[2018] UKFTT 363 (TC)

TC06577

Appeal number: TC/2015/02784

VAT – sales of alcohol – whether goods were supplied in the UK and therefore were subject to UK VAT or whether appellant was trading goods under bond in France – whether assessment was made to best judgment and within time limit in s 73(6)(b) VATA – appeal allowed in part

FIRST-TIER TRIBUNAL
TAX CHAMBER

DALE GLOBAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE SARAH FALK
TOBY SIMON

Sitting in public at Taylor House, 88 Rosebery Avenue, London EC1R 4QU on 21 to 25 May 2018

David Bedenham, instructed by Bivonas Law LLP, for the Appellant

Brendan McGurk, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction and preliminary matters

1. This is an appeal by the appellant Dale Global Limited ("DGL") against two VAT assessments made under s 73(1) Value Added Tax Act 1994 ("VATA"). The first assessment was made on 30 September 2014 in respect of VAT periods 09/12 and 12/12, in the aggregate amount of £138,930. The second was made on 5 November 2014 in respect of periods 09/11, 12/11, 03/12 and 06/12 in the aggregate amount of £595,010, making the total tax in dispute £733,940.

2. The individual amounts assessed were as follows:

Period	Amount
09/11	143,467
12/11	74,925
03/12	121,669
06/12	254,949
09/12	119,280
12/12	19,650
Total	**£733,940**[1]

3. The amounts assessed reflected entries in box 6 of DGL's VAT returns, which is the box that requires taxpayers to set out the total value of their sales and other outputs excluding VAT. DGL's position is that these entries related to sales of beer and wine to French cash and carry customers made while the goods were located in bonded warehouses in France, and on that basis the sales were not subject to UK VAT. Although payment for the goods was made in cash in sterling and was banked in the UK, this simply reflected the fact that DGL had been paid in the UK, with the French customers using cash couriers to transport the sterling into the UK for that purpose. The assessments were raised because HMRC does not accept that DGL's version of events is credible.

4. There were three preliminary matters to consider. The first was an application to admit additional evidence, in the form of bank statements. When raising the

[1] DGL's notice of appeal refers to £733,494.54. The reason for the difference was not made clear.

assessments the assessing officer had had access to bank statements covering only part of the period during which the disputed transactions occurred. The application relating to bank statements for the remaining part of that period. We admitted the evidence on the basis that there was no real prejudice to HMRC and the information could in any event generally be derived from other documentary evidence, albeit in a less convenient form.

5. The other two matters related to the admission of witness statements from two witnesses who did not appear in person. We also admitted these documents, but on the basis that in assessing their weight we would take account of the absence of the ability to cross examine them: see [21] and [22] below.

Legal background

The legislation

6. Relevant extracts from VATA and Directive 2006/112/EC (the Principal VAT Directive or "PVD") are set out in the Appendix. In summary, by virtue of sections 1 and 4 of VATA, VAT is charged on the supply of goods in the UK by a taxable person in the course or furtherance of a business. Section 5 makes clear that supply covers all forms of supply, but not anything done otherwise than for a consideration. Section 7 governs the place of supply of goods, and s 7(2) provides that if the supply does not involve the removal of the goods from or to the UK then they are to be treated as supplied in the UK if they are in the UK. Section 6 determines the time of supply. Under s 6(2)(b), where goods are not to be removed the time of supply is when they are "made available" to the recipient of the supply. This is subject to s 6(4), which applies where the supplier issues a VAT invoice or receives a payment in respect of the supply at an earlier time, and which operates to bring forward the time of supply to that earlier time to the extent it is covered by the invoice or payment.

7. These provisions reflect the PVD. Article 1(a) provides for the supply of goods for consideration by a taxable person acting as such within the territory of a Member State to be subject to VAT. Article 14 defines a supply of goods as the transfer of the right to dispose of tangible property as owner. Article 31 provides for the place of supply to be the place where the goods are located at the time the supply takes place (if the goods are not to be dispatched or transported). Article 63 specifies that VAT becomes chargeable when the goods are supplied, and Articles 65 and 66 make provision for earlier tax points where a payment is made on account or an invoice is issued.

8. Section 73(1) VATA empowers HMRC to make an assessment of VAT to the best of their judgment where it appears to the Commissioners that VAT returns are incomplete or incorrect. Any such assessment must be made within the time limit in s 77 VATA, in this case not more than four years after the end of the relevant accounting period, and also within the time specified in s 73(6). That provision requires an assessment to be made not later than (a) two 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". In this case it is accepted that the first assessment was made within the two year period, but the second assessment (made on 5 November 2014) was only in time if it satisfied the one year rule in s 73(6)(b).

Burden of proof and the issue of fraud

9. DGL's case is simply that its supplies were made when the goods were in France, and therefore that UK VAT is not chargeable. HMRC's case is that the burden of proof is on DGL to demonstrate this, and that they have not discharged that burden. It is important to recognise that it is not any part of HMRC's case that there was fraud on the part of DGL. This is also not a case based on the *Kittel*[2] principle, which requires HMRC to demonstrate that DGL knew or should have known about a connection with fraudulent evasion of VAT. In essence, it is simply a case about where goods were supplied. In disavowing any allegation of fraud against DGL HMRC placed particular reliance on comments by Dillon LJ and Mustill LJ in the Court of Appeal decision in *Brady v Group Lotus Car Companies plc* [1987] STC 635 ("*Brady*").

10. In summary, *Brady* made it clear (in the context of assessments to corporation tax) that where an assessment is made in time the burden is on the taxpayer to show that he is overcharged, referring to *Hudson v Humbles* (1966) 42 TC 380 at 384 and *Haythornthwaite & Sons Ltd v Kelly (Inspector of Taxes)* (1927) 11 TC 657. This is the case even though the possibility of fraud may have been raised, as it had been in that case, and even if the only alternative explanation, if the taxpayer's version of events was not accepted, was that there was fraud. Dillon LJ explains the position by reference to these two cases at pages 639 to 640, and Mustill LJ said the following at page 642c to j:

> "…it has been clear law binding on this court for sixty years that an inspector of taxes has only to raise an assessment to impose on the taxpayer the burden of proving that it is wrong: *Haythornthwaite & Sons Ltd v Kelly (Inspector of Taxes)* (1927) 11 TC 657. The taxpayer companies do not dispute this principle but maintain that they have done everything which it requires by tendering senior officials and the auditors of the taxpayer companies to give evidence and producing the taxpayer companies' accounts and records to show that there is nothing in them to justify the raising of an assessment in respect of the sums which the inspector has asserted were wrongfully diverted from the taxpayer companies' funds. They go on to say that the burden of displacing this evidence rested on the Revenue, given that the case against them was fundamentally one of fraud, a case which the party asserting it must always be under a heavy burden to prove.
>
> I believe that when analysed this proposition has two quite different aspects. The first is based on the way in which the Revenue approached the matter in correspondence. In a letter of 14 December 1983 the inspector notified the taxpayer companies that a number of

[2] *Axel Kittel v Belgium; Belgium v Recolta Recycling* (C-439/04 and C-440/04) [2006] ECR 1-6161

assessments would be made and went on to say that he had decided to make them 'on the basis that there has been fraud, wilful default or neglect' on the part of the taxpayer companies. It would, I believe, have been natural to read this letter as an intimation that the Revenue were proposing, either to claim lost tax out of time under s 36 of the Taxes Management Act 1970 by proving fraud or wilful default, or to use an in-time assessment based on fraud, wilful default or neglect as a springboard for subsequent out of time assessment under s 39. If this had indeed been the basis on which the hearing had been conducted before the commissioners, it would indeed have been perfectly clear on general principle, without the need for recourse to specialist revenue law, that the burden of proof would rest on the Crown; and, if authority were needed on this particular field, *Hudson v Humbles (Inspector of Taxes)* (1965) 42 TC 380 at 384 is only one example of cases which could be called up in support. We have, however, had the benefit of an explanation of the way in which the dispute was actually conducted before the commissioners. We are told that, whatever the letter may have said, the Revenue was concerned only to protect its right to interest under s 88, and that, when it came to the hearing before the commissioners, no attempt was made to advance a case under ss 36 and 39. Rather, the matter was approached, so far as the Revenue were concerned, on an ordinary *Haythornthwaite* basis. If this is so, and the contrary has not, as we understand it, been asserted, the formal burden of proof was not assumed by the Revenue. The commissioners had no ground for approaching their fact-finding functions on any other basis than that it was for the taxpayer companies to make the running."

11. Mustill LJ went on to say the following at pages 643j to 644c (emphasis added):

"…It is a commonplace that, if there is a disputed question of fact admitting of only two possible solutions, X and Y, with party A having the burden of proving X in order to establish his case, if A produces credible evidence in favour of X and B produces none in favour of Y, it is very likely that A will win. B must therefore exert himself if he wishes to avoid defeat. But this does not mean that B ever has the burden of proof. So also here. *It may well be that, if the taxpayer companies' version does not correspond with the true facts, it must follow that someone was guilty of fraud. This does not mean that, by traversing the taxpayer companies' case, the Revenue have taken on the burden of proving fraud.* Naturally, if they produce no cogent evidence or argument to cast doubt on the taxpayer companies' case, the taxpayer companies will have a greater prospect of success. But this has nothing to do with the burden of proof, which remains on the taxpayer companies because it is they who, on the law as it has stood for many years, are charged with the task of falsifying the assessment. *The contention that, by traversing the taxpayer companies' version, the Revenue are implicitly setting out to prove a loss by fraud, overlooks the fact that, in order to make good their case, the Revenue need only produce a situation where the commissioners are left in doubt. In the world of fact there may be only two possibilities: innocence or fraud. In the world of proof there are three: proof of one or other possibility,*

and a verdict of not proven. The latter will suffice, so far as the Revenue are concerned."

12. It is clear that these principles also apply to VAT assessments, see for example *Khan (t/a Greyhound Dry Cleaners) v Customs and Excise Commissioners* [2006] STC 1167("*Khan*"), where Carnwath LJ (as he then was) said the following at [69], commenting both on the burden of proof and the "best judgment" issue discussed further below:

> "[69] There is no problem so far as concerns the appeal against the VAT assessment. The position on an appeal against a 'best of judgment' assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:
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> 'The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right.' (See *Bi-Flex Caribbean Ltd v The Board of Inland Revenue* (1990) 63 TC 515 at 522–523 per Lord Lowry.)
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> That was confirmed by this court, after a detailed review of the authorities, in *Customs and Excise Comrs v Pegasus Birds Ltd* [2004] EWCA Civ 1015, [2004] STC 1509. We also cautioned (see [2004] STC 1509 at [38]) against allowing such an appeal routinely to become an investigation of the bona fides or rationality of the 'best of judgment' assessment made by Customs:
>
> '*Evidence to the tribunal*
>
> [38] … (i) The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment …'
>
> It should be noted that this burden of proof does not change merely because allegations of fraud may be involved (see eg *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635 at 642, [1987] 3 All ER 1050 at 1057–1058 per Mustill LJ)."

13. Is also worth referring to comments by Henderson J about *Brady* in *Ingenious Games LLP v HMRC* [2015] STC 1659 at [15]:

> "[15]…As the decision in *Brady* shows, this is so even if the circumstances of the case are such that there either must, or may, have been some fraudulent conduct on the part of the taxpayer which is relevant to the tax liability. As Mustill LJ said at 644g:
>
> 'The fact that the possibility of fraud is on one side of the case will of course require the tribunal to take particular care when weighing the evidence, given the seriousness of any finding which puts in question the honesty of a party to a civil suit (see *Hornal v Neuberger Products*

> *Ltd* [1957] 1 QB 247). At the same time, I cannot accept that this bears on the burden of proof.'"

