[2021] UKFTT 149 (TC)

TC08118

VAT – alcohol trading – best judgment assessments carried no appeal right as no VAT returns had been submitted – appeal only against decision appellant should have been VAT registered - cash deposits into supplier's bank account – appellant claiming to act as principal in purchasing and selling within a French bonded warehouse without an account at the warehouse – whether evidence showed supplies outside the UK.

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2016/02499 (V)

BETWEEN

GOOCH TECHNOLOGY LIMITED **Appellant**

-and-

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

TRIBUNAL: JUDGE TRACEY BOWLER
MRS P GORDON

The hearing took place on 11-15 January 2021. With the consent of the parties, the form of the hearing was V (video) using the Tribunal video platform. A face to face hearing was not held because of the circumstances of the pandemic.

Prior notice of the hearing had been published on the gov.uk website, with information about how representatives of the media or members of the public could apply to join the hearing remotely in order to observe the proceedings. As such, the hearing was held in public.

After the hearing the parties submitted a joint set of submissions in response to a request from the Tribunal.

Mr Timothy Brown, counsel, instructed by Obsidian Tax Limited for the Appellant.

Mr Joshua Carey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents.

DECISION

INTRODUCTION

1. Gooch Technology Ltd ("Gooch") appeals against the Commissioner's ("HMRC") decision that it should have been registered for VAT with effect from 12 January 2012 until it ceased trading on 24 December 2012 and.

2. In 2012 Gooch was involved in transactions in alcohol with one supplier, Elbrook Cash and Carry Ltd ("Elbrook"). Gooch says that it sold the alcohol on to one purchaser, Hasselt Grocerie BVBA ("Hasselt"). All of those transactions are said to have taken place within a bonded warehouse in France, MT Manutention ("MTM"), even though Gooch did not have an account with MTM. Nearly £27.7 million was paid to Elbrook in cash. Gooch says that the cash was either brought to it in Birmingham from Hasselt by couriers and its director, Mr Adris, then took the cash to Elbrook's business premises in Mitcham; or it was paid into Elbrook's bank account directly by the couriers. Gooch says that its only supplies were in France (when selling to Hasselt under bond in MTM) and therefore no taxable supplies were made in the UK.

3. HMRC has treated the cash payments as payments for supplies made by Gooch in the UK and have issued a best judgment assessment for the amount of £4,614,648 of output tax. That assessment does not carry a right of appeal as Gooch has not submitted any VAT returns.

4. HMRC maintain that Gooch's supplies were more likely than not to have been part of an inward diversion fraud i.e. the goods were smuggled into the UK and Gooch then supplied them to persons unknown in the UK. As a result, those supplies were taxable supplies made by Gooch in the UK. HMRC maintains that Gooch's account of the transactions is not plausible or credible.

5. In essence, this case is about whether Gooch has provided sufficient evidence to show that on the balance of probabilities it only made supplies outside the UK.

BACKGROUND

6. In a letter dated 11 January 2016, HMRC enclosed a letter dated 23 December 2015 setting out its decision that Gooch should have been registered for VAT and was liable to pay output tax of £4,614,648.

7. Gooch requested a review of the decision, saying that it acted as an agent and only received commission for brokering alcohol deals between the supplier and the supplier's customer. In a letter dated 6 April 2016 HMRC notified Gooch that the decision was upheld.

8. Gooch submitted a Notice of Appeal on 4 May 2016.

GROUNDS OF APPEAL

9. Gooch's initial grounds of appeal included the ground that it had no liability to register for VAT in the UK because it made all of its supplies in France within an excise bonded warehouse.

10. On 6 February 2018 Gooch, having changed representatives, applied for permission to amend its grounds of appeal based on an application prepared by Adam Tolley QC in which he said that the Appellant's previous representatives had failed to properly articulate the grounds of appeal.

11. HMRC did not object. As a result the grounds of appeal were amended. In summary, they were changed to state as follows:

(1) At all material times Gooch acted only as a broker or agent in relation to the transactions in alcoholic drinks. Accordingly, it did not supply goods within the meaning of section 1(1) Value Added Taxes Act 1994 ("VATA") in the relevant period;

(2) Alternatively, if Gooch did supply goods, it did not supply any goods in the UK and any goods supplied were supplied on a "duty suspended" basis;

(3) In any event, Gooch was not knowingly involved in any inward diversion fraud as HMRC allege;

(4) Gooch was not obliged to be registered for VAT on 12 January 2012 because the value of its taxable supplies in the period of one year then ending did not exceed £73,000 and there were no reasonable grounds to believe that the value of its taxable supplies in the period of 30 days then beginning would exceed £73,000.

12. By the time of the hearing it had become apparent from Mr Brown's skeleton argument that Gooch no longer relied upon acting as a broker or agent in relation to the transactions. This was confirmed by Mr Brown at the hearing. Instead, Gooch relies on the alternative basis described above – that it acted as principal and the supplies of goods made by it as principal took place outside the UK.

APPLICATION TO ADMIT FURTHER EVIDENCE

13. On 4 January 2021 Gooch made an application to admit further evidence: a witness statement from Gooch's sole director, Mr Adris, and an email. The subject matter of the witness statement and the email concerned evidence of "Nectar" points which Mr Adris says supported his evidence about purchasing fuel in order to drive to Elbrook with cash.

14. HMRC objected on the basis of the application being so late, being prejudicial to HMRC's preparation of the appeal, likely to lead to an adjournment and likely to increase the costs disproportionately, and generally in the interests of justice.

15. On 7 January 2021 Mr Brown responded to HMRC's objection. He submitted that the evidence had only just come into Gooch's possession. Other than trying to prove the email from Nectar was false, there would appear to be little preparation for HMRC to carry out beyond preparing questions regarding the evidence for their cross-examination and this would have little impact on the time required for the hearing. If admitted, the Tribunal could decide what weight should be given to the evidence and could take into account HMRC's submissions.

16. In an email dated 7 January 2021 permission to admit the late evidence was granted. In making that decision rule 2 of the Tribunal Procedure (First tier Tribunal) (Tax Chamber) Rules 2020 which requires the Tribunal to give effect to the overriding objective of dealing with cases fairly and justly was applied. HMRC had submitted that admission of the evidence would cause procedural unfairness and prejudice, but in fact the evidence was not only extremely limited in volume, but also raised few, if any, new issues. It showed little more than that Mr Adris bought petrol and used his Nectar card. It was considered that there was little basis to conclude that as such it would cause procedural prejudice to HMRC, applying the principles described in Judge Mosedale's decision in *First Class Communications v Revenue and Customs Commissioners* [2013] UKFTT 342 (TC).

17. However, as this new evidence was being admitted only a few days before the start of the hearing, it was directed that HMRC should indicate if they wished the hearing to start at 2pm on the first day to provide more time to prepare. HMRC confirmed that no such postponement was requested by them.

APPLICATION FOR A GOOCH WITNESS TO BE PRESENT WHILE THE DIRECTOR OF GOOCH GAVE EVIDENCE

18. During the hearing Mr Brown asked whether Mr Khalid (a director of Elbrook) could join the hearing before he gave evidence and while Mr Adris was being cross-examined. We decided that Mr Khalid should not join the hearing until Mr Adris' evidence was complete because there were potential significant issues regarding the consistency of evidence given by Mr Adris and Mr Khalid shown by the evidence in the bundles and the cases presented by the parties.

RIGHTS OF APPEAL

19. Gooch originally appealed against HMRC's decision dated 23 December 2015 (confirmed in a review letter of 6 April 2016) which states:

> (1) Gooch was required to notify its liability to be VAT registered for the period 12 January 2012 to 24 December 2012; and
>
> (2) Gooch is assessed under section 73 VATA to £4,614,468.

20. HMRC's Statement of Case and Mr Brown's skeleton argument both refer to an appeal against not only the decision that Gooch should have been registered for VAT purposes, but also the best judgement assessment of £4,614,468. HMRC's Statement of Case sets out their submissions regarding the application of the best judgement criteria in some detail.

21. However, section 83 VATA sets out rights of appeal as follows:

> (1) Subject to sections 83G and 84, an appeal shall lie to the tribunal with respect to any of the following matters—
>
> (a) the registration or cancellation of registration of any person under this Act;…
>
> …(p) an assessment—
>
> (i) under section 73(1) or (2) in respect of a period for which the appellant has made a return under this Act; or
>
> . . .
>
> or the amount of such an assessment (underlining added).

22. Gooch has not made any VAT returns. Therefore on the face of the legislation, Gooch is unable to appeal the assessment. This Tribunal only has the powers granted to it by statute. It does not have any inherent authority to determine appeals beyond those powers. Consequently, after the hearing Judge Bowler asked for submissions on this issue.

23. Mr Carey and Mr Brown replied with joint submissions which confirmed that both parties accept that Gooch has no right of appeal against the assessment made under Section 73 VATA.

24. Accordingly, we are satisfied that the appeal against the assessment of £4,614,468 must be struck out by for lack of jurisdiction under Rule 8 of the First-tier Tribunal (Tax Chamber) Rules 2020.

25. That leaves the appeal against HMRC's decision that Gooch should have been registered for VAT. Mr Brown and Mr Carey have referred to the decision of Judge McNall and Miss Stott in the case of *Withington KFC Services Ltd and another v Revenue and Customs Commissioners* [2020] UKFTT 319 (TC). We respectfully agree with the approach and conclusions reached there, where it was concluded that an appeal against an assessment should be struck out, but the appeal against the registration of the appellant was valid.

26. We are satisfied that Gooch has a valid right of appeal against the decision that it should have been registered for VAT purposes. As the parties jointly submit, the effect is that if the appeal is allowed the assessment should fall away, but if the appeal is dismissed the assessment stands good.

RESPONDENT'S CASE

27. In setting out HMRC's case we have excluded any arguments relating only to the appeal of the best judgment assessment and principles relating thereto.

28. HMRC maintains that Gooch's account is not credible and that it is more probable that the cash payments totalling £27,686,927.79 paid to Gooch's supplier, Elbrook reflected standard rated taxable supplies made by Gooch in the UK. The circumstances of the transactions mean that they are more likely than not to have been part of an inward diversion fraud. However, HMRC maintains that it does not need to plead or prove the knowing involvement of Gooch in such a fraud and do not allege so in this case.

