TC03193

Appeal number: TC/2010/09313, TC/2011/02300 & TC/2011/03518

EXCISE DUTY – diversion of excise goods – liability of registered owner – Regulations 8 and 9 Excise Goods (Holding, Movement and Duty Point) Regulations 2010 – whether the registered owner was aware or should have been aware of the diversion – revocation of registration – whether review decision reasonable – VAT – evidence of removal from the UK – appeal against excise duty assessment allowed – appeal against review decision confirming revocation of registration allowed – appeal against VAT assessment dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

PANORAMA CASH & CARRY LIMITED t/a BOOZE DIRECT — **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MISS SUSAN STOTT FCA

Sitting in public in Manchester on 5 and 6 November 2012, 17 May 2013 and 16 and 17 September 2013 with subsequent written submissions on 24 September 2013 and 1 October 2013.

Mr Andrew Young of counsel instructed by Dass Solicitors appeared for the Appellant

Mr Vinesh Mandalia of counsel instructed by the General Counsel and Solicitor to HM Revenue and Customs appeared for the Respondents

DECISION

Introduction

1. This appeal concerns three decisions of the respondents ("HMRC") arising out of the diversion of excise goods sold by the appellant. The decisions under appeal are as follows:

(1) A review decision dated 9 November 2010 upholding a previous decision to revoke the appellant's registration as a registered owner of duty suspended goods.

(2) A notice of assessment to VAT made on 16 February 2011 covering the appellant's VAT period 08/10 and relating to VAT on the goods diverted in the sum of £81,064.

(3) A review decision dated 28 March 2011 confirming an assessment to excise duty on the goods diverted in the sum of £261,703.85.

2. The hearing of this appeal commenced in November 2012 and went part heard. Due to circumstances beyond anyone's control it was not possible to complete the hearing until September 2013, following which we received further written submissions on certain issues. We are very grateful to both counsel for the professional approach they have taken throughout this appeal.

3. The grounds of appeal pursued by the appellant may be broadly summarised as follows:

(1) In all the circumstances the review decision confirming revocation of the appellant's registration was unreasonable.

(2) The appellant was entitled to zero rate the supply of excise goods for VAT purposes and there should be no VAT assessment

(3) In all the circumstances the appellant has no liability to excise duty.

4. In the event that the appellant does have a liability to either VAT or excise duty the quantum of the assessments is not in dispute.

5. In the following paragraphs of this decision we set out the background, the legal framework in relation to the various aspects of the appeal, our findings of fact based on the evidence before us and our decision based on those findings of fact.

Background

6. The appellant traded as a wholesaler of alcohol products under the name "Booze Direct". It was registered as an owner of warehoused excise goods with effect from 9 September 2004 pursuant to the provisions referred to below. Throughout that period it was also registered for VAT.

7. In July 2010 the Appellant entered into transactions whereby it purchased and sold 10 consignments of duty suspended beer. The appellant's customer was a Latvian company called Legata SIA ("Legata") or at least someone purporting to act in the name of Legata. In each case the goods were held at a tax warehouse in Leighton Buzzard operated by Edwards Beers and Minerals Bond Ltd ("Edwards"). The goods were intended to be transported to what was thought to be a tax warehouse in Belgium called Simply Vodka BVBA ("Simply Vodka"). Transport of the goods was arranged on behalf of the appellant by Derek Garnett trading as Revolution International 2000 ("Revolution") who also provided a movement guarantee.

8. In fact Simply Vodka had ceased trading on 4 February 2010 and the goods never arrived at their destination. It was not disputed that a diversion fraud had taken place and the goods were removed from duty suspension arrangements without payment of excise duty.

9. By way of background we should also describe what is known as a "SEED" check. This stands for "System for the Exchange of Excise Data". Each Member State maintains a computerised SEED database, including details of all tax warehouses and registered entities in that Member State. Registered entities include registered consignees, registered consignors and guarantors. In the UK, owners of excise goods held in a tax warehouse are also required to be registered as such, however we understand that no other Member State requires registration of owners.

10. Member States are required to update SEED on a regular basis. The data available to the customs authorities of a Member State includes the SEED data from all other Member States. We did not have reliable evidence as to how the data from other Member States is made available to HMRC for it to update the UK database, but we note that Member States are expected to exchange data files on a monthly basis.

11. An authorised warehousekeeper must ensure that the destination of duty suspended goods is another tax warehouse either in the UK or the EU. It must do so whenever it first sends goods to the other tax warehouse and periodically thereafter. The authorised warehousekeeper does this by means of a SEED check which involves emailing the HMRC SEED Unit in Glasgow to confirm that the tax warehouse of destination is properly authorised to receive duty suspended goods. It is not possible for a registered owner to carry out its own SEED check. HMRC maintains a record of all requests for SEED checks and the results of those checks. The results will show whether the destination is a tax warehouse and what types of goods the warehouse is authorised to hold in duty suspense.

12. When the diversion of the goods in the present appeal came to light, HMRC revoked the appellant's registration as an owner of warehoused excise goods and made the assessments to excise duty and VAT. They also assessed Revolution but no action was taken against Edwards.

13. It has not been suggested at any stage that Mr and Mrs Kang were in any way complicit in the fraudulent diversion of excise goods.

Legal Framework – Excise Duty

14. In order to trade in the UK in duty-suspended alcohol goods it is necessary for the trader to be approved and registered by HMRC pursuant to regulations made under *section 100G Customs and Excise Management Act 1979* ("CEMA 1979"). Approval and registration is granted by HMRC on the application of any revenue trader who appears to HMRC to satisfy such requirements for registration as they may think fit to impose. Registration is for such period and subject to such conditions as HMRC think fit or as are prescribed by regulations.

15. The relevant regulations for present purposes are the *Warehousekeepers and Owners of Warehoused Goods Regulations 1999 SI 1999/1278* ("WOWGR"). Regulation 5 provides:

> "*(1) For the purposes of section 100G of the Act, the Commissioners may approve revenue traders who wish to deposit relevant goods that they own in an excise warehouse and register them as registered excise dealers and shippers in accordance with section 100G(2) of the Act.*
>
> *(2) A revenue trader who has been so approved and registered shall be known as a registered owner.*"

16. A revenue trader is a person carrying on a trade or business which includes the buying or selling of excise goods (*Section 1 CEMA 1979"*).

17. Regulation 12 provides that the privileges of being a registered owner are that he may hold relevant goods that he owns in an excise warehouse and buy relevant goods that are in an excise warehouse. There are strict record keeping requirements placed on revenue traders and they are subject to a strict compliance regime. See for example Notice 206 *Revenue Traders' Records* and Notice 197 *Excise Goods: Holding and Movement.*

18. By *s100G(5) CEMA 1979* HMRC may at any time for reasonable cause revoke or vary the terms of the approval or registration of any person.

19. EU Directives govern the taxation and movement of duty suspended excise goods. For present purposes we are mainly concerned with *Council Directive 2008/118/EC* ("the 2008 Directive") which repealed and replaced *Directive 92/12 EEC* ("the 1992 Directive") with effect from 1st April 2010. The 2008 Directive lays down the general arrangements in relation to excise duty which is levied directly or indirectly on the consumption of specified goods including alcohol and alcoholic beverages.

20. We note the following recitals to the 2008 Directive which set the context for our detailed reference to the articles which follows:

> *" (1) Council Directive 92/12/EEC of 25 February 1992 on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products has been substantially amended several times.*

Since further amendments are to be made, it should be replaced in the interests of clarity.

(11) In the event of an irregularity, excise duty should be due in the Member State on whose territory the irregularity has been committed which has led to the release for consumption or, if it is not possible to establish where the irregularity has been committed, it should be due in the Member State where it has been detected. 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.

(17) It should be possible for excise goods, prior to their release for consumption, to move within the Community under suspension of excise duty. Such movement should be allowed from a tax warehouse to various destinations, in particular another tax warehouse but also to places equivalent for the purposes of this Directive.

(19) In order to safeguard the payment of excise duty in a case of non-discharge of the excise movement, Member States should require a guarantee, which should be lodged by the authorised warehousekeeper of dispatch or the registered consignor or, if the Member State of dispatch so allows, by another person involved in the movement, under the conditions set by the Member States.

(23) In order to ensure the proper functioning of the rules relating to movement under suspension of excise duty, the conditions for the start of the movement as well as the end, and the discharge of responsibilities, should be clarified.

(36) In order to allow a period of adjustment to the electronic control system for the movement of goods under suspension of excise duty, Member States should be able to benefit from a transitional period during which such movement may continue to be carried out subject to the formalities laid down by Directive 92/12/EEC."

21. We understand that the 2008 Directive coincided with the introduction of an electronic control system for the movement of excise goods. That electronic system was not in place for the movements we are concerned with in this appeal. Therefore those movements were carried out by reference to documentary formalities set out in the 1992 Directive.

22. We now turn to the specific articles of the 2008 Directive relevant to this appeal.

23. *Article 4* of the 2008 Directive provides various definitions for the purposes of the Directive. The following are relevant for present purposes:

*'**authorised warehousekeeper**' means a natural or legal person authorised by the competent authorities of a Member State, in the course of his business, to*

produce, process, hold, receive or dispatch excise goods under a duty suspension arrangement in a tax warehouse;

*'**tax warehouse**' means a place where excise goods are produced, held, received or dispatched under duty suspension arrangements by an authorised warehousekeeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located;*

*'**duty suspension arrangement**' means a tax arrangement applied to the production, processing, holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duty being suspended;*

*'**registered consignee**' means a natural or legal person authorised by the competent authorities of the Member State of destination, in the course of his business and under the conditions fixed by those authorities, to receive excise goods moving under a duty suspension arrangement from another Member State;*

*'**registered consignor**' means a natural or legal person authorised by the competent authorities of the Member State of importation, in the course of his business and under the conditions fixed by those authorities, to only dispatch excise goods under a duty suspension arrangement upon their release for free circulation in accordance with Article 79 of Regulation (EEC) No 2913/92.*

24. We pause to observe that these definitions are incorporated in the *Excise Goods (Holding, Movement and Duty Point) Regulations 2010* ("the 2010 Regulations") by which the Directive is implemented in UK domestic law. The reference to *Article 79 Regulation EEC No 2913/92* in the definition of registered consignor is to the release for free circulation of non-Community goods imported into the EU. We are not concerned with such goods in the present appeal.

