[2021] UKFTT 0461 (TC)

TC 08345

EXCISE DUTY – Assessment to excise duty in respect of irregularity in the movement of duty suspended goods – whether irregularity occurred – if so whether irregularity occurred in the UK – Article 6 and Article 20 Council Directive 92/12/EEC – Regulation 3 Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001- Article 7 and Article 10 Council Directive 2008/118/EC – Regulation 7 and Regulation 80 Excise Goods (Holding, Movement and Duty Point) Regulations 2010 – whether insurance company issuing insurance policy at the request of the consignor is liable for duty in place of the consignor as a person who has provided or arranged for a guarantee – Article 13 and Article 15 Council Directive 92/12/EEC – Regulation 7 Excise Duty Points (Duty Suspended Movement of Excise Goods) Regulations 2001 – Article 18 Council Directive 2008/118/EC – Regulation 9 and Regulation 39 Excise Goods (Holding, Movement and Duty Point) Regulations 2010 – time limit for notification of assessment – Section 12 Finance Act 1994 – whether an assessment to excise duty is only made when it is notified – whether EU principle of legal certainty requires assessment to be notified within a reasonable period of time – ability of appellant to rely on public law principles based on HMRC statements as to time limits

FIRST-TIER TRIBUNAL
TAX CHAMBER

Appeal number: TC/2017/03154

BETWEEN

CANTINA LEVORATO SRL **Appellant**

-and-

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

TRIBUNAL: JUDGE ROBIN VOS

Sitting in public at Taylor House, London on 8-10 November 2021

Kieron Beal QC and David Bedenham, counsel, instructed by Vincent Curley & Co Limited for the Appellant

Sarabjit Singh QC, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs for the Respondents

DECISION

INTRODUCTION

1. The appellant, Cantina Levorato is a producer and exporter of wine based in Dolo, Italy.

2. HMRC have assessed Cantina Levorato to excise duty by way of two assessments dated 26 April 2013 totalling £1,294,028. The assessments relate to 40 duty suspended consignments of wine sold by Cantina Levorato to a UK company, 13 Ten Limited ("13 Ten") between September 2009 and September 2010 which should have arrived at an approved warehouse in Liverpool operated by Plutus (UK) Limited ("Plutus").

3. Cantina Levorato now appeals against those assessments on a number of grounds. The appeal is made outside the statutory time limit but HMRC do not object to the late appeal. To the extent necessary, the Tribunal gives permission for the appeal to be notified to the Tribunal outside the statutory time limit.

4. HMRC accept that they are out of time for assessing the duty relating to the first consignment which reduces their first assessment from £375,610 to £344,310 (a reduction of £31,300). They also accept that the final consignment never arrived in the UK and so they are not able to assess the excise duty in relation to that consignment. This reduces the second assessment from £918,418 to £885,613, a reduction of £32,805.

DUTY SUSPENDED MOVEMENTS OF GOODS

5. Rules apply across the EU to determine when a liability to excise duty arises and which Member State is entitled to levy the duty. During the period relevant to this appeal, the UK was a member of the EU.

6. Wine is of course one of the products which is subject to excise duty. However, the payment of duty can be deferred until the wine is "released for consumption" in a Member State. In the meantime, the goods can be transported between approved tax warehouses operated by an authorised warehouse keeper under what is known as a duty suspension arrangement.

7. Where there is an irregular departure from the duty suspension arrangement, the goods are treated as having been released for consumption, thus triggering a liability to excise duty. The duty is due in the Member State where the irregularity took place or where it was detected; but, if that is not known, the duty is due in the Member State of dispatch.

8. Due to the risk of irregularities in duty suspended movement of goods, a guarantee must be provided by one or more of the authorised warehouse keeper who dispatches the goods, the consignor, the transporter, the consignee or the owner of the goods. The person providing the guarantee is liable for any excise duty arising as a result of an irregularity during a duty suspended movement of goods.

9. The movements of goods in this case covered a period straddling a change in the rules which took effect on 1 April 2010. Prior to that date, the rules were primarily contained in Council Directive 92/12/EEC ("the 1992 Directive") and, in the UK, in the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001/3022 ("the 2001 Regulations"). From 1 April 2010, the rules were set out in Council Directive 2008/118/EC ("the 2008 Directive") and the Excise Goods (Holding, Movement and Duty Point) Regulations 2010/593 ("the 2010 Regulations"). For present purposes, the two regimes are very similar although there are some differences which I shall need to refer to.