29. HMRC relies, in particular, on the following circumstances to reject Gooch's explanation of its transactions:

(1) Gooch's one supplier and one customer were known to each other. There was no commercial reason for Gooch to be interposed between them and Gooch had no commercial function in the transactions;

(2) Mr Adris' claims that the director of his customer instructed him as to his profit margin on his sales to the customer and directed that Gooch should divide the goods on its own purchase orders into different accounts made no commercial sense;

(3) the lack of ordinary commercial features in Mr Adris' account of Gooch's trade with Hasselt show it to have been a fiction;

(4) there is no evidence linking the goods purchased by Gooch from Elbrook to premises in another Member State selling goods to UK customers in order to explain the derivation of the sterling cash;

(5) the Belgian authorities confirmed that Gooch's sole customer, Hasselt, entered insolvency on 10 November 2011, before the purported supplies in 2012 commenced. Hasselt is the subject of a criminal investigation and has not produced any records for any period after August 2011;

(6) all payments said to be made by Hasselt to Gooch were said to be made in cash delivered by two Romanian couriers despite Hasselt's insolvency. It is inherently unlikely that an insolvent Belgian company would have access to more than £27 million in sterling and it is even more unlikely that such an enterprise would send cash via couriers rather than use bank transfers. Cash transfers are more consistent with UK standard rated sales.

(7) Mr Adris' account of the handling of the cash, involving the couriers delivering it to him for him to take it on to Elbrook's premises or, in some cases paying it in at Elbrook's bank account if they were running late, is not credible. Travel checks do not support the claimed travel of the couriers to the UK from Europe and neither courier is recorded by the French authorities as having declared removing cash of more than €10,000. The fact that cash payments were both made into bank branches and taken to Elbrook on the same day, often with multiple deposits being made at different bank branches on the same day, was not properly explained. Mr Adris' fuel, MOT and service records do not support the amount of driving claimed to have been done by him to deliver cash to Elbrook;

(8) the documents are inconsistent with the claimed sales outside the scope of UK VAT. For example, there is no evidence within the documents that the Appellant paid MTM for the services purportedly provided by it. The inconsistencies within the documents, for example, as between payment records and invoice amounts, and as between purchase orders and sales invoices, suggest that the documents were not used for legitimate trade but were more likely to have been used as part of an inward diversion fraud. The fact that the same products in the same quantities repeatedly appear on numerous invoices said to have been issued by Gooch on the same day is also suggestive of an inward diversion fraud, where multiple identical loads are moved under the same unique reference number.

30. The case of *Award Drinks* v *H M Commissioners of Revenue and Customs* [2020] UKUT 201 (TCC) is relied upon. Mr Carey recognised that in *Award Drinks* the appellant received the cash, whereas in this case the cash is received by a supplier, but submitted that the overall nature of the transactions in that case and this is the same. The transactions in this case did not take place in the way suggested by the limited documentation provided. On various matters Mr Adris' evidence lacked the ring of truth.

31. Mr Carey submitted that adverse inferences should be drawn as a result of the failure to call the alleged couriers as witnesses and failure to provide relevant documentation, relying upon the cases of *British Airways Plc* v *Airways Pension Scheme Trustee Ltd* [2017] EWHC 1191 (Ch) and *Wetton v Ahmed* [2011] EWCA Civ 610. In addition, he relies upon the principles set out in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm). No evidence had been provided to show that the couriers could not be located. Documentation which had been provided was window dressing or a sham provided in an attempt to avoid the inevitable conclusion that Gooch made taxable supplies in the UK. A clear example of false documentation was shown in documents purporting to show sales to a company called Prada when Mr Adris said that Gooch did not trade with Prada.

32. Mr Carey submitted that Mr Adris' evidence at the hearing had shown a lack of understanding of the transactions/business in which Gooch was supposedly involved and a lack of commerciality. Mr Carey made detailed submissions about Mr Adris' evidence: perceived inconsistencies, implausible accounts and inadequate explanations.

33. The evidence of Mr Adris and the other Gooch witnesses was inconsistent in various significant respects. The evidence of Mr Khalid should be treated with some degree of caution, given that he provided inconsistent evidence regarding the due diligence carried out by Elbrook. Account should be taken of other tax cases involving Elbrook. Mr Khalid had been challenged about the reliability of his evidence. In response to a submission by Mr Brown that the Elbrook documents had not been challenged, Mr Carey referred to Officer Ginn's Witness Statement which notes that, the documents on their face show £24.8 million of supplies from Gooch to Hasselt; £20.7 million of supplies from Elbrook to Gooch, and cash payments of £27.6 million. Mr Carey also referred to part of his cross-examination of Mr Khalid asking about the existence of release notes (by which Elbrook released goods held at MTM and directed their transfer to Hasselt).

34. Mr Carey submitted that account should be taken of the fact that MTM is a company into which the French authorities had been conducting investigations relating to allegations of illegally diverting goods into the UK at the relevant time.

35. The expert report from Ms Berrington should be given no weight as she confirmed at the hearing that she had not been provided with any of the exhibits attached to Officer Ginn's Witness Statement and she had not been told before the hearing that Gooch was claiming to

have acted as principal. She had confirmed at the hearing that this additional information would have given her "some concerns".

36. The late-produced evidence in the Nectar schedule had not been interrogated by HMRC given the lack of time before the hearing. However, Gooch has not shown whether the locations referred to in the Nectar schedule codes correlate to locations on the route claimed to have been used by Mr Adris.

APPELLANT'S CASE

37. Again, in setting out Gooch's case we have excluded any arguments relating only to the appeal of the best judgment assessment and principles relating thereto.

38. It is accepted that the burden of proof rests with Gooch. We clarified with Mr Brown that there was no suggestion of any evidential proof being with HMRC as a result of the transaction documents and Mr Brown confirmed that no such argument was relied upon. Gooch accepts that the burden of proof is entirely on it.

39. Mr Brown submitted that HMRC's decisions have been based on circumstantial evidence, assuming that the goods must have been part of an inward diversion fraud. Purchase and sales invoices provide evidence of all of the transactions. There is an audit trail for all of the cash payments with receipts having been issued by Elbrook, or credits shown on bank statements. HMRC has not alleged that there were transactions that were not recorded in Gooch's business records, or that the total amount of cash received was greater than the recorded sales (save for a possible de minimis amount). There is also no allegation by HMRC that there were any breaches of the duty suspended regulations when any goods were dispatched by Elbrook and received by MTM in France.

40. Mr Brown relied upon *HMRC v Aimia Coalition Loyalty UK Ltd (formerly Loyalty Management UK Ltd (LMUK)) [2013] UKSC 15* and submitted that any decision concerning the application of VAT requires all of the circumstances of the transactions to be taken into account. He referred to the case of *Award Drinks* and submitted that neither the Upper Tribunal nor the First-Tier Tribunal in that case had discussed whether or not there was a supply of goods. Instead, the case turned on possession and control because, unlike here, the appellant in that case had been an account holder in the bonded warehouse. In addition, in this case the cash has been paid to Elbrook and not to Gooch.

41. However, the approach described by the Upper Tribunal in *Award Drinks* to transaction documents should be followed. Full weight should be given to all of the Elbrook documents in the bundle - the MTM transfer documents, release notes, Elbrook's invoices and its "W7s" (Notifications of cash payments for alcohol goods in duty suspension). It had not been put to Mr Khalid that these documents were fake or inaccurate. The fact that Elbrook has been connected by HMRC to other cases involving alleged fraud should not result in any stain on Mr Khalid's character. As the Elbrook documents had not been challenged and Mr Khalid's evidence about the documents had not been challenged it should be found that Elbrook transferred goods held in MTM. Similarly, the cash should be treated as relating to those invoices given that it was not alleged that the invoices differed massively, or at all, from the cash paid to Elbrook.

42. Mr Brown submitted that the transfer of ownership to Gooch was immediately followed by the transfer on to Hasselt – there was "flash title". We explored the question of whether Gooch had control over the goods for even a split second when the "flash title" transferred. Mr Brown submitted that the Appellant did not have control of the goods at any time. It could not remove the goods from MTM as it did not have an account there. It could not even have decided to transfer the goods to another person with an account at MTM. They remained under

Elbrook's control until transferred to Hasselt's account, even though Gooch acted as principal. Mr Brown compared it to other business situations where A transfer goods to C even though an intermediary, B, buys from A and sells onto C.

43. Mr Brown submitted that a supply of goods occurs when the right to dispose of them as owner is transferred (Article 14(1) VAT Directive 2006/112/EC; section 1 VATA) and for there to be a transfer, transfer of legal ownership is not necessary (*Shipping and Forwarding Enterprise BV* Case C-320/88). Instead, all that is necessary is the transfer of the right to dispose of the goods.

44. Mr Brown relied on the time of supply rules set out in section 6 VATA and the place of supply rules in section 7 VATA. In particular, if goods are not in the UK when the right to dispose of them as owner is transferred, they are treated as supplied outside the UK (section 7(2) VATA). In this case the time of supply was when the right to dispose of the goods as owner was transferred to Hasselt by Gooch (even though Gooch had no account in MTM) and at that point they were physically in the MTM bond in France. Therefore the supplies took place outside the UK, no VAT was due and there was no liability to register for VAT in the UK.

45. Mr Brown submitted that HMRC have provided no evidence at all to show that Gooch or anyone else arranged transportation of the goods, which amounted to around 1000 containers, to the UK, or that even a single vehicle containing the goods supplied by Gooch to Hasselt has been detected in the UK in contravention of the excise duty regulations. HMRC has not provided any evidence to show that any of the goods were purchased by any person in the UK. However, in closing submissions, Mr Brown accepted that there was no burden of proof on HMRC.

46. Mr Brown submitted that if the goods were smuggled into the UK that was after they left the MTM bonded warehouse in France and therefore after Gooch had supplied them to Hasselt. Gooch did not release any goods for consumption from MTM; it supplied the goods "in bond". Any further change of ownership after transfer of the goods to Hasselt in the tax warehouse is outside Gooch's knowledge.

47. Mr Brown referred to the case of *BXB v Watch Tower and Bible Tract Society of Pennsylvania and Trustees of the Barry Congregation of Jehovah's Witnesses* [2020] EWHC 156 (QB**)** and submitted that the fallibility of Mr Adris' evidence going back over such a long period should be recognised, particularly in the context of robust cross-examination for a few days. The checks said to have been made by Mr Adris when dealing with his supplier and customer (and which HMRC accepted had been shown to Officer Ginn) were consistent with those identified by HMRC in Notice 726.