25. Registration as an owner of excise goods is not a requirement in every Member State. It is a requirement in the UK pursuant to WOWGR 1999 as described above but there is no definition of a registered owner in the 2008 Directive.

26. The general effect of the 2008 Directive and the 2010 Regulations is that goods may be kept in a tax warehouse, or moved from one tax warehouse to another (including to another tax warehouse in a different country within the EU), without excise duty becoming chargeable (See Article 17 of the 2008 Directive). Excise goods can be traded by owners and prospective purchasers whilst in a tax warehouse and may be moved under duty suspension arrangements. Excise duty becomes chargeable on such goods when they are "released for consumption".

27. Article 7 of the 2008 Directive makes provision for the time and place when excise duty shall become chargeable.

" 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.

…

4. The total destruction or irretrievable loss of excise goods under a duty suspension arrangement, as a result of the actual nature of the goods, of unforeseeable circumstances or force majeure, or as a consequence of authorisation by the competent authorities of the Member State, shall not be considered a release for consumption.

For the purpose of this Directive, goods shall be considered totally destroyed or irretrievably lost when they are rendered unusable as excise goods. The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, when it is not possible to determine where the loss occurred, where it was detected.

5. Each Member State shall lay down its own rules and conditions under which the losses referred to in paragraph 4 are determined."

28. Article 8 makes provision for the person liable to pay the excise duty that has become chargeable:

" 1. The person liable to pay the excise duty that has become chargeable shall be:

(a) in relation to the departure of excise goods from a duty suspension arrangement as referred to in Article 7(2)(a):

(i) the authorised warehousekeeper, the registered consignee or any other person releasing the excise goods or on whose behalf the excise goods are released from the duty suspension arrangement and, in the case of irregular departure from the tax warehouse, any other person involved in that departure;

(ii) in the case of an irregularity during a movement of excise goods under a duty suspension arrangement as defined in Article 10(1), (2) and (4): the

authorised warehousekeeper, the registered consignor or any other person who guaranteed the payment in accordance with Article 18(1) and (2) and any person who participated in the irregular departure and who was aware or who should reasonably have been aware of the irregular nature of the departure;

…

2. Where several persons are liable for payment of one excise duty debt, they shall be jointly and severally liable for such debt."

29. Article 10 defines the term "irregularity" during any movement of excise goods, makes provision for certain deemed irregularities and also makes provision identifying in which Member State the irregularity occurs. For present purposes we note the following:

" *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.

…

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)."

30. For present purposes the reference to Article 20(2) is to the ending of a movement at a tax warehouse.

31. Article 18 directs Member States to require that the risks inherent in the movement of goods with duty suspended are guaranteed. The guarantee must be provided by the authorised warehousekeeper, registered consignor, registered consignee, transporter, or the owner of the goods, or jointly by two or more of those persons:

" *1. The competent authorities of the Member State of dispatch, under the conditions fixed by them, shall require that the risks inherent in the movement under suspension of excise duty be covered by a guarantee provided by the authorised warehousekeeper of dispatch or the registered consignor.*

2. By way of derogation from paragraph 1, the competent authorities of the Member State of dispatch, under the conditions fixed by them, may allow the

guarantee referred to in paragraph 1 to be provided by the transporter or carrier, the owner of the excise goods, the consignee, or jointly by two or more of these persons and the persons mentioned in paragraph 1."

32. By Article 46(1), Member States could until 31st December 2010 continue to allow movements of excise goods under a duty suspension arrangement initiated under the formalities set out in Articles 18 of the 1992 Directive. Those formalities included that when such goods moved between Member States they should be accompanied by an administrative document or a commercial document.

33. Insofar as material to this appeal, the 2010 Regulations implement the 2008 Directive as follows.

34. Regulations 5, 6 and 7 set out the time when excise duty becomes payable.

"*5. Subject to regulation 7(2), there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom.*

6. (1) Excise goods are released for consumption in the United Kingdom at the time when the goods—

(a) leave a duty suspension arrangement;

(b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;

……

7. (1) For the purposes of regulation 6(1)(a), excise goods leave a duty suspension arrangement at the earlier of the time when—

(a) they leave any tax warehouse in the United Kingdom or are otherwise made available for consumption (including consumption in a tax warehouse) unless—

(i) they are dispatched to one of the destinations referred to in regulation 35(a); and

(ii) are moved in accordance with the conditions specified in regulation 39;

…

(h) there is an irregularity in the course of a movement of the goods under a duty suspension arrangement which occurs, or is deemed to occur, in the United Kingdom;

(i) there is any contravention of, or failure to comply with, any

requirement relating to the duty suspension arrangement; or

(j) they are found to be deficient or missing from a tax warehouse.

…..

(4) In paragraph (1)(h), "irregularity" has the meaning given by Article 10(6) of the Directive.

35. For present purposes the destination referred to in Regulation 35(a) is a tax warehouse approved in relation to the specific type of excise goods being moved.

36. Regulation 39 requires a guarantee to be provided before excise goods may be moved between tax warehouses under duty suspension. The guarantee must be provided by the authorised warehousekeeper of dispatch or the registered consignee. Subject to such conditions as are specified in a notice HMRC may allow the guarantee to be provided by the transporter of the goods, the owner of the goods or the consignee of the goods:

" *(1) Except for movements between tax warehouses which the Commissioners may specify in a notice, excise goods may not be moved under duty suspension arrangements unless—*

(a) the risks inherent in the movement are covered by an approved guarantee provided by the authorised warehousekeeper of dispatch, the registered consignor or any other person the Commissioners may allow in accordance with paragraph (2) which secures such amount of the duty chargeable on the goods as the Commissioners may require; and

…

(2) Subject to such conditions as they may specify in a notice the Commissioners may allow the guarantee referred to in paragraph (1)(a) to be provided by —

(a) the transporter or carrier of the excise goods;

(b) the owner of the excise goods; or

(c) the consignee of the excise goods."

37. Regulations 8 and 9 make provision to identify the person or persons liable for the excise duty:

8. (1) Subject to regulation 9, the person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(a) (excise goods leaving a duty suspension arrangement) is the authorised warehouse keeper, the UK registered consignee or any other person releasing the excise

goods or on whose behalf the excise goods are released from the duty suspension arrangement.

(2) In the case of an irregular departure from a tax warehouse any other person involved in that departure is jointly and severally liable to pay the duty with the persons specified in paragraph (1).

9. (1) The person liable to pay the duty when excise goods are released for consumption by virtue of an irregularity in the course of a movement of the goods under a duty suspension arrangement which occurs, or is deemed to occur, in the United Kingdom is—

(a) in a case where a guarantee was required in accordance with regulation 39, the person who provided that guarantee;

(b) in a case where no guarantee was required—

(i) the authorised warehouse keeper of dispatch (where the excise goods were dispatched from a tax warehouse in the United Kingdom); or

(ii) the UK registered consignor (where the excise goods were dispatched upon their release for free circulation in the United Kingdom in accordance with Article 79 of Council Regulation 2913/92/EEC).

(2) Any other person who participated in the irregularity and who was aware, or should reasonably have been aware, that it was an irregularity, is jointly and severally liable to pay the duty with the persons specified in paragraph (1).

(3) In this regulation "irregularity" has the meaning given by Article 10(6) of the Directive."

38. *s116 CEMA 1979* makes provision for the payment of excise duty by revenue traders as follows;

" *116(1) Every revenue trader shall pay any duty of excise payable in respect of his trade at or within such time, at such place and to such person as the Commissioners may direct whether or not payment of that duty has been secured by bond or otherwise.*

(2) If any duty payable is not paid in accordance with subsection (1) above, it shall be paid on demand made by the Commissioners either to the trader personally or by delivering the demand in writing at his place of above or business."

39. We observe at this stage that the previous regulations which implemented the 1992 Directive were recently the subject of consideration by the Upper Tribunal in *Butlers Ship Stores Limited v Commissioners of HM Revenue & Customs [2013]*

UKUT 0564 (TCC). The decision was released after the final submissions in the present appeal.

40. *Butlers Ship Stores Limited* was concerned with the liability of an authorised warehousekeeper following an irregularity in the movement of goods. In particular it was concerned with the application of the 1992 Directive which as we have said was repealed and replaced by the 2010 Directive. The 1992 Directive placed liability on the consignor identified in the accompanying administrative document which was the authorised warehouse. It is not therefore directly relevant to the legislative regime and facts of the present appeal. We do however note by way of background Butlers' case as described in summary at [7] of the decision of Lord Glennie:

> " *Butlers' case on these facts is straightforward. They say that it is simply unfair that they, an innocent party, should be made liable for the whole of the excise duty payable on the goods. The tax warehousekeeper is not the person primarily liable for the duty. The primary obligation to pay the duty is placed on the vendor of the goods. Imposing a liability on the warehousekeeper fulfils no fiscal or economic purpose. It is simply a means of ensuring that the tax is paid. To make an innocent third party, such as the warehousekeeper, liable for the whole duty without it being established that he is at fault in any way – and, indeed, when it is established that he is not at fault in any way – is a disproportionate response to the need to ensure that the duty chargeable on the goods is paid. It infringes the principle of proportionality. It also infringes the principle of legal certainty, since if liability to pay the duty is triggered by acts of a third party over whom the warehousekeeper has no control and of whose existence he may be entirely ignorant, the warehousekeeper cannot predict with any degree of confidence what will be the legal outcome of his actions; and he cannot in any effective way temper his actions so as to avoid the risk of liability. The main thrust of their attack is directed at the UK Regulations. While on a sympathetic construction, they might not render the warehousekeeper liable, more realistically (as Mr Ghosh QC on their behalf candidly accepted), they do make the warehousekeeper liable, but in so doing they infringe the principles of proportionality and legal certainty and go further than is required by the EU Directive to which they purport to give effect. In the alternative, however, they say that if the Directive itself requires the warehousekeeper to be held liable in such circumstances, and the UK Regulations do no more than is required to comply with the Directive, then the Directive too does not comply with the relevant principles of EU law and should be declared to be invalid; though they recognise that this would require a reference to the European Court of Justice.*"

41. Butler's arguments were rejected by the Upper Tribunal. In doing so the Upper Tribunal noted at [17] that the primary liability to pay excise duty under *Article 10* of the *1992 Directive* lay with the vendor. However in cases of irregularity where excise goods were moving under duty suspension, the excise duty was due from the person who guaranteed payment of the duty. That would be the authorised warehousekeeper unless someone else provided a guarantee. Then at [18] Lord Glennie stated:

" *Put short, while the duty is chargeable to the vendor of the goods, a system has been established whereby, to facilitate the holding, movement and storage of goods before excise duty has been paid, goods may be held under duty suspension arrangements in authorised tax warehouses and may be shipped from one tax warehouse to another, including to a tax warehouse in another country within the EU. This gives rise, perhaps inevitably, to the risk that taxable goods will be lost or stolen before excise duty is ever paid on them. In those circumstances it has been thought appropriate to make the warehousekeeper liable for the unpaid excise duty which would have been paid on the goods had they not been lost or stolen, and to require the warehousekeeper to put up a guarantee against such liability. The warehousekeeper can only be relieved of his liability if, by agreement of the competent authorities in the member state, the transporter or owner of the goods provides a guarantee in his place. But the authorities of a member state are given no power to insist that the transporter or owner of the goods provides a guarantee in place of the warehousekeeper.*"

42. At [31] Lord Glennie noted that under the 1992 Directive and the previous regulations the "default liability" for payment of excise duty on goods which go missing during movement falls on the warehousekeeper. However the warehousekeeper could be relieved of liability if he could negotiate for the transporter or the owner to provide the guarantee. Similarly, he noted at [50] that the previous regulations provided any person who has caused the occurrence of an excise duty point would be jointly and severally liable with the warehouskeeper. Hence the warehousekeeper would have a right of contribution.