10. One of the changes implemented by the change of regime in 2010 was to introduce a computerised system for tracking duty suspended movements of goods known as the Excise Management and Control System ("EMCS"). However, it is common ground that EMCS was

not introduced into the UK until 1 January 2011 which is after the date of the last of the consignments to which the assessments under appeal relate.

11. Instead, the tracking of the consignments took the form of a paper based system. The key documents comprise a consignment note (known as CMR) together with an Accompanying Administrative Document ("AAD"). The AAD consists of four copies. Copy 1 is retained by the consignor. Copy 2 is retained by the consignee on delivery. Copy 3 is signed and stamped by the consignee to confirm delivery and then return to the consignor. Copy 4 is available for endorsement by the Customs authorities in the place where the goods were received, if required. It is agreed that the Customs authorities in the UK did not require Copy 4 of the AAD to be received or endorsed by them. Therefore, the only record of receipt of the goods by the consignee (and therefore the end of the duty suspended movement of goods) was Copy 3 of the AAD.

12. Both parties agree that, by ss 2, 6 and 7 of the European Union (Withdrawal) Act 2018 ("EUWA 2018"), the laws which the UK has made to implement the EU law regime governing excise duty continue to apply as retained EU law. The requirement to construe those laws in conformity with the requirements of the relevant EU directives in accordance with what is generally referred to as the *Marleasing* principle, as well as with other general principles of EU law, also continues to apply: see s 6(3) EUWA 2018.

GROUNDS OF APPEAL

13. Cantina Levorato puts forward five grounds of appeal:

(1) No excise duty was due as there was no irregularity, as evidenced by the fact that Cantina Levorato received receipted copies of part 3 of the AAD.

(2) Any liability to excise duty in the UK is a liability of the guarantor shown in Box 10 of the AAD, Assicurazioni Generali SpA ("Generali"), an Italian insurance company and not of Cantina Levorato.

(3) The assessments are out of time as they were not notified to Cantina Levorato within the relevant time limit.

(4) If there was an irregularity in the movement of the goods, it is deemed to have taken place in Italy and not the UK, so that no excise duty is payable in the UK.

(5) Assessing Cantina Levorato to excise duty would be a breach of the EU principles of proportionality and/or legal certainty. Mr Beal did not however rely on the principle of proportionality in his oral submissions. As far as the principle of legal certainty is concerned, this was relied on principally in relation to the time limit for assessment. I shall therefore deal with it when considering that ground of appeal.

14. In accordance with s 16(5) Finance Act 1994 ("FA 1994") the Tribunal has a full appellate jurisdiction, including power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

15. As far as the burden of proof is concerned, s 16(6) FA 1994 provides that, save for certain matters where HMRC have the burden of proof (which are not relevant in this case), it is for the appellant to show that the grounds on which any appeal is brought have been established. The standard of proof is the normal civil standard, being the balance of probabilities.

16. Although I have found in favour of Cantina Levorato in respect of the third ground of appeal (in conjunction with the fifth ground) which is sufficient to dispose of this appeal, I have nonetheless considered each of the other grounds of appeal in case I am wrong on that point and given that they were fully argued before me.

THE EVIDENCE AND THE BACKGROUND FACTS

17. The evidence consisted of a bundle of documents and correspondence including witness statements provided by Carlo Levorato, the owner and director of Cantina Levorato, his brother Marco Levorato and three HMRC officers, Imran Khan, Laura MacLean and Charlotte Murtagh. Marco Levorato's evidence was short and straightforward and he was not required to attend the hearing to be cross examined. The other four witnesses all gave oral evidence at the hearing.

18. I should record that Carlo Levorato gave evidence with the assistance of an interpreter. Some concerns were expressed about the interpretation of both questions and answers. Although this resulted in cross examination taking longer than might be expected, I am satisfied that the correct interpretation of both questions and answers was eventually conveyed.