48. Hasselt was not dissolved until 2017 and was therefore in existence at the relevant time. It had a VAT number. Contracts were signed by one of its directors, albeit acting as administrator and even though he was only such until August 2011. The inference from evidence provided by the Belgian authorities is that Hasselt engaged in off-record trading. Reliance continues to be placed upon the Brokerage Agreement, despite the fact that it was signed by Mr Singh after he ceased to be a director of Hasselt and despite the fact that it describes Gooch as an agent, because it is evidence of transactions between the parties. MTM was an authorised warehouse in 2012.

49. No adverse inference should be drawn by the lack of evidence from the Romanian couriers given that this issue had only recently been identified by HMRC, although Mr Brown recognised that it was an accepted conclusion in civil procedure where there is a failure to provide expected evidence. Gooch did not need to produce evidence which was already provided by HMRC.

50. It was noted that the evidence shows that most of the Nectar payments relate to a garage near to Mr Adris' home. It was recognised that there was no differentiation of business and personal mileage and, even taking all of the Nectar payments as relating to the mileage for the Elbrook trips, the evidence was still insufficient to show the full mileage needed for the trips which Mr Adris claimed to have done.

51. The fundamental question was why £27.7 million was paid to Elbrook and the most obvious answer was that Gooch was paying Elbrook for supplies. If this was all part of an inward diversion fraud then where did Gooch get its supplies? The cash payments correspond with the invoices and this is therefore the obvious answer.

52. In light of the Upper Tribunal decision in *Ampleaward v HMRC* [2020] UKUT 0170 (TCC) we asked the parties to address the application of Section 18 VATA. Neither party relies upon Section 18. Mr Brown submitted that even if the result of *Ampleaward* was that Section 18 could apply to supplies (as opposed to acquisitions) in non-UK warehouses, Section 18(3) VATA could not be applied in this case as it was not known what Hasselt did with the goods after their acquisition. As a result, Section 7(2) VATA must be applied to determine the place of supply.

LAW

The assessment of evidence and burden of proof

53. This case involves the application of various principles in assessing the weight to be given to evidence and in assessing the extent to which the veracity of documents is challenged.

54. In *British Airways Pension Scheme Trustee Ltd* Mr Justice Morgan confirmed the following statement of principles made by Brooke LJ in *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 at page 340 :

> (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
>
> (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
>
> (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
>
> (4) If the reason for the witness's absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified."

55. Similarly, in the context of addressing missing documentary evidence rather than witnesses Arden LJ said in *Wetton v Ahmed* 2011 EWCA Civ 610 (at para 14):

> "In my judgment, contemporaneous written documentation is of the very greatest importance in assessing credibility. Moreover, it can be significant not only where it is present and the oral evidence can then be checked against it. It can also be significant if written documentation is absent. For instance, if the judge is satisfied that certain contemporaneous documentation is likely to

> have existed were the oral evidence correct, and that the party adducing oral evidence is responsible for its non-production, then the documentation may be conspicuous by its absence and the judge may be able to draw inferences from its absence."

56. In relation to the reliability of witness statements prepared some time after relevant events, the oft-quoted principles stated by Legatt LJ in *Gestmin SGPS SA v Credit Suisse (UK) Ltd* [2013] EWHC 3560 (Comm) (at paras 15-22) which, in particular, identify that:

> "Memory is especially unreliable when it comes to recalling past beliefs. Our memories of past beliefs are revised to make them more consistent with our present beliefs… Considerable interference with memory is also introduced in civil litigation by the procedure of preparing for trial…
>
> …[So that] "it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

57. However, as the Court of Appeal made clear in *Kogan v Martin & Ors (Rev 1)* [2019] EWCA Civ 1645 (at para 88), the *Gestmin* guidance does not prevent reliance upon witness statements.

> "A proper awareness of the fallibility of memory does not relieve judges of the task of making findings of fact based upon *all* of the evidence."

58. The same emphasis on the duty to consider all of the evidence and determining the weight to be given to it was stated in *BXB* although the fallibility of memory should be recognised.

59. The burden rests on the taxpayer to establish the correct amount of tax. That burden of proof is to the usual civil standard of the balance of probabilities.

60. Gooch concedes that there is no burden of proof on HMRC even though documents have been produced and there is an allegation by HMRC that the supplies made by Gooch are part of an inward diversion fraud. That is in accordance with the law as confirmed in *Award Drinks* in which the Upper Tribunal summarised the authorities in this area (at para 36) to state that:

> (1) The burden of showing an assessment is incorrect remains on the taxpayer throughout the appeal. 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.
>
> (2) The allegation that a witness is dishonest must be put fairly and squarely to the witness in cross-examination before the tribunal can find the witness is dishonest, but does not need to have been pleaded in advance in cases where the burden is on the taxpayer.

61. Although in *Award Drinks* the Upper Tribunal was addressing the position in a case appealing a best judgment assessment, we see no reason to apply a different approach to the burden of proof in a case such as this. Indeed, no alternative approach was advocated by Mr Brown.

The VAT rules

62. The requirement to register for VAT is set out in Section 3 and Schedule 1 of the VATA. In essence, a person was liable at to be registered if they made taxable supplies exceeding the VAT threshold which was £73,000 in the period from 12 January 2012 to 31 March 2012 and £77,000 for the remainder of that year. There is no dispute about the intricacies of the VAT registration rules. The parties agree that either Gooch made all of its supplies in the UK or outside the UK.

63. Gooch relies upon the time and place of supply rules in VATA, implementing the provisions of Directive 2006/112/EC (the "Principal VAT Directive"). There is no argument that the provisions of the Directive should be treated as producing a different result to the provisions in VATA.

64. Section 1(1) VATA accordingly provides for VAT to be charged in accordance with the provisions of the Act "(a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply)…"

65. Section 1(2) provides "VAT on any supply of goods or services is a liability of the person making the supply …". Gooch says that it has not made any supplies in the UK. It says that its supplies were made under bond in France. Therefore it says that it was not required to be registered for VAT purposes.

66. Gooch relies upon the description of a supply of goods in the case of *Shipping and Forwarding Enterprise BV Case* where it was stated (at para 19) that:

> Supply, within the meaning of [Article 5(1) of the Sixth Directive], covers any transfer of the right to dispose of property by which a party acquires a position which is de facto analogous to that of the formal legal owner. It is for the national court to assess on the basis of the particular circumstances of the case whether such a right of disposal is transferred. In that regard it makes no difference that the parties to an agreement by which such a right to dispose of property is transferred have reached an agreement as to the subsequent transfer of legal ownership.'

67. In addition, (although not referred to by either party) in *Customs and Excise Commissioners v Oliver* [1980] STC 73 Mr Justice Griffiths considered a case where a car dealer sold stolen cars. He decided that the widest possible interpretation should be given to supply so that the fact that the contract of sale was void was irrelevant and said:

> "'Supply' is the passing of possession in goods pursuant to an agreement whereunder the supplier agrees to part and the recipient agrees to take possession. By 'possession' is meant in this context control over the goods, in the sense of having the immediate facility for their use. This may or may not involve the physical removal of the goods."

68. Section 7 deals with place of supply of goods. In particular, section 7(2) provides that "Subject to the following provisions of this section, if the supply of 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." Gooch maintains that the goods which it supplied were in the MTM warehouse in France and therefore supplied by it outside the UK. HMRC have assessed Gooch on the basis that Gooch did not supply goods in France, but in the UK.

69. Section 18 VATA deals specifically with goods subject to a warehousing regime. A warehouse for these purposes is any warehouse where goods may be stored in any member State without payment of any one or more of specified duties including Community customs duty; VAT on the importation of the goods into any member State; and any duty of excise or any duty which is equivalent in another member State to a duty of excise (section 18(6).

70. The case of *Ampleaward* considered whether such warehouses include warehouses outside the UK.

71. Section 18(2) states that Section 18(3) applies where any person makes a supply of—

> (i) any dutiable goods which were produced or manufactured in the United Kingdom or acquired from another member State; or

(ii) any goods comprising a mixture of goods falling within sub-paragraph (i) above and other goods.

72. Section 18(3) provides that where it applies and the material time for the acquisition or supply mentioned in sub-section (2) above is while the goods in question are subject to a warehousing regime and before the duty point, that acquisition or supply shall be treated for the purposes of this Act as taking place outside the United Kingdom if the material time for any subsequent supply of those goods is also while the goods are subject to the warehousing regime and before the duty point (underlining added).

73. Neither party seeks to rely upon Section 18 VATA in this case. In particular, (without digressing into consideration of the application of the *Ampleaward* decision and its implications for not only acquisitions, but also supplies) Gooch is unable to identify what Hasselt did with the goods after the claimed purchases by Hasselt. That means that the Section 18(3) cannot be relied upon by Gooch because of the underlined condition.

74. HMRC have said that the arrangements with which Gooch was involved are consistent with "inward diversion fraud" unless some genuine alternative explanation can be shown. For the reasons set out in this decision we have not needed to address whether such a fraud took place, but the explanation of it provided by Judge Falk and Mr Simon in *Dale Global Ltd v HMRC* [2018] UKFTT 363 (TC) serves as a useful explanation of the background to HMRC's actions, as noted in HMRC's witness' evidence:

> "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."

GENERAL ASSESSMENT OF EVIDENCE

75. In addition to the bundles of evidence, including Witness Statements from Mr Asad Adris, Mr Khalid, Ms Berrington (confirming her expert report) and Mr Narzim Adris for

Gooch, and Officers Ginn and Polkington-Bailey for HMRC, we heard oral evidence from each of the witnesses. Before making specific findings we explain our general conclusions about the evidence and its relative weight.

HMRC witnesses

76. We found the evidence of HMRC's witnesses to be credible and consistent and there was little challenge to it by Mr Brown. We therefore accept their evidence insofar as it relates to matters of fact.

77. Mr Brown confirmed at the hearing that HMRC's notes of meeting were not challenged. We consider there to be no reason to reduce the weight given to the evidence in those meeting notes.

Mr Asad Adris

78. Our assessment of the witness evidence presented for Gooch is somewhat different. Mr Asad Adris (whom we generally refer to as Mr Adris) is the sole director of Gooch, who set up the company and was the sole person running its activities. However, his evidence was repeatedly vague and evasive. He was cross-examined over a period of 2 ½ days, but his vagueness and evasiveness started in the very first morning and persisted. We are satisfied that Mr Carey's cross-examination was measured and appropriate. There were regular breaks taken, recognising, in particular, the need for such in a video hearing.