Best judgment

14. HMRC's power under s 73(1) VATA is a power to assess "to the best of their judgment". It was part of DGL's case that the assessments made did not satisfy the "best of judgment" requirement.

15. The leading authority on this question is the Court of Appeal decision in *Customs and Excise Commissioners v Pegasus Birds Ltd* [2004] STC 1509, referred to in the citation from *Khan* above, where earlier cases are considered. The principles that emerge can be summarised as follows:

> (1) "Best of judgment" simply means to the best of HMRC's judgment on the information available (paragraph [10]).
>
> (2) An assessment on the best of judgment basis is not invalid simply because the Tribunal disagree with HMRC as to how the judgment should have been exercised: a much stronger finding is required (paragraph [16]).
>
> (3) Although there are two questions or stages, namely whether the assessment was made according to best judgment and, if it was, whether the amount of the assessment is correct or should be reduced, the principal concern of the Tribunal should be to ensure that the amount of the assessment is fair (that is, the second stage). The Tribunal's primary task is to find the correct amount of tax, so far as possible on the material available to it, with the burden resting on the taxpayer, and in all but very exceptional cases this should be the focus of the hearing (paragraphs [17] to [19], [38(i)] and [91] to [92]).
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> (4) On the best of judgment test, the relevant question is whether any mistake the Tribunal considered that HMRC has made is "consistent with an honest and genuine attempt to make a reasoned assessment of the VAT payable; or is of such a nature that it compels the conclusion that no officer seeking to exercise best judgment could have made it" (paragraphs [21], [80] and [81], citing Chadwick LJ in *Rahman v Customs and Excise Commissioners (No 2)* [2003] STC 150 at [32]). This is an authoritative statement which was part of the ratio of that decision. It should not be refined or added to, and references to *Wednesbury* principles are unhelpful and possibly confusing (paragraph [22]).
>
> (5) The exercise of best judgment requires the task to be approached with an open mind. This does not prevent material being rejected on the basis that, on evaluation, it is not regarded as credible, but it does prevent material being rejected without evaluation because the HMRC officer has closed his mind to the possibility that it might be credible (paragraph [75]).
>
> (6) An assessment which is wholly unreasonable might still be the result of an honest and genuine attempt to assess the VAT properly due (the officer doing his "honest best"), although it might be so far outside the

bounds of reasonableness to call that into question (paragraph [77]; see also paragraph [22] on "wholly unreasonable" potentially being misleading if treated as a separate test, and paragraph [84]). There is no objective standard of reasonableness that must be applied (paragraphs [82] and [88]).

(7) In the (rare) case where the best of judgment test is not met but the complaint is in substance about the amount of the assessment rather than the assessment as such, it may be possible to do justice by correcting the amount rather than treating the entire assessment as a nullity (paragraphs [28] and [29]).

Time limit: s 73(6)(b)

16. As already mentioned, the second assessment was only in time if it satisfied the one year rule in s 73(6)(b) VATA. DGL's case was that it did not.

17. Section 73(6)(b) was considered in the High Court decision in an earlier case also called *Pegasus Birds Ltd v Commissioners of Customs and Excise* [1999] STC 95, where Dyson J summarised the principles to apply at pages 101 to 102:

> "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).
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> 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."

18. Dyson J made clear at page 102e to g that there is no requirement that the opinion as to the sufficiency of the evidence must be reasonable. It is the opinion of the person who make the assessment that is imputed to the Commissioners, whether or not he or she was the first person who acquired knowledge of the evidence.

The evidence

19. Witness statements were produced by nine witnesses, four for DGL and five for HMRC. Seven witnesses gave oral evidence.

20. The witnesses for DGL were Daljit Singh Dale, its sole director and shareholder, Mark Curley, a director of Due Diligence Exchange Ltd ("DDE"), Ronny Devos, the owner and manager of Wybo Transport SARL ("Wybo") and Manuel Gluck, the manager of Import Export Fonderie de Wimille ("IEFW"). Wybo and IEFW are excise bonded warehouses located in France and approved by the French Customs authorities. DDE is a company that was engaged to supply services to DGL in or after October 2012. The nature of those services and the period for which they were supplied was not made clear. DDE's business, as described in Mr Curley's witness statement, is to specialise in enhanced due diligence checks, policies and procedures and to assist businesses to comply with anti-money laundering requirements. Before establishing DDE Mr Curley worked for a few years as a trainee tax consultant.

21. Mr Dale provided three witness statements and the other witnesses for DGL each provided one witness statement. Mr Dale, Mr Curley and Mr Devos gave oral evidence and were cross-examined. Mr Devos gave his evidence by video link from France. Mr Gluck was due to give evidence in the same way but notified DGL relatively shortly before the hearing that he would be away and would not be available to give oral evidence. In the circumstances we decided to admit Mr Gluck's witness statement, which also had a number of exhibits providing additional documentary evidence, but in determining its weight to take into account the important point that there was no ability to cross examine him.

22. The witnesses for HMRC were Ian Cathie, an HMRC Higher Officer who was responsible for making the assessments, Guy Bailey, another Higher Officer who specialises in tackling excise fraud, and in particular alcohol fraud and the evasion of excise duty by pan European organised criminal groups, Elaine Emery, a member of HMRC's Fraud Investigation Service who acted as the review officer and who is also HMRC's Appeal Support Officer in respect of this case, Laurence Smith, an HMRC Higher Officer who has local responsibility in respect of DGL, and Leslie Pitt, another HMRC Higher Officer who was involved in visiting DGL's premises in June 2013 to uplift business records. Mr Cathie provided two witness statements and each of the other officers provided one. Mr Pitt's statement was very short and was essentially included to exhibit documents. Mr Pitt was not available to give oral

evidence and we decided to admit his witness statement, subject to a similar comment as made in relation to Mr Gluck's statement about weight (although the content of Mr Pitt's statement was much less contentious). All the other HMRC witnesses gave oral evidence and were cross-examined.

23. We found all of HMRC's witnesses to be honest and we accept their evidence insofar as it relates to matters of fact. We deal with specific issues relating to Mr Bailey's evidence about the "booze cruise" market further below. We also discuss some specific issues raised in relation to Mr Cathie's evidence in the context of the "best judgment" and time limit issues, but we should emphasise that overall we are satisfied that Mr Cathie did do his "honest best" in raising the assessments, making an "honest and genuine attempt to make a reasoned assessment of the VAT payable".

24. Our assessment of DGL's witnesses is much more mixed. Mr Dale's witness statements contained some statements that were clearly not correct. He was cross-examined for a lengthy period and, overall, we found his oral evidence to be evasive and unconvincing. Mr Curley's evidence had a very limited remit, essentially related to the state of the "booze cruise" and Calais cash and carry market, and we did not find it to be of any great assistance or, in some respects, to be particularly convincing. Mr Devos's oral evidence (in particular) was also unsatisfactory. It was generally not specific to DGL and therefore of limited assistance in that respect. Significantly, Mr Devos also introduced a suggested explanation of apparent discrepancies between warehouse documentation and DGL's transaction documentation, involving phone calls to the warehouse to request early release of goods, that was not foreshadowed in his witness statement, and which (if applied to DGL) flatly contradicted Mr Dale's evidence. This explanation is discussed further below but, in summary, we accept that phone calls of the nature described by Mr Devos may have occurred in some cases, but that any such phone calls were made by warehouse customers other than DGL.

25. In addition, Mr Devos and Mr Gluck produced witness statements that were strikingly similar in a number of respects. On being asked about this in cross examination Mr Devos was somewhat evasive, and did not accept (or at least did not clearly accept) that he had had significant assistance in preparing it.

26. The extensive documentary evidence included the transaction documentation taken from DGL's own files, documentation produced by Mr Devos and comprising warehouse documentation relating to those of the transactions that involved Wybo, some documentation produced by Mr Gluck relating to transactions that involved IEFW, due diligence documentation held by DGL on customers and suppliers, a number of reports from the French authorities pursuant to requests for mutual assistance, bank statements and correspondence between the parties.

Findings of fact

27. We have grouped our findings under the following subheadings:

(1) the establishment of DGL and its dealings with HMRC, the assessments and HMRC's review ([28] to [48]);

(2) a brief summary of how inward diversion fraud works ([49] to [53]);

(3) Mr Dale's evidence: an overview and chronology ([54] to [65]);

(4) due diligence ([66] to [69]);

(5) DGL's transaction documents and cash payment arrangements ([70] to [75]);

(6) evidence from the warehouses and discrepancies between the warehouse documentation and the transaction documents ([76] to [90]);

(7) reports from the French authorities ([91] to [96]); and

(8) evidence about the "booze cruise" market ([97] to 102]).

Incorporation of DGL and dealings with HMRC

28. DGL is a UK company which was incorporated on 1 March 2011. Mr Dale is and has at all material times been the sole shareholder and director, and there are no other employees. The issued share capital is £1, although Mr Dale deposited an initial £500 into DGL's bank account on 21 April 2011. DGL registered for VAT on a voluntary basis with effect from 1 May 2011. DGL also registered with HMRC as a High Value Dealer under the Money Laundering Regulations 2007 ("MLR") with effect from 28 May 2011. The application for VAT registration described the current or intended business activity as "wholesale of alcoholic and none [sic] alcoholic beverages", which was further categorised as "wholesale of wine, beer, spirits, and other alcoholic beverages (main activity)". The value of taxable supplies in the following 12 months was estimated at £300,000, and the application stated that DGL intended to make intra EU sales and purchases of goods with an estimated value of £30,000 each. Mr Dale stated in cross-examination, and we accept, that he made an error and that the £300,000 figure should have related to intra EU trading and the £30,000 should have related to (UK) taxable supplies.

29. No accounts of DGL were available for the period covered by the assessments, although the documentary evidence did include unaudited accounts for the year ended 31 March 2014 which included prior year figures (for the year to 31 March 2013). For that earlier year turnover is stated at a little under £2.4 million, with a gross profit of around £50,000, and operating profit of around £20,000 after administrative expenses. The figures for the year to 31 March 2014 show turnover of a little over £1 million, gross profit of nearly £70,000 and operating profit of approximately £33,000.

30. In August 2012 Mr Smith and a colleague visited DGL's office on two occasions to meet Mr Dale. The meetings were arranged following a previous unannounced visit at a time when Mr Dale was not in the office. That visit was prompted by concerns that DGL was receiving goods from other member states and not declaring their acquisition on its VAT returns, a potential indicator of fraud.

31. At the meetings Mr Dale explained that DGL's business was the sale of wine and beer under bond, with the goods always remaining on the continent. Mr Dale said that he currently only had one supplier, Bluewater Trading (South East) Ltd ("Bluewater") and one customer, Excalibur SARL ("Excalibur"). Excalibur was based in France and

brought cash in sterling to DGL to buy the goods on each deal, with Mr Dale banking the cash through the night safe at Lloyds TSB and paying his supplier by bank transfer. Mr Dale explained that Excalibur's manager had said that its customers were British and paid sterling, which was used to pay DGL. Mr Dale's due diligence folder was examined and the MLR and risk of MTIC fraud was raised.

32. On 3 October 2012, having examined the business records, Mr Smith wrote to Mr Dale about DGL's trading practices. The focus of the letter is the MLR. The letter explains the concept of High Value Dealer and highlights a number of concerns. It states that DGL was dealing with four French customers, Moulin SARL ("Moulin"), Bourgogne Beers SARL ("Bourgogne Beers"), Saki Boissons SARL ("Saki Boissons") and Excalibur, all based in the Pas de Calais area, each of which were controlled and operated by Romanian rather than French nationals. Since 6 July 2011 DGL had made sales apparently within various bonded warehouses in the same area. All the customers paid in the same manner, making the trip from France to West London to pay in cash in sterling rather than in euros. The letter notes that it is a requirement of the French Customs code that all amounts of cash over €10,000 carried out of France are declared on the day of passage on a form, a stamped copy of which is returned to the holder. The letter advises that DGL should obtain a copy of the form on each occasion.