43. Finally in this section we note that an assessment to excise duty in the case of an irregular movement is made under the general assessing provisions contained in *section 12(1A) Finance Act 1994.*

44. We were not addressed on the burden of proof, but in the light of the evidence we have heard we have been able to make findings of fact irrespective of where the burden of proof lies in relation to specific issues.

Legal Framework - VAT

45. *Section 18 Value Added Tax Act 1994* ("VAT Act 1994") and the following sections set out the application of VAT to supplies of goods subject to the warehousing regime. For these purposes goods are in a warehousing regime when they are in a tax warehouse or fiscal warehouse or where they are being transported between warehouses. A fiscal warehouse is a warehouse approved by HMRC pursuant to section 18A.

46. Section 18B deals with relief in respect of fiscally warehoused goods and in general terms applies where there is a supply of excise goods subject to a fiscal warehouse regime. In those circumstances, subject to certain conditions the supply is treated by section 18B(3) as taking place outside the UK for VAT purposes. Hence no VAT would become due in the UK.

47. For present purposes, relief is available if there is a supply of excise goods where duty has been deferred and the supply takes place when the goods are subject to a fiscal warehousing regime.

48. In general, the time of supply where goods are removed from the UK and acquired by a taxable person in another Member State is the earlier of the date of issue of a VAT invoice or the 15th day of the month following removal of the goods from the UK. See *Section 6(7),(8) VAT Act 1994*.

49. However in the context of warehoused goods, section 18B(4) provides:

> " *Where subsection (3) does not apply and the acquisition or supply in question falls, for the purposes of this Act, to be treated as taking place in the United Kingdom, that acquisition or supply shall be treated for the purposes of this Act as taking place when the goods are removed from the fiscal warehousing regime.*"

50. Where *section 18B(4)* applies, for example where goods are diverted from fiscal warehousing, *section 18D* makes provision for accountability for VAT. In particular, subsection (2) provides:

> " *Any VAT payable on the supply … shall (subject to any regulations under subsection (3) below) be paid –*
>
> *(a) at the time when the supply or acquisition is treated as taking place under the section in question; and*
>
> *(b) by the person by whom the goods are removed or, as the case may be, together with the excise duty, by the person who is required to pay that duty.*"

51. It seems to us therefore that where VAT is payable on removal of goods from a warehousing regime, it is payable by the person who made the supply or by the person who is required to pay the excise duty. However the VAT payable on that supply will follow the usual rules for exemption or zero rating. Hence if the goods were supplied in circumstances that would otherwise qualify for zero rating then the supply would be zero rated.

52. Section 30(8) of the VAT Act 1994 provides:

> " *Regulations may provide for the zero-rating of supplies of goods … in cases where –*
>
> *(a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the Member States or that the supply in question involved both -*
>
> *(i) the removal of the goods from the United Kingdom; and*

(ii) their acquisition in another Member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that Member State ...

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

53. Article 134 of the Value Added Tax Regulations 1995 provides:

" *Where the Commissioners are satisfied that –*

(a) a supply of goods by a taxable person involves their removal from the United Kingdom,
(b) the supply is to a person taxable in another Member State,
(c) the goods have been removed to another Member State, and
(d) the goods are not goods in relation to whose supply the taxable person has opted, pursuant to section 50A of the [VAT] Act, for VAT to be charged by reference to the profit margin on the supply,

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

54. HMRC Notices 703 and 725 also have the force of law. In particular these require that goods supplied to a taxable person in another Member State may be zero rated if the UK supplier:

(1) Obtains and shows on its VAT sales invoice the customer's EC VAT registration number, including the two-letter country code prefix,

(2) The goods are sent or transported out of the UK to a destination in another Member State; and

(3) Within three months of the date of supply, the UK supplier obtains and keeps valid commercial documentary evidence that the goods have been removed from the UK.

55. To some extent, following the decision of the Court of Justice in *Teleos plc & Others v Commissioners of Customs & Excise Case C-409/04*, a trader may in certain circumstances be entitled to zero rate a supply even where these conditions are not satisfied. See for example the discussion in *N2J Limited v HM Revenue & Customs [2009] EWHC 1596 (Ch)* where the trader did not establish that the goods had left the country. We deal with the parties' submissions on Teleos later in this decision.

56. By *section 73(7B) VATA 1994* where it appears to the Commissioners that goods have been removed from a warehouse or fiscal warehouse without payment of the VAT payable under section 18D on that removal, they may assess to the best of their judgment the amount of VAT due from the person removing the goods or other person liable and notify it to him.

Legal Framework - Jurisdiction

57. There was no dispute as to our jurisdiction in relation to the various aspects of this appeal.

58. In relation to the decision revoking the appellant's registration as a registered owner we have a supervisory jurisdiction pursuant to *section 16(4) Finance Act 1994*. Our powers are limited and for present purposes only arise if we are satisfied that HMRC could not reasonably have arrived at a decision to revoke the registration.

59. In relation to the excise duty assessment we have a full appellate jurisdiction under *section 16(5) Finance Act 1994*.

60. In relation to the VAT assessment the appeal is pursuant to *section 83(p) VAT Act 1994* and we have a full appellate jurisdiction.

Findings of Fact

61. We heard evidence from Jatinder Pal Kang ("Mr Kang") and Kulvinder Kang ("Mrs Kang") for the appellant. They are respectively the Managing Director and Company Secretary of the appellant. For HMRC we heard evidence from Ms Lavinia McGuinness, Mr Robert McWilliam and Mr Allan Donnachie, all officers or higher officers of HMRC.

62. We make the following findings of fact based on that evidence.

63. Mr Kang has been in the cash and carry business since 1995. Mrs Kang started working in the business when she took voluntary redundancy from her job as head of the Business School at University College Suffolk. In general Mr Kang would visit customers and suppliers dealing with sales and purchases. Mrs Kang would deal with the paperwork and due diligence on trading partners. Mr and Mrs Kang were both well aware that there was a risk of fraud in movements of duty suspended alcohol.

64. By 2006 the appellant had an annual turnover of some £1.9 million involving cash and carry of alcoholic drinks, other drinks and foodstuffs. The business also involved exporting own brand wines, spirits and beers to the United Arab Emirates.

65. Between 2003 and 2006 the appellant dealt with Edwards as a tax warehouse.

66. In 2006 the business was sold and Mr Kang concentrated on establishing an airline business called Kang Pacific Airline based in the UAE.

67. The airline business was not successful and in late 2008 Mr Kang, through the appellant, sought to re-establish the cash and carry drinks business, including the own brand drinks. The account with Edwards was re-activated. For the purposes of its business the appellant used the services of various bonded transport businesses.

68. In the year 2009-10 the appellant achieved a turnover of approximately £½ million and in the first 6 months of 2010 a turnover of approximately £1 million. Generally the appellant traded in wines and spirits which were more profitable that beer.

69. In June 2010 the appellant first came into contact with Revolution. On 9 June 2010 one of the appellant's long standing customers, Chateau des Dunes based in Calais, arranged for a load of beer they were purchasing from the appellant to be transported by Revolution under duty suspension to a tax warehouse in Calais. The appellant then went on to arrange for Revolution to transport several further loads to Calais under duty suspension on 11 June and 29 June 2010.

70. Revolution did not have its own vehicles or drivers and employed third party vehicle operators. It had an address in Bury which we understand was Mr Garnett's home address.

71. On 14 June 2010 Mrs Kang on behalf of the appellant exchanged various documents with Mr Garnett. Those documents included confirmation that Revolution had a movement guarantee in place in the sum of £30,000. The confirmation was in the form of a letter from HMRC dated 16 October 2009. Mrs Kang also obtained a copy of Mr Garnett's passport, copies of two utility bill addressed to Mr Garnett, a letterhead for Revolution and a copy of Mr Garnett's VAT registration certificate. The latter document showed that he had been registered for VAT since August 2002 and had a trade classification of "Freight Transport by Road".

72. Edwards and Chateau des Dunes verbally confirmed to Mr Kang that they had dealt with Revolution. There was no suggestion at this stage that Revolution was involved in any irregular movements.

73. Mr Kang met Mr Garnett on 3 occasions. Twice when he came to the appellant's office to receive payment for his invoices and on a third occasion when payment was made at the Trafford Centre, which was a convenient mid-way point between Bury and Northwich.

74. In his witness statement Mr Kang outlined the circumstances in which the appellant first came to deal with Legata. He recalled that Mr Garnett introduced Legata, and an individual called "Kuki" who was Legata's agent in the UK. Mr Kang was wary because some years previously he had sold goods to Kuki who did not pay for them and had been forced to recover the goods. As a result Mr Kang told Kuki that Legata would have to pay for the goods upfront before the stock was released by Edwards. There was no documentation from Legata to the appellant which confirmed Kuki was acting as its agent. However, following negotiations with Kuki about the price, the appellant received email purchase orders which at least appeared to come from Mr Maris Barbals, expressed to be the managing director of Legata.

