[2015] UKFTT 441 (TC)

TC04613

Appeal number: TC/2012/04434

EXCISE DUTY – assessment - whether made in time – yes – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

LITHUANIAN BEER LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN RICHARDS

Sitting in public at The Royal Courts of Justice, Strand, London on 18 August 2015

Geraint Jones QC and Rizwan Ashiq, instructed by Rainer Hughes, solicitors, for the Appellant

Richard Evans, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

1. The appellant carries on a business that includes the import of "flavoured ciders". These flavoured ciders included ingredients that are not on the list of "permitted cider and perry ingredients" set out in HMRC's Excise Notice 162 ("Notice 162"). It is therefore common ground between the appellant and HMRC that excise duty due on the flavoured ciders is to be calculated by applying the rate applicable to "made wine" and not the lower rate applicable to "cider". However, and by mistake rather than by design, the duty actually paid on import of the flavoured ciders was calculated by applying the rate applicable to "cider". Therefore, insufficient excise duty was paid on import.

2. To recover this shortfall, on 14 November 2011, HMRC issued the appellant with an assessment to excise duty (the "Assessment") for an amount of £257,407.70. The Assessment was made in respect of imports of flavoured cider between 5 December 2007 and 28 January 2011 from a supplier known as "Ragutis" and imports between 17 March 2008 and 12 November 2010 from a supplier known as "Utenos". HMRC subsequently reduced the Assessment to £189,661.57 on 12 March 2012.

3. The appellant appeals on the sole ground that the Assessment was made out of time.

Evidence and procedural matters

4. I heard evidence from Officer Santaram Gowrea, the HMRC officer who made the Assessment. On occasions during his cross-examination he did not answer the questions that Mr Jones put to him and, instead, sought to make a statement of his own. Overall, however, I was satisfied that he was an honest and reliable witness.

5. I also heard evidence from Mr Egonas Jakimavicius, a director of the appellant. While I have not accepted the evidence that he gave as to the purpose of Officer Salami's visit (discussed at [48] to [52] below), this is simply because I have concluded that he was mistaken in that regard. I found Mr Jakimavicius to be an honest and reliable witness.

6. I did not hear evidence from Officer Salami or Officer Ansah who, as noted in more detail below, had visited the appellant prior to the Assessment being made. I found that unsatisfactory. A key point at issue in this appeal is whether, and if so when, particular information was made available to those officers. Therefore, it would have been of material assistance to hear direct evidence from these officers. As things stand I have had to infer, as best I can, from the evidence of others precisely what they were given and when.

7. HMRC prepared a helpful hearing bundle containing documentary evidence. The authenticity of the documents it contained was not in dispute and, therefore, even where documents were not exhibited to a witness statement I was prepared to treat them as evidence of the matters set out in them.

8. Some documents (relating to the circumstances in which Officer Joy Gower asked Officer Gowrea to visit the appellant) came to light only at the hearing itself. Those documents were certainly relevant to the appeal as they contained evidence of when HMRC were aware that there was an issue with the way that the appellant was calculating duty on its imports of flavoured cider. Mr Jones criticised the respondents for not disclosing this material in advance. However, since the directions for disclosure required both parties to disclose only those documents on which they proposed to rely at the hearing, I did not consider there was anything in that criticism. If the appellant had wished to obtain disclosure of internal HMRC documents relating to the appellant's treatment of flavoured ciders, it could have made an application for fuller disclosure.

Background and facts not in dispute

9. In February 2010, Miss Nurat Salami, an officer of HMRC, visited the appellant's premises, reviewed documentation that was supplied to her and made a note of her visit.

10. On 2 November 2010, Mr Chris Ansah, an officer of HMRC made a further visit. Officer Ansah also reviewed documents and Mrs Jakimavicius, Mr Jakimavicius's wife, provided him with copies of documents after his visit. Officer Ansah made a short return visit on 15 December 2010 (apparently to check on the position regarding duty stamps) and prepared a single note of both visits.

11. The parties were not agreed on the precise purpose of the visits of Officer Salami and of Officer Ansah or on the precise documents which they reviewed or with which they were provided during their visits. I make findings on these issues at [48] to [53] below. However, the parties were agreed that, at the time of both visits, the appellant was importing flavoured cider on which duty was being paid, incorrectly, at the rate applicable to "cider" rather than the rate applicable to "made wine". In addition, neither party suggested that Officer Ansah or Officer Salami told the appellant that this mistake was being made either during, or subsequent to, their visits. On the contrary, Mr Jakimavicius gave evidence that was not challenged that both Officer Salami and Officer Ansah told him that the appellant was calculating excise duty correctly.