33. The letter goes on to refer to Mr Smith's view that the business might be at risk of money laundering, setting out customer behaviours that might indicate a potential risk. Mr Dale had named the courier bringing the cash on behalf of Excalibur as "Sunny" or "Victor", and the letter states that Mr Smith did not believe that Mr Dale had established his true identity, queried whether he had reported the transactions to SOCA, and sets out Mr Smith's view that the circumstances could only lead to the conclusion that DGL's customers were in fact making large-scale cash transactions within England.

34. The letter also includes a section on due diligence, commenting that Mr Smith was concerned that the due diligence done was inadequate for DGL's own assurance and for MLR purposes, and a further section on how to report a suspicious transaction or activity under the MLR. It concludes that DGL had had cause to report suspicious transactions and had failed to do so, and recommended that DGL insist on payment by normal commercial bank transfers in future and not in cash.

35. Mr Dale responded on or around 29 October 2012 saying that he had decided no longer to trade with Excalibur and Saki Boissons, and had instructed DDE to assist with due diligence in future.

36. On 12 June 2013 Mr Pitt and another HMRC officer visited DGL, at which point the available business records were uplifted for further analysis.

37. Between 30 November 2012 and 13 March 2014 HMRC received a number of reports from the French authorities, which are discussed further below.

The assessments

38. The first assessment was made on 30 September 2014. The explanation given in the assessment, which was repeated in the second assessment made on 5 November 2014, was as follows:

> "I believe that you have not declared or we have not assessed the correct amount of VAT due for the periods shown below. This is because monies have been deposited in the UK for the sale of goods said to be made in non-UK bonded warehouses, and the money is said to be transported into the UK by cash couriers. However, subsequent HMRC checks reveal this scenario is not credible and the monies must have had a UK origin. Therefore the goods [are] subject to UK VAT at the standard rate."

39. Both assessments were made by Mr Cathie, who had not previously been involved in the investigation. The assessments were based on 83 cash deposits into DGL's Lloyds TSB business bank account between 2 April and 15 October 2012, totalling over £2.3 million or an average of about £28,000 per deposit. Mr Cathie's second witness statement explains that he compared these deposits to the entries in Box 6 of the corresponding VAT returns, and they matched. On that basis he concluded that 100% of the sales in those periods were paid for in cash. For the remainder of the period covered by the assessments bank statements were not available and Mr Cathie instead simply multiplied the total sales shown in Box 6 by the VAT fraction (20/120), on the basis that (on a best judgment basis) all those sales were in cash.

40. Mr Cathie's evidence was that HMRC considered DGL's account of its trading operations to be implausible. His first witness statement refers to the €10,000 French Customs declaration requirement (see [32] above) and to a report dated 13 March 2014 from the French authorities (as well as a subsequent French report dated 11 May 2015 which obviously post-dates the assessments), noting that those reports stated that there was no record of any such declarations being made by the couriers, or by DGL or its customers. The statement also summarises other material taken into account, including information from HMRC's contacts with DGL and earlier reports from the French authorities, which Mr Cathie concluded cast serious doubt on the overall credibility of DGL's alleged customers. It was clear from both this witness statement and Mr Cathie's second witness statement that the reports from the French authorities, and the absence of Customs declarations in relation to any of the alleged cash movements, had a strong bearing on Mr Cathie's decision to raise the assessments. Mr Cathie also relied on his understanding that the type of products sold were not products usually associated with French drinkers, that the location of DGL's customers was unlikely to attract any "booze cruise" market, and the lack of proper due diligence.

41. In his second witness statement Mr Cathie included a statement clarifying that he was not alleging that DGL acted fraudulently or orchestrated the inward diversion fraud "of which its supplies became a part". He added:

> "I do not challenge the transactional documents under which the Appellant contends its supplies were made other than to the extent of

> saying that I do not accept that the documents provide any evidence that the Appellant's alleged French customers paid for the supplies. As previously explained, all the evidence suggests that these alleged customers were not genuine wholesalers or cash and carries, had not means of even storing the alcohol, never mind the means to make a further supply to any customer in France (never mind the fact that given their location there was no possibility that they were selling to UK travelling consumers). Therefore, I want to make clear that I do not accept that the transactional documents are proof that the Appellant ever received payment of the goods from the French customers, that were said to be supplied, or that the alleged French customers ever took physical receipt of those goods. Given the other factors (detailed in my first statement), I was (and remain) of the view that it is far more probable that the cash deposits were consideration for supplies that were made by or on behalf of the Appellant in the UK and which, to that extent, gives rise to an under-declaration of output tax in the UK."

42. Mr Cathie was cross examined at some length about various aspects of his evidence. Overall, we detected no material inconsistencies with the content of his witness statements and we are satisfied that he took an honest approach in making the assessments, taking account of all the information available to him.

43. On being asked why HMRC did not raise assessments in 2012 given the information it obtained from DGL at that time, Mr Cathie gave what we regard as reasonable responses by reference to the generality of the information available and the absence of sufficient evidence to justify an assessment. His responses were less clear when he was shown certain of the French Customs reports from 2013 that are discussed below and which indicate that no customs declaration was made in respect of Moulin or Excalibur (reports received on 22 January and 1 October 2013). He explained that he was not working in that area of HMRC at the time and could not comment on what HMRC had available and whether that would be enough to justify an assessment, but thought that a different report had been exhibited to his witness statement.

44. Mr Cathie was also cross-examined about the section of his second witness statement set out above. It was clear that Mr Cathie had formed the view that the cash came from the UK and not France, and that he also took account of French Customs' view that the goods were coming into the UK. In his view DGL's alleged cash and carry customers did not appear to exist as genuine businesses. He relied on the French Customs reports. His response to Mr Bedenham's challenge that the approach of not disputing DGL's transactional documents and focusing on DGL's customers meant that any smuggling was done by those customers, with DGL's supplies being in France, was essentially that DGL was a UK based trader and Mr Cathie considered that any trading by it could be assumed to be in the UK unless it could demonstrate otherwise. He emphasised that he did not have evidence of fraudulent activity by DGL or Mr Dale, and did not engage clearly with Mr Bedenham's references to goods being in France at the time of supply by DGL.

45. Mr Cathie's explanation for not allowing any credit for input tax was that UK VAT had not been paid on DGL's purchases, on the basis that they were said to have

been made under bond, noting that his understanding was that legitimate trading in France should have been subject to French VAT. The position would have been different if DGL had held purchase invoices showing UK VAT or, potentially, if other evidence of UK input supplies was available.

HMRC's review

46. Following receipt of the assessments DGL instructed KPMG LLP to advise them, and KPMG wrote to HMRC on 23 January 2015 to request a review. Mrs Emery undertook the review and replied on 25 February 2015 upholding the original decisions. In her witness statement Mrs Emery confirmed that she had considered the time limits in s 73(6) VATA and had relied on the report from the French authorities dated 13 March 2014, which confirmed that individuals who transferred assets from France to another member state must declare any transfer in excess of €10,000, as being necessary evidence for the purposes of the one year rule.

47. Mrs Emery was cross-examined about this. In cross-examination she clarified that this section of her witness statement did not properly reflect the fact that what was relied on from the report was not simply the existence of the French declaration requirement (of which HMRC were already aware) but the fact that the report related to all but two of the couriers referred to in DGL's transaction documents, as well as all of its customers. Mrs Emery's oral evidence was straightforward and convincing, and we accept it. The scope of the French report is also clearly covered in another paragraph of her statement.

48. DGL appealed to the Tribunal on 15 April 2015. Its grounds of appeal stated that HMRC had failed to provide it with any sufficient information or basis to explain the assessments, that its VAT returns were accurate, that to the best of its knowledge and belief the goods never physically entered the UK, that the goods sold by it to its non-UK customers in France "were purchased and sold excise duty suspended (under bond)" and therefore s 73 VATA did not apply, and that the second assessment was outside the time limit.

Inward diversion fraud

49. Mr Bailey's witness statement included a description of the main elements frequently present in alcohol diversion fraud, which we accept. It is convenient to summarise the material parts of this evidence here because it explains some aspects, in particular the EMCS and ARC number systems, that are relevant to other findings.

50. In outline, alcohol diversion fraud is used to evade excise duty and VAT through abuse of the Excise Movement and Control System ("EMCS"), which permits authorised warehouse keepers to move excise goods from warehouse to warehouse within the EU on behalf of account holders, in duty suspense. Any movement requires the generation of an Administrative Reference Code ("ARC") within the EMCS, which must travel with the goods. The system has operated in electronic form since January 2011. An ARC number will typically last for a few days, and expires when

the load is recorded on the system by the receiving warehouse as having been being delivered.

51. Inward diversion fraud, which is the type of fraud potentially relevant in this case, operates as follows. Alcohol originating in the UK is supplied under duty suspension to tax warehouses on the near continent, principally in France, the Netherlands and Belgium (what follows uses the example of France). Once in the tax warehouse they will usually change hands a number of times and will often be divided up before being reconstituted. A supply chain is set up with a purported end customer based in France. Some of the goods will be consigned back to the UK in duty suspense using an ARC number. This is the "cover load". Within the lifetime of the ARC number further consignments of goods of the same description will purportedly be released for consumption in France, attracting duty at low French rates, but will in fact be smuggled to the UK using the same ARC number. These are the "mirror" loads, and this will carry on until the ARC number expires or one of the loads is intercepted by Customs, following which a new ARC number will be generated in a similar manner.

52. Mirror loads are typically sold immediately following their arrival in the UK for cash. This process is known as "slaughtering". The UK customers may create false paper trails to generate the impression that the goods were supplied to them legitimately.

53. Mr Bailey also described the type of operation that, based on a visit he made in 2013, he thought was typically involved in inward diversion fraud as the French "customer". It was common for individuals of East European origin to be involved as directors. The premises occupied would be "dusty warehouses" which were comparatively small, did not offer any of the facilities found at large cash and carries (for example, car parking, cash tills, and shop staff) and were generally situated in isolated areas, away from the main cash and carry zone near the ferry and Eurostar terminals, not advertised and probably not signposted. Essentially they are shell promises simply designed as holding pens for goods that are intended to constitute mirror loads. French Customs refer to them as "pseudo cash and carries".

Mr Dale's evidence: overview and chronology

54. Mr Dale has some background in the alcohol business, in that he ran an off licence in the London area for around 10 years from the early 1990s and also developed supply contracts with bigger customers, including some local pubs and societies. The business model he adopted was to supply at a very competitive price in large volumes with small margins. He became familiar with dealing with cash receipts. He subsequently worked in an estate agency where he also dealt with tenants paying rent in cash, and later attempted to enter the property business as a developer. He learnt about trading in alcohol under duty suspense (commonly known as under bond trading) from acquaintances in the industry, and visited Calais in late 2010 with an old friend who was involved in that business. He visited a number of cash and carry businesses, together with four bonded warehouses, including the three he subsequently held accounts with.