79. Examples of matters on which Mr Adris' response to questions was that he could not remember, or where he failed to provide any real answer, include the reason for winding up his previous company and setting up Gooch initially, why he chose to trade under bond in France rather than the UK and the extent of research he conducted into that market, why the couriers did not take the cash directly to Elbrook, why he did not bank the cash locally rather than drive it some 240 miles. Mr Brown submitted fallibility should be recognised over such a long period, but these are not matters of detail. They are fundamental issues going to the heart of the appeal which have been identified as such in HMRC's witness' statements and HMRC's Statement of Case. In *BXB* the fallibility of memory was noted in the context of what has also been described in *Gestmin* as the tendency of people to develop a narrative after the event. In this case Mr Adris has struggled to provide any consistent narrative after the event; and just as explained in *BXB*, our duty remains to find the facts based on the evidence overall.

80. In addition, Mr Adris' evidence was frequently internally inconsistent and inconsistent with other evidence. For example, he claimed that Gooch's business was fundamentally different to the business he carried on in Myah because Gooch was trading under bond, whereas his own Witness Statement recognises that Myah also traded under bond. He provided inconsistent evidence at the hearing regarding the use of an advertisement to attract customers. He claimed that Hasselt was not a direct customer of Elbrook, yet evidence in Elbrook's bank statements shows that Hasselt was making direct payments to Elbrook as early as February 2012; and Mr Khalid says in his Witness Statement that during the time Elbrook supplied goods to Hasselt through Gooch as agent, Elbrook also dealt directly with Hasselt.

81. More fundamentally, Mr Adris' Witness Statement repeats on several occasions that Gooch was only acting as agent for Hasselt and never acted as principal. He goes so far as to state reasons in his Witness Statement why Gooch could not be treated as principal, explaining that in order to do so it would have been necessary for Gooch to deal with all the costs and administration of handling, storage and shipping of the alcohol and would have expected a far higher margin if it had been selling the goods as principal and taking the consequent commercial risk in so doing. He states that Gooch was not involved in the activity of buying and selling alcohol and making a profit on the difference in the prices, yet that is exactly the case which Gooch now wishes to present. No application has been made to amend this Witness

Statement since it was lodged and it was adopted as his evidence-in-chief without amendment despite the fundamental inconsistency with the case presented.

82. During the hearing Mr Adris was unable to provide a consistent answer regarding the ownership of the goods. Initially, he was adamant that the goods were owned by Elbrook until they were transferred to Hasselt. He was asked how this was the case given that he issued invoices to Hasselt. He remained of the view that Gooch took no ownership of the goods. It was only when Mr Carey suggested to him that he must have owned the goods in order to sell them that Mr Adris changed his evidence and said that he owned the goods when he sent the purchase order to Elbrook. (Neither party addressed us on the position in contract law at that point and we do not address that any further given our conclusions about the appeal set out later.)

83. Overall, we found Mr Adris' evidence to be generally evasive, inconsistent and unreliable.

Mr Khalid

84. Mr Khalid is a long-standing director of his family's business, Elbrook. He took over the running of the Elbrook under-bond department around 2010. However, his evidence was also inconsistent regarding significant matters. For example, in his Witness Statement he says that Mr Adris would email an enquiry asking about pricing and availability of the product and once a price was agreed Elbrook would issue a pro forma invoice. Mr Adris also described his own role in the transactions as involving him checking and negotiating prices with Elbrook. However, at the hearing Mr Khalid told us that the prices were pre-set with little variation week to week. Elbrook would notify customers, including Gooch, in good time (around 30 days in advance) if there was a proposed price increase. When it was put to him that Mr Adris described regularly checking the prices Mr Khalid assumed this would only be in relation to purchases of "Stella" as that is bought by Elbrook in Euros and therefore currency fluctuation could affect the sterling prices.

85. In addition, at the hearing Mr Khalid said that initially when trading with Gooch, Elbrook had no knowledge of Hasselt and that was the reason why Gooch acted as intermediary between Elbrook and Hasselt. However, the evidence regarding the lack of relationship earlier is not consistent with the evidence in Elbrook's bank statements showing direct contact between Hasselt and Elbrook as early as February 2012. In his own Witness Statement he says that, during the time Elbrook supplied goods in bond to Hasselt through Gooch as agent, Elbrook also dealt directly with Hasselt. The evidence in the Elbrook bank statements shows that Elbrook received £7,219,869 in cash directly from Hasselt in 2012. That is not an insignificant amount of business.

86. Mr Khalid's evidence in his Witness Statement is also inconsistent with other evidence in the bundles. For example, Mr Khalid describes the transactions in his Witness Statement in the following way: if the pro forma invoice was raised by Elbrook on Monday, Gooch would pay on Tuesday and the goods would be released on Wednesday. There are remarkably few release notes and documents showing transfers in MTM, but one set attached to Ms Berrington's report shows a very different order of events: a Gooch purchase order sent to Elbrook on 28 May 2012; Elbrook issued three release notes to MTM on 31 May 2012 directing transfer to Hasselt; MTM issued a transfer confirmation for the transfer from Elbrook to Hasselt on 31 May 2012; and finally an invoice issued by Elbrook to Gooch on 1 June 2012. So the invoice was issued by Elbrook after the transfers occurred (according to the other documents), rather than before. The inconsistency in the evidence about the order of the transactions appears on other occasions.

87. Indeed, Mr Khalid has maintained in his Witness Statement and in his oral evidence that goods were only released after payment (with at most some small percentage of credit being offered over time), yet many of the documents, if taken at face value, (as explained further below) show credit for the full value was operated.

88. There is also a problem regarding Mr Khalid's explanation of the capacity in which Gooch was acting. In his Witness Statement he maintains that as far as Elbrook was concerned Gooch was acting as broker/agent. At the hearing he struggled to identify whether Gooch acted as agent or principal saying that Gooch was simply a customer, whether as agent or principal.

89. Similarly, he struggled to provide any cogent answer when asked to clarify what he meant in his Witness Statement when saying that looking back it would have been easier to deal with Hasselt directly and pay Gooch a fee, or when he said that Gooch had no control or ownership over the goods at any point. When asked whether it would have been possible for Gooch to have decided to take the goods out of the bonded warehouse and sell them to another party, Mr Khalid struggled. He said that the ownership could never have gone to Gooch, but then suggested that the ownership on the invoice would be with Gooch and the "responsibility" would be with Hasselt. After Mr Carey attempted to clarify this further, Mr Khalid's evidence changed to say that ownership transferred to Gooch.

90. Whether Elbrook transacted with Gooch as principal or agent is not a dry legal question of little import. We would expect this to have been a key commercial question for Elbrook – who was their customer and, as a result, who could Elbrook look to if payment was not received?

91. Mr Khalid says in his Witness Statement that "it was sometime late into our trading with Hasselt during 2012 we received information to suggest that Hasselt had an invalid VAT number" and at that point Elbrook stopped trading with Hasselt. Yet Elbrook's bank statements show receipts of money from Gooch as late as 24 December 2012. When asked at the hearing when Mr Khalid learnt that Hasselt's VAT number was no longer valid, Mr Khalid was unable to answer. There is little time after 24 December 2012 to learn about an invalid VAT number before the year end. When he was asked by us whether the notification meant that Elbrook also stopped trading with Gooch, Mr Khalid was unable to answer, but of course, if Gooch was really perceived to be Hasselt's agent as Mr Khalid has claimed, then it should have been obvious that ceasing to trade with Hasselt meant ceasing to trade with Gooch.

92. Considering the extent of inconsistencies in Mr Khalid's evidence, we have reduced the weight given to it.

Mr Narzim Adris

93. Mr Adris has claimed that he drove from Gooch's premises in Birmingham to Elbrook's premises in Mitcham with cash for the supply of the alcohol under bond to Hasselt. HMRC has identified that Mr Adris' MOT and service records show mileage which is significantly less than the amount which would have been driven if Mr Adris' claim was correct. Mr Adris has responded by saying that he drove various cars including cars owned by his brother, Mr Narzim Adris, who is in the business of selling second-hand cars; and Mr Narzim Adris gave evidence to support this account.

94. However, Mr Narzim Adris' evidence was also evasive and inconsistent regarding significant matters. He was asked in cross-examination about whether records were kept to show, for example, the mileage on a car when it was bought by the business and when it was sold by the business. Mr Narzim Adris repeatedly avoided answering the question.

95. Similarly, he was asked about the insurance policy operated by the business. In his Witness Statement he states that there was a trade insurance policy for the use of company

vehicles and that Mr Adris was a director in his car sales company until 25 May 2012. At the hearing he was asked in cross-examination to clarify who was covered by the policy. At first he said that it covered anyone who was entitled to drive the vehicles owned by the business, but that provided little clarification. After several attempts at seeking clarification, Mr Narzim Adris said that he and his brother were named on the insurance policy, but only when his brother was a director of the business. He claimed that after that point his brother drove relying only on Mr Adris' own third party insurance applicable in the usual way to driving another person's car with their consent. He claimed that it would make no difference to the value of the second-hand cars if his brother drove each of them for hundreds of miles to "run them in" and feel they are right. We find both of these claims raise plausibility concerns.

96. Reference is made at various points in our decision to the lack of plausibility. We recognise that an account may be implausible, yet be found by us to reflect the facts. Similarly, an account may be entirely plausible, but for good reasons not to be found to reflect the facts of a case. However, the courts have recognised that the more improbable an account is, the more important it is that supporting evidence is provided, particularly if readily available, for that description of events.

97. Mr Narzim Adris has provided an implausible account of Mr Adris driving cars from his business repeatedly for hundreds of miles simply to test them out, with inconsistent evidence about insurance, as well as a lack of clarity and at times evasiveness about records to show the miles driven. For these reasons we reduce the weight given to Mr Narzim Adris' evidence.

Ms Berrington

98. Ms Berrington is a forensic accountant who was appointed by the Appellant's previous representatives to prepare an expert report in 2018. The scope of that report is limited. Ms Berrington was asked to identify whether a 5p per case mark-up was applied to the invoices issued to Hasselt and various other matters such as Gooch's profit and value of its taxable supplies. Ms Berrington was not provided with all relevant documentation, including, in particular, all of the exhibits referred to in HMRC's officers' witness statements. Most importantly, the report is expressly stated to be on the basis that Gooch claimed to be acting as agent between Elbrook and Hasselt. Extraordinarily, Ms Berrington was only informed at the hearing that this was no longer the basis of Gooch's appeal. She appeared, to say the least, surprised and promptly asked how it was possible for transfers of the goods to have been made to Gooch. On the basis of what she was told at the hearing Ms Berrington made clear that what she had written in her report would not apply and that she had "some concerns".