12. On or around 21 October 2010, Ms Joy Gower, an officer of HMRC, contacted Officer Gowrea and asked him to visit the appellant. We did not hear evidence from Officer Gower. However, Officer Gowrea gave evidence, which was not challenged, that one of the reasons why he was asked to visit the appellant was that Officer Gower had seen copies of invoices issued by the appellant to another trader for flavoured ciders which had raised in her mind the question of how those ciders should be classified for excise duty purposes. At the hearing, Officer Gowrea produced a copy of some internal HMRC documentation that stated that one of the purposes of the visit would be to "check correct rate of duty paid on fruit ciders" and contained a specific reference to Notice 162.

13. Officer Gowrea did not make his visit to the appellant immediately. In March 2011 he received a reminder to do so and on 19 April 2011 he met Mrs Jakimavicius at the appellant's business premises. Officer Gowrea gave unchallenged evidence that the reason why there was a delay between the original request in October 2010 and this visit taking place was that he had other visits to make and was, generally, very busy.

14. During his visit, Officer Gowrea raised the issue of whether the flavoured ciders should be classified as "made wine". It was agreed that Mrs Jakimavicius would provide him with a spreadsheet giving details of relevant imports of flavoured cider.

15. Officer Gowrea also visited Mrs Jakimavicius on 11 May 2011 to follow up on the flavoured ciders issue and also to obtain more information on the procedure for importing cider through the appellant's shipping agent, Harbour Shipping. On 23 May 2011, he was introduced to the appellant's accountant, Mr Ashok Sonah of Brebners.

16. There was then some correspondence between Mr Sonah and Officer Gowrea as follows:

(1) In an email of 26 May 2011, Mr Sonah asked Officer Gowrea to confirm "based on the paperwork we have made available to you" that the flavoured ciders qualified as cider.

(2) In response, on 27 May 2011, Officer Gowrea set out the conditions for a beverage to qualify as cider, and explained that if those conditions were not met, it should be classified as "made wine" and subject to a higher rate of duty.

(3) On 31 May 2011, Mr Sonah replied with further questions. He also attached a "certificate of conformity" for the products in question. This certificate of conformity set out the precise composition of the flavoured ciders, and the amount of alcohol they contained.

17. On 1 June 2011, Officer Gowrea consulted HMRC specialists on the characterisation of flavoured cider. They responded indicating that it was likely that the products' flavourings (strawberry, blueberry and cherry) would fall outside the list of permitted ingredients set out in Notice 162 with the result that the flavoured cider should be classified as made wine. Having received that confirmation, on 2 June 2011, Officer Gowrea replied to Mr Sonah's email of 31 May as follows:

> The products listed on the certificate of conformity will be made-wines.
>
> Any cider based product which contains any flavourings other than those set out in PN 162, section 25, is classed a made-wine. The fact that these products are called 'strawberry, blueberry and cherry fizz' leads me to believe that the flavourings added will be outside the list of permitted ingredients….

18. On 12 July 2011, Mrs Jakimavicius sent Officer Gowrea the spreadsheet (the "Spreadsheet") detailing imports of flavoured cider which she had agreed to prepare during her meeting with Officer Gowrea on 19 April 2011.

19. Officer Gowrea then started a process of cross-checking the information that was contained in that spreadsheet against information that he obtained from his enquiries with Harbour Shipping. Officer Gowrea gave evidence, which was not challenged, that this process revealed some discrepancies, but made no suggestion that these were anything other than unintentional. Following this process, he made the Assessment and also issued Harbour Shipping with an assessment for £456,937.31 in relation to imports made after April 2010.

Statutory provisions

20. Section 12(1) of the Finance Act 1994 provides as follows:

> **12 Assessments to excise duty**
>
> (1) Subject to subsection (4) below, where it appears to the Commissioners—
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
>
> (b) that there has been a default falling within subsection (2) below,
>
> the Commissioners may assess the amount of duty due from that person to the best of their judgement and notify that amount to that person or his representative.

21. It was common ground that, as a consequence of the appellant paying excise duty on the flavoured ciders at the wrong rate, there was a "default falling within subsection (2)", that the appellant was liable for any shortfall and that, accordingly, HMRC were in principle entitled to assess the appellant under s12(1).

22. Section 12(4) of the Finance Act 1994 provides:

> (4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say—
>
> (a) subject to subsection (5) below, the end of the period of 4 years beginning with the time when his liability to the duty arose; and
>
> (b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;
>
> but this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making of an assessment under this section, to the making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment.

23. It is common ground that the time limit referred to in s12(4)(a) is not relevant to this appeal. However, the appellant argues that HMRC have purported to make the

Assessment later than the time specified in s12(4)(b) and that the Assessment is, accordingly, out of time.