75. In oral evidence Mr Kang's account was different. He said that Legata were introduced to him by Revolution after he tried to instruct Revolution to transport goods to Romania. Revolution told him that it did not transport goods to Romania

leaving the appellant stuck with the stock. Mr Garnett told Mr Kang that he knew a company called Legata who might take the goods.

76. The explanation in oral evidence cannot be right. On 7 July 2010 Erbol Distribution Srl, a Romanian company provided details of their registration as a tax warehouse to Edwards. Edwards carried out a SEED check on Erbol on 12 July 2010 and HMRC confirmed that it was authorised to receive excise duty suspended goods. On 15 July 2010 Mr Kang sought to instruct Revolution to deliver 3 consignments of excise goods to Erbol in Romania but Mr Garnett responded on the same date at 7.13pm that he did not transport to Romania. The appellant had already dealt with Legata before 15 July 2010 so this could not have been the cause of any introduction.

77. On several occasions in his evidence in chief Mr Kang said that Revolution "introduced" him to Legata. He also said specifically that Mr Garnett told Mr Kang the name of Legata's agent, Kuki which was a name Mr Kang recognised.

78. We found Mr and Mrs Kang to be straightforward and honest witnesses. The most likely explanation is that it was indeed Mr Garnett who introduced Mr Kang to Legata, but not when the deal with Erbol fell through. Mr Kang was mistaken in that part of his evidence. We accept that the circumstances were as set out in Mr Kang's witness statement. When the deal with Erbol fell through it was however Mr Garnett who first suggested to Mr Kang that Legata might be interested in taking the goods.

79. Following the introduction to Legata, on 2 July 2010 the appellant received an email from Mr Barbals signed on behalf of Legata as managing director. The email asked to open an account with the appellant and for a price list of available stock. The email also attached documents showing details of Legata. The documents, described by Mrs Kang as "due diligence", comprised details of Legata's address in Riga, company registration number and VAT number. This document was dated 14 June 2010 and was addressed to Revolution. It seems therefore that Mr Garnett had himself only recently been introduced to Legata. There were also various other formal registration documents provided by Legata which we assume are written in Latvian together with a copy of Mr Barbals passport. Mrs Kang did not obtain a translation. Mr and Mrs Kang did not notice that Legata's email address was "*.ru*" signifying that it was hosted in Russia. We do not find that significant.

80. Mrs Kang immediately replied to Mr Barbals noting that the company details were addressed to Revolution and asking that they be re-sent addressed to the appellant. They were resent on 5 July 2010.

81. Mrs Kang also checked the website of Legata. There was no documentary evidence that she did so but we accept the evidence of Mr and Mrs Kang to this effect. Mr Mandalia put to Mr and Mrs Kang that the website would have shown that the genuine Legata did not trade in alcoholic drinks but traded in workwear. However there was no direct evidence before us which would substantiate what business Legata was in. There is a report from an HMRC fiscal liaison officer in Vilnius to the effect that Legata was registered with the equivalent of Companies House as a workwear

manufacturer, but that is insufficient for us to reach any conclusion on whether Legata did genuinely trade in alcoholic drinks.

82. On 6 July 2010 Mrs Kang emailed Mr Barbals with details of stock availability comprising various quantities of beer and also saying "*we can shift the goods to you as soon as possible*". Mr Kang said that all negotiations were carried out by Kuki on behalf of Legata. It was also agreed that the appellant would pay Kuki a commission.

83. In response to Mrs Kang's email, Mr Barbals emailed later on 6 July 2010 attaching a purchase order ("PO 28") for all the goods identified as available. The purchase order stated:

> "*Please release the above goods to be deliver into our account at:*
> *Simply Vodka BvBa*
> *Excise No.: BE1A000098000*
> *Delften 23, Hall 43 Malle, Belgium*
>
> *We have instructed our transport to collect our orders*"

84. The purchase order was incorrect in that it was the appellant who was going to be responsible for arranging transport of the goods. We do not consider that anything really turns on that discrepancy.

85. Mr Kang decided to use Revolution to ship the goods. He was satisfied that they were reliable based on his initial dealings with the firm and his discussions with Edwards and Chateau des Dunes. He did not use the appellant's usual bonded transport companies. One was Golding Hoptroff but they did not ship bonded goods internationally. One was A & R Haulage although Mr Kang could not recall why he did not use that firm. He suggested that they may have been busy.

86. When Legata asked for the goods to be delivered to Simply Vodka, Mrs Kang carried out the following checks:

(1) Mrs Kang discussed Simply Vodka with Stacey Edwards and was told that Edwards had been shipping goods to Simply Vodka for some time. Mrs Kang assumed that Edwards had carried out a SEED check on Simply Vodka. That assumption turned out to be correct and in the course of these appeal proceedings the appellant was provided with a SEED check dated 10 June 2010 in which HMRC confirmed to Edwards that Simply Vodka was authorised to receive excise duty suspended beer.

(2) Mr Garnett informed Mrs Kang that he was transporting up to 10 consignments a day from Edwards to Simply Vodka for Legata.

(3) Stacey Edwards also informed Mrs Kang that Edwards had been dealing regularly with Legata and Revolution. Mrs Kang was unable to recall over what period Edwards said they had been trading with Legata but she would have discussed that with Stacey Edwards at the time and was satisfied with the answer.

(4) Mrs Kang carried out an internet search for Simply Vodka. There was no documentary evidence of that search but Mr and Mrs Kang both said that Mrs Kang had printed the results and showed it to Mr Kang. The internet search confirmed Simply Vodka's address as that given to them by Legata. Mrs Kang also recalled that Simply Vodka used a trading name of "Simply Wodka" for its own brand vodka. We accept this evidence.

(5) Mrs Kang said in evidence that she had carried out a "Europa" check on Legata's VAT registration number in July 2010 but did not retain a screen print. We accept her evidence.

87. Mr and Mrs Kang also said that Edwards required the appellant to give 24 hours notice of all deliveries and shipments. They thought that there was something in Edwards' terms and conditions to this effect. We were provided with a copy of what both parties accepted were the terms and conditions. In so far as relevant they provided that "*orders must be received before 3.00pm for next day collection*". Both Mr and Mrs Kang understood that this was required by HMRC so that HMRC would have advance notice of movements. We accept that Mr and Mrs Kang believed this to be the case and gained some comfort from this procedure.

88. In fact HMRC had no such requirement in relation to movement of beer. We accept Mr McWilliam's evidence that in 2002 when Edwards first became an authorised warehousekeeper it would have been required to notify movements in advance to its compliance officer. Over time that condition would have been lifted. By 2010, most of Edwards movements were beers and the condition had been lifted. Edwards was still required to pre-notify movements of spirits. Edwards would also notify the UK Border Force at Dover on a daily basis of any goods being sent that day and what was intended to be sent the following day. This was not a formal requirement but was done as a matter of practice.

89. We were also referred to Notice 197 which describes an "early warning system" whereby prior notification of certain movements of excise goods must be given to HMRC in Glasgow by authorised warehousekeepers. However this early warning system did not apply to beers.

90. Mr Mandalia put to Mr and Mrs Kang that the checks they carried out on Simply Vodka were inadequate. We do not accept that is the case. We find that the appellant had sufficient information about Simply Vodka, in particular from Stacey Edwards, to reasonably conclude that Simply Vodka was an authorised warehousekeeper in Belgium. Mrs Kang had every reason to believe that it was an authorised warehousekeeper and the SEED check obtained by Edwards, whilst not seen by Mr or Mrs Kang, was a sufficient basis for Edwards to confirm the reliability of Simply Vodka.

91. Mr Mandalia put to Mr and Mrs Kang that the checks on Revolution were inadequate. We do not accept that is the case. Revolution had been VAT registered since August 2002. Their movement guarantee had been accepted by HMRC from which Mr and Mrs Kang were entitled to take re-assurance. Revolution were used by one of their existing customers and known to Edwards. It is true that the appellant had

used Revolution prior to 14 June 2010, when it obtained documentary checks in relation to Revolution, but it had relied on the knowledge of Edwards and Chateau des Dunes and in any event the movements we are concerned with took place after that date.

92. Mr and Mrs Kang placed great reliance on what they were told by Edwards and took that information at face value. They had known Edwards and had been dealing with them as an authorised warehousekeeper on and off for nearly 10 years.

93. On 8 July 2010 the appellant invoiced Legata in relation to PO 28. The sum invoiced was £47,820 with no VAT because the goods were to be removed from the UK and Legata was VAT registered in Latvia. We note that this invoice, and subsequent invoices to Legata, did not include Legata's VAT registration number. In total Legata emailed 8 purchase orders to the appellant and there were 9 invoices from the appellant to Legata. The purchase orders confirmed deals which had been negotiated with Kuki.

94. Kuki paid cash for the goods. On 7 July he paid cash of £47,820, on 22 July 2010 cash of £107,581 and on 29 July £65,036. Kuki did not ask for any receipt from Mr Kang.

95. The appellant instructed Edwards to release the goods to Revolution "*for the account of Simply **Wodka***". This is the spelling Mrs Kang must have seen on the internet. We have had some difficulty in identifying which release instruction relates to which consignment of goods. The evidence was unclear, but it was not in dispute between the parties that the appellant directed release of each load in the same terms.

96. Similar difficulty arose in the case of instructions to Revolution where the appellant again instructed the goods to be delivered to "Simply Wodka". Curiously the first such instruction was dated 5 July 2010 apparently before the deal was agreed, but this was not pursued in the evidence. In total there were 9 sets of instructions to Revolution resulting in 10 consignments of beer.

97. The appellant shipped 10 consignments of beer to Legata intended for delivery at Simply Vodka. The date of shipping is not entirely clear but it was never suggested that the goods moved before the date of payment. The invoicing and payment for the consignments were as follows suggesting that 2 consignments were invoiced and paid together:

Invoice Date (2010)	Value £	Date Paid (2010)
8 July	47,820	7 July
15 July	21,106	22 July
19 July	21,808	22 July
19 July	21,808	22 July
20 July	22,042	22 July
20 July	20.817	22 July
20 July	25,852	29 July
21 July	21,808	29 July
21 July	17,376	29 July

98. The appellant was registered for the purposes of money laundering regulations on 4 May 2010. As such it could accept cash payments for goods over €9,000. As part of the process of obtaining that registration the appellant was advised by a consultant called Mark Curley. He had advised the appellant to obtain signed payment confirmations from the customer, and also that they should obtain identity documents from anyone making payment.