99. Mr Brown said that the report had been left as evidence as Ms Berrington had made no adverse comment on the veracity of the documents. However, we find that the failure to provide Ms Berrington with the full set of documents undermines any conclusions regarding the veracity of the documents.

100. One issue resulting from the inadequate basis of the instructions provided to Ms Berrington is shown by the way in which the report deals with documents showing transactions with "Prada Trading". It is stated in the report that Ms Berrington was told that certain invoices had been prepared in error when it was intended that the customer should be Prada Trading, but that trade had not in fact taken place. However, the report then proceeds to note release notes and a delivery note for transfers to "Prada J". without any query about the apparent inconsistency in being told that trades with Prada did not take place. Mr Adris has denied trading with Prada, which as Mr Carey put to Mr Adris in the hearing, raises the question of the veracity of the Prada documents.

101. Given that Ms Berrington was only provided with a very small extract of the documents and a fundamentally flawed basis of the transactions, we consider that any comments regarding the veracity of the documents should be given little weight.

Lack of witness evidence

102. We take into account the lack of witness evidence from Mr Singh (the director of Hasselt), or any other person involved with that company. As far back as 29 September 2017 Gooch applied by consent for a direction to extend the time for delivery of witness statements so that a visit could be made to Hasselt in order to obtain a statement. There has been no subsequent explanation of the failure to obtain such a statement.

103. There is also no evidence provided by Mr Adris' wife despite the fact that Mr Adris claims to have used her car for transporting cash to Elbrook. While she would not be an independent witness, that is a matter that goes to the weight to be given to her evidence and does not mean her evidence would have no impact.

104. Most notably, there is no evidence from the Romanian couriers. Although Gooch's previous representatives stated in pre-hearing correspondence that they could not find those people to give evidence, there is no evidence to show what steps were taken to find them. We therefore find that little explanation for their non-attendance has been provided. There is no reason for this to be a new matter, taking Gooch by surprise, as Mr Brown suggested. The *Wisnieski* principal is well-established. There is very clearly a case to be answered as to the role of the couriers and we therefore draw an adverse inference from their non-attendance.

Lack of documentary evidence

105. Turning to the documentary evidence we apply the principles set out in *Wetton v Ahmed* 2011 EWCA Civ 610 and take into account a marked lack of supporting evidence from Gooch. In particular, the following items, for which there is little reason for their omission, are identified: pricelists said by Mr Adris to have been received from Elbrook and sent to Hasselt; "know your client" files and other due diligence said to have been carried out by Mr Adris in relation to Hasselt; all but a very few MTM transfer documents showing transfers from Elbrook's account to Hasselt's account; most of the purchase orders sent by Hasselt to Gooch; counterfoils showing the deposit of cash by Mr Adris; copies of receipts said to have been kept showing delivery of cash by the couriers to Gooch; a copy of the advertisement Mr Adris claims was used to find customers and which resulted in his relationship with Hasselt; more than 90 pages of emails which Mr Adris told us he had sent to HMRC showing contact between Gooch, Elbrook and Hasselt about orders and showing negotiation of a 5p mark-up on his sales; and a letter from MTM from which he quotes in his Witness Statement as evidence of a check into Hasselt.

106. Mr Adris said that counterfoils and receipts for cash delivered by the couriers were given to HMRC and he had an HMRC receipt, but that has not been provided in evidence. He has not attempted to obtain return of any such documents and given our conclusions about the weight to be given to Mr Adris' evidence, we rely instead on the evidence of Officer Ginn who says that HMRC have repeatedly and unsuccessfully asked for the counterfoils and receipts.

The Brokerage Agreement

107. One document which has been provided is called a Brokerage Agreement between Hasselt and Gooch. It is written as a document under which Gooch would negotiate purchase of products in Hasselt's name and for its account, and be paid a commission of 5p per case for doing so. Mr Adris signed the document on behalf of Gooch and it is dated 19 March 2012. Mr Adris was asked to explain what he did in compliance with the agreed activities to be undertaken by Gooch, such as reporting negotiations of purchases with prospective suppliers

and keeping Hasselt informed of current marketing conditions. Mr Adris was unable to remember any activity carried out in accordance with the agreement. He could not explain the reference in the document to a requirement to adhere to Hasselt's schedule of prices. He could not explain why the document was dated 19 March 2012, a couple of months after the trading involving Gooch and Hasselt is said to have commenced.

108. The document is another example of evidence which is fundamentally inconsistent with the case presented by Gooch. Mr Adris' response to this problem was to say that he was advised by his lawyer that he could not say he was agent even though he always thought he was.

109. Given the inability of Mr Adris at the hearing to explain the operation of this document and the fact that it is wholly inconsistent on its face with the basis on which Gooch says it is acting, we are satisfied that the Brokerage Agreement should be given little weight.

110. Other documents in the bundles are addressed by us later in the decision.

General evidential conclusion

111. As a result of this evaluation of the evidence, where there is conflict of evidence we have preferred the evidence of facts set out in the HMRC Officer's Witness Statements and the notes of meetings provided by HMRC.

FINDINGS OF FACT AND REASONS

112. Having set out our general approach to the evidence we proceed to set out our findings of fact.

Background

113. Mr Adris' background is in construction and project management. He has previously set up various companies to carry out activities in that sector. However, in 2010 he became involved in the alcohol trade through a company he wholly owned and which he had set up in 2006 for construction business – Myah.

114. Myah's trade in alcohol developed very quickly. By the end of 2010 it had one main supplier, Weaver Wholesale Ltd, with a few purchases also made from HT & Co (Drinks) Ltd. Myah sold to various customers including, in particular, Elbrook. In its first year Myah reached a turnover of around £1 million. Mr Adris attributed the business' success to his strong negotiating skills. (We return to this later in the decision.) All of the transactions were in cash, often involving very large amounts being handed over in motorway service station car parks. Myah never took delivery of the goods; Mr Adris never saw any of them. They went directly from Myah's suppliers to Myah's customer. Myah was registered as a high-value dealer under the Money-Laundering Regulations.

115. Myah's premises were visited by HMRC on 22 July 2010. He was warned about the missing trader concerns regarding the type of trading Myah was undertaking. He was advised to carry out as many commercial checks as possible and to ensure that the people he was dealing with were bona fide and the goods he was dealing in were genuine. However, Mr Adris continued to trade through Myah without seeing the goods which were transferred directly from supplier to customer, despite committing to making such checks.

116. By 31 January 2011 Myah was using one supplier - Bedford GB Ltd - again with payment in cash handed over at various locations including motorway service stations. Myah had stopped using another supplier, Firstgate, as contact could not be made. In fact, Firstgate had been deregistered by HMRC although the evidence does not show that Mr Adris was aware of the deregistration until told by HMRC. On 1 February 2011 HMRC wrote to Myah informing the company that Bedford had also been deregistered. Myah was also sent a letter regarding

missing trader fraud detailing documents generally required as part of HMRC's verification process.

117. Mr Adris has not provided any reasonable explanation for the role of Myah in the transactions. Mr Khalid confirmed in his evidence that the market involves high volume, low margin transactions, yet Mr Adris told HMRC in 2010 that he could make up to 10p per case and this was all down to his considerable negotiating skills. He maintained that the suppliers would never deal directly with his customers because that would breach business ethics, yet we know that by the time he was trading in alcohol through Gooch, his one supplier was in fact dealing directly with his one customer. We find the assertion of the business ethics as a reason why he was not cut out of transactions to be highly implausible in the context of what is well recognised to be an aggressively priced and negotiated market.

118. In his Witness Statement Mr Adris says that he first ventured into the alcohol market through Myah when he saw an opportunity to service the Calais market, but this was not a reason for the business given in oral evidence and he has provided little evidence showing that Myah had any involvement with the Calais market. We specifically asked him to explain this reference and he was unable to do so at the hearing.

119. In 2011 Mr Adris stopped conducting business through Myah. Myah was deregistered for VAT purposes in August of that year and the company was dissolved on 24 July 2012. We find that Mr Adris has been unable to provide any plausible reason for why he ceased carrying on business through Myah and set up Gooch to use instead for trade in alcohol. He said that the business in Gooch was totally different because he took on board HMRC's advice and decided to move to trading wholly under bond in order to avoid VAT fraud risk. However, the evidence of Mr Adris is that Myah had conducted some business under bond and we find that the core constituents of the business conducted by Gooch are, on the fact of it, essentially the same as that conducted through Myah, in buying and selling alcohol. Mr Adris struggled at the hearing to provide any reason for setting up Gooch; tentatively suggesting that it may have been because he wanted to continue construction work, but Gooch was not involved in such a business when it was set up or at any stage, and he dissolved Myah so did not restart construction in that company.

120. Gooch was incorporated in 2011 with the name Maryam and Co Ltd. During the periods to which this appeal relates it was known as Maryam and Co Ltd. Its name was not changed to Gooch Technology Ltd until 20 April 2014. It was registered with HMRC as a high-value dealer under the Money-Laundering Regulations. It was not registered for VAT purposes in the UK or France and has not applied for any such registration.

121. On 31 March 2014 the Respondents wrote to Gooch saying that it had breached Regulations 7, 8(1), 14(1), 19, 20(1) and (2) of the Money Laundering Regulations 2007 in the following ways:

> (1) Failed to establish and maintain appropriate and risk-sensitive policies and procedures relating to:
>
> (a) Customer due diligence;
>
> (b) Reporting;
>
> (c) Record keeping;
>
> (d) Internal control; and
>
> (e) Risk assessment and management,

(2) Failed to establish policies and procedures which provided for the identification and scrutiny of:

(a) Complex or unusually large transactions;

(b) Unusual patterns of transactions which have no apparent economic or visible lawful purpose; and

(c) Any other activity which the relevant person regards as particularly likely by its nature to be related to money laundering or terrorist financing,

(3) Failed to apply customer due diligence measures at other appropriate times to customers on a risk sensitive basis;

(4) Failure to conduct ongoing monitoring of a business relationship including the failure to:

(a) Scrutinise transactions undertaken throughout the course of the relationship (including, where necessary, the source of funds) to ensure that the transactions are consistent with the relevant person's knowledge of the customer, business and risk profile; and

(b) Keep documents, data or information obtained for the purpose of applying customer due diligence measures up-to-date;

(5) Failed to apply on a risk-sensitive basis enhanced customer due diligence measures and enhanced ongoing monitoring in any other situation which by its nature can present a higher risk of money laundering or terrorist financing; and

(6) Failed to keep relevant records relating to the customer's identity, records for particular transactions and when the business relationship came to an end.