Submissions of the parties

The appellant's submissions

24. As a starting point, Mr Jones submitted that the hurdle HMRC have to overcome in order to make an assessment under s12(1) of FA 1994 is a low one. It only needs to "appear" to the Commissioners that insufficient duty has been paid and that the person whom the Commissioners are seeking to assess is liable to the unpaid duty. This, he submits, operates to HMRC's disadvantage when the provisions of s12(4)(b) fall to be considered since, as soon as HMRC have evidence of facts that satisfy the low threshold for making an assessment, the clock starts to tick.

25. Mr Jones pointed out that HMRC had not called Officer Salami or Officer Ansah to give evidence. In those circumstances, he submitted that the Tribunal must determine, as a question of fact, whether the information available to those officers was sufficient for an assessment to be raised at the time they came into possession of that information. That process, he submitted required the Tribunal first to determine what facts were in the actual possession and knowledge of Officer Salami and Officer Ansah following their visits (and when they became aware of those facts). Having done that, the Tribunal should form its objective view of whether those facts justified the making of an assessment at the relevant time or times.

26. Having framed the test in those terms, Mr Jones submitted that mere knowledge of the fact that the beverages in question were described as "strawberry, blueberry and cherry fizz" would be enough to justify an officer in concluding that it "appeared" that those beverages could not be classified as "cider" (given the highly prescriptive list of ingredients contained in Notice 162). He submitted that the only other information that would be necessary to justify the making of the assessment would be (i) the amount of the beverage that had been imported (ii) the rate of duty that should be applied to those beverages and (iii) how much duty had already been paid.

27. He submitted that an examination of the facts would establish that all of the information referred to at [26] was available to Officer Salami at the time of her visit in February 2010 and to Officer Ansah at the time of his visit on 2 November 2010. Even if Officer Salami or Officer Ansah failed to appreciate the significance of the information they had, and even if either of them thought the information they had was not relevant to the specific purpose of their visit, he submitted that they nevertheless had it. Accordingly, he submitted that the "clock started to tick" in February 2010, or at the latest, 2 November 2010, and that, since the Assessment was made on 14 November 2011, it was made out of time.

HMRC's submissions

28. Mr Evans submitted that, when considering whether the Assessment had been made in time, the Tribunal should first determine, as a subjective matter, the facts

which justified the making of the assessment in the opinion of Officer Gowrea who was the officer who made the Assessment. In Mr Evans's submission, those facts were, most importantly, contained in the Spreadsheet and also in the certificates of conformity.

29. The next step, in Mr Evans's submission, is to consider when the latest time by which all the facts referred to at [28] came to the knowledge of Officer Gowrea. In his submission this was either 12 July 2011, the date on which Officer Gowrea received the Spreadsheet or 5 August 2011, the date on which Officer Gowrea realised, following his enquiries of Harbour Shipping, that the information contained in the Spreadsheet was not absolutely accurate.

30. Since both dates referred to at [29] fell much less than 12 months before Officer Gowrea made the Assessment on 14 November 2011, in Mr Evans's submission, the Assessment was in time.

31. Mr Evans therefore considered that s12(4) of FA 1994 was focused on information available to Officer Gowrea, the officer who made the Assessment. Even if the visits of Officer Salami and Officer Ansah were relevant to the issue, which he did not accept, he submitted that neither of them would have been in a position to issue an assessment because:

(1) The purpose of both of their visits was to determine whether duty had been paid and not to evaluate the rate of duty and classification of products.

(2) In any event, neither Officer Salami nor Officer Ansah referred to the "certificates of conformity" in their reports and, without the information contained in the certificates of conformity, they would have had no knowledge that the beverages were "made wine" rather than "cider". Moreover, neither Officer Salami nor Officer Ansah had available to them the information set out in the Spreadsheet which was crucial to the making of the Assessment.

The legal test to be applied

32. As will be seen from [24] to [31] above, there was a considerable difference between the parties as to the test that should be applied. Therefore, before setting out my findings of fact, I will set out my conclusions on the applicable test.

The decision in Pegasus Birds

33. I was not referred to any authority that relates specifically to excise duty assessments under s12(4) of FA 1994. However, I was referred to authorities that deal with a very similar provision that applies for VAT purposes that is to be found in s73(6) of the Value Added Tax Act 1994 ("VATA 1994").

34. Section 73(6) of VATA 1994 provides as follows:

> An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within

> the time limits provided for in section 77 and shall not be made after the later of the following—
>
> (*a*) 2 years after the end of the prescribed accounting period; or
>
> (*b*) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,
>
> but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment.