19. Clearly significant time has passed since the relevant events took place. The consignments were over ten years ago. HMRC's investigation concluded with the assessments being issued more than eight years ago. Unsurprisingly, there were therefore a number of areas where the witnesses had a hazy recollection of events. In addition, Ms Murtagh had no involvement at the time but was simply giving evidence of the investigations carried out by another HMRC officer, Kevin Daglish based on her review of HMRC's files. She was therefore unable to answer a significant number of the questions put to her by Mr Beal.

20. However, subject to this, I accept that all four witnesses were doing their best to assist the Tribunal in the answers in which they gave to the questions put to them and I have no hesitation in accepting their evidence at face value.

21. There were three key areas where there are factual disputes which I will come to. The first is whether the pre-assessment letters and the notices of assessment sent by HMRC to Cantina Levorato in March and April 2013 reached their destination. The second is whether the various consignments of wine reached their destination, being Plutus' warehouse in Liverpool. The third is whether, if there was an irregularity in relation to the movement of the goods resulting in their failure to arrive at Plutus' warehouse in Liverpool, that irregularity took place in the UK. Subject to these points, the background facts are relatively straightforward and, to the extent relevant, are set out below.

22. Cantina Levorato is a producer of wine based in the town of Dolo which is in the Veneto region in Italy. It exports goods around the world both in the EU and beyond.

23. In August 2009, Cantina Levorato was contacted by a Mr Robert Francis, representing a business known as Liquid Gold. He introduced Cantina Levorato to Mr Ashraf Sharif who visited Cantina Levorato in August 2009. As a result of this, Cantina Levorato agreed to supply consignments of wine to 13 Ten, a company of which Mr Ashraf Sharif's son, Mr Ahrif Sharif was the director.

24. The consignments were to be sent to an approved warehouse operated by Plutus in Liverpool. Transport was arranged and paid for by 13 Ten. The carrier engaged by them was Resped Transport ("Resped") based in Vrtojba in Slovenia.

25. Cantina Levorato's main contact was with Mr Ahrif Sharif's wife, Mrs Saph Sharif. During 2009, most of the consignments were paid for by Mrs Saph Sharif delivering cash to Cantina Levorato in Italy. In 2010, the arrangements changed. Cash was delivered to Cantina Levorato's agent, Euro Wine and Food Direct in the UK which banked the cash and transferred the money to Cantina Levorato in Italy. In each case, payments were made in advance before the goods were shipped.

26. In total, Cantina Levorato sold 43 consignments of wine to 13 Ten between 9 September 2009 and 22 September 2010.

27. It is accepted that consignments 16 and 30 reached their destination at Plutus' warehouse in Liverpool. Consignment 30 was intercepted by Customs officers in Dover. However, the load was allowed to continue on its way.

28. Consignment 42 was intercepted by the UK Border Force at the UK Channel Tunnel control zone at Coquelles in France on 23 September 2010. Although the total number of cases of wine tallied with the invoice provided by Cantina Levorato, there were discrepancies in the number of cases of white wine and red wine compared to the invoice issued by Cantina Levorato. The load, tractor and trailer were all seized but the tractor and trailer were returned to Resped following a payment of £6,561 on 24 January 2011.

29. As a result of the seizure of consignment 42, consignment 43, which was still on its way, was returned to Cantina Levorato and was unloaded at a warehouse used by them in Fontanaviva, Italy.

30. Following the seizure, HMRC started to investigate the consignments sold by Cantina Levorato to 13 Ten. The investigation was led by HMRC officer Kevin Daglish.

31. In January 2011, Mr Daglish made enquiries of the Italian and Slovenian authorities under the EU Mutual Assistant Directive. A response was received from the Slovenian authorities in June 2011 which referred to only three consignments of wine, being consignments 16 and 30 which were delivered to Plutus and consignment 42 which had been seized.

32. No response was received from the Italian authorities until May 2012. This response identified all 43 consignments and enclosed copies of the CMR and AAD documents. This led to a further request by Mr Daglish to the Slovenian authorities who replied on 20 September 2012 with detailed information about the destination of the various loads as well as supporting documents including copies of CMRs, AADs, route maps and drivers' logs.

33. On the same day (20 September 2012), Mr Daglish forwarded the paperwork to HMRC's excise liaison office (at the time, known as the NVC) advising that 40 consignments of wine had failed to arrive at Plutus' warehouse in Liverpool and requesting that assessments be issued for the outstanding excise duty.