55. In what seems to have been a separate trip to France in early 2011 (although there was some conflict between the witness statement and oral evidence on this point) Mr Dale and the same friend travelled to Cannes and attended a wine and food fair. Mr Dale's evidence was that he met a contact of Moulin at the fair who told him that they were looking for an under bond supplier. Mr Dale's second witness statement said that he took the contact's details, but in cross-examination he said that the contact took Mr Dale's details and that he did not obtain any contact details. We prefer the evidence in the witness statement. Mr Dale said that based on his visits and internet research he formed the view that, with his experience of supplying alcohol in bulk when he ran the off-licence, he could be successful in under bond trading by applying the same model of high volume and low margins. DGL was established for the purpose.

56. Another trip was made to Calais at which Mr Dale opened accounts with three warehouses, Wybo, IEFW and Eurostop SARL ("Eurostop", a company that has since gone out of business) on behalf of DGL. During the same trip Mr Dale also met the owner of Moulin at Eurostop, Claudiu Rascu, and agreed to work together. He also asked the warehouses to keep him in mind if they were approached by companies looking to buy duty suspended alcohol, and he said that the name Bourgogne Beers was mentioned by Eurostop. We accept this evidence as far as it goes, although we have significant doubt about whether the description of the contacts with Moulin and Mr Dale's explanation for going into under bond trading provide a full picture. There were also some discrepancies between Mr Dale's oral evidence and the relevant witness statement, for example as to how Mr Rascu was contacted (the witness statement stating that Mr Dale telephoned the contact he had met in Cannes, whereas in oral evidence he suggested that Eurostop supplied Mr Rascu's details: we prefer the former version), and apparent inconsistencies as to dates: Mr Dale's second witness statement states that this visit to Calais was made in early 2011, but Moulin was only formed on 1 April 2011. In cross-examination Mr Dale suggested that the visit was in March or April 2011 and we think this is more likely.

57. A further area of discrepancy related to the use of cash sterling. Mr Dale's second witness statement stated that Mr Rascu made it clear that DGL would be paid in cash because Mr Rascu was a foreign national and did not have a French bank account. It also stated that Mr Rascu wanted to pay in euros but that Mr Dale insisted on cash sterling because he did not want to lose out exchanging euros to pounds. His first witness statement took a different approach. That stated that Mr Dale said that during the relevant period there was a significant trade in the Calais region with day trippers and "expats" who bought goods predominantly manufactured in the UK, and that all the cash-and-carry businesses involved in this trade accepted cash sterling. (We comment on that aspect further below: this section of the statement appears to be based on information from Mr Curley.) According to this evidence, it was this that was the source of the cash paid to DGL, with the customers arranging for the cash to be brought to the UK and delivered to Mr Dale. This was the approach Mr Dale also took in oral evidence, to which he added that the warehouse had confirmed to him that it was normal for businesses like Moulin not to have bank accounts. A third approach was taken in the review request letter sent by KPMG on behalf of DGL on 23 January 2015, on the basis of what must have been Mr Dale's instructions. This letter stated

that DGL understood that its customers preferred and insisted on making payments in cash sterling, because they had an excess of sterling which they collected from their own UK customers and wished to save the cost of exchanging sterling to euros and avoid the risk of theft involved in transporting the cash from their own customers in the UK back to France. In other words, in this version the cash remained in the UK throughout.

58. As discussed below, we do not accept any of these versions. We do however accept Mr Dale's consistent evidence that he did not provide credit (and was not provided credit by his suppliers), and instead that in each case he required cash payment to be received by him before he sent instructions to the relevant warehouse to release the goods to his customer.

59. Mr Dale's second witness statement also said that his unique selling point was that he was happy to deal in large quantities of cash because he was used to it. The main risk was being robbed and he was prepared to take that risk. This was fairly, and in our view successfully, challenged in cross-examination, because on the version of events that involved the customers arranging for the cash to be brought from France to the UK it was those customers that were taking by far the greatest risk of theft.

60. DGL started trading with Moulin in late June 2011, using a supplier called Planet Wines that Mr Dale said he had identified from internet research (a statement we find somewhat doubtful). Mr Dale also said he was contacted by the manager of Bourgogne Beers, Alina Vaideanu, by email and agreed to supply to them, on the same terms as Moulin (involving payment in cash sterling) once Eurostop had confirmed that Bourgogne Beers had an account with it. The first deal with Bourgogne Beers was in late July 2011. Mr Dale also developed contacts with some other suppliers, including Bluewater, the owner of which was a family friend. Around the end of October 2011 he was approached by telephone by Stefan Boloaga, the owner of a further company, Saki Boissons, who said he had been given Mr Dale's details by one of the bonded warehouses. DGL's first transaction with Saki Boissons was in early November 2011. In April or May 2012 he was telephoned by Catalin Cristache, manager of Excalibur, who again said he had been given Mr Dale's details by one of the warehouses. The first transaction with Excalibur was in May 2012.

61. Mr Dale's second witness statement describes these contacts as a network of suppliers and customers with whom DGL could trade. This is somewhat disingenuous. There were a total of 147 disputed trades between June 2011 and October 2012, together with one transaction which both parties accepted took place in the UK. DGL only traded with Moulin for about three months, from June to September 2011, a total of nine transactions. It traded with Bourgogne Beers on 43 occasions between the end of July 2011 and early May 2012, with most transactions concentrated in the first part of that period up to February 2012. It undertook one trade with Saki Boissons in November 2011 and started trading with it more frequently in February 2012, with its last transaction with Saki Boissons being in early September 2012. There were a total of 59 transactions with Saki Boissons, all but two being before August 2012. DGL traded with Excalibur between May and October 2012, a total of 36 transactions. The overall picture is of sequential but

overlapping trading periods with the four customers, with the most significant degree of overlap being between Bourgogne Beers and Saki Boissons. Of the three warehouses, Eurostop was associated with 13 of the transactions, IEFW with 37 and Wybo with 97.

62. Mr Dale was asked in cross-examination how the relationship with, for example, Moulin, had ended. He said that they had simply not placed any further order. He was disappointed and thought he might have queried their failure to do so by email, but was unsure. He made a similar response in relation to Bourgogne Beers. There is no reference in Mr Dale's witness statements to attempting to contact customers in this way and we found Mr Dale's comments unconvincing.

63. Mr Dale's evidence was that, except for the one trade in the UK, DGL had only traded in the wholesale of alcoholic beverages in France, with all purchases and sales taking place in warehouses approved by the French Customs authorities. DGL's customers were "wholesalers and cash and carry businesses" based in France, although he described each of the four customers as cash and carry businesses. Each sale was completed by the goods being transferred to the customer's account at the relevant warehouse, without DGL taking physical possession of any of the goods. In relation to this evidence, we accept that DGL never took physical possession or itself transported or arranged for the transport of any goods.

64. In oral evidence Mr Dale was asked to clarify what he meant by a cash and carry business in the context of his customers. He said that he used the term to mean a business with both a wholesale and retail arm. The wholesale arm would be selling to other French businesses, and the retail arm would sell to individuals. It followed that only the retail arm could serve the day trippers (or the "booze cruise" market) and expats. We note that it must follow from this that only the retail arm would generate cash sterling.

65. Mr Dale's evidence was that following receipt of the 3 October 2012 letter from HMRC (see [32] above) he ceased accepting payment in cash. We accept this. Mr Dale also suggested that the reason he ceased to trade with Excalibur and Saki Boissons (having already ceased to trade with Moulin and Bourgogne Beers) was related to a family bereavement rather than a refusal to accept cash, but we do not accept that. We do however accept that DGL undertook some trades with a different customer, based in Portugal, during 2013 and 2014, in which all payments were made and received by bank transfer, before ceasing to trade completely.

Due diligence by DGL

66. The documentary evidence included some limited due diligence related information held by DGL. Although Mr Dale's first witness statement refers to him visiting and meeting with suppliers and customers, in fact he accepted that he had never visited any of the customers' premises. He had met Mr Rascu as described above at Eurostop and at some stage also met Mr Boloaga of Saki Boissons, but that was a chance meeting at IEFW after trading had started rather than an arranged

meeting. He never met Ms Vaideanu. There was also no meeting with Mr Cristache, at least before trading commenced.

67. The documentary due diligence was clearly unsatisfactory. There was no indication that Mr Dale had inspected original documents (such as identity documents or passports) or received properly certified copies. For Excalibur and Saki Boissons there were print outs of information from an online provider of credit reports, Creditsafe, which gave some basic corporate information in English, but this appeared to be the only independent verification undertaken by Mr Dale: the remainder of the information was received from the customers. Scans of Romanian identity cards were provided for Mr Rascu, Ms Vaideanu, Mr Boloaga and Mr Cristache. Although limited French corporate documentation was supplied (such as a copy of an extract from the company register showing basic corporate details) this documentation was obviously in the French language, which Mr Dale does not understand. Mr Dale's oral evidence was that he relied on the fact that the French corporate documentation appeared to be official in nature and that company numbers and addresses appeared to match up, and that he particularly relied on the bonded warehouses. His evidence on this was somewhat unclear. Our understanding was that what he was saying was that he relied on the fact that each of the customers had an account with one or more of the bonded warehouses he was dealing with (and presumably that the warehouse must therefore have conducted its own due diligence), rather than that he had actually asked any of the warehouses to assist with due diligence by DGL.

68. The extent, quality and content of the due diligence is in our view not consistent with what we would expect from a responsible business. Although Mr Dale claimed that he thought he was taking a reasonable approach to due diligence and at the time had not received any visits or recommendations from HMRC on the subject, the due diligence file he had compiled included some HMRC guidance about due diligence and risk assessment, together with anti-money laundering guidance for High Value Dealers, which it was clear that Mr Dale had not taken the time to study properly, if at all. We also noticed that some due diligence documentation relating to two of the customers, Moulin and Bourgogne Beers, appeared to have been scanned and sent to DGL within a period of around one hour on the same day in July 2011, even though Mr Dale's evidence was that each customer was taken on at a different time, with due diligence being conducted separately on each customer before the first trade with them. It was also apparent from the information that each company had been recently established. As already mentioned, Moulin was incorporated on 1 April 2011. The due diligence material held also shows that Bourgogne Beers was incorporated on 8 March 2011, Saki Boissons on 13 September 2011, and Excalibur on 16 March 2012. The Creditsafe information for Excalibur and Saki Boissons records that each had nominal capital. Mr Dale appears not to have queried this or wondered how such newly established companies could get cash and carry businesses up and running, and generating significant amounts of cash, within a very short period.

69. Our overall impression was that Mr Dale did something to "go through the motions" of performing due diligence (or at least to appear to do so) but without taking the matter seriously or being concerned to take any steps to check or verify any

information received. He also appeared to have little understanding of any obligations that he might be subject to under the MLR.

DGL's transaction documents

70. DGL's transaction documents were included in the documentary evidence. As we understood Mr Dale's evidence, transactions were typically agreed by telephone and confirmed by the transaction documents. Typical documentation comprised a purchase order from DGL's customer, a purchase order placed by DGL with its supplier, pro forma invoices and invoices, and release instructions from DGL's supplier to the warehouse and from DGL to the warehouse. In a number of cases there was a written notification that a courier would arrive with the cash on a particular day. In many cases the bank transfer to the supplier was also evidenced. For some deals involving IEFW, DGL's documents also included some documentation from the warehouse relating to the transfer to and/or by DGL. The transaction documents we reviewed that were produced by or obtained from DGL were consistent with Mr Dale's version of events, in the sense that the instructions given to the warehouse to release the stock were provided only after receipt of the cash and payment to DGL's supplier, and we were not made aware of any other material inconsistencies, for example between the dates or contents of purchase orders and invoices, or between those and the dates or amounts of receipts and payments. DGL's pro forma invoices and invoices stated that all goods remained the property of DGL until paid in full.