35. The wording of s73(6)(b) of VATA 1994 is in all material respects identical to that of s12(4)(b) of FA 1994. In those circumstances, the parties were agreed, as am I, that authorities on the construction of the VAT provision are relevant to the construction of the excise duty provision.

36. In *Pegasus Birds Ltd v Customs and Excise Commissioners* [1999] STC 95, Dyson J (as he then was) considered the application of s73(6)(b) of VATA 1994 and summarised the legal principles to be applied as follows:

> 1. The commissioners' opinion referred to in s 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.
>
> 2. The evidence in question must be sufficient to justify the making of the assessment in question (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 754 per Potts J).
>
> 3. The knowledge referred to in s 73(6)(b) is actual, and not constructive knowledge (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 755). In this context, I understand constructive knowledge to mean knowledge of evidence which the commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.
>
> 4. The correct approach for a tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from the date in (ii) (see *Heyfordian Travel Ltd v Customs and Excise Comrs* [1979] VATTR 139 at 151, and *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10).
>
> 5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on *Wednesbury* principles, or principles analogous to *Wednesbury* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223) (see *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10–11, and more generally *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941 at 952 per Neill LJ).

> 6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s 73(6)(b) of the 1994 Act.

37. The taxpayer argued that the test set out in s73(6)(b) had to be an objective one as otherwise it would be open to inspectors to require successive further pieces of information before making an assessment. At page 102g to 103a of his judgment, Dyson J explicitly rejected this argument in the following terms:

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

38. He went on to amplify this statement at page 104d as follows:

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

39. The decision of Dyson J was upheld by the Court of Appeal in a judgment reported at [2000] STC 91. At 97b of that judgment, Aldous LJ observed:

> Subsection (6) is to protect the taxpayer from tardy assessment, not to penalise the commissioners for failing to spot some fact which, for example, may have become available to them in a document obtained during a raid.

Moreover, Aldous LJ, with whom both of the other members of the Court agreed, concluded, at 99e of the judgment, that Dyson J "came to the right conclusion for the right reasons".

Conclusions I have drawn from Pegasus Birds

40. I note that, in common with the VAT assessment provisions that Dyson J was considering, the excise duty assessment provision set out in s12 of FA 1994 similarly contains a requirement that an assessment be to "best judgment". Therefore, I regard Dyson J's reasoning in this regard as equally applicable to s12 of FA 1994.

41. In point (ii) of principle 4, Dyson J refers to the task of ascertaining when the "last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners" and states that the period of one year runs from that date. He did clearly not intend this to convert the test into an objective examination of when HMRC as a whole had sufficient evidence to justify the making of the assessment (since he has made it absolutely clear that the test depends on the subjective opinions of the officer making the assessment). Rather he intends principle 4 to be read together with principles 1 and 5. Therefore, if a particular officer forms the subjective opinion that further information is needed to support the making of an assessment even though (viewed objectively) the commissioners have, for over a year, held information that justifies the making of an assessment the relevant question will be whether the officer's opinion is "perverse or wholly unreasonable".

42. On a related point, it is notable that in part (ii) of his principle 4, Dyson J frames the test by reference to when information was received by **the commissioners** and not when it was received by the **officer making the assessment**. I believe that is deliberate. Firstly, part (i) of principle 4 is clearly referring to the subjective views of the officer making the assessment so Dyson J has made a conscious choice, in part (ii), to refer to "the commissioners" and not the particular officer. Secondly, if Dyson J considered that the date of receipt by the particular officer making the assessment was the sole relevant factor the taxpayer would have no remedy in the situation described at 104d of his judgment (and quoted at [38] above). Dyson J clearly envisages, in that situation, that it should be open to a taxpayer to assert that, because HMRC as a whole had all the information in year one, but have been "wholly unreasonable" in sharing that information among themselves, an assessment can be out of time even though the officer making the assessment only received the information in year three.

Conclusion on the test to be applied

43. Mr Jones emphasised in his submissions that the appellant is not asserting that Officer Gowrea himself should have made the Assessment earlier and that rather its case is that HMRC, by it Officer Salami and Officer Ansah, were in possession of necessary facts to make an assessment at a much earlier stage. I do not consider that alters the approach that I should take and the correct approach remains that set out *Pegasus Birds*.

44. The test that Mr Jones put forward focuses on the question of whether the facts available to Officer Salami and/or Officer Ansah were sufficient for an assessment to be raised. Mr Jones is therefore proposing an objective test and, moreover, a test that does not invite any consideration of the information available to, or the subjective opinions of, Officer Gowrea. I have not accepted Mr Jones's formulation of the test as *Pegasus Birds* makes it clear that (i) the test is subjective and (ii) the subjective state of mind of Officer Gowrea, being the officer who made the Assessment, is highly relevant. Mr Jones's approach, therefore, is at odds with authority that is binding on me and I do not believe it can be justified simply by the fact that Officer Salami and Officer Ansah did not give evidence to the Tribunal.