99. On 7 July 2010, when the first payment was made, Kuki refused to sign the confirmation of payment. Kuki was asked for copies of identity documents but would not provide them. He assured Mr Kang that Mr Barbals would come at a later date and provide documents.

100. Mr and Mrs Kang produced documents headed "Confirmation of Payment" for each of the 9 payments identified above. These documents included the amount, number and date of each invoice from the appellant to Legata with the following narrative:

"*Please sign below to confirm that payment has been made and received.*"

101. Mr Kang said that he intended both himself and Kuki to sign the documents. When Kuki made the first payment he refused to sign the confirmation but said he would get it signed. On the second occasion he said that he would get them signed by the owner of Legata who was, he said, due to come to the UK. On the third occasion he again refused and gave as his reason for not signing the fact that the appellant had not paid him the full commission he was entitled to. The appellant disputed this with Kuki, Mr Kang maintaining that he had paid all the commission due to Kuki. Both Mr and Mrs Kang said that the original agreement for Kuki's commission was £200 per load. Kuki asked for more money and Mr Kang agreed to pay £3,000 but Kuki wrongly claimed £5,000. At that stage Mr Kang said that he refused to deal with Legata anymore.

102. We consider that the appellant's dealings with Kuki should, as they progressed, have raised concerns with Mr Kang. However Mr Kang clearly took considerable comfort from the fact that the goods were moving from one tax warehouse to another tax warehouse under the guarantee of an authorised transporter.

103. On 12 August 2010 Mrs Kang sent the payment confirmation forms to Legata. There was no response and on 1 September 2010 she emailed Mr Barbals with the forms attached asking him to sign them and send them back by post. Mr Barbals refused, saying that there was £5,435 outstanding from the appellant to Kuki.

104. At no stage prior to the revocation of the appellant's registration did HMRC ever suggest that the commercial checks being carried out by the appellant were deficient in any way. Having said that we did not have any evidence as to previous contact between HMRC and the appellant.

105. The circumstances in which the diversion of the excise goods sold by the appellant to Legata came to light are as follows.

106. On 27 July 2010 officers of HMRC intercepted a consignment of duty suspended alcoholic drinks being unloaded at a site near Shepperton. In customs' terminology this was a "slaughter site" where loads of duty suspended goods are unlawfully diverted from duty suspension arrangements with a view to being split into smaller consignments and distributed throughout the country. We heard evidence from Ms Lavinia McGuinness, an experienced HMRC officer who was on duty that day. We are satisfied that she gave an entirely true account of events at Shepperton.

107. There was plainly some intelligence which led HMRC to believe that duty suspended goods would be diverted at the site in Shepperton. The exercise was given a codename "Operation Landfill". Ms McGuinness was, in her own words, "a foot soldier" and was not privy to the intelligence which led to this operation. The HMRC officers including Ms McGuinness waited outside the site together with police support. When a lorry arrived and unloading commenced the officers entered the site, stopped all activity, and interviewed all persons present. Ms McGuinness' role was to interview the driver and she made a contemporaneous note.

108. We do not need to set out the events in detail. The goods in the lorry comprised pallets of beer which had been collected by the driver from Edwards. Administrative Accompanying Documents ("AADs") found in the cab showed goods from Edwards being consigned to Simply Vodka and shipped by Revolution. We note that the goods in the lorry at Shepperton and identified in the AADs were not the appellant's goods. The Statement of Case served by HMRC asserted that the goods intercepted at Shepperton included goods owned by the appellant. In fact that was not the case, and Mr Mandalia accepted as much.

109. Elsewhere on the site the officers found counterfeit excise duty labels for bottles of spirit.

110. On 28 July 2010 Ms McGuinness contacted Senior Officer McWilliam who was the compliance officer for Edwards to tell him that they had found AADs for

consignments of duty suspended alcohol moving from Edwards to Simply Vodka at the site in Shepperton. He immediately instructed Edwards that no more removals must take place under Revolution's guarantee or to Simply Vodka. He also took steps to revoke Revolution's guarantee. On the same day, Mr Garnett called Mr McWilliam to challenge the revocation of his guarantee and was told to write to HMRC.

111. Mr McWilliam said he had no previous knowledge of any investigation into movements of goods from Edwards and we accept that evidence.

112. On 28 July 2010 Mr McWilliam received faxes of documents uplifted from the site in Shepperton. These included AADs and CMRs. The AADs showed Edwards as the consignor and Simply Vodka as the consignee. The transporter was "Reveloution 2000" and the guarantee was provided by "Reveloution International 2000". These references were intended to be to Revolution and the entries on the AADs were certified as correct by Stacey Edwards.

113. On the same date Mr McWilliam issued a formal direction to Edwards restricting any removal of goods to Simply Vodka. Any such removal could only be under duty suspension with the written permission of HMRC.

114. On 29 July 2010 Mr McWilliam went to a meeting at Customs House in London with representatives of the Belgian fiscal authorities. We accept that this meeting had been pre-arranged and was not arranged for any purpose connected with Operation Landfill. It was a general meeting to discuss the movement of excise goods from Belgium to the UK. Edwards was a warehouse that had received goods from Belgium. The Belgian authorities suspected that Edwards was one of a number of warehouses being used as an intended destination for goods being moved from Belgium to the UK but being diverted on route. That is why Mr McWilliam was invited to the meeting. There was a discussion about various tax warehouses including Edwards.

115. At the end of the meeting Mr McWilliam raised a question in relation to Simply Vodka arising out of the events at Shepperton. He was told by a Belgian official that Simply Vodka had closed and she arranged for a fax to be sent to them which confirmed from the Belgian SEED database that the authorisation of Simply Vodka had been withdrawn on 4 February 2010. This came as a surprise to Mr McWilliam because he had previously checked Simply Vodka on the UK SEED and it was showing as an authorised warehouse.

116. Mr McWilliam subsequently made enquiries of officers in Glasgow responsible for maintaining the SEED database as to why Simply Vodka continued to show as a tax warehouse after February 2010. However he did not get any response and unfortunately he did not pursue those enquiries.

117. Mr McWilliam then obtained from Edwards the copies of AADs which were returned to them following purported delivery of the appellant's goods to Simply Vodka. These AADs purported to include a signature and stamp on behalf of Simply

Vodka and the Belgian fiscal authorities. The stamp for Simply Vodka read "*Simly Vodka Bvba*".

118. An AAD is a four part document initially completed by the consignor, in this case Edwards. The consignor keeps copy 1. Copies 2, 3 and 4 go with the driver. They are completed at the destination warehouse which keeps copy 2 and sends copy 3 back to the consignor. Copy 4 is not used in the UK. No other party gets a copy of the AAD. The driver will also take a CMR leaving one copy with the destination warehouse and retaining one copy signed by the destination warehouse which he presents to the person responsible for paying him. In the ordinary course therefore a registered owner of goods such as the appellant would not receive a copy of the AAD or the CMR unless it had made specific provision to do so.

119. Edwards should have received its copy of the AAD for each load by the 15th day of the following month. The first loads moved by Edwards to Simply Vodka were in June 2010. If by 15 July 2010 Edwards had received the first AADs they ought to have noted the clear indications from the Simply Vodka stamps that they were false documents. There is no evidence as to when Edwards received the AADs, although we do know that they continued to release goods to Simply Vodka after 15 July 2010, including the appellant's goods.

120. It will be apparent that there is a timing anomaly here. The last payments by Kuki to the appellant were made on 29 July 2010. Mr McWilliam contacted Edwards and restricted movements to Simply Vodka on 28 July 2010. This was not explained in evidence. It is inconceivable that goods moved from Edwards to Simply Vodka after 28 July 2010. One inference might be that the appellant sent goods to Simply Vodka before Legata had paid for those goods. However in the absence of any opportunity for Mr and Mrs Kang to explain these matters it would not be right for us to draw such an adverse inference.

121. In the light of the evidence available to him Mr McWilliam decided to revoke the movement guarantee of Revolution and also the registrations of all registered owners involved in sending goods to Simply Vodka. The date on which he took those decisions is not entirely clear but appears to have been on or about 20 August 2010. That is the date on which he drafted a letter to the appellant. No letter was sent at that time. Instead it was sent to the Glasgow office of HMRC to be issued.

122. On 10 September 2010 Mr McWilliam's letter to the appellant revoking its status as a registered owner was sent to the appellant. One reason was given for the decision:

> "*There have been 11 movements of duty suspended excise goods from your account in Edwards Beers & Minerals Ltd which were not delivered to the declared destination warehouse – Simply Vodka BvBa in Belgium (as recorded on the accompanying paperwork).*"

123. In fact it was common ground that there had been only 10 movements. Leaving that aside, the reason given seems less that full. The real reason, as Mr McWilliam

said in evidence, was that there had been some 177 transactions purporting to move duty suspended goods from Edwards to Simply Vodka. These movements involved a significant loss of excise duty in excess of £7 million and Mr McWilliam considered that the owners had "participated" in the irregularities. He felt that there was a significant risk that further duty could be lost.

124. Mr McWilliam applied the same sanction to 6 registered owners who had purportedly moved goods to Simply Vodka.

125. The appellant did not receive Mr McWilliam's letter revoking its registration until 14 September 2010. However Mrs Kang first learnt the appellant's registration had been revoked prior to that, when speaking with Stacey Edwards about booking a routine consignment of duty suspended goods.

126. On 25 September 2010 Mrs Kang formally requested a review of the decision revoking the appellant's registration.

127. On 28 September 2010 Mr McWilliam sent an enquiry to the HMRC fiscal liaison officer for Lithuania and Latvia in connection with Legata. He received a response on or about 4 November 2010 to the effect that the Latvian Company Registration database showed Legata as manufacturing workwear, it had no imports or exports since 2003 and the Latvian authorities had no information that it was dealing in excise goods.