71. One issue we did raise on the transaction documents was that, in some of the documents we saw, the stock was described in extremely general terms, in one example (deal 47, discussed further at [83] below) as a specified number of cases of "Italian Chardonnay", "Italian white" and "Italian rose". There was no satisfactory explanation as to how (if the deal was legitimate) Mr Dale would understand exactly what the customer wanted or how that level of detail would be sufficient either for the supplier or for the customer. Mr Dale suggested that there would have been further detail in emails not included in the evidence, but we found that unconvincing. We were also unconvinced by another explanation, namely that the customer wanted the cheapest available and would have known that that would be a particular brand supplied by DGL's supplier (Bluewater in the example). Among other things this explanation is completely inconsistent with statements in Mr Dale's second witness statement that his customers did not know the identity of his suppliers and that they never suggested that he should use a particular supplier.

Cash payments and couriers

72. The transaction documents held by DGL include, for a number of the transactions, a notification from the customer stating the name of the individual who it was said would bring the cash payment due in respect of the supply in question to DGL. The names listed include Victor Subrinski[3] and a Mr Vsevolod (for Excalibur), Ms Vaideanu (for Bourgogne Beers), a Mr Johnson and a "Mr Ciuca Razvan Nicolae" for

[3] This is the Victor referred to at [33] above (Sunny apparently being a nickname).

Saki Boissons, and a "Mr Calinschi Marian" for Moulin (for the last two names, the surnames are more likely Calinschi and Ciuca respectively). A date was generally provided, but no time or location. In at least one case no name was provided.

73. With the exception of Victor Subrinski, Mr Dale was very vague about the couriers. He confirmed that he had never met Ms Vaideanu, despite her being named as a courier (itself somewhat surprising if she was the manager of a busy cash and carry). He was not sure whether he had met a Mr Johnson, and commented that sometimes the person who brought cash was different to the person previously identified for the job. He said he did not have contact details for the couriers, but it was unclear how the logistics would work unless he was sure of the time at which they would arrive so that he could make sure that he was available. An inability to make contact was also inconsistent with previous indications he had given that he had met couriers away from his office on occasion for security reasons. In cross-examination he claimed that the only individual he met away from his office was Mr Subrinski. He said that Mr Subrinski had his telephone number and used to ring him up to vary the location from Mr Dale's office, for example to a local pub or hotel.

74. We do not accept a number of aspects of this evidence. It is more likely than not that Mr Dale either had contact details for whoever he was meeting, or at least that there were further communications that he did not explain, for example involving him being telephoned in advance to provide a time of arrival. We also agree with Mr McGurk that, given the number of cash transactions and the relatively few named couriers, Mr Dale might be expected to be much less vague about the individuals involved, whom he would surely have got to know at least to some extent. The only individual he had clearly met, and on several occasions, was Mr Subrinski. We do however find that in the case of each transaction Mr Dale was paid cash at his office or at an agreed meeting place somewhere else in the London area. We also find that in each case he paid cash into DGL's account at his local branch of Lloyds in the amount shown as due from DGL's customer on the relevant invoice, and that following this he arranged payment by bank transfer to the supplier.

75. There were some further discrepancies in Mr Dale's evidence about how the cash was banked. He told HMRC in August 2012 that he used the night safe at Lloyds TSB. His first witness statement said that he made bank deposits during normal business hours and not using the night safe. Mr Dale's final position on this point, reflected in his second witness statement, was that he initially banked cash during business hours but was subsequently encouraged to use the night safe by the branch manager, to avoid large amounts of cash being counted when the branch was busy. We accept that this may have occurred, and overall the point is not material other than as an illustration of discrepancies in the evidence.

The warehouse evidence: Mr Devos and Mr Gluck

76. Mr Devos's witness statement provided some background information about Wybo and its business operations, confirming its use of the EMCS system and stating that it makes monthly reports to the French authorities of goods released, accounting for the duty owed which it then invoices to its customers. The statement summarised

the requirements to obtain approval as an excise bonded warehouse in France and the due diligence checks undertaken on account holders, and explained that Wybo was in regular contact with French Customs. The statement also summarised goods in and goods out procedures. It maintained (and Mr Devos repeated in oral evidence) that he had asked the French tax authorities whether overseas companies trading in bond at the warehouse should be registered for French VAT (TVA) and had been told that the situation was unclear and that there was no need to insist that they were so registered. This conflicted with evidence from HMRC that their understanding was that TVA should be accounted for on under bond trading in France. We do not think it necessary to make a finding on this point, and Mr McGurk confirmed that HMRC were not relying on it, although it is not immediately apparent why French VAT would not arise as a matter of EU law.

77. Mr Devos's statement confirmed that, during the period between June 2011 and December 2012, Wybo held goods under bond for DGL, and that based on Wybo's records DGL had five (named) suppliers and three customers during that period (Bourgogne Beers, Saki Boissons and Excalibur). All goods received by Wybo are allocated a "WDR" number which applies to them throughout their time in the warehouse, and this enabled Wybo's paperwork to be located in respect of the transactions involving DGL, and exhibited to Mr Devos's statement. This was subject to a caveat that, due to a "redevelopment of the business", Mr Devos was only able to produce paperwork relating to goods at the point they left the warehouse. He was not able to locate paperwork showing any transfers from DGL's own customer to the person who owned the goods at the time they left the warehouse, where that person was different to DGL's customer.

78. Mr Gluck's witness statement provided some background information about IEFW, its use of EMCS and dealings with French Customs. It included similar comments to Mr Devos about the requirements to obtain approval as an excise bonded warehouse in France and due diligence checks on account holders. It also summarised goods in and goods out procedures. In relation to DGL, it confirmed that between June 2011 and December 2012 IEFW held goods for DGL, that DGL had five named suppliers, and four customers (Moulin, Bourgogne Beers, Saki Boissons and Excalibur). All goods arriving at IEFW were allocated a lot number, and a new lot number was generated in the event that goods were transferred under bond at IEFW. The witness statement exhibited a number of schedules relating to the transactions in which DGL was involved.

Discrepancies between warehouse documentation and DGL's transaction documents

79. Following receipt of Mr Devos's witness statement HMRC undertook an analysis to compare the warehouse documentation exhibited to his witness statement with DGL's transaction documents. Analysis was also undertaken in relation to the documents produced by Mr Gluck, but the paperwork available was less extensive

and in particular did not include copies of CMR[4] consignment notes showing movements out of the warehouse, instead generally comprising schedules compiled by IEFW. Importantly, for transfers in duty suspense the CMRs include the ARC number from the EMCS system, which must travel with the goods. French Customs also require releases into the French domestic market to be entered into the EMCS system, generating the domestic French equivalent of an ARC number, and this is also shown on the CMR.

80. HMRC's analysis identified a number of significant discrepancies. It became apparent during the course of the hearing that these discrepancies had not been identified by Mr Dale, or at least by Mr Dale's advisers, prior to the hearing, and they were raised with Mr Dale for the first time by Mr McGurk during cross examination. Some examples of significant discrepancies with the Wybo documents are summarised below, using the deal numbering adopted by the parties for the purposes of the hearing. Mr Dale was unable to provide any cogent explanation for the discrepancies.

81. Deal 58 related to a purchase and sale of Listello Spanish red, white and rose wine. Saki Boissons placed its purchase order with DGL on 22 March 2012 and DGL placed its purchase order with its supplier Bluewater on the same day. Pro forma invoices for both transactions were dated the following day, with DGL's purchase being at a price of £16,800 and its sale at £17,550. Cash of that amount was paid into DGL's bank account on 26 March and DGL paid its supplier on the same day. Both Bluewater's and DGL's release notes, instructing Wybo to release the stock to DGL and Saki Boissons respectively, were dated 27 March. However, in the Wybo documents exhibited to Mr Devos's witness statement there is a document from Saki Boissons dated 23 March 2012 instructing Wybo to release stock with the same WDR number to it duty paid, suggesting that from Wybo's perspective the goods were being held for the account of Saki Boissons on that earlier date. There is also a CMR with a date of 26 March, relating to transport from Wybo to Saki Boissons, and a print out from the "GAMM@" system, the French system that interfaces with EMCS, also with a date of 26 March and showing a transfer out of the warehouse to Saki Boissons.

82. Deal 59 related to a mixed supply of South African and South American wine to Saki Boissons. Saki Boissons' purchase order was placed on 21 March 2012 and it received a pro forma invoice on 22 March in the amount of £24,880. DGL's purchase order to its supplier Bluewater was dated 22 March and it received a pro forma invoice from Bluewater on the same date in the amount of £24,130. Cash of £24,880 was paid into DGL's account on 26 March and DGL paid its supplier, Bluewater, the same day. Bluewater's and DGL's release notes were both dated 27 March. However, the CMR document produced by Mr Devos showed the goods leaving Wybo for Saki Boissons' Calais address on 21 March, with the haulier named as A&R Haulage, located in Bedfordshire.

[4] "CMR" is an abbreviation of the French title of the Convention on the Contract for the International Carriage of Goods by Road *(Convention relative au contrat de transport international de Marchandises par Route).*

83. Deal 47 related to the supply of Italian Chardonnay, red and rose referred to at [71] above. Saki Boissons' purchase order to DGL was dated 2 March 2012 and DGL's to Bluewater was dated the following day. Cash of £20,776 was paid in to DGL's account on 6 March 2012 and DGL paid Bluewater £20,016 on the same day. Bluewater's and DGL's release notes were both also dated 6 March 2012. However, the CMR from Wybo is dated 5 March 2012 and shows a transfer from Wybo France to Wybo Belgium, apparently for the account of Saki Boissons[5] and again using A&R Haulage. There is also a print out from the GAMM@ system which similarly shows a date of 5 March 2012, relating to a transfer in duty suspense.

84. Deal 46 related to a further supply of Italian wine to Saki Boissons. Cash of £26,502 was banked by DGL on 5 March, and it paid Bluewater £25,752 on the same day. Both Bluewater's and DGL's release notes were also dated 5 March 2012. However, the CMR shows the goods being consigned to an address in Calais for the account of Bourgogne Beers (and not Saki Boissons) on 6 March 2012, again using A&R Haulage. In this example the inconsistency obviously relates to the customer rather than the date, although a possible explanation is that Saki Boissons had sold the goods on to Bourgogne Beers.

85. Deal 35 related to a supply of Echo Falls wine to Bourgogne Beers. The purchase order from Bourgogne Beers had a slip in the date (18 January 2011 rather than 18 January 2012) and also named another company as the supplier, not DGL. There is no documentary evidence that this was queried. Bourgogne Beers notified DGL that Ms Vaideanu would be the Courier and would make the payment on 21 January 2012. Cash of £43,890 was paid into DGL's account on 23 January 2012 and it paid its supplier, Dranken Plus BV, £42,370 on the same day. (This makes sense as 21 January was a Saturday.) An email from Wybo to DGL held with DGL's transaction documents states that the goods were received into DGL's account on 24 January, and DGL's release note in favour of Bourgogne Beers has the same date. The documents produced by Mr Devos, including the CMR, also have a date of 24 January but name Saki Boissons and not Bourgogne Beers. Again the possible explanation is that there was a further on sale, this time from Bourgogne Beers to Saki Boissons.

86. Deal 143 related to a further purchase of mixed South African and South American wine from Bluewater, and a sale on to Excalibur. The Bluewater and DGL release notes to Wybo were both dated 1 October 2012, following a cash receipt of £29,290 being banked and a payment of £28,410 being made, both on 28 September. However, the Wybo records include an instruction from Saki Boissons to release stock with the same WDR number to "AR Haulage", with the destination "Edwards Beer and Minerals" on 19 September. There is a CMR of the same date, showing the address of Edwards Beers and Minerals in the same town in Bedfordshire as A&R Haulage.