122. Following its acceptance of liability for these breaches, Gooch was fined £10,000. Mr Adris recognised at the hearing that the Money Laundering Regulations had been breached.

An overview of the disputed transactions

123. During the period in dispute, Gooch claims to have conducted business, trading in alcohol under bond held at MTM, where its sole supplier was Elbrook and its sole customer was Hasselt. Gooch has never had an account at MTM or any other bonded warehouse.

124. Mr Adris was unable to explain at the hearing why he had decided to conduct business through a French bonded warehouse rather than a UK one. He could not remember what research he had done or what risk assessments he carried out. At the hearing he denied knowing that there were any risks associated with under-bond trading, even though Mr Khalid says that he was satisfied Mr Adris was fully aware of the risks, and in a meeting with HMRC in November 2013 Mr Adris claimed to have considered the risk of alcohol fraud.

125. Mr Adris claims in his Witness Statement and in his oral evidence that he ran an advertisement looking for customers for Gooch in a trade magazine. He has not produced a copy of that advertisement. He made no reference to the advertisement when interviewed by HMRC in 2012 and 2013.

126. He said that it never crossed his mind to sell to anyone other than Hasselt. Yet this is a man who describes himself as being a skilled negotiator who had been beaten down on price by Hasselt. Surely if he was acting in an ordinary commercial way in the circumstances Mr Adris seeks to portray, he would consider selling to others as well?

127. Mr Adris has been unable to provide any reasonable explanation of Gooch's role in-between Elbrook and Hasselt and for what the mark-up of 5p was paid. He said at the hearing

that the 5p per case was payment to recognise his need to travel from Birmingham to Mitcham to take cash from Hasselt to Elbrook. The explanation of the 5p recompense in Gooch for Mr Adris' travel is not consistent even with Gooch's evidence, even taken at its highest, since it is claimed that a high proportion of the cash was banked by the Romanian couriers, as we explain later. When asked further questions in cross-examination he said that he also had work to do in sending emails, but none of those have been produced.

128. In addition, the Belgian authorities have confirmed that Hasselt was bankrupt in 2012 and had been since 10 November 2011, although it was not finally dissolved until 19 January 2017. While we recognise that Hasselt's VAT number was still valid in 2012 and Hasselt was therefore able to trade, we would expect there to have been an enhanced obligation on the administrators to act to preserve assets in Hasselt. Hasselt already had a direct relationship with Elbrook as shown by Elbrook's bank statements. It was an active relationship with more than £7 million paid directly from Hasselt to Elbrook in 2012. No plausible reason has been given for Gooch acting in-between the two companies and charging the claimed mark-up to Hasselt.

129. Overall, we find the evidence regarding the background to and basis of the claimed transactions between Gooch, Elbrook and Hasselt to be lacking commerciality and consistency and to be generally unsatisfactory.

The cash payments

130. Gooch maintains that cash was brought by couriers to Mr Adris from Hasselt for the purchase by it of alcohol from Gooch and Mr Adris then took the cash to Elbrook, unless the couriers were running late, in which case they deposited the cash into Elbrook's bank account directly through various bank branches.

131. Mr Adris told HMRC that he completed a W7 and receipt for each delivery of cash from the couriers, but none have been provided as evidence. He has not provided the counterfoils which he says the couriers provided after depositing cash into Elbrook's account directly.

132. Mr Adris' evidence about his transportation of the cash to Elbrook has been riddled with inconsistencies. In an interview with HMRC he said that money was paid into Gooch's bank account about once every two weeks and otherwise he would receive the cash from the same two couriers and then take amounts of up to £400,000 to Elbrook in his car. (In his Witness Statement he says that cash was never paid into Gooch's Lloyds account, but no bank statements have been provided.) Mr Adris was specifically asked by HMRC in 2013 if he always used the same car and he confirmed that he did, saying that he would travel 3 to 4 times a week to Elbrook. In contrast, the cash receipt and W7 documents issued by Elbrook on their face show more frequent travel on 245 days in the period 12 January 2012 to 24 December 2012. HMRC have calculated the travel involved in one journey using the shortest route as 268 miles for a round trip (although Mr Adris in fact has described using a longer route). The total mileage involved would therefore have been at least 65,660 miles (and probably more given the longer route Mr Adris has described using).

133. By November 2014 Mr Adris said that he used other cars such as his wife's for perhaps 10% of the journeys, but he maintained that he always purchased the fuel and had provided nearly all of the fuel receipts to HMRC. HMRC therefore adjusted the total mileage for Mr Adris' car to just over 59,000 miles. Mr Adris service records show he drove only 19,504 miles in the longer 14 month period between 19 January 2012 and 21 March 2013; and, of course, that mileage would encompass both business and private purposes.

134. In his Witness Statement, after HMRC had identified that his fuel receipts, MOT and service records did not support the claimed mileage, Mr Adris denied using the same car and said that he also used his wife's, a deceased friend's and those belonging to his brother's car

dealership, as well as trains. We have identified inconsistencies in the evidence regarding the insurance for Mr Adris to drive his brother's cars. Mr Adris also claimed at the hearing that he insured his deceased friend's Porsche to enable him to use it for the journeys, but he has not provided a copy of that insurance. He has not provided any train tickets.

135. Mr Adris has provided a schedule showing him using his Nectar card when making payments at garages. However, he has not provided the information necessary to identify the locations to which all of the Nectar codes relate. Even taking into account the schedule as providing additional evidence of fuel purchases we find, on the basis of HMRC's unchallenged evidence, that the overall evidence would support no more than 34,000 miles having been driven, which is less than half the miles he would have needed to have done to transport the cash as he has claimed (including use of the longer route).

136. In addition, the evidence of fuel does not alter the fact that the odometer in Mr Adris car does not support anything like the claimed mileage. In his Witness Statement he claims that he had the odometer replaced in 2012, but he has not provided any supporting evidence such as an invoice from the garage, even though this would be a significant element of the car's history. He even goes so far as to speculate as to whether the mileage was adjusted, with no basis shown for this suggestion despite the seriousness of the allegation.

137. At the hearing Mr Adris described being nervous about handling large amounts of cash, meeting people in car parks for cash to be handed over, having more than £100 in his pocket and even holding cash at his premises overnight, yet he sought to claim that he would travel by train with £150,000 in no more than a holdall. We find this inconsistent and the use of the train as described, given his reservations, to be implausible.

138. However, despite all of these inconsistencies in the travel evidence, the Elbrook W7s and cash receipts have not been challenged as false. Indeed, HMRC's assessment has been based on Elbrook receiving the more than £26.6 million in cash including more than £16 million from Mr Adris. Therefore while we note that there are concerns about the claimed travel by Mr Adris, we find that Elbrook received £16,401,336.79 from him. We return to this fact later.

139. There are several additional and fundamental problems with Gooch's evidence regarding the cash payments and the involvement of the claimed couriers. The first is that there has been no rational explanation for why the Romanian couriers brought cash to Mr Adris simply for him to take it some 260 miles to Elbrook. Why could the couriers not simply take the cash directly to Elbrook? On many occasions the evidence shows cash deposits made directly into Elbrook's bank account. Mr Adris says that these were made by the couriers when they were running late, in which case why could those deposits not have been made generally by the couriers, or even by Mr Adris in Birmingham without travelling 260 miles? Mr Adris was specifically asked by us at the hearing about these obvious alternative ways for the cash to be paid to Elbrook and he could not give us an answer. It was one of very many occasions when he said that he did not remember why the system was set up as it was.

140. There has been no evidence to show that direct bank transfers from Hasselt would have incurred fees as he suggested to HMRC in a meeting. Even if fees would have been payable we would expect there to have been an assessment of the relative costs of using bank transfers rather than couriers. The Elbrook bank statements show that Hasselt was otherwise prepared to transfer more than £7 million to Elbrook directly in 2012.

141. The evidence from Elbrook's bank statements shows that nearly 900 deposits were made over a period of 140 days. That is not consistent with the explanation of the couriers just resorting to a direct deposit when running late. It is a clear practise of regular deposits.

142. The greatest number of individual deposits on any one date was 22. On one occasion £60,000 was deposited. Mr Adris has suggested that deposits for more than £10,000 would give rise to bank costs, but the evidence shows that nearly half of the deposits were for more than £10,000.

143. There are several examples of cash being deposited into several branches on the same day. For example, on 27 June 2012 there were 15 deposits paid into five different branches. None of the evidence has provided any consistent or plausible explanation for this. In one meeting with HMRC, Mr Adris gave the implausible explanation that that was the result of banks not being happy to receive large amounts of cash, yet this is inconsistent with the evidence of deposits as large as £60,000.

144. This table provided by Officer Ginn has not been challenged. It shows the numerous branches at which deposits of cash into Elbrook's account were made, based on the evidence in Elbrook's bank statements which identify these payments as relating to Gooch:

Branch	**Deposit number**	**Total value**
Barking	483	£ 6,029,960.00
Beacontree	1	£ 24,000.00
Beacontree Heath	1	£ 15,000.00
Belgravia	1	£ 37,000.00
Chadwell Heath	3	£ 40,000.00
Chelsea	1	£ 40,000.00
City Hall SQlO	1	£ 36,000.00
Clapham Junction	1	£ 19,000.00
Ealing	1	£ 43,670.00
Edinburgh	1	£ 2,500.00
Fairx 32	1	£ 20,000.00
Grays	1	£ 20,000.00
Hillingdon	1	£ 25,000.00
Hayes	2	£ 49,000.00
Ilford	32	£ 346,791.00
Park Royal	240	£ 2,288,500.00
Sheffield City	4	£ 70,000.00
Sheff Banner	2	£ 20,000.00
Sloane Square	2	£ 29,800.00
Slough	39	£ 750,330.00
South Harrow	6	£ 60,000.00
Thornton Heath Pond ,	2	£ 22,000.00
Tilbury	2	£ 20,000.00
Vicarage Field, BA	5	£ 99,000.00
Wellingborough Rd	1	£ 25,000.00
Wembley	57	£ 1,080,000.00

Totals	891	£ 11,212,551.00

145. HMRC have asserted that if the couriers made the deposits when they were running too late to get to Mr Adris it would be expected that the deposits would be made on or close to the route taken from Dover or Folkestone to Birmingham. At the hearing Mr Brown sought to challenge the implication that the couriers necessarily came from the Continent. However, the HMRC meeting notes record Mr Adris as describing the couriers as "coming over". In addition, he was specifically told about checks (described below) regarding the alleged courier's travel and made no suggestion that they did not travel from Europe. When told about the lack of evidence he simply said he could not offer any explanation. There is no evidence to show how Hasselt based in Belgium and France could otherwise have got the sterling cash to the couriers in order for them to bring it to Gooch.