45. Mr Evans is correct to focus on the facts that, in Officer Gowrea's subjective opinion, justified the making of the assessment (as set out in part (i) of point 4 of Dyson J's test quoted at [36]). However, he is not correct that it is then necessary to consider when those facts came to **Officer Gowrea's** knowledge. The true question is to consider when those facts came to the knowledge of the **Commissioners**. Moreover, Mr Evans's formulation of the test ignores the question of whether it was "wholly unreasonable or perverse" of the Commissioners not to make the Assessment earlier.

46. I will therefore adopt the following approach:

(1) I will first decide what were the facts which, in the opinion of Officer Gowrea, the officer making the Assessment, justified the making of the Assessment.

(2) I will then consider when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the Commissioners (whether or not to Officer Gowrea himself).

(3) If the Assessment was made more than one year after the date in (2) above, I will consider whether it was wholly unreasonable or perverse for the Commissioners not to make the Assessment earlier.

Findings of fact

47. I have made findings of fact in relation to matters in dispute set out at [48] to [70] below.

The purposes of the visits of Officer Salami and Officer Ansah

48. I accepted Officer Gowrea's evidence that, if an HMRC officer is asked to visit a trader's premises, he or she would often be sent a form Exit 465B. Page 1 of the form would be filled in by the HMRC officers requesting the visit and would contain brief details of the purpose of the visit. The officer making the visit would then be required to fill in the rest of the form to set out relevant conclusions following that visit.

49. The bundle of documents produced at the hearing contained extracts from a form Exit 465B that I accepted related to Officer Salami's visit. However, page 1 of

that form was not included (so there was no record of what Officer Salami's instructions were).

50. Mr Jakimavicius stated in his witness statement that "[t]he purpose of Miss Salami's visit was to verify the rate at which duty viz. cider and beer had been accounted for". That statement was not challenged in cross-examination. However, Mr Jakimavicius accepted that his evidence in this regard was based on what Officer Salami had said to him about the purpose of her visit. Therefore, his evidence was hearsay and I have taken that into account in assessing its weight.

51. Evidence of the purpose of Officer Salami's visit can also be inferred from the entries that she made when completing pages 2 and 3 of the Exit 465B. Those entries record essentially arithmetic conclusions, namely that payments of excise duty made corresponded with invoices and shipments of goods received. If Officer Salami had been asked to check that the appellant was applying the right rate of duty to the products that it was importing, I would have expected her note to include an analysis of the type of products being imported. However, her notes contain only a few generic references to product types such as "beer", "cider", "vodka" and "liqueurs" which appear in the course of an explanation as to how she has verified various payments. There is no reference in her notes to "strawberry, blueberry or cherry fizz". I therefore concluded that Officer Salami's notes of her visit were not consistent with the explanation that Mr Jakimavicius put forward in his witness statement.

52. It follows that I have to weigh up the evidence of Mr Jakimavicius against the inconsistent evidence in the form of Officer Salami's Form Exit 465B. I consider that the notes that Officer Salami prepared are more reliable than Mr Jakimavicius's recollection of his conversation with Officer Salami. Therefore, my overall conclusion is that it is more likely that Officer Salami had simply been asked to perform an arithmetic exercise and had not been asked to verify that beverages that the appellant was importing were being classified correctly for excise duty purposes.

53. The purpose behind Officer Ansah's visits appears clearer. Page 1 of the Exit 465B relating to those visits requested the visiting officer to "[c]onfirm the duty status of the goods". Officer Gowrea accepted that he would interpret such a task as including ascertaining whether goods that the appellant was importing were subject to duty and, if they were, how much duty was payable on them. I conclude that Officer Ansah's interpretation would have been the same.

Documents made available to Officer Salami during her visit

54. Mr Jakimavicius said in his evidence:

> "Miss Salami inspected all imports and payments of excise duty for the period January 2009 – January 2010. During the course of that inspection, all paperwork was made available to Miss Salami, including but not limited to, invoice(s), product names, shipping information."

He also stated that he was present in the room while she reviewed that paperwork. None of these statements were challenged in cross-examination.

55. Mr Jakimavicius also stated in evidence that each load of flavoured cider that the appellant imported would be accompanied by a certificate of conformity and that certificates of conformity were kept in the same files as the related invoices. He also said that Officer Salami "saw them" during her visit. Those statements were not directly challenged in cross-examination, although Mr Jakimavicius did accept in cross-examination that Officer Salami's notes of the visit, set out on pages 2 and 3 of her Exit 465B made no reference to certificates of conformity, or to the terms "blueberry, strawberry and cherry fizz".