87. A further Excalibur example is deal 142, again relating to Listello wine. The release notes to Wybo from Bluewater and DGL are dated 1 October 2012, cash of

[5] The original typed version has the name of Bourgogne Beers but this is corrected in manuscript to Saki Boissons.

£18,000 having been paid in on 28 September and a payment of £17,100 made to Bluewater on the same date. However, Wybo's documents include a release instruction from Saki Boissons dated 18 September, again naming AR Haulage, and a CMR of the same date with the same haulier and naming the consignee as Saki Boissons.

88. Deal 131 related to Pacific Heights wines, again with Bluewater as the supplier and Excalibur as the purchaser. Cash of £25,150 was paid into DGL's account on 7 August 2012 and it paid Bluewater £24,400 on 9 August 2012. Bluewater sent release instructions to Wybo on 13 August and DGL sent its release instructions on 14 August. But in Wybo's records there is a CMR dated 8 August 2012 consigning the goods to Edwards Beers and Minerals, using A&R Haulage, pursuant to instructions provided by Excalibur on 7 August and (apparently) following a transfer under bond from Saki Boissons to Excalibur on the same date.

89. Mr Devos was taken to the examples of deals 31 and 58 in oral evidence. Our understanding of Mr Devos' evidence is that Wybo's paperwork is put together by a team of employees in Wybo's office (rather than by Mr Devos personally), and that it is that team that is responsible for dealing with customers as well as making entries on the EMCS system and preparing CMRs. He confirmed that the date entered on a CMR corresponds to the date when the truck transporting the goods is loaded in the warehouse for dispatch (and, we infer, leaves the warehouse). On being asked about discrepancies in dates, he indicated that account holders would quite frequently telephone the warehouse and request the early release of goods, with written confirmation being received only later. He recalled that Saki Boissons was one of the customers who made these calls. Wybo has since tightened its procedures and will not release stock without written instructions. We are prepared to accept that phone calls of the nature described by Mr Devos occurred in some cases, but there is no evidence of any such calls being made by or on behalf of DGL. Our conclusion is that any such phone calls were made by warehouse customers other than DGL.

90. Mr Devos was unclear about the consequences of entering incorrect information into the EMCS system or using incorrect dates on CMRs, but confirmed in cross examination that the dates on CMRs are more likely to be reliable than different dates suggested by DGL's transaction documents. We accept this. The GAMM@ system involves interface with an external database and the generation of an ARC number or its French domestic equivalent, which is included on the CMR. It is unlikely that an incorrect date would appear.

The French authorities' reports

91. The documentary evidence included a number of reports, either in English or in English translation, from the French Customs authorities pursuant to mutual assistance requests. The date of the first report, which related to Moulin, was 30 November 2012. Further reports were provided on 11, 16 and 22 January 2013, 8 February 2013, 9 December 2013 and 8 April 2014, as well as the reports dated 13 March 2014 and 11 May 2015 referred to at [40] above.

92. Starting with the 13 March 2014 report first, this is a formal report signed by two officers of the Dunkirk Customs Directorate under oath. It relates to checks carried out on a list of individuals and legal entities provided by the UK authorities, to determine whether declarations of transfers of capital had been filed. It notes the requirement for declarations to be made in respect transfers of more than €10,000. The entities listed include DGL, Excalibur, Bourgogne Beers, and Saki Boissons. The individuals listed include Ms Vaideanu, Mr Subrinski, Mr Calinschi and Mr Cicua. In each case the report was negative, that is there was no record of any declaration being made.

93. The 11 May 2015 report was a similar report relating to two other individuals named as couriers, Mr Johnson, and Mr Vsevolod, with the same negative result.

94. Earlier reports comprise a mixture of formal reports and what appear to be less formal responses. Several of the earlier reports relate to Moulin, indicating that (at least by early 2013) it had ceased all business activity, having declared a turnover of €10,687 between April and July 2011. The report received on 22 January 2013 said that Mr Rascu was untraceable and that his name did not appear on the database of persons who had submitted Customs declarations for money transfers. The report says that he was probably connected with several other Romanian managers of companies around Calais, most of which were inactive, with movements that had been observed probably covering fraudulent movements of alcoholic drinks towards the UK or elsewhere in Europe.

95. The reports received on 11 and 16 January 2013 and 8 April 2014 related to Saki Boissons. These record that it had been impossible for investigating officers to contact the company's manager (Mr Boloaga) despite many attempts. The warehouse was isolated from urban areas and it was impossible to get information about the company locally. The company had no visible activity when officers visited in December 2012, January and September 2013 and February 2014 (and passed by on other occasions), and it was likely that the company had ceased activity. Colleagues in the French fiscal administration had informed them that the company had ceased activity, and had a bad reputation with them. The first two reports also contain some details of certain transactions involving Saki Boissons that the authorities had obtained from IEFW, noting that goods in some of the invoices could not be traced, and were probably sent direct to the UK or used to conceal a bogus movement of goods in connection with UK VAT fraud. The third report attached some photographs of the premises used by Saki Boissons, at what appeared to be a former Scania garage. The quality of the copies we saw were generally poor, but they appeared to confirm that the premises were not typical cash and carry premises that would attract retail trade, but rather appeared to comprise relatively isolated industrial premises that, at least when the pictures were taken, had not been occupied for some time.

96. The report dated 9 December 2013, together with another undated report which was received on 1 October 2013, related to Excalibur. The 1 October 2013 report refers among other things to money not being declared to Customs. The 9 December report noted that the company was no longer operating from its address and had been removed from the trade register. The authorities had been unable to contact Mr

Cristache. Some details of transactions had been obtained from IEFW and are summarised in the report. The report describes the flow of the goods in one transaction as having "undoubtedly been designed to conceal VAT and excise duty fraud", refers to Excalibur's sudden disappearance as designed to avoid paying VAT in France, and states that the only explanation behind the complex nature of the transactions would seem to be a desire to hide VAT and duty evasion. The Dunkirk investigation department was "completely convinced" that the transactions referred to in the report were of a fraudulent nature, with Mr Cristache being "suspected of being part of a Mafia-type organisation run by Romanian nationals in the Calais region".

The "booze cruise"/Calais cash and carry market: Mr Curley's and Mr Bailey's evidence

97. Mr Curley's witness statement stated that he was very familiar with the type of under bond trading conducted by DGL, and that he had also visited wholesalers, cash and carries and approved excise duty warehouses in the Calais area for a number of years. He said that there was a substantial level of trade in the Calais area to satisfy the day tripper and expat market, with goods purchased predominantly being those manufactured in the UK and with customers paying in cash sterling. Mr Curley's witness statement maintained that the French cash and carries pay their suppliers in sterling and that it was not unusual or suspicious that large amounts of sterling were couriered to pay businesses in the UK. Banks in Calais were unwilling or unable to provide banking facilities to handle sterling cash amounts.

98. Mr Curley explained in oral evidence that he had probably averaged two visits a month to the Calais area between 2010 and 2012, undertaking due diligence for clients supplying to cash and carries, and visiting both warehouses and cash and carries. He could not confirm whether he had visited the premises of any of DGL's four customers, but had not done so for DGL. At the cash and carry businesses he did visit he saw a large range of stock but did regularly see UK as well as continental brands. He disagreed with the suggestion that what was available was primarily continental beers. He considered that there was a day tripper market and noted that some cash and carries provided prepaid ferry tickets if a certain amount was pre-ordered.

99. Mr Curley was asked to clarify what he meant by a cash and carry. He explained it in terms of a business that primarily supplies the domestic market (including day trippers), but normally also has a wholesale side where they purchase goods under duty suspense and sell them to other EU countries, with those goods being held to their account in bonded warehouses.

100. Mr Bailey confirmed in oral evidence that he had made one two-day visit to Calais in an investigative capacity in mid 2013. He did not visit any of DGL's customers' premises, although he did visit IEFW. He visited one well established cash and carry business, and this stocked almost exclusively continental brands of beer. For example, although Carlsberg was available it was the Danish rather than UK version. There was greater commonality with wine, with New World wines being available. Based on that visit, his evidence was that the (legitimate) cash and carry businesses

aimed at the "booze cruise" or French home market largely stock continental beers and wines, rather than the sorts of beers and wines that DGL supplied. In particular, the types of products traded by DGL included Red Stripe Lager, Tennents Super, Guinness Draught and Special Brew as well as products with a more obvious continental market, such as Heineken and Holsten Pils. He also considered that the "booze cruise" market was operating at a very low level by the time of his visit.

101. Mr Cathie's first witness statement also included a brief section on the "booze cruise" market. Mr Cathie confirmed in oral evidence that he had not visited Calais and this evidence was based on discussions with others that HMRC. This evidence was that there had been a significant decline in the popularity of "booze cruising" since its heyday in the late 1990s and early 2000s, due to a number of factors including currency movements, the increasing availability of cheap alcohol in the UK, and rising costs of travel. A number of the leading Calais cash and carries had ceased trading, and British companies such as Tesco has closed their Calais outlets. Mr Bailey confirmed in oral evidence that he agreed with this assessment.

102. Our assessment of the evidence is that a "booze cruise" market did exist in the Calais area in 2011 and 2012, but we find it more likely than not that there had been a real decline in the level of business since the early 2000s, and that the business that remained was generally concentrated in well-advertised cash and carry operations located within easy access of the port and Eurostar terminal. We also find that, although a range of goods would be stocked by cash and carries which would include goods generally available in the UK or associated with a UK market, it was not the case that the totality of the goods stocked would be designed for the UK rather than continental market. In contrast, it is quite clear from the descriptions of the goods in the deals undertaken by DGL that the brands of both beer and wine supplied were of a kind that we would expect to be associated with a UK domestic market. Whilst continental beers and wines are included, there are also significant amounts of beer clearly designed for the UK market. Although New World wines are clearly available in both markets, overall we would expect them to predominate more in the UK than on the continent, and we think this predominance is reflected in the supplies by DGL. We would also comment that the type of goods supplied appeared generally to be aimed at the cheaper end of the UK market.

Submissions

Submissions for DGL

103. Mr Bedenham, for DGL, submitted that this was simply a case about the place of supply. It was not necessary for DGL to demonstrate that it made taxable supplies in France, but only that it did not make taxable supplies in the UK. In fact, it did make supplies in France to its French customers, as demonstrated by its transaction documents. The payments for those supplies could all be cross checked against DGL's bank statements. Mr Cathie had specifically confirmed that he did not challenge DGL's transaction documents, other than not accepting that they provided any evidence that the alleged French customers paid for the supplies. The fact that the source of the cash might have been the UK, or that DGL was paid in the UK, or that

DGL's own customers may have been involved in inward diversion fraud, did not affect the place of supply by DGL.

104. HMRC had specifically confirmed they were not alleging that DGL had acted fraudulently or that it was orchestrating inward diversion fraud. Instead, they were saying that that is what DGL's customers did. The only options were that DGL itself smuggled the goods into the UK and sold them there (which was not HMRC's case), or that it sold the goods in France and its customers smuggled them to the UK (in which case the goods were, by definition, in France when DGL supplied them). On the basis that the goods were in France, then the transaction could not be brought within the scope of UK VAT even if a third party paid DGL rather than its customers. DGL's position was not affected by any smuggling subsequently undertaken by its customers.