146. There is no explanation for why deposits would be made as far afield as Sheffield and Edinburgh. Mr Brown speculated at the hearing that the couriers may have made a visit to friends, but speculation is not evidence.

147. There were 140 days on which the direct deposits were made which are claimed to have been made by late-running couriers. The total period in question is less than one year. In a full year there are only 260 weekdays excluding weekends and without any allowance for bank holidays. Consequently, the 140 days accounted for more than half of the banking days in the relevant period. The evidence overall regarding the frequency of alleged courier deposits and the deposits into several branches on the same day is not consistent with the evidence from Mr Adris of the couriers just depositing the money when they ran late.

148. Mr Adris provided HMRC with a copy of the passport for each of the claimed couriers. HMRC have carried out checks with Eurotunnel, ports and ferry companies and there was no evidence to show one of the alleged couriers travelled to the UK from Europe in the relevant period. The evidence showed that a person with the other alleged courier's name travelled to the UK on only four occasions during the period. Officer Ginn says in his Witness Statement that flight information was also checked and no evidence was found of the alleged couriers flying into the UK. Although Officer Ginn has provided email evidence showing that checks were being made about flights there is no email confirmation of the position. However, Mr Brown was clear in cross-examination that he did not suggest that Officer Ginn's Witness Statement included false information. We are therefore satisfied that the only evidence of travel by the alleged couriers to the UK consists of that showing one person with that name travelled to the UK on four occasions in the period.

149. The evidence from Elbrook's bank statements, cash receipts and W7s shows that on numerous days Mr Adris took money to Elbrook and cash was separately deposited into Elbrook's account, allegedly by the couriers. Mr Adris told us that he did not keep the cash in his premises overnight and therefore took it to Elbrook on the same day he received it, yet how could he receive the cash and take it to Elbrook when the couriers ran too late to get the cash to him? There has been no evidence of other couriers, or the couriers splitting up to deliver the cash.

150. Evidence from Mr Khalid at the hearing suggested that occasions when Elbrook's bank statements show a deposit was made directly into the bank on the same day as evidence shows that Mr Adris took money to Elbrook could be explained by the direct deposit having been made at a bank late in the day, so that it was not credited on the same day but on the following day. There is no evidence to support this assertion and Officer Ginn disputed it. If large amounts of money were being handed over to cashiers in a bank (as claimed) we see no reason for the statement to show a credit on any day other than that day. Mr Khalid's suggestion is also not capable of explaining some of the multiple deposits. For example, there were cash

deposits and deliveries of cash said to have been made by the couriers and by Mr Adris on each weekday in the week of 10 September 2012. Mr Adris was clear that he did not keep cash in his premises overnight so the couriers must have reached him on the Monday. That in turn means the couriers must also have reached him on the Tuesday and the Tuesday direct credit cannot be explained by late bank accounting of a late running courier deposit from the Monday.

151. The evidence from the W7s and cash receipts showing the frequency of Mr Adris taking cash to Elbrook is inconsistent with Gooch's other evidence. The W7s and cash receipts show him travelling to Elbrook on six or seven days of the week, week after week. According to Mr Adris' evidence that would have involved the couriers bringing the cash to him with the same frequency as he travelled on the same day as receipt. It would have involved the couriers almost constantly travelling to and fro' with cash to him and at the same time on various occasions "running late" and making direct deposits – which is clearly not possible.

152. On the basis of the evidence in Officer Ginn's Witness Statement we find that no cash declarations have been provided as would be required under French law for movements of cash exceeding €10,000. We take into account the fact that Hasselt was a Belgian company. Although Mr Brown suggested that it was not necessarily the case that the couriers travelled from France or Europe, Gooch has not responded to Officer Ginn's long standing evidence to show that the money came from anywhere other than France.

153. Mr Adris was told by HMRC, as early as the visits to him when conducting business in Myah, that he should obtain information regarding the method of transportation of cash, but he did not do so and could not explain why he omitted to take that step. Mr Adris made no enquiries about the security of the cash which he says Hasselt paid to him for purchases made under bond in MTM, yet as he now claims to been acting as principal in the transactions he would have been liable to pay Elbrook regardless of what happened to the money from Hasselt. He took no steps to ensure his own security, despite the fact that he could be travelling with up to £400,000 in cash at a time and despite his own evidence about being fearful of holding or carrying cash.

154. Mr Adris' evidence regarding reconciliation of the cash to sales was evasive and vague. When asked a simple question by Mr Carey in cross-examination about what he would do if Gooch had sold £300,000 worth of goods to Hasselt and the couriers had only brought £150,000 in cash, he was unable to provide a coherent answer. According to his evidence, Mr Adris did not know what amount of money he was expecting on any particular day. We find this to be another example of the lack of credibility in Mr Adris' description of the transactions.

155. We therefore find the evidence relied upon by Gooch regarding the payments in cash to be riddled with inconsistencies, to lack clearly relevant supporting evidence and to lack commerciality.

Evidence shown by the transaction documents

156. There are numerous documents which on their face are invoices issued by Gooch to Hasselt for supplies of alcohol. None of them is supported in any way by evidence of supplies made by Elbrook until 21 March 2012.We return to the treatment of the Gooch invoices to Hasselt later in this decision. It rests at the heart of this case. The documents have been challenged as being false by HMRC and our decision on that can only be made after consideration of the evidence overall.

157. The first Elbrook document is dated 21 March 2012 – a release note from Elbrook asking for goods to be transferred to Hasselt. That release note does not identify any account for Hasselt – it just directs transfer to Hasselt, whereas we are told that Hasselt required transfers

to one of four accounts and the purchase order from Gooch which ostensibly relates to the same goods shows an account "AC002".

158. The first Elbrook invoice to Gooch arises on 23 March 2012. There is no reference in that invoice to the goods being in France or under bond. By a box for Gooch's VAT number it states "Applied". No VAT is charged. This format is repeated in the other Elbrook invoices provided as evidence.

159. Based on the unchallenged evidence of Officer Ginn in his Witness Statement we find that:

(1) The sales invoices in the bundle relied on by Gooch for sales to Hasselt show a total of £24,891,828.95 between 3 February 2012 and 23 November 2012;

(2) The purchase invoices in the bundle relied on by Gooch for purchases from Elbrook show a total of £20,719,735.14 between 23 March 2012 and 23 November 2012;

(3) The cash shown by the 298 W7s issued by Elbrook for cash received from Mr Adris totalled £16,401,336.79. The W7s show that Mr Adris took cash to Elbrook on 245 separate occasions during the period of the appeal. The W7s show that cash was taken to Elbrook by Mr Adris on six, or sometimes seven, days per week; significantly more than the 2 or 3 times per week Mr Adris has told HMRC;

(4) The cash shown by Elbrook's bank statements as cash deposits received from Gooch (i.e. those attributed by Gooch to the direct payment by couriers) totalled £11,285,591;

(5) Therefore the total cash identified as relating to Gooch was £27,686,927.79 which is nearly 30% more than the amount indicated by the purchase invoices as being due to Elbrook for the purchases.

160. HMRC has identified that there were numerous occasions when multiple invoices were apparently issued on the same day. For example, the evidence on the face of the documents shows that 11 invoices were issued by Gooch to Hasselt on 27 April 2012 with a combined value in excess of £880,000. This pattern is repeated. Mr Adris could provide no explanation for this practice.

161. There are only a handful of MTM transfer documents. Most of the transfer and release documents for the claimed transactions have not been provided. Most of those which have been provided raise issues in the context of the other evidence in this appeal. For example:

(1) one MTM transfer note dated 30 August 2012 records a transfer from Elbrook to Hasselt of "vins mixes". Unlike other MTM transfer notes included in the evidence no further identification is provided, whereas the invoices issued by Elbrook and Gooch specifically identify the wines. There is no other document provided to show that Elbrook told MTM what wines to transfer to Hasselt account. In addition, it is not clear why the MTM transfer shows the date of 30 August 2012 when the invoices show the date of 31 August 2012. Mr Khalid told us that "an invoice would have followed once the payments were confirmed, and then the bond would give a transfer copy" as we described earlier;

(2) the same issue regarding dates of transactions arises in relation to another MTM transfer dated 22 August 2012, where the corresponding Elbrook and Gooch invoices are dated 24 August 2012;

(3) In another set there is a purchase order dated 20 March 2012 issued by Gooch to Elbrook; an invoice issued by Elbrook to Gooch dated 23 March 2012 and one issued by Gooch to Hasselt on the same date marked with a manuscript note to show paid on 29

March 2012, yet the release note sent by Elbrook to MTM directing transfer to Hasselt and the MTM transfer notes are each dated 21 March 2012. This is all in the context of evidence that credit was not offered, (or according to Mr Adris at the hearing credit was only offered after 3-4 months of trading so not as early as March 2012) yet the transfers are shown to take place before the invoices are issued or payment made.

162. Other examples of inconsistencies in the documentary evidence arise in the context of use of account numbers 1-4 by Gooch and/or Hasselt. Mr Adris' evidence at the hearing was that he was told by Hasselt which account number at MTM should be used for purchases. Mr Khalid also told us that Elbrook would be told the account number and, while it was slightly more inconvenient to deal with four separate accounts, there was no other issue raised for Elbrook. However, this explanation of use of the numbers is not consistently supported by the evidence in the documents. In one of the very few MTM transfer documents, and indeed in one of the very few Elbrook release notes, no account number is stated for Hasselt even though Gooch's purchase order and Elbrook invoice each state "account 2". There are numerous other instances where the Hasselt purchase order either makes no reference to an account, or states "Account?", but the apparently related Gooch invoices state an account number. Clearly, if the evidence that Hasselt split its goods into four accounts at MTM and directed to which account goods should transfer is correct, it would have been particularly important for the MTM document to show an account number and for the purchase orders to have identified the accounts.

163. Remarkably few MTM documents have been provided and yet even this small sample contains numerous inconsistencies with the other evidence provided to us. We therefore conclude that the MTM documents add little support to Gooch's case and indeed, given the inconsistencies, undermine its case.