128. By letter dated 9 November 2010 Mr Donnachie wrote setting out the results of his review and maintaining what he described as a decision dated 20 August 2010. Separately in the letter Mr Donnachie referred to a letter to the appellant dated 19 August 2010. Mr Donnachie was clearly dealing with the decision revoking the appellant's registration. Mr McWilliam's draft was dated 20 August 2010 but it was not sent out until 10 September 2010. Mr Donnachie's reasons for maintaining the decision were as follows:

> "*The Commissioners consider that you have allowed Excise duty suspended goods to be removed from duty suspension in the [Edwards] tax warehouse for dispatch on behalf of a new customer to a tax warehouse in another member State that you had not dealt with before without taking any steps to confirm the bona fides of your customer or the authority of Simply Vodka BVBA to receive these goods.*
>
> *Basic enquiries could have revealed that the Belgian tax warehouse was no longer operational and given you sufficient information to make an informed decision about the request from your customer to dispatch the requested goods to that destination*
>
> *You would appear to have made no investigations into your customer or destination and as the Belgian warehouse is not operational it follows that none of these consignments could possible have been delivered*

As a result Excise duty liabilities of £77,660 have been calculated for the consignments authorised by you for release from Edwards.

The Commissioners consider that your failure to make the most basic of enquiries before authorising release of goods from the UK tax warehouse is reasonable cause for revocation of your [registration]"

129. There was some confusion during the course of Mr Donnachie's evidence as to exactly what material he had before him at the time of his review decisions. The appellant had provided 3 folders of evidence to be taken into account, together with a 4 page detailed narrative similar to Mr Kang's witness statement. Initially Mr Donnachie thought that he had this material at the time of his review into the excise duty assessment in March 2011 but that he did not have it at the time of his review into revocation of the appellant's registration in November 2010. It transpired that the material was sent to HMRC on 25 October 2010 and was available to Mr Donnachie at the time of his review in November 2010. He subsequently agreed that he had considered the material in November 2010.

130. Mr Donnachie does not appear to have addressed his mind at the time of his review to the number of loads shipped by the appellant to Simply Vodka. Mr McWilliam was under the mistaken impression that it was 11 loads. The appellants provided information that there were in fact 10 loads, however Mr Donnachie in his review letter adopted Mr McWilliam's mistaken view. Indeed it is notable that none of the material referred to in the appellant's 4 page narrative found its way into Mr Donnachie's review decisions, notwithstanding it was plainly relevant to those decisions. It is also notable that the eventual assessment to excise duty was much more than £77,660.

131. For the purposes of his review Mr Donnachie made no independent investigations, which does not imply any criticism. He confirmed and we accept that he took into account that Edwards had received an incorrect SEED confirmation in relation to Simply Vodka. However in his review Mr Donnachie did not refer to the fact that Edwards had obtained a valid SEED check and that the appellant, through Edwards, had relied on the SEED confirmation.

132. Mr Young put to Mr Donnachie that he had used very similar language in his review to another review officer who, on 7 October 2010, had been dealing with a decision in relation to another registered owner which had shipped goods from Edwards to Simply Vodka. We do consider that it is unfortunate that independent review officers have apparently used the same template for decisions. Obviously there is no reason why templates which set out the structure of a decision and the legal framework should not be used, with care. The other review contained a more detailed analysis of the facts and the evidence in that case than Mr Donnachie subsequently gave in this case. However the substance of the decision was put in almost exactly the same terms as quoted above from Mr Donnachie's letter. At the very least it gives the impression that the review was not entirely independent, especially in light of the fact that the terms in which the decision was put were not apt to describe the circumstances in which the appellant came to deal with Legata and send goods to

Simply Vodka. The other decision was also reviewing a decision made on 19 August 2010 which is a date incorrectly appearing in Mr Donnachie's review decision.

133. It is also of some concern to us that the review letter in relation to the other registered owner states that "*The Belgian fiscal authorities informed HMRC in the UK that although the warehouse approval [of Simply Vodka] was revoked in February 2010, because of technical difficulties, the international SEED database of registered excise traders was not updated to reflect this revocation until 7 August 2010"*. Whether or not it is right that technical difficulties known to the Belgian fiscal authorities were to blame, none of the witnesses were able to shed any light whatsoever on the reason the SEED database was incorrect when checked by Edwards in June 2010.

134. Mr Donnachie explained that when he referred to *"basic enquiries"* which he said could have revealed Simply Vodka was no longer operational, he was referring to a Google search or similar. He recalled that he had done a Google search on Legata which showed it was not involved in alcoholic drinks. We consider this to be a relevant point, and if Mr Donnachie had evidence that a Google search would have disclosed to Mr and Mrs Kang that Legata was a workwear company then direct evidence in the form of a screen print ought to have been retained and produced. In all the circumstances we cannot be satisfied that Mr Donnachie did a Google search, nor are we satisfied what the results of any such search would have been.

135. Mr Donnachie said in his evidence that HMRC could not attach conditions to the registration of a registered owner. He understood that the only specific way to control a registered owner would be to attach conditions to the tax warehouse they were dealing with. Subsequently the respondents accepted that conditions could have been attached to the appellant's registration and Mr Donnachie accepted that his understanding had been incorrect.

136. By letter dated 26 January 2011 Mr McWilliam assessed the appellant to excise duty of £261,703.85 on the goods it had sold to Legata. He noted in this letter that Simply Vodka had been closed by the Belgian authorities in February 2010 and whilst the details were not updated on SEED the goods were not rejected or returned. Whilst the letter is not entirely clear, Mr McWilliam seemed to be saying that a prime assessment had been made against Mr Garnett as the guarantor and that the appellant was being assessed jointly and severally with Mr Garnett.

137. We understand that the total duty assessed on Mr Garnett for movements of goods purportedly to Simply Vodka amounted to more than £7 million. We also understand that in total a similar amount of duty has been assessed on registered owners, including the appellant, on a joint and several basis.

138. On 10 February 2011 Mrs Kang wrote to HMRC requesting a formal review of the assessment to excise duty. Mrs Kang denied that the appellant had participated in the irregularity or that it was aware or should have been aware that it was an irregularity.

139. On 16 February 2011 a VAT assessment was notified to the appellant in the sum of £81,064.

140. Mr Donnachie wrote to the appellant with his review decision on 28 March 2011. He maintained Mr McWilliam's assessment to excise duty. The reasons he gave were essentially in the same language as the previous review decision quoted above, with some subtle differences. For example he said that "*basic enquiries **would** have revealed that the Belgian tax warehouse was no longer operational* …" and "*you **made no** investigations into your customer or the tax warehouse*". It seems therefore that Mr Donnachie's view had hardened slightly, albeit that he had the same information as that available to him on 9 November 2010.

141. It does not appear in the review letter but Mr Donnachie stated in evidence and we accept that he considered whether both decisions were proportionate and he concluded that they were. He took into account that this was the first example of the appellant falling foul of the compliance regime but maintained that the excise duty regime had to be robustly enforced given the risk of duty loss.

142. In the context of proportionality Mr Donnachie said that he did not have access to information in relation to the appellant's business generally and so he did not take that into account. However it is clear that he did have such information in the narrative provided by the appellant. He failed to take into account therefore the effect the revocation of registration would have on the appellant's business which is an aspect of the proportionality of the decision.

Decision

143. In making our decision we consider the issues before us under the following headings:

(1) The excise duty assessment;

(2) The VAT assessment;

(3) Revocation of the appellant's registration

144. We approach the issues in this order because our analysis of the evidence in relation to the excise duty assessment in particular will have implications for our consideration of the decision to revoke the appellant's registration as a registered owner.

(1) The Excise Duty Assessment

145. Regulations 8 and 9 of the 2010 Regulations make provision to identify the person or persons liable for excise duty when excise goods leave a duty suspension arrangement.

146. Regulation 8(1) refers to liability in the case of goods leaving a duty suspension arrangement. It is expressed to be subject to Regulation 9 which specifies the person liable where there is an irregularity in the course of movement of goods under a duty

suspension arrangement. Regulation 8(2) deals with liability in the case of an irregular departure from a tax warehouse. It seems to us that this must concern irregularities other than in the course of movement and it extends the liability to "any other person involved in" the irregular departure.

147. Mr Mandalia accepted that Regulation 8 did not apply to excise duty falling due because of an irregularity in the movement of excise goods, and that in the present appeal we are concerned with Regulation 9, which implements Article 8(1)(ii) of the 2008 Directive.

148. Mr Mandalia also relied on section 116 CEMA 1979. In referring to this provision it was not suggested that it made the appellant strictly liable for the excise duty simply on the basis that it was a revenue trader. Mr Mandalia accepted that the liability of the appellant for excise duty in the circumstances of this appeal depends on whether it falls within Regulation 9(2). In other words section 116 is only relevant to the assessment and collection process where the detailed regulations provide for a liability.

149. Mr Young submitted that where the destination of duty suspended goods was not an authorised warehouse then there was an irregularity the moment the goods were released by Edwards. We took his submission to be that this would be an irregular departure from a tax warehouse which would engage both Regulation 8(1) and 8(2). As such Edwards would be liable for the excise duty. He further submitted that in the absence of any assessment on Edwards, the appellant could not be jointly and severally liable under paragraph 8(2).

150. In order to identify what he submitted was the error in HMRC's position, Mr Young relied on provisions in the 1992 Directive where liability of an authorised warehousekeeper was excluded in the case of losses occurring under suspension arrangements attributable to force majeure or fortuitous events. It is notable that no such argument was advanced in the Upper Tribunal in Butlers Ship Stores Limited, having been rejected by the F-tT (see [46] of the Upper Tribunal decision).

151. The provision in the 2008 Directive is in rather different terms to what was Article 14 of the 1992 Directive. In our view Article 7(4) of the 2008 Directive clearly provides that goods are only to be considered totally destroyed or irretrievably lost for the purposes of Article 7(4) when they are rendered unusable as excise goods. That is not the case where there are diverted and thereby released for consumption.

152. During his evidence Mr McWilliam accepted that there was an irregular departure from Edwards' warehouse. We initially thought that was right, but on reflection we are satisfied that Regulation 8 is not engaged on the facts of the present appeal. It would amount to strict liability on the part of Edwards in circumstances where they had carried out a proper SEED check on Simply Vodka. The exposure of Edwards to liability under Regulation 8(1) would be because HMRC gave an incorrect SEED confirmation. It was that which caused Edwards to authorise removal of the goods from their warehouse. In *Butlers Ships Stores Ltd* the Upper Tribunal at [38] held that EU principles of proportionality and legal certainty apply in the field of

excise duty. However the Upper Tribunal held that Butlers as an authorised warehouse could be liable for the duty because it was in a position to protect itself against liability, for example by way of insurance. We do not consider that it would be reasonable to expect a warehousekeeper to insure against the possibility of an incorrect SEED confirmation. To impose liability on Edwards in those circumstances would be disproportionate and inconsistent with the legal certainty that a SEED confirmation is intended to provide.