34. At some point between then and March 2013, the HMRC officer dealing with the assessments at the NVC, Linda MacLean, made a request to the Italian authorities for information about the guarantor shown in Box 10 of the AADs. This request informed the Italian authorities that HMRC proposed to issue an assessment against the guarantor pursuant to Article 10 of the 2008 Directive.

35. The response from the Italian authorities on 5 March 2013 advised that Cantina Levorato was the principal debtor and that the guarantor was Generali.

36. On 12 March 2013, Ms MacLean sent letters to Cantina Levorato stating HMRC's belief that an irregularity in the movement of the goods had taken place in the UK and inviting Cantina Levorato to provide information or evidence to show that this was not the case. In the absence of any response by 2 April 2013, excise duty assessments would be issued. The letters were addressed to Cantina Levorato in Italy but, due to an oversight, omitted the town "Dolo" and the region "VE".

37. No response to these letters was received and so, on 26 April 2013, Ms MacLean issued assessments to excise duty. There were two assessments: one dealing with the period up to 1 April 2010 when the excise duty regime changed and one relating to loads despatched on or after that date. The first assessment was for a total of £375,610 and the second for £918,418.

38. On 12 July 2013, HMRC issued a "Uniform Instrument Permitting Enforcement" ("UIPE") under the EU directive relating to mutual assistance for the recovery of tax debts (Council Directive 2010/24/EU). This was delivered by hand to Cantina Levorato on 10 September 2013 by the Italian tax authorities under cover of a letter dated 27 August 2013. The UIPE stated that it related to a debt in respect of customs duty on wine for the period 9 September 2009 – 26 April 2013, the amount of the debt (£1,294,028) and HMRC's address and telephone number. The covering letter invited Cantina Levorato to pay the debt within 60 days and gave details of the relevant HMRC bank account to which payment should be made.

39. Cantina Levorato took advice from its Italian lawyer in relation to the UIPE. It was informed that the UIPE was invalid (and therefore of no effect) as the correct procedures had not been followed. As a result of this, it took no action.

40. There is no evidence that anything further happened until June 2016 when the Italian tax authorities sent a notice to Cantina Levorato requesting payment of the outstanding customs duty plus interest. Despite attempts to arrange a meeting with the Italian tax authorities, enforcement action was taken in November 2016. At a meeting on 6 December 2016, the Italian tax authorities accepted that the enforcement action was invalid and formally withdrew the enforcement proceedings on 19 December 2016.

41. Meanwhile, on 9 December 2016, Eversheds LLP, instructed by Cantina Levorato, wrote to HMRC requesting a review of their decision to demand payment of the excise duty. This letter also asked for copies of the assessments.

42. HMRC (Ms MacLean) responded on 15 March 2017 refusing the request for a review, principally on the basis that Cantina Levorato had ample opportunity to ask for a review after it received the letter from the Italian tax authorities dated 27 August 2013 enclosing the UIPE. HMRC did however enclose copies of the pre-assessment letters dated 12 March 2013, the assessment letters dated 26 April 2013 and the 40 AADs on which the assessments were based.

43. Cantina Levorato lodged its appeal with the Tribunal on 12 April 2017. HMRC initially objected to the late appeal but, having seen Carlo Levorato's first witness statement and Marco Levorato's witness statement which, amongst other things, stated that the pre-assessment letters and the notices of assessment had not been received, HMRC withdrew their objection to the late appeal.

44. With that background in mind, I will now consider each of the grounds of appeal.

GROUND 1 – NO IRREGULARITY IN THE MOVEMENTS

Legal principles

45. A duty suspended movement of goods comes to an end when the goods have been received by the consignee (in this case Plutus) which has to be proved by the delivery of the receipted copy 3 of the AAD to the consignor (see Article 19 of the 1992 Directive and Article 20 of the 2008 Directive – the continued application in the UK of the procedure set out in the 1992 Directive until 1 January 2011 is provided for by a combination of Regulation 14 of the Excise Goods (Accompanying Documents) Regulations 2002/501, Note 4(c) in paragraph 1 of Schedule 3 to the 2010 regulations and paragraph 52 of the 2010 regulations).