164. Given the matters identified in connection with the MTM documents we are not satisfied that even the few transfers shown from Elbrook to Hasselt are transfers of the same goods as those identified in the invoices issued by Elbrook to Gooch. There is an entirely plausible explanation for the documents being taken at face value, but not considered to reflect the claimed transactions involving Gooch: Elbrook also traded directly with Hasselt.

165. On the basis of Officer Polkington-Bailey's unchallenged evidence we find that he invoices for the sale of alcohol by Elbrook to Gooch are for items for which there is notable demand in the UK.

Tracing goods found in the UK

166. On the basis of Officer Ginn's unchallenged evidence we find that HMRC needs pallet labels in order to trace goods back to their point of origin and often labels are removed. Therefore the fact that HMRC have not specifically identified smuggled goods in the UK which could be traced back to the transactions involved in this dispute does not in itself have any implication for what did or did not happen in this case.

DISCUSSION

167. We first address points raised in argument which we have dismissed.

168. HMRC have sought to rely on Myah being connected in transactions to companies which have been linked to missing trader fraud, but there is no evidence that Myah was involved in any fraudulent transactions. HMRC has also sought to rely on the removal of Elbrook's Warehouse Keepers and Owners of Warehoused Goods Regulations registration in March 2015, but we are not aware the circumstances involved with that removal and consider it to be irrelevant to this appeal. HMRC have also referred to an arrest of Mr Khalid's brother, but this is wholly irrelevant to our assessment of Mr Khalid and any other evidence in this appeal.

Similarly, HMRC note ongoing appeals in which Elbrook denies liability for alleged fraudulent tax losses, but these appeals have not been concluded and the existence of an appeal is again not relevant to the matters before us.

169. HMRC have relied upon an enquiry showing that MTM was the subject of legal proceedings as a result of smuggling alcohol resulting in two individuals being remanded in custody and charged with conspiracy to defraud. However, there is no evidence to show any link to the matters in this appeal either via MTM itself or the individuals at MTM.

170. Mr Brown referred in his skeleton argument to the lack of evidence from HMRC to show that the Appellant paid for or arranged the transportation of the large amount of goods which would underlie the assessment, or to show that any of the goods has been found to have been smuggled into the UK. However, as submitted by Mr Carey, this incorrectly reverses the burden of proof. In addition, we take into account the evidence of Officer Ginn which explained that those involved in smuggling remove the pallet labels so it is generally impossible to identify specific goods in the way suggested by Mr Brown.

171. The issue in this case is simple to state – did Gooch make taxable supplies in the UK so that it should have been registered for VAT purposes, or did it make supplies outside the UK so that it was not required to be VAT registered? The answer to that question comes down to an assessment of the evidence before us.

172. However, there is a lurking issue in this case which we briefly note.

173. Council Directive 2008/118/EC of 16 December 2008, concerning the general arrangements for excise duty and repealing Directive 92/12/EEC ("the 2008 Directive") provides for bonded warehouses so that "It should be possible for excise goods, prior to their release for consumption, to move within the Community under suspension of excise duty. Such movement should be allowed from a tax warehouse to various destinations, in particular another tax warehouse but also to places equivalent for the purposes of this Directive."

174. Article 4 of the 2008 Directive provides that:

> 7. "duty suspension arrangements" means a tax arrangement applied to the production, processing, holding or movement of excise goods not covered by a customs suspensive procedure or arrangement, excise duty being suspended;
> …
> 11. "tax warehouse" means a place where excise goods are produced, processed, held, received or dispatched under duty suspension arrangements by an authorised warehousekeeper in the course of his business, subject to certain conditions laid down by the competent authorities of the Member State where the tax warehouse is located."

175. The Directive leaves the terms of authorisation of authorised warehouses to each Competent State. Mr Adris told us that he was unable to obtain an account at MTM. Yet he and Gooch wish to rely upon a case in which he was effectively operating as if he had such an account. The possibility and legality in France of him doing so has not been addressed before us. Neither has the position of Elbrook in the context of the claim that it sold to a third party, Gooch, which was not an account holder in MTM. Of course, we recognise that it is possible that in fact any problems arose for Elbrook under the French VAT system when Elbrook sold to Gooch and that such problems would not necessarily prevent Gooch from selling on to Hasselt. However, this tension in the parties' positions was reflected in the evidence of Mr Khalid and was reflected in Ms Berrington's immediate response to the factual scenario put to her, that French duty would have been payable.

176. What was clear from the evidence provided by Mr Adris and Mr Khalid was that the parties had no understanding or intention that Gooch should have any rights of ownership of the goods held in MTM. Gooch had no right to take the goods out of MTM or to direct that they be transferred to any third party account holder at MTM, or another bonded warehouse.

177. However, we do not address any further in this decision whether and to what extent Gooch could be found to have made supplies by reference to a "flash title", or what the courts have described in other contexts as a "scintilla temporis", as we are satisfied that Gooch fails, by a significant margin, to discharge the burden of proof on it to show that the claimed transactions with Hasselt in fact took place for the following reasons.

178. Elbrook's documents were not directly challenged as being in some way false by Mr Carey and we do not make any such finding. While we have reduced the weight given to Mr Khalid's evidence, as explained earlier, that does not mean he has been found to be dishonest. Indeed, no suggestion of dishonesty was put to him and we make no such finding. However, these conclusions are not sufficient to prove Gooch's case. Taken at their highest, the Elbrook invoices, W7s, cash receipts, bank statements and MTM documents show the following:

(1) Gooch was invoiced by Elbrook for purchases of alcohol. The invoices do not show where that alcohol was located and, in particular, do not show that it was located at MTM or otherwise overseas;

(2) Mr Adris took cash to Elbrook on behalf of Gooch;

(3) A few MTM transfer documents show that goods were transferred from Elbrook to Hasselt, but, given the inconsistencies we have identified, we are not satisfied that the MTM transfer documents can be tied to any sale by Gooch to Hasselt;

(4) A few release notes show Elbrook asking for goods to be transferred to Hasselt, but again the inconsistencies identified by us mean that we conclude that the evidence does not show that the release notes relate to any sales by Gooch to Hasselt;

(5) Elbrook received cash deposits into its bank account which it has identified on its bank statements as being attributed to Gooch.

179. These Elbrook documents can be entirely valid and Gooch still be found not to have shown that it supplied goods outside the UK. The Elbrook documents show sales by Elbrook to Gooch and transfers from Elbrook to Hasselt, but as found above, the transfers from Elbrook to Hasselt have not been shown to reflect sales from Gooch to Hasselt rather than from Elbrook directly to Hasselt.

180. Key to Gooch's case are the documents relied upon by Gooch as evidence of its sales to Hasselt; in particular, the invoices which on their face show sales of alcohol by Gooch to Hasselt. HMRC asserted in its Statement of Case that Gooch's case was not credible, the trade between Gooch and Hasselt was a fiction and the documents relied upon by Gooch were not used for a legitimate trade, but for an inward diversion fraud. Mr Carey put to Mr Adris on numerous occasions that in fact Gooch's trading had resulted in supplies in the UK, which Mr Adris repeatedly denied. Mr Carey asked Mr Adris about specific Gooch invoices and put to him that HMRC maintain that the documents are a "smokescreen" and do not reflect what happened. In more than two days of cross examination Mr Carey put most of the disputed evidence to Mr Adris. The allegations being made about the reliability of the documents relied upon by Mr Adris were therefore abundantly clear.

181. The task before us is to consider all of the evidence to determine whether, and to what extent, the documents relied upon by Gooch and clearly challenged by HMRC should be taken at face value. In this regard we identify the following matters, in particular:

(1) The lack of any reasonable explanation for Gooch's role in the claimed purchases from Elbrook and sale to Hasselt, accentuated by the fact that Elbrook and Hasselt also transacted directly with each other in a highly competitive market;

(2) The numerous issues identified with the claimed receipt and deposit of cash said to have come from Hasselt, including the lack of supposedly available evidence in counterfoils and receipts; the numerous locations for deposits; the lack of explanation of how the couriers brought more than £27 million in cash in the period of less than a year from the Belgian company, Hasselt, and evidence from HMRC that they did not travel from Europe; the impossibility of Mr Adris delivering money as claimed as a result of courier deliveries of cash at the same time as the couriers not visiting him but depositing money "late" directly;

(3) The considerable amount of evidence which we have identified should have been available but which has not been provided, including the emails Mr Adris says he has showing transactions with Hasselt, price lists and counterfoils for the claimed deposits by couriers; as well as the failure to explain why key participants such as the couriers did not provide evidence;

(4) The fundamental and persistent inability of Mr Adris to provide a coherent explanation of what Gooch did or why it did it, with reliance upon evidence that Gooch did not and could not have acted as principal at the same time as evidence that it did so act;

(5) The inconsistency in evidence about the order of transactions engaged in by Gooch, Elbrook and Hasselt, including the inconsistent evidence about whether credit was offered. If the documents are taken at face value, some transfers from Elbrook to Hasselt take place prior to any involvement of Gooch;

(6) Our findings regarding the MTM documents and our conclusions that even the few transfers shown from Elbrook to Hasselt have not been shown to be transfers of the same goods as those identified in the invoices issued by Elbrook to Gooch;

(7) The extent to which this case is riddled with inconsistencies, non sequiturs and implausibilities.

182. As a result we are clear that the Gooch invoices to Hasselt should not be taken at face value. Given the evidence overall, we conclude that the Gooch invoices have been produced solely to present a picture which is lacking basis and we find those documents to be false.

183. As explained earlier, the veracity of the Elbrook documents does not in itself mean that Gooch made supplies of goods outside the UK. Gooch has paid Elbrook more than £27.6 million and has therefore obtained that money from some activity. Mr Adris has previous experience selling alcohol in the UK through Myah and the goods are ones for which there is demand here. Given the inadequacies of the evidence before us we are clear that Gooch has not discharged the burden of proof on it to show that the £27.6 million derived from supplies made by it outside the UK. Instead, we conclude that Gooch made taxable supplies in the UK and should therefore have been VAT registered in the period from 12 January 2012 to 24 December 2012.

CONCLUSION

184. As a result of all our findings above, Gooch's appeal is DISMISSED. HMRC's decision of 23 December 2015 that Gooch should have been registered for VAT from 12 January 2012 until 24 December 2012 is confirmed.

185. The appeal of the assessment of output tax of £4,614,648 is struck out. For the avoidance of doubt, even if we were able to entertain that appeal our conclusion would be that the appeal should be dismissed for the same reasons.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

186. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

TRACEY BOWLER
TRIBUNAL JUDGE

RELEASE DATE: 10 MAY 2021