153. We do not consider therefore that there was any liability on the part of Edwards under Regulation 8(1) and therefore there could be no liability on the part of the appellant under Regulation 8(2).

154. Regulation 8(1) is not concerned with assessments or the assessment procedure. It is concerned with liability. If we are wrong and there was a liability on Edwards under Regulation 8(1), the fact that HMRC did not assess that liability would not prevent them from assessing a liability arising on another person under Regulation 8(2). However based on our interpretation of Regulation 8(1) that point does not arise.

155. Indeed, if Mr Young were correct and liability arose under Regulation 8 in the circumstances of this case, his client would not have the opportunity to argue lack of awareness which appears in Regulation 9(2).

156. Mr Young also argued that whilst a person may be "liable" for excise duty there was still some discretion on the part of HMRC whether or not to assess that person. He argued that in the absence of an assessment against Edwards, there should be no assessment on the appellant. We do not accept that this tribunal has any jurisdiction to consider the way in which HMRC might choose to exercise that discretion.

157. Regulation 9(1) provides that primary liability in the case of an irregularity during a movement of excise goods is the person who provided the guarantee. Any other person who participated in the irregularity and who was aware or should reasonably have been aware that it was an irregularity is also jointly and severally liable with the guarantor. We are not concerned with the position where there is no guarantee, but we note that in those circumstances the person primarily liable is the authorised warehousekeeper or in certain circumstances the UK registered consignor.

158. In England and Wales, a guarantor generally guarantees the obligation or liability of another person who has the primary liability. It seems to us that the 2010 Regulations and the 2008 Directive on which they are based use the term guarantee in a different sense, namely guaranteeing payment of the excise duty rather than the primary liability of another person to pay the excise duty. We consider therefore that Article 8(1)(ii) of the 2008 Directive and Regulation 9(1) of the 2010 Regulations are identifying the primary liability to pay excise duty during an irregular movement of goods. The primary liability is placed on the person who provided the guarantee which secures the amount of duty chargeable on the goods rather than the primary liability of another person.

159. In the present case the guarantor is Revolution. Any liability that the appellant has for excise duty on the goods must arise, if at all, under Regulation 9(2).

160. There are difficulties in the language of Regulation 9(2). The primary liability is that of the guarantor which in this case was the transport company. For any other person to be jointly and severally liable under Regulation 9(2) that person must have "*participated*" in the irregularity and must also have been aware or should reasonably have been aware that "*it*" was an irregularity.

161. Questions arise as to what amounts to participation for the purposes of Regulation 9(2) and what exactly "it" is that the person must have been aware of or should reasonably have been aware of.

162. In relation to the first question the language of Regulation 9(2) simply repeats the term used in Article 8.

163. Mr Young argued that the term "participation" implies some form of "mens rea" or guilty mind. We do not accept that submission. The state of mind is dealt with explicitly in Regulation 9(2) and Article 8(1)(ii) by reference to the knowledge of the person concerned. Whether he was aware or should reasonably have been aware of certain matters. Participation for these purposes must therefore involve something other than a person's state of mind.

164. In our view a participant is someone who had some role in the movement of the goods. The appellant was the owner of the goods who had arranged for the goods to be transported by Revolution to the tax warehouse in Belgium. As such it plainly had a role in the movement of the goods and the movement involved an irregularity. The appellant is therefore to be treated as having participated in the irregularity.

165. In relation to the second question, Article 8 speaks of a person who was aware or who should reasonably have been aware of "*the irregular nature of the departure*", that is a departure from the duty suspension arrangement during a movement of excise goods. That must therefore be the "it" to which Regulation 9(2) refers.

166. In our view these provisions must mean that any participant who was aware or reasonably should have been aware that there would be an irregular departure from the duty suspension arrangement is liable. It cannot be a question of awareness of the risk of an irregular departure because, as the 2008 Directive implicitly acknowledges, there is always a risk of duty loss in the movement of excise goods. Further, the 2008 Directive and the 2010 Regulations do not identify the level of risk a person must have been aware of in order to trigger liability. The decision of the Court of Appeal in *Mobilx Limited & Others v Commissioners for HM Revenue & Customs [2010] EWCA Civ 517*, by analogy, supports that construction. We recognise the different context of that decision, but we note what Moses LJ said in relation to knowledge of a connection with MTIC fraud at [55]:

> " *If HMRC was right and it was sufficient to show that the trader should have known that he was running a risk that his purchase was connected with fraud, the principle of legal certainty would, in my view, be infringed. A trader who*

knows or could have known no more than that there was a risk of fraud will find it difficult to gauge the extent of the risk; nor will he be able to foresee whether the circumstances are such that it will be asserted against him that the risk of fraud was so great that he should not have entered into the transaction. In short, he will not be in a position to know before he enters into the transaction that, if he does so, he will not be entitled to deduct input VAT. The principle of legal certainty will be infringed."

167. Mr Young submitted that in considering what a person should "reasonably" have been aware of in this context regard should be paid to the regulatory regime. We certainly accept that submission in so far as it identifies one factor we should have in mind in considering whether the appellant should reasonably have been aware that there would be an irregular departure.

168. The regulatory regime makes provision for strict regulation of authorised warehousekeepers and others involved in the movement of excise goods between tax warehouses. When a registered owner enters into a transaction for the movement of goods under duty suspension he is entitled to take into account and to take some comfort from the regulatory regime, both in this country and in the country of destination.

169. It is relevant therefore that the appellant was dealing with an authorised warehouse which had sent goods to what it had every reason to believe was an authorised warehouse in Belgium using an authorised transporter of excise goods who had given a guarantee.

170. We must consider whether the appellant was aware or should reasonably have been aware that there would be an irregularity in the movement of the goods. That involves consideration of all the circumstances set out above in our findings of fact. We are particularly concerned with the circumstances of the transactions and the checks carried out by the appellant on its trading partners.

171. We take into account our findings of fact as to the appellant's trading history with Edwards, Revolution, Legata and Simply Vodka, including the nature of the transactions and the level of due diligence carried out on each of those parties.

172. The appellant had no reason to consider that the involvement of Edwards or Simply Vodka gave rise to any risk that the goods would be diverted. Edwards was an authorised warehousekeeper and the appellant had a long established trading history with them. The appellant was also entitled to assume that Simply Vodka was an authorised warehousekeeper and whilst it had not previously dealt with Simply Vodka the appellant effectively had a reliable reference from Edwards.

173. Revolution was in a different category. The appellant had no real trading relationship with Revolution prior to the transactions we are concerned with. However the appellant had verified Mr Garnett's identity, confirmed his excise duty guarantee and had verbal references from both Chateau des Dunes and Edwards. In our view the appellant was entitled to assume that the involvement of Revolution did not present

any material risk over and above that which is inherent in the movement of excise goods.

174. The real area of risk involved the appellant's dealings with Legata. We take into account Mr and Mrs Kang's experience in this trade and their knowledge of the risk of diversion of excise goods. They were aware that Kuki had previously failed to pay for goods, however that in itself does not imply dishonesty on the part of Kuki. Plainly it gave rise to a risk of non-payment, but Mr Kang dealt with Legata on the basis that payment would be made in cash before the goods were released.

175. The documentation received from Legata, or at least from Mr Barbals purporting to act on behalf of Legata, confirmed Mr Barbals was a Latvian national, Legata was a Latvian company with a Latvian VAT registration. We accept that Mrs Kang confirmed Legata's VAT registration and address on the Europa website. Mr and Mrs Kang were entitled to take comfort from the fact that Legata was known to Revolution but more importantly to Edwards as a dealer in excise goods. Stacey Edwards informed Mrs Kang that they had dealt regularly with goods being shipped to the order of Legata.

176. It is true that as the dealings between the appellant and Legata continued, Mr and Mrs Kang ought to have had increasing concerns that Kuki and Legata might be involved in some form of illegitimate trade. Those concerns ought to have first manifested themselves when Kuki refused to sign the payment confirmations on 7 July 2010 and refused to provide evidence of identity.

177. We have already identified that any movement of excise goods involves a risk of diversion. Mr and Mrs Kang ought to have been aware that the involvement of Legata meant there was an increased risk of diversion, especially by the time of the last movement. Whilst that risk was material, the circumstances giving rise to it were not such that Mr and Mrs Kang should have concluded that the goods would be diverted.

178. It has not been suggested that Mr and Mrs Kang were aware the goods would be diverted. Taking into account all the circumstances we find that this is not a case where Mr and Mrs Kang should have been reasonably aware that the goods would be diverted. On the basis of our analysis of the law we find that the appellant was therefore not liable to excise duty under Regulation 9(2).

179. For the sake of completeness we also deal with a number of further submissions made by Mr Young.

180. Mr Young submitted that an assessment to excise duty must be made to best judgment. He submitted that HMRC's failure to appreciate that Edwards could be assessed for the duty meant that the assessment against the appellant was not the best judgment. Section 12(1A) Finance Act 1994 notably makes no reference to best judgment unlike section 12(1). But even if it is implicit that an assessment must be made to best judgment, we are not satisfied that Edwards were liable for the duty. They had not guaranteed the duty and any liability they would have for an irregular

movement would arise under Regulation 9(2). In any event, we are not satisfied that if there had been a failure to appreciate Edwards might also be liable, that would have any effect on the assessment against Edwards.

181. Any remedy which the appellant might have in relation to such matters would arguably be the right to a contribution against any other person jointly and severally liable under Regulation 9(2).

182. We should record at this stage that Mr Young relied on the fact that Edwards had not been assessed as part of the factual matrix which justified an inference that HMRC had been aware of the fraud and had been "letting it run" in order to identify the orchestrators.

183. HMRC had the opportunity to adduce evidence as to whether there was any criminal or other investigation related to the appellant's movements of goods. We can see why the circumstances raise such a suspicion in the minds of Mr and Mrs Kang and the appellant's advisers. Those circumstances include the incorrect SEED confirmation and a pre-arranged meeting with the Belgian fiscal authorities shortly after the interception at Shepperton. It would have been desirable for HMRC to deal with that suspicion directly by adducing definitive evidence from a witness who would be able to give such evidence. Instead they relied on 3 witnesses who would not necessarily have known about any such investigation. For example, Ms McGuinness was a "foot soldier" when a vehicle was intercepted at Shepperton. Mr McWilliam was the compliance officer for Edwards but he accepted that he would not necessarily know about any criminal investigation. Mr Donnachie simply said that he would have expected any such criminal investigation to have come to light by now.