46. The question therefore is whether Plutus did in fact receive the 38 consignments in question (being the 43 consignments other than the first consignment (where HMRC accept that the assessment is out of time), consignments 16 and 30 (which HMRC accept were received), consignment 42 (which was seized) and consignment 43 (which did not enter the UK)).

Were the consignments received by Plutus?

47. Based on the evidence provided, I am satisfied on the balance of probabilities that the consignments in question were not received by Plutus at its warehouse in Liverpool.

48. Mr Beal's starting point is that Cantina Levorato received the receipted copy 3 of the AAD for each of the consignments. On this basis he says that the evidential burden shifts to HMRC to show that the consignments were not received by Plutus. He accepts however that, if HMRC can show that the receipt on the AADs has been forged, this would indicate that the consignments were not in fact received by Plutus.

49. The evidence from Mr Khan is that he accompanied Mr Daglish to a meeting at Plutus' warehouse in Liverpool on 29 June 2012. The meeting was with Mr Michael Norgate who was in charge of the facility. Mr Norgate was shown the 43 AADs for each of the consignments and confirmed that the only consignments which had been received by Plutus were consignment 16 and consignment 30. He wrote out and signed a statement to this effect at the meeting. He observed that the stamps on a number of AADs were not genuine. He applied the genuine stamp to the statement which he wrote out at the meeting.

50. Looking through copy 3 of the AADs which are exhibited to Mr Khan's witness statement, it is apparent that the only AAD which clearly bears the genuine stamp is the one in relation to consignment 30. There is no visible stamp in relation to consignment 16. All of the rest of the AADs are stamped with a different stamp.

51. The strong inference from this is that the loads where the AAD bears the different stamp were not received by Plutus in Liverpool but were instead received elsewhere and a counterfeit stamp applied to purportedly evidence receipt of the goods by Plutus before copy 3 of the AAD was then return to Cantina Levorato.

52. This conclusion is supported by the answers given to HMRC in response to their enquiries following the seizure of consignment 42, in late 2010 and early 2011. In September 2010, Plutus stated that it had received two loads for 13 Ten. Similarly, at a meeting with HMRC on 1 October 2010, Mr Ahrif Sharif, the director of 13 Ten, stated that there had only been two previous loads which had been delivered to Plutus. This is also consistent with a fax sent by Resped to the Border Force on 7 October 2010 which again referred to only two previous loads delivered to Liverpool.

53. It seems likely that there has been some collusion between 13 Ten and Resped since they both claimed that there had only ever been two previous loads whereas, it is now clear that there were 41 consignments prior to the one which was seized. However, the fact that both of them were only prepared to admit to two previous loads strongly suggests that these were the only loads which were in fact delivered to Plutus.

54. Mr Beal submits that what Mr Norgate of Plutus is reported to have said should be treated with some caution given that he has not himself directly provided any evidence and has not been cross examined. He also points out that Mr Norgate has an incentive to deny having received any of the other loads given that Plutus could be liable for the excise duty if it were involved in any wrongdoing. Whilst I accept that the weight which should be placed on what Mr Norgate has said is not as great as might be the case if he had given evidence himself, it certainly cannot be discounted. It is consistent with the other evidence and what was said by Plutus in 2010 is consistent with what was said in 2012.

55. The only evidence which might suggest that more than two of the consignments were delivered to Plutus in Liverpool is that provided by the response of the Customs authorities in Slovenia to the second request for information made by Mr Daglish in 2012. That response indicated that eight consignments had been delivered to Plutus in Liverpool. Mr Beal suggests

that there is no reason for Resped to do anything other than tell the truth at this stage given that it had accepted that the vast majority of the consignments were not delivered to Plutus. However, Mr Beal also accepted that the documents provided by Resped were confusing and that what they have said should be treated with caution. I have no doubt that this is correct.

56. For example, based on the information provided by Resped, the Slovenian authorities identify consignment 30 as having being delivered to an address in Manchester whereas all parties (including Resped in 2010) accept that this consignment was delivered to Plutus in Liverpool. The driver's log and the route map show stops in both Manchester and Liverpool. In my view, the inference to be drawn from this is that Resped had originally been due to unload the consignment in Manchester but, as a result of it having been stopped at Dover, it was decided that the load should in fact be delivered to Plutus in Liverpool.

