular after the length of time that had elapsed, the fact that there had been two hearings before the Upper Tribunal and the fact that he too had concluded that HMRC had wrongly failed in July 2009 to consider the exercise of its discretion."

178. On the basis of that analysis, we conclude that the correct course for us in these proceedings is to allow Logfret's appeal. Although HMRC did not accept the alternative commercial evidence, we find that was not because Mr Cousins and Mrs Howard analysed it and rejected it; rather, it was because the officers considered the absence of endorsements from the foreign authorities determined the matter against Logfret. Therefore, our conclusion is that HMRC were in the same position as if they had not considered their discretion to accept alternative commercial evidence (as was the position in *Housley*). Accordingly, we will allow Logfret's appeal against the First Assessment in relation to Movement One and Movement Two. If the dispute proceeds further and it proves relevant then we record that on the same reasoning we would also allow Logfret's appeals against (i) the First Assessment in relation to Movement Three, (ii) the Second Assessment.

Summary of conclusions

179. Logfret's movement guarantee covered all four movements notwithstanding that (i) Logfret were unaware that on Movement Three and Movement Four Medway had changed the consignee on EMCS, and (ii) such changes may have been contrary to the agreement between Medway and Logfret concerning the use of Logfret's guarantee. (See [118] above.)

180. Both assessments were issued within the time limit in s 12A FA 1994. (See [140] above.)

181. For Movement Four the report of receipt by Palmeri Giovanni is proof of end of movement by delivery of the excise goods, and reg 81 is not applicable. (See [145] above.)

182. For Movement Three the release for consumption took place in France, and reg 81 is not applicable. (See [155] above.)

183. HMRC's decision to refuse to accept the alternative commercial evidence provided by Logfret was unreasonable, and thus the decision to issue the First Assessment was flawed. Logfret's appeal against the First Assessment should be allowed. (See [169 & 178] above.)

184. It follows from the above that Logfret's appeals against both the First Assessment and the Second Assessment are allowed. We have provided above our conclusions on the alternative bases if necessary for any onward appeal, and do not repeat them in this summary.

Decision

185. The appeal is ALLOWED.

186. 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.

PETER KEMPSTER
TRIBUNAL JUDGE
RELEASE DATE: 7 JUNE 2017

APPENDIX – one page separate document