184. Mr Young argued an analogy with the customs duty case of *De Haan Beheer v Inspecteur der Invoerrechten en Accijnzen te Rotterdam Case C-61/98*. In that case the Dutch authorities during the course of a covert investigation deliberately allowed fraudulent irregularities to be committed causing an innocent trader to incur a liability to customs duty. The Court of Justice held that those circumstances could consistute a "special situation" for the purposes of the Community Customs Code so as to engage a power to remit the customs debt in circumstances where there was no deception or obvious negligence on the part of the trader

185. De Haan was decided by reference to specific provisions of the Community Customs Code which give a form of equitable relief. There are no equivalent provisions in excise duty and we do not consider that De Haan assists the appellant.

186. In any event, in the light of our decision that the appellant has no liability under Regulation 9(2) it is not necessary for us to consider this aspect further.

187. Mr Young also argued that HMRC itself caused the irregularity by giving Edwards incorrect information about Simply Vodka when replying to the SEED check. If correct information had been given then the movement of goods would never have taken place. We have some sympathy with that argument. For the reasons we have given it prevents any liability attaching to Edwards under Regulation 8(1).

We do not consider that it would prevent liability attaching to an owner of goods under Regulation 9(2), but the existence of a valid SEED confirmation was relevant in our assessment of what the appellant should reasonably have been aware of in relation to the movement of goods.

(2) The VAT Assessment

188. The assessment to VAT was made pursuant to Section 73(7B) VAT Act 1994. Unlike the excise duty regime, there is no provision in the VAT Act 1994 whereby the VAT liability does not arise unless the appellant was aware or should reasonably have been aware of any irregularity.

189. Mr Young's argument in relation to the VAT assessment centred on the decision of the European Court of Justice in Teleos. The Court of Justice was concerned with the zero rating of goods dispatched by Teleos to a VAT registered customer in Spain. Teleos produced evidence of removal of the goods from the UK to support zero rating. On a subsequent inspection by HMRC zero rating was disallowed on the basis that the documentation was false and an assessment to output tax was made.

190. The facts of Teleos involved the supply of mobile telephones to a Spanish company. The goods were to be removed from the UK to either France or Spain. Teleos placed the goods at the purchaser's disposal at a warehouse in the UK with the purchaser being responsible for arranging their transport to the specified Member States. Teleos received stamped and signed CMRs which were prima facie evidence that the mobile telephones had reached the specified destinations.

191. Initially HMRC accepted those documents as evidence that the goods had been exported from the UK and the supplies were zero rated. Repayments of input tax were made to Teleos. However having carried out subsequent checks HMRC discovered that in certain cases the destination stated on the CMR notes was false, that the carriers mentioned did not exist or did not transport mobile telephones, or that the registration numbers given were of non-existent vehicles or of vehicles which were unsuitable for transporting such goods.

192. HMRC concluded that the mobile telephones had never left the UK and therefore assessed Teleos to VAT on those supplies whilst fully acknowledging that Teleos was in no way involved in any fraud.

193. There was no reason for Teleos to doubt the information contained in the CMRs or their authenticity. Teleos had made serious and detailed inquiries to establish the legitimacy of the purchaser and had no other real means of establishing the falsity of the CMRs. No additional evidence other than the CMRs could reasonably have been obtained, having regard to the nature of the trade in question.

194. Teleos was not concerned with excise goods, but the principle applies equally to a supply which occurs on removal of the goods from a fiscal warehouse. We did not understand Mr Mandalia to contend otherwise.

195. In Teleos, the Court of Justice considered the UK domestic legislation in section 30 VAT Act 1994, Regulation 134 of the 1995 Regulations and the conditions in Notice 703, all in the context of the Sixth Directive. It ruled as follows:

> " *[The Sixth Directive] is to be interpreted as precluding the competent authorities of the Member State of supply from requiring a supplier, who acted in good faith and submitted evidence establishing, at first sight, his right to the exemption of an intra-Community supply of goods, subsequently to account for value added tax on those goods where that evidence is found to be false, without, however, the supplier's involvement in the tax evasion being established, provided that the supplier took every reasonable measure in his power to ensure that the intra-Community supply he was effecting did not lead to his participation in such evasion.*"

196. Mr Young argued that the appellant should be entitled to zero rate the supply of goods as though they had been dispatched to the EU in the same way that Teleos was entitled to, notwithstanding that the goods were diverted in the UK. In particular he submitted that the appellant acted in good faith and had taken every reasonable measure to ensure that its intra-community supply did not lead to its participation in evasion.

197. We have described the relevant legislative provisions above. The time of supply by the appellant to Legata was the date of the VAT invoices which we have also set out in the table above.

198. Mr Mandalia on behalf of HMRC submitted that applying the principle in Teleos requires sufficient proof of export being held by the taxable person. The facts, he says, do not support such a case. In particular he submitted that:

(1) There was no evidence of export held by the appellant at "the relevant time". We take the relevant time to be the date of supply and the period of 3 months thereafter.

(2) The appellant never examined the evidence as to transportation of the goods which was held by Edwards.

(3) SEED checks provided no assurance that the goods had been removed from the UK.

(4) In any event, a visual inspection of the documents held by Edwards showed inconsistencies:

(a) The AADs held by Edwards bear a stamp for "*Simly Vodka*".

(b) The purchase orders held by the appellant stated "we have instructed our transport to collect our orders".

(5) The customer's agent refused to sign any document confirming receipt of the cash by the appellant.

199. In the present case the appellant's invoices did not contain the VAT number of Legata. However that was not a point taken by HMRC to justify the assessment.

200. Mr Mandalia essentially says that the conditions for zero rating were not satisfied in that the appellant did not hold any evidence of removal from the UK at the time of submitting its VAT Return, or within 3 months of the date of supply. If it had done it would have seen that the AADs returned to Edwards showed a stamp for "Simly Vodka" and it would have been clear that the goods had been diverted and not arrived at their intended destination.

201. In our view Mr Mandalia's submission is correct. The appellant did not satisfy the conditions for zero rating. The appellant had responsibility for removing the goods from the UK. Clearly the goods were not removed from the UK. Nor did the appellant hold any evidence that the goods were removed from the UK. The position of the appellant is therefore distinguishable from the basis on which the Court of Justice ruled in Teleos. It was not suggested in Teleos that the UK domestic conditions in this regard were incompatible with the Sixth Directive. We are satisfied therefore that the appellant was not entitled to zero rate the supply it made when the goods were diverted from fiscal warehousing. It is irrelevant therefore whether the appellant took every reasonable measure in his power to ensure that the intra-Community supply he was effecting did not lead to his participation in such evasion.

202. If we are wrong on that analysis, we should record that the basis on which the evidence was presented by both parties was principally directed towards the excise duty issues. As a result the formulation of the Court of Justice in Teleos – whether the appellant took every reasonable measure in his power to ensure that the intra-Community supply he was effecting did not lead to his participation in such evasion – was not put to Mr or Mrs Kang either in chief or in cross-examination. The reason for this was that the question of Teleos did not arise until Mr Young's closing submissions.

203. The test outlined in Teleos is differently formulated from that appearing in regulation 9(2) of the 2010 Regulations. The two tests are no doubt closely related. However one is aimed at awareness, and the other is aimed at taking reasonable measures. By way of example, it might be said that the appellant could have contracted on terms that the goods would not be released until they arrived at Simply Vodka. That is not something that bears on the appellant's knowledge, but it may well have a bearing on whether the appellant had taken every reasonable measure to ensure that the supply did not lead to participation in fraud.

204. If it had been necessary to decide the point, based on our findings of fact and the way in which the evidence was adduced we would not have been satisfied that Mr and Mrs Kang took every reasonable measure to ensure that their supply did not lead to the appellant participating in VAT evasion.

(3) Revocation of Registration

205. The review decision of Mr Donnachie is quoted above. For the reasons we have noted it is deficient in a number of respects:

(1) The appellant did take steps to confirm that Legata was bona fide.

(2) The appellant did take steps to confirm the authority of Simply Vodka to receive duty suspended goods.

(3) The appellant did make enquiries to confirm that Simply Vodka was operational.

(4) The Appellant did make investigations into Legata and Simply Vodka.

(5) The excise duty liabilities were considerably in excess of the £77,660 quoted in the letter.

(6) The original decision was not contained in a letter dated 20 August 2010. That was a draft letter, the actual decision being contained in a letter dated 10 September 2010.

(7) There was no letter to the appellant dated 19 August 2010.

(8) Mr Donnachie failed to clarify whether there were 10 or 11 consignments.

(9) The review letter contains no reference to the relevant material provided by Mr and Mrs Kang in relation to the appellant's background and the specific transactions.

(10) Mr Donnachie failed to take into account that conditions falling short of revocation could have been placed on the appellant's registration.

(11) Mr Donnachie failed to take into account the effect revocation would have on the appellant's business.

206. Those criticisms arise irrespective of whether the steps, enquiries or investigations were sufficient. Mr Donnachie framed his decision on the basis that no such steps were taken or enquiries and investigations made.

207. In the circumstances we find that HMRC did not reasonably arrive at the review decision confirming revocation of the appellant's registration. They took into account matters they were not entitled to take into account and they failed to take into account matters they ought to have taken into account.

208. Our powers following that finding are limited by section 16(4) Finance Act 2004. In the circumstances we direct that:

(1) Mr Donnachie's decision on review shall cease to have effect.

(2) The decision of Mr McWilliam, which remains in force, shall be re-reviewed by an independent officer who has not previously been involved in the appellant's case, or other cases involving registered owners shipping goods to Simply Vodka.

(3) The re-review should take into account and remedy all the deficiencies identified above.

(4) The re-review should be based solely on the findings of fact we have made in this decision and our finding that the appellant was not liable to excise duty because it was not aware and could not reasonably have been aware that there would be an irregularity.

Conclusion

209. For the reasons given above we allow the appeals against the excise duty assessment and against the review decision which confirmed revocation of the appellant's registration as an owner of warehoused excise goods. We dismiss the appeal against the VAT assessment.

210. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 8 January 2014