56. I have accepted Mr Jakimavicius's evidence on these matters. I have, therefore, concluded that during her visit, Officer Salami saw documentation that described the ciders as "blueberry, strawberry and cherry fizz". I have also concluded that, in the room she used during her visit, there were lever arch files containing:

(1) invoices relating to imports of flavoured cider made between 5 December 2007 and the date of her visit; and

(2) certificates of conformity which, if compared against Notice 162, would have made it clear that the flavoured cider in question should be categorised as "made wine".

I also conclude that Officer Salami would not have seen the Spreadsheet (as that was prepared for Officer Gowrea much later in 2011).

57. Mr Jakimavicius did not say that all of the documents that had been made available to Officer Salami were subsequently copied and sent to her. Officer Salami's report refers to some specific documents and attaches copies of some documents that were provided to her. I have concluded that she was at most sent copies of the specific documents referred to in, or attached to, her report.

58. In cross-examination, Officer Gowrea accepted that an officer of HMRC could access HMRC internal systems to verify the rate of duty that the appellant was applying to flavoured ciders, and the amount of duty it had paid on their import. I therefore conclude that, Officer Salami had access to this information.

59. Given my conclusions on the purpose of Officer Salami's visit, I find that she did not appreciate the significance of the documents relating to flavoured ciders and therefore did not realise that they indicated that the appellant was paying duty on those ciders at the wrong rate.

Documents made available to Officer Ansah during his visits

60. Mr Jakimavicius gave evidence that:

> "Mr Ansah was provided with all paperwork and/or records he requested during his visit. This includes, but was limited to[1] purchase invoices, AAD, duty demand notices from Harbour Shipping and duty worksheets showing the duty tax codes and the rates paid.
>
> …
>
> As Mr Ansah's checks involved considering a lot of paperwork, he requested for all the paperwork he checked at the premises plus bank statements showing that the duty had been paid to be sent to him in the post."

61. Mr Jakimavicius's witness statement only records what Officer Ansah asked to be sent. It does not actually refer to what was sent or the date on which it was sent. In cross-examination Mr Jakimavicius said that he couldn't remember whether certificates of conformity were sent to Officer Ansah. He also admitted that Mrs Jakimavicius had put together the documentation attached to his witness statement and agreed when Mr Evans put it to him that Ms Jakimavicius was in a better position than him to answer questions as to what documents were provided to Officer Ansah.

62. I considered Mr Jakimavicius to be a reliable witness. His candour in cross-examination, and willingness to accept points that were not necessarily helpful to the appellant's case reinforced that view. I accept the evidence outlined at [61]. Moreover, since I have concluded that certificates of conformity had been provided to Officer Salami, I concluded that they would also have been provided to Officer Ansah as well.

63. I have therefore concluded that during his visit on 2 November 2010, the following information was made available to Officer Ansah:

(1) documentation that described the ciders as "blueberry, strawberry and cherry fizz";

(2) invoices relating to imports of flavoured cider made between 17 November 2008 and the date of his visit; and

(3) certificates of conformity which, if compared against Excise Notice 162, would have made it clear that the flavoured cider in question should be categorised as "made wine".

64. Since the Spreadsheet was prepared only in 2011, Officer Ansah did not have a copy of that. In addition, from Officer Gowrea's evidence discussed at [58], I have concluded that Officer Ansah had access to information from HMRC's internal systems as to the rate of excise duty that the appellant was applying to flavoured ciders and the amount of excise duty it had paid on import of these ciders.

65. I also conclude that he was provided, after his visit, with copies of all the documents set out at [63]. However, I was not told when they were sent, or when he received them. The exhibits to Mr Jakimavicius's witness statements suggests that documentation was provided in stages, that by 3 December 2010, Officer Ansah had

[1] It seems clear from the context that Mr Jakimavicius means "**not** limited to"

all the documents he requested and that, as of 29 November 2010, only a few specific invoices were yet to be supplied. However, in the absence of specific evidence as to when this copy documentation was sent or received, I am not satisfied on a balance of probabilities that any particular copy document was received 12 months or more before the Assessment was made.

Facts that, in Officer Gowrea's opinion, justified the making of the Assessment

66. Officer Gowrea said in his witness statement that, in his view, he needed both the certificate of conformity and the Spreadsheet in order to be in a position to make the Assessment. He also said that he needed to know the outcome of the "cross-checking" exercise with Harbour Shipping. It was not suggested that Mr Gowrea did not genuinely hold this opinion. I find that he did.