105. DGL relied on its own transaction documents, and on that basis there were no supplies in the UK. Even if the Wybo documents were preferred, it was clear that the warehouse would only release goods to the owner. Where there was a discrepancy over dates, this meant that the goods were owned by DGL's customer before DGL's transaction was entered into. It followed that either DGL never bought and sold the goods at all or that it was involved but the goods were nevertheless released to its customer before the date on DGL's transaction documents. On either basis the goods were in France with the customer and so it could not be DGL that made any supply in the UK. It did not assist HMRC that DGL's invoices included retention of title wording, because in this scenario they post dated the actual release to the customer and in any event retention of title is irrelevant to the VAT treatment: the test is when the goods are made available, which is the time of delivery. That occurred in France when the goods were made available to the customers. Even if this was wrong, then DGL's supplier's retention of title clause would operate, and would logically mean that its supplies to DGL would be in the UK, entitling DGL to an input tax credit. HMRC had a discretion to allow credit without a VAT invoice and (if the Tribunal got that far) the proper course was for the Tribunal to direct the assessment to be varied.

106. The assessments did not meet the "best judgment" requirement because there was no rational basis for making them, given Mr Cathie's lack of challenge to the transaction documents and the absence of any allegation that DGL was involved in smuggling. This was not simply an error as to some part of the assessments. No reasonable officer acting in good faith could have thought that there was a UK VAT liability. The best judgment test did not require any allegation of bad faith by HMRC (and none was made). The lack of any input tax credit being allowed demonstrated Mr Cathie's mindset that DGL acquired the goods in France.

107. The second assessment was also out of time under the one year rule in s 73(6)(b). HMRC relied solely on the fact that DGL received cash sterling, which it was aware of in August 2012. To the extent it placed reliance on the French Customs requirement to declare amounts of over €10,000, HMRC was also aware of that requirement in 2012. It also received reports from the French authorities during 2013,

and more than 12 months before the second assessment was raised, which confirmed that such declarations had not been made.

Submissions for HMRC

108. Mr McGurk, for HMRC, submitted that the burden of proof was on DGL and there was no need for HMRC to prove a positive case, even if some of the evidence relied on might only be consistent with fraud: *Brady* and *Khan*. DGL had not discharged the burden of proof and, furthermore, the evidence demonstrated that in fact it was more likely than not that the supplies did take place in the UK.

109. Mr McGurk referred to a number of different aspects of the transactions in support of HMRC's case. Taken as a whole, the goods were of a nature aimed at the UK domestic, and not continental, market. There was no evidence that DGL had registered for TVA (as it should have done if the supplies were in France). Legitimate sales in France which have been paid for in France, in euros. It was implausible that DGL's customers would have sourced the sterling from "booze cruise" customers because they were not set up to operate as cash and carry businesses and the "booze cruise" market had in any event dropped off. A French wholesale business would not have had the sterling available. A legitimate French business would in any event pay by bank transfer or other electronic means. None of the customers appeared to be legitimate businesses, and the premises were generally in isolated areas. They were controlled and operated by Romanian nationals, none of whom had been called to give evidence and with whom the French authorities had not managed to make contact. Similarly, no cash courier had been called to give evidence, and there was no evidence of journeys allegedly made by them from France and no Customs declarations to the French authorities. The French authorities' clear conclusion was that the customers were involved in UK VAT and excise duty fraud. No proper due diligence was done by Mr Dale. The transaction and warehouse documents contradicted each other in significant ways, despite both being relied on in evidence by DGL, and the latter showed significant involvement by a UK haulage firm.

110. Mr McGurk also submitted that the second assessment was not time-barred. Mrs Emery had confirmed that the French report dated 13 March 2014 was necessary for Mr Cathie to make the assessment. The question was not whether that evidence was objectively sufficient to justify the assessment, but rather whether the Commissioners had subjectively considered the evidence to be sufficient, which they had.

Discussion

Best judgment

111. We are satisfied that both assessments met the "best judgment" requirement in s 73(1) VATA. As explained at paragraph [15] above the test to apply is whether HMRC, in the form of Mr Cathie, made an honest and genuine attempt to make a reasoned assessment of the VAT payable, or whether no officer seeking to exercise best judgment could have made the assessments. We have already recorded our finding that Mr Cathie did his "honest best". *Pegasus Birds* makes clear that there is

no objective standard of reasonableness that must be applied, but in any event we do not think that the approach Mr Cathie took was outside the bounds of reasonableness.

112. Mr Bedenham's key challenge to Mr Cathie's approach was his focus on the source of the cash and his confirmation that he was not challenging DGL's transaction documents. This approach is described in the extract from Mr Cathie's second witness statement set out at paragraph [41] above. We agree that Mr Cathie did focus on the source of the cash and whether the alleged French customers paid for the supplies, and that he did not challenge the transaction documents except to that extent. As discussed further below, we also agree with Mr Bedenham that, in fact, the key question is the location of the goods at the time of any supply rather than the source of the payment. However, this does not mean that the assessments can be challenged on best judgment grounds. The fact that this Tribunal may disagree with the assessing officer's reasoning is not enough. As explained in *Rahman v Customs & Excise Commissioners* [1998] STC 826 at page 835, and cited in *Pegasus Birds* (CA) at [16]:

> "… the Tribunal should not treat an assessment as invalid merely because they disagree as to how the judgment should have been exercised. A much stronger finding is required: for example, that the assessment has been reached 'dishonestly or vindictively or capriciously'; or is a 'spurious estimate or guess in which all elements of judgment are missing'; or is 'wholly unreasonable'."

(In fact *Pegasus Birds* cautions against the use of a "wholly unreasonable" test as potentially misleading: paragraph [22].)

113. In our view none of the types of stronger finding referred to in *Rahman* are of any relevance. Although elements of Mr Cathie's reasoning, including the general failure to challenge transaction documents, could be criticised, they fall a long way short of failure to satisfy the best judgment test. Whilst the conclusion that the cash must have had a UK source does not of itself determine that DGL's supplies were made in the UK, it is a clear indicator that DGL's version of events was not correct, and provided a basis to make the assessments. We think it is clear from Mr Cathie's evidence overall that he was making the assessments on the basis that the cash deposits were consideration for taxable supplies made in the UK, and that it was up to DGL to explain why that was not the case in circumstances where DGL was a UK VAT registered trader, and HMRC considered that the source of the cash was the UK and that the alleged French customers were not genuine. The basis on which Mr Cathie calculated the quantum of the output tax due, using bank statements and the entries in box 6 of the VAT returns, was not challenged. There was also no requirement for a Mr Cathie to allow an input tax credit in circumstances where DGL was maintaining that it acquired goods in France. Overall we consider that the assessments were made to a best judgment standard by reference to the information available to Mr Cathie.

Was the second assessment out of time?

114. We have concluded that the second assessment, made on 5 November 2014, was made within the one year period referred to in s 73(6)(b) VATA and was therefore not out of time. Again, considering Mr Cathie's evidence as a whole we are satisfied that

he placed material reliance on the French Customs report dated 13 March 2014, which was clearly received less than one year before the assessment was made. That was a relatively comprehensive report of the absence of customs declarations by named couriers, customers and DGL itself. Most importantly, it was the first report to cover named couriers, who were the persons most likely to have made a declaration, rather than the French customer or its manager or owner (as was the case with earlier reports relating to Moulin and Excalibur). In relation to the source of the cash, this feature gives the 13 March 2014 a weight which earlier reports did not have.

115. Following Dyson J's statement of the principles to apply (see [17] above) we must first decide what were the facts which, in the opinion of Mr Cathie, justified making the assessment, and secondly determine when the last piece of evidence of those facts of sufficient weight to justify making the assessment was received. The officer's failure to make an earlier assessment can only be challenged on *Wednesbury* type principles. The facts on which Mr Cathie relied are summarised at paragraphs [39] and [40] above. We do not consider that it was an unreasonable approach for HMRC to delay making any assessment until after the 13 March 2014 report was received, a report which from HMRC's perspective did carry material weight in demonstrating that the cash had a UK source, that DGL's version of events was therefore incorrect and that HMRC now had sufficient information available to justify raising assessments.

Were the assessments correct?

116. We now move on to the second stage referred to by the Court of Appeal in *Pegasus Birds*, namely whether the assessments were correct.

117. Whilst we accept Mr McGurk's submissions on the burden of proof, based on *Brady* and *Khan*, there are some aspects of his arguments that we cannot accept. In particular, in oral submissions he sought to argue that, in order to succeed, DGL needed to demonstrate that it made taxable supplies in France, and that the lack of consideration shown to be paid by the French customers demonstrated that there was an absence of the reciprocity required for such supplies (*Tolsma v Inspecteur der Omzetbelasting Leeuwarden* (Case C-16/93) [1994] STC 509 at [14]). Mr McGurk submitted that it was not sufficient for DGL just to show that the goods were in France. He placed particular reliance on one paragraph of DGL's grounds of appeal, which referred to the goods being sold to French customers.

118. We agree with Mr Bedenham that this is not the test. The assessments can only be justified on the basis that taxable supplies were made in the UK. Whether that was the case must be determined by reference to the VAT principles summarised in paragraphs [6] and [7] above, including in particular the rules governing the place and time of supply. In order to succeed, DGL must demonstrate on a balance of probability that any taxable supplies that were made were not made in the UK. In reaching a view as to whether the assessments were correct, the legal principles that the Tribunal must apply cannot be restricted by reference to arguments about the precise way in which DGL's grounds of appeal were framed. (In any event in our

view the grounds of appeal make it clear that DGL was relying on the goods being located in France.)

119. In our view the correct approach to apply is as follows. We have accepted Mr Dale's evidence that neither he nor his suppliers gave credit, and instead that in each case he required cash payment to be received by him before he sent instructions to release the goods to his customer ([58] above). We have also found that any phone calls requesting early release were made by warehouse customers other than DGL. On that basis goods were only released by DGL to its customer when it sent its release note to the relevant warehouse, following receipt of payment, and DGL's transaction documents should be respected to that extent. For the purposes of the time of supply rules in s 6 VATA this means that the goods were "made available" by DGL at the time when the release instruction was sent. We agree with Mr Bedenham that under UK VAT legislation a retention of title clause is not relevant: the question is when the goods were made available[6].

120. There was no evidence that any supply by DGL involved goods being removed, or taken on approval, sale or return or similar terms, so under s 6 VATA the time of supply was when the goods were made available or, if earlier, when payment was received by DGL (s 6(2)(b) and (4)). Since no release was made until after payment was received (consistent with Mr Dale's evidence that he did not give credit), the time of any supplies was therefore governed by the date of payment to DGL. We note that this makes any retention of title clause irrelevant on the facts in any event, because that clause would have been satisfied by the time of payment.

121. Again on the basis that any supply did not involve removal of the goods, the place of any supply by DGL simply depends on the location of the goods (s 7(2) VATA). The key question is therefore whether DGL can demonstrate that the goods were not in the UK at the time at which any supplies were made by it, that time being (on these facts) the time of payment.

122. In making submissions about inconsistencies between DGL's transaction documents and the warehouse documentation, Mr McGurk submitted that we should rely on dates included in CMRs or other documentation related to GAMM@. We agree. We have found that the GAMM@ system involves interface with an external database, EMCS, and the generation of an ARC number or its French domestic equivalent which is included on the CMR, and that it is unlikely that an incorrect date would appear (see [90] above). It follows that, where there is CMR or EMCS related evidence (such as a print out from the GAMM@ system) which shows that goods left the French warehouse on a particular date, then it is reasonable to conclude that those goods were located in France for at least some period up to that date.

123. In our view there are three categories of transaction:

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[6] The position is arguably not as clear under the PVD, given the definition of supply of goods in Article 14 as the transfer of the right to dispose of tangible property as owner. However, given the point made in the next paragraph about the relevance of the time of payment, this point is not material on the facts.

(1) Transactions where there is CMR or GAMM@ evidence which can be linked to the transaction in question (through a WDR or lot number) and which shows a date of dispatch from the French warehouse which is the same as, or later than, the date of payment to DGL.