Information that, viewed objectively, would justify making the Assessment

67. Officer Gowrea accepted that, if a cider is described as "strawberry, blueberry and cherry fizz" that description gave a very strong indication that, given the terms of Excise Notice 162 it could not qualify as "cider" for excise duty purposes. He agreed when Mr Jones put it to him that "the clue is in the name". He also agreed when Mr Jones put it to him that he could have, quite properly, included within his email of 2 June 2011, referred to at [17] above, a statement that, from the description of the ciders provided, it appeared to him that insufficient duty had been paid on their import.

68. In his evidence he stated, however, that he himself would not have been able to make the Assessment by reference to the information that Officer Salami and Officer Ansah set out in their respective visit forms. I accepted that evidence, but noted it was not the same as a statement that neither Officer Salami nor Officer Ansah could have made the Assessment based on information provided to them during their visits or subsequently.

69. Officer Gowrea also accepted in cross-examination that the Spreadsheet was not essential to the making of the Assessment. He accepted that the Spreadsheet simply pulled together in one place information as to the amount of cider imported which could have been obtained from invoices and information as to the rate of duty applied, and the amount of duty paid, that could be gleaned from HMRC's own systems. In that sense, therefore, Officer Gowrea accepted that, since Ms Jakimavicius had put together the Spreadsheet, it had saved him work. However, he maintained that the Spreadsheet still fulfilled a useful function as it made it easier for him to cross-check information that Mrs Jakimavicius had provided with that provided by Harbour Shipping and he emphasised that the process of cross-checking had enabled him to uncover some anomalies.

70. I accept Mr Jones's submission that s12 FA 1994 imposes a relatively low threshold for making an assessment. I therefore conclude that an officer of HMRC would be **justified** in making the Assessment under s12 if he or she had (i) knowledge of the amount of imports covered by the Assessment, which could be gleaned either

from original invoices or from the Spreadsheet, (ii) knowledge that the ciders were described as having a "strawberry", "blueberry" or "cherry" flavour and (iii) the knowledge (which could be gleaned from HMRC systems) of the amount of duty that had been paid on import. Therefore, I conclude that neither certificates of conformity, nor the Spreadsheet, were, viewed objectively, **essential** to the making of the Assessment.

Discussion

71. I will now apply the test outlined at [46] to the relevant facts. I note that the parties were agreed, rightly given the judgment of Dyson J in *Pegasus Birds*, that the burden of proving the assessment was made out of time lies with the appellant.

The facts which, in Officer Gowrea's opinion justified the making of the Assessment

72. As I have found at [66], I have concluded that these were (i) the information contained in the certificates of conformity, (ii) the information contained in the Spreadsheet and (iii) the information that Officer Gowrea obtained from cross-checking the information in the Spreadsheet with Harbour Shipping.

When was the last piece of evidence of sufficient weight to justify making the Assessment communicated to the Commissioners?

73. I have accepted that, during her visit in February 2010, Officer Salami saw certificates of conformity and invoices describing the flavoured cider as "blueberry, strawberry and cherry fizz". This information was therefore communicated to the Commissioners on that date.

74. I am not satisfied, however, that evidence of the precise quantities of cider that had been imported and which were covered by the Assessment was "communicated" to Officer Salami (or, that such information "came to her knowledge" within the meaning of s12(4)(b) FA 1994) during, or subsequent to, her visit. As I have found at [56], invoices were available in lever arch files for Officer Salami to inspect if she chose to. However, I do not consider that this of itself means that the contents of all those invoices came to her knowledge or were communicated to her. If Mr Jakimavicius had said to Officer Salami that she could review any document on the company's premises, that could not have brought the contents of all the company's documents to Officer Salami's knowledge and I do not see how the position is any different if some of those documents happened to be located in lever arch files in the room she was sitting in. Moreover, given the findings I make at [51] and [52] as to the purpose of Officer Salami's visit, I conclude that she would not have read every invoice in order to build up a picture of the precise quantities of cider the appellant was importing, Finally, I note my conclusion at [57] that a full set of invoices was not copied and sent to Officer Salami after her visit.

75. I have therefore concluded that, following Officer Salami's visit, there had not been communicated all the evidence of sufficient weight to justify the making of the Assessment as details of the precise amount of cider imported had not been provided.

76. As I have noted at [65], a full set of documentation was made available for Officer Ansah to review during his visit on 2 November 2010. For reasons set out at [64], I am not satisfied that merely making this documentation available during that visit amounted to communication of the contents of all documents that were made available. However, I have found that copies of all documents were sent to Officer Ansah after his visit. At some point the contents of that copy documentation were "communicated" to Officer Ansah and came to his knowledge. I express no view on whether that happened as soon as the documents were received. However, even if it did, for reasons set out at [65], I am not satisfied that any particular copy document was received one year or more before the Assessment was made and so it follows that I am not satisfied that the information contained in any particular document was communicated to Officer Ansah, or came to his knowledge, on or before 14 November 2010.

77. Officer Gowrea received the Spreadsheet on 12 July 2011 and he obtained the response to his cross-checking exercise on 5 August 2011. However, those dates are relevant only if that information was of sufficient weight to justify the making of the Assessment. I have noted at [69] Officer Gowrea's acceptance that the Spreadsheet did nothing more than collate information contained in relevant invoices and information on HMRC's own systems that was already available to Officer Gowrea (and other officers). The contents of the underlying invoices had already been communicated to HMRC and came to HMRC's knowledge when Mrs Jakimavicius sent copies of them to Officer Ansah. Moreover, Officer Gowrea's evidence was that his cross-checking exercise identified errors in the Spreadsheet. He did not suggest that it identified errors with the underlying invoices, or information on HMRC's own records. In those circumstances, both the Spreadsheet and the information gathered from the "cross-checking" exercise did nothing more than duplicate information that HMRC already had. Accordingly, the information in the Spreadsheet, and the results of the "cross-checking" exercise were not of "sufficient weight to justify the making of the Assessment".

78. Overall, I have concluded that the last piece of evidence to justify the making of the Assessment was communicated to the Commissioners when contents of the copy documentation sent to Officer Ansah following his visit on 2 November 2010 came to his knowledge. For reasons set out at [76], I am not satisfied this was on or before 14 November 2010. It follows that, on a balance of probabilities I have concluded that the Assessment was made within 12 months of the last piece of evidence being communicated to the Commissioners.

Reasonableness

79. Given the conclusion I have reached at [78], it is not necessary to consider the *Wednesbury* issue that Dyson J identified. However, even if I had concluded that all information of sufficient weight to justify the making of the Assessment had been communicated to Officer Salami in February 2010 or Officer Ansah during his visit on 2 November 2010, I would not have considered that the failure to make an earlier assessment was "wholly unreasonable or perverse".

80. I do not consider there could be any such criticism of the failure to issue an assessment following Officer Salami's visit even if she had been provided with all information necessary to make it. As I have found at [51] and [52], Officer Salami made her visit to perform essentially arithmetic checks. I do not, therefore, consider that it would be "wholly unreasonable or perverse" of her, or the Commissioners, to fail to go through information that been gathered for an arithmetic purpose to see if it could support assessments that relied on fine points of classification of alcoholic beverages.

81. The position with Officer Ansah's visit is more difficult. If the facts were simply that all relevant information had come to Officer Ansah's knowledge during his visit on 2 November 2010, he had failed to identify the issue with flavoured ciders (despite one of the purposes of his visit being to check that the right amount of duty was being paid) and nothing had happened until Officer Gowrea made the Assessment on 14 November 2011, the situation would be similar to that identified by Dyson J in the extract from his judgment quoted at [38] above and HMRC's behaviour could well be regarded as "wholly unreasonable or perverse". However, that was not the position. On 21 October 2010 (and prior to Officer Ansah's visit), Officer Gower had separately identified a potential issue with the appellant's flavoured ciders. At that point, HMRC knew that the appellant was selling beverages that appeared, from their description, to fall outside the definition of "cider". However, HMRC did not have sufficient information to justify making the Assessment, not least because they did not know the precise quantities of flavoured cider that the appellant had imported. It was entirely reasonable of HMRC to seek to look into that issue further.

82. HMRC were certainly not co-ordinated in the way they chose to look into the issue that Officer Gower identified. It would have been much more efficient if HMRC's internal systems had identified that Officer Ansah was due to visit the appellant imminently and he had been asked specifically to look at the appellant's treatment of flavoured ciders. However, that is at most an efficiency failing. It does not suggest that HMRC behaved in a wholly unreasonable or perverse manner. Similarly, the interval between Officer Gowrea being asked to visit the appellant to look at the treatment of flavoured ciders and his actual visit was nearly 6 months. That is certainly on the high side but I was not satisfied that it was so high as to be "wholly unreasonable". Following Officer Gowrea's visit, matters proceeded efficiently.

83. Overall, I do not consider the appellant has satisfied the "high hurdle" that Dyson J identified of demonstrating that HMRC's conduct was "wholly unreasonable or perverse".

Conclusion

84. For the reasons set out above, the Assessment was made in time. The appeal is dismissed.

85. 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 RICHARDS
TRIBUNAL JUDGE

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