(2) Transactions where there is CMR or GAMM@ evidence which can be linked to the transaction in question (through a WDR or lot number) and which shows a date of dispatch from the French warehouse which is earlier than the date of payment to DGL.

(3) Transactions where there is no CMR or GAMM@ evidence which demonstrates either (1) or (2) above.

124. In the case of transactions within category (1) our conclusion is that DGL has demonstrated, on a balance of probability, that any taxable supplies that it made were not made in the UK, on the basis of clear evidence that the goods were in France at the time of supply, being the date of payment. In the case of category (2), the most reliable evidence available demonstrates that the goods had left the French warehouse prior to the time of supply. In the absence of other evidence that the goods continued to remain in France at the time of supply, DGL has in our view not discharged the burden of proof that supplies were not made in the UK. In any case where the gap is more than a couple of days we would add that we consider that it is more likely than not that the goods had indeed found their way into the UK by the time of supply (although this is not the test we need to apply, the burden being on DGL).

125. Transactions in category (3) are transactions where, again, we do not consider that DGL has discharged the burden of proof to demonstrate that supplies were not made in the UK. In reaching this conclusion, we rely among other things on the fact that the inconsistencies that HMRC have been able to demonstrate between the transaction and warehouse documents provide a strong indicator that any straightforward reliance on the accuracy of the transaction documents is not justified.

126. We do not agree with Mr Bedenham's submission that, in cases where the warehouse documents indicate that the goods were dispatched from the warehouse to DGL's customer before DGL's own supply, the warehouse must have been releasing goods to their owner, and this meant that DGL either never bought and sold the goods or that it did but the goods were released by it to its customer before the date on its documents, and while the goods were in France. First, there is no absolute rule that a warehouse will only deliver goods to the owner of them. It should only release goods to or at the direction of the relevant account holder, but a warehouse has no way of knowing for sure who actually owns goods, which may have been traded without its knowledge and without instruction to it to change the account holder. Secondly, given the convoluted chains of supply involved in inward diversion fraud there is no reason in principle why DGL's customer could not also have been a supplier at an earlier point in the supply chain, before DGL's acquisition. Thirdly, it has never been part of DGL's case that it made no supplies of goods at all (irrespective of whether those supplies are taxable supplies) and this suggestion is not supported by DGL's evidence. Finally, we have found that DGL did not provide credit and did not release goods before the date of payment to it.

127. In reaching our conclusion that DGL has not discharged the burden of proof in respect of supplies in categories (2) and (3) we have considered all the evidence and our findings on it. We have dealt with much of this in detail already but what follows draws together the most material elements. In doing so we should emphasise that factors such as the source of the cash and the nature of DGL's customers are not determinative – the legal question is whether the goods were not in the UK at the time of any supply – but they are of critical relevance to the credibility of DGL's version of events and the reliability of its transaction documents, and therefore to whether we accept that DGL has made out its case in circumstances where the CMR and GAMM@ evidence is not determinative.

128. We do not accept that DGL's customers operated genuine French businesses making supplies in France, whether cash and carry or wholesale. Each had very recently been established, had nominal capital and operated (or appeared to operate) for a relatively brief period. There appeared to be no advertising and there was no indication that any of the businesses was in a location that would be likely to attract customers. It is not credible that a recently established operation of that nature could require stock on the scale supplied by DGL, and be able to pay for it in cash.

129. We do not accept any of Mr Dale's explanations about how his French customers came to pay him cash sterling. This follows from the previous point, from the fact that we think it unlikely that a Calais cash and carry business operating in 2011 or 2012 would generate significant cash sterling (bearing in mind that only its retail arm could do so, see [64] above, and the "booze cruise" market had suffered a real decline), and from the fact that we think it highly unlikely that a French business would be willing to take the foreign exchange risk (if it did sell goods in euros) or the risk of transporting large amounts of cash to London. It is also supported by the reports from the French authorities and the absence of evidence from any of the couriers, as well as the absence of documentary evidence of any journey made. As HMRC maintained, a legitimate business would surely find a way of paying by bank transfer, or at least using a security firm to transport cash rather than an individual unprotected courier. We have no doubt that the source of the cash was the UK, and that it was not brought from France by couriers or generated in any other way from trading undertaken by DGL's customers in France. By far the most likely explanation is that in each case it represented the proceeds of "slaughtering" in the UK following an inward diversion fraud. (We do accept, however, that it would not necessarily be the case that the cash attributed to a particular supply by DGL was sourced from the slaughtering of those particular goods rather than other goods.)

130. Overall, the stock supplied was of a kind that we would expect to be associated with the UK domestic market: see [102] above. Whilst stock of at least some of these kinds could be found in the French market, looked at overall the stock is not consistent with the range of stock that we would expect to be supplied by a French business to customers in France, whether or not including day trippers. The references on a number of the CMRs to a UK haulage firm, and in some cases to transfers to the UK, provides further support for the stock being destined for the UK market. We agree with Mr McGurk that it made sense to use a UK haulage firm if the ultimate

destination was in the UK, but not for a five mile trip within the Calais area or just over the border to Belgium.

131. Mr Dale's evidence contained a number of inconsistencies and was unconvincing overall. It is clear, for example, that he took no real steps to establish whether his customers were genuine. His failure to recollect individual couriers other than Mr Subrinski and the evidence (which we do not accept) that he was not in contact with other couriers before they arrived, indicates that it is more likely than not that he dealt principally with Mr Subrinski and was aware that his four customers were under the same control. This is supported by his inexplicable failure to question why individual customers fell away and others conveniently emerged, and by other evidence such as the due diligence documentation in relation to two customers being received on the same day (see [68] above).

132. Whilst on an initial impression DGL's transaction documents appear to hang together, and can be reconciled to the bank statements, overall they tell a story that is rather too good to be true. In particular, the lack of specificity in some of the purchase orders strongly suggests that, contrary to Mr Dale's evidence, he must have been aware of some link between DGL's suppliers and customers. The level of margin (as illustrated by the example deals described above) is also somewhat suspicious. DGL seemed to have been able to obtain a margin of a few hundred pounds, without difficulty, on each transaction.

133. We have also considered Mr Bedenham's submission that it would be appropriate to allow an input tax credit. We do not consider that it would be. Although there is a basic entitlement to claim input tax credit under VAT legislation, regulation 29(1) of the Value Added Tax Regulations 1995 makes it clear that a claim to deduct is required, normally supported by a valid VAT invoice. Whilst HMRC have a discretion to accept other evidence of a claim to deduct input tax under regulation 29(2)[7], that does not avoid the need for a claim. Any claim must be made within a four year time limit: see regulation 29(1A). DGL has clearly made no claim to date, and is now out of time. In these circumstances we do not need to consider whether DGL would in fact be able to establish that, for those transactions which give rise to a charge to output tax, it should be entitled to a credit for input tax on the basis that the supply of goods to it was made in the UK.

Approach to determining the appeal

134. Given the nature of our conclusions on the different categories of transaction, we think the most appropriate course is to make a decision in principle and leave it to the parties to seek to agree precisely which transactions fall into which categories. There are some additional remarks we should make about this exercise.

135. First, the focus should be on differences in dates. The mere fact that there may be discrepancies as to customer (as for example in the case of deals 35 and 46, see [85]

[7] For a recent discussion of the general principles in relation to invoices, see the Upper Tribunal decision in *Scandico v HMRC* [2017] UKUT 467 (TCC).

and [84] above) does not lead to the conclusion that DGL's supply was in the UK. As noted there, a possible explanation was that there was a further sale of the goods by DGL's customer before they left the warehouse. The key point is the location of the goods at the time DGL received payment.

136. Secondly, we are aware that there might be scope for debate where the time of supply occurred on the same date as the date on the CMR (or other GAMM@ evidence). In theory at least, goods might arrive in the UK on the same day that they left the warehouse. However, on balance we consider that the appropriate approach is to accept that DGL made any supply in France in those circumstances, and that the warehouse released them in accordance with DGL's instruction. For the sake of clarity, however, we do not think that this approach should be adopted in any case other than where the dates are the same. So, for example, in a case where the time of supply is one day later than the date on a CMR, our view is that DGL has not discharged the burden of proof to demonstrate that the supply was not made in the UK.

137. Thirdly, in some cases the date of payment to DGL might be disputed. The bank statements provide clear evidence of the latest date by which payment was received, but in a number of cases the transaction documents may have indicated that payment was expected on an earlier date (deal 35 also illustrates this, see [85] above). In any case where this might be material we consider that the transaction documents should be respected as indicating the correct date, unless in any case there is an unusual delay or inexplicable discrepancy between that date and the cash being received in the bank account, in which case the bank account evidence should be preferred. Gaps of one day, or explained by cash being received at a weekend, do not fall into this category.

138. Finally, there may be transactions such as deal 47 (see [83] above) where the CMR evidence indicates that the goods left the French warehouse for another warehouse in duty suspense before the time of supply. Where this is the case and DGL had not produced any other CMR or EMCS related evidence demonstrating that the goods were still outside the UK at the time of supply, then in our view it has not discharged the burden of proof to demonstrate that any supply was not made in the UK.

Disposition

139. The appeal is allowed in part in principle, insofar as it relates to transactions falling within category (1) referred to in paragraph [123] above. In all other respects the appeal is dismissed. We are also issuing directions relating to the final determination of the appeal.

140. 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.

SARAH FALK

TRIBUNAL JUDGE
RELEASE DATE: 29 JUNE 2018

APPENDIX

Value Added Tax Act 1994

1. Value added tax

(1) Value added tax shall be charged, in accordance with the provisions of this Act-

(a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply) …

4. Scope of VAT on taxable supplies

(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

5. Meaning of supply…

(2) Subject to [*irrelevant exceptions*]-

(a) "supply" in this Act includes all forms of supply, but not anything done otherwise than for a consideration;

(b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.

6. Time of supply

(1) The provisions of this section shall apply…for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge to VAT.

(2) Subject to subsections (4) to (14) below, a supply of goods shall be treated as taking place-

(a) if the goods are to be removed, at the time of the removal;

(b) if the goods are not to be removed, at the time when they are made available to the person to whom they are supplied;

(c) if the goods (being sent or taken on approval or sale or return or similar terms) are removed before it is known whether a supply will take place, at the time when it

becomes certain that the supply has taken place or, if sooner, 12 months after the removal.

(3) Subject to subsections (4) to (14) below, a supply of services shall be treated as taking place at the time when the services are performed.

(4) If, before the time applicable under subsection (2) or (3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection (2)(a) or (b) or (3) above, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received.

…

7. Place of supply of goods

(1) This section shall apply…for determining, for the purposes of this Act, whether goods are supplied in the United Kingdom.

(2) Subject to the following provisions of this section, if the supply of any goods does not involve their removal from or to the United Kingdom they shall be treated as supplied in the United Kingdom if they are in the United Kingdom and otherwise shall be treated as supplied outside the United Kingdom.

…

73. Failure to make returns etc

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

…

(6) 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,

…

77. Assessments: time limits and supplementary assessments

(1) Subject to the following provisions of this section, an assessment under section 73…shall not be made-

(a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned…

Principal VAT Directive (2006/112/EC)

Article 2

1. The following transactions shall be subject to VAT:

(a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;

…

Article 14

1. 'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner.

…

Article 31

Where goods are not dispatched or transported, the place of supply shall be deemed to be the place where the goods are located at the time when the supply takes place.

Article 63

The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.

Article 65

Where a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received.

Article 66

By way of derogation from Articles 63, 64 and 65, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:

(a) no later than the time the invoice is issued;

(b) no later than the time the payment is received;

…