57. Similarly, consignment 43 is identified by the Slovenian authorities as having been delivered to an address in Manchester, whilst it is clear from the other documents they have provided that the load did not reach the UK and instead was unloaded at Fontanaviva in Italy.

58. When the detailed records provided by Resped in relation to the other consignments said to have been delivered to Plutus in Liverpool are examined, it is apparent that, with one exception, the loads were delivered to Manchester and not to Liverpool. The exception is load 17 which, based on the driver's log and Resped's invoice could have been delivered either to Manchester or Liverpool. However, it appears that consignment 16 (which is accepted as having been delivered to Liverpool) travelled on the same vehicle as consignment 17. It would therefore appear that the explanation for this is that load 16 was delivered in Liverpool and load 17 was delivered in Manchester.

59. Based on all of this evidence, the summary provided by the Slovenian authorities cannot in my view be relied on as it is inconsistent with the underlying evidence which they have provided. An examination of that evidence supports the conclusion that the consignments in question were not delivered to Plutus in Liverpool.

60. I am therefore satisfied that none of the consignments other than loads 16 and 30 were received by Plutus in Liverpool and that there was therefore an irregularity in respect of each of those movements. I will consider separately when I come to Cantina Levorato's fourth ground of appeal whether those irregularities occurred in the UK, thus giving rise to a liability to excise duty in the UK.

Ground 2 – Whether any liability to UK excise duty is that of Generali as guarantor and not Cantina Levorato

61. As I have already explained, where there is a duty suspended movement of goods, a guarantee is normally required for the payment of any excise duty should an irregularity occur. The guarantor is generally liable for any duty. I set out below the provisions which make this clear in respect of movements taking place prior to 1 April 2010.

62. Article 20(1) of the 1992 Directive provides as follows:

> "Where an irregularity or offence has been committed in the course of a movement involving the chargeability of excise duty, the excise duty shall be due in the Member State where the offence or irregularity was committed from the natural or legal person who guaranteed payment of the excise duties in accordance with Article 15(3) …"

63. Article 15(3) of the 1992 Directive requires that:

> "The risks inherent in intra-Community movement shall be covered by the guarantee provided by the authorised warehouse keeper of dispatch,

> as provided for in Article 13, or if need be, by a guarantee jointly and severally binding both the consignor and the transporter. If appropriate, Member States may require the consignee to provide a guarantee."

64. Article 13 in turn requires an authorised warehouse keeper to:-

> "Provide … a compulsory guarantee to cover movement, the conditions for which shall be set by the tax authorities of the Member States where the tax warehouse is authorised."

65. Regulation 7 of the 2001 Regulations deals with liability for excise duty. It provides that:-

> "… the person liable to pay the excise duty on the occurrence of that excise duty point shall be the person shown as the consignor on the accompanying administrative document or, if someone other than the consignor is shown in box 10 of that document as having arranged for the guarantee, that other person."

66. For the purposes of the 2001 Regulations, "guarantee" is defined by reference to Article 15(3) of the 1992 Directive.

67. The provisions which apply on and after 1 April 2010 are slightly different as there is no express reference to box 10 of the AAD.

68. Article 8(1)(a)(ii) of the 2008 Directive states that the people who are liable for any excise duty resulting from an irregularity during a movement of duty-suspended goods are the authorised warehouse keeper, the registered consignor or any other person who guaranteed the payment in accordance with Article 18 of that Directive as well as any other person who knowingly participated in the irregularity.

69. Article 18 in turn requires the risks inherent in a duty-suspended movement of goods to be covered by a guarantee provided by the authorised warehouse keeper of dispatch, the registered consignor, the transporter, the owner of the goods or the consignee.

70. Regulation 9 of the 2010 Regulations contains the UK domestic provisions as to liability for excise duty where there has been an irregularity in the movement of the goods as follows:

> "9.
>
> (1) The person liable to pay the duty when excise goods are released for consumption by virtue of an irregularity in the course of a movement of the goods under a duty suspension arrangement which occurs, or is deemed to occur, in the United Kingdom is –
>
> (a) In a case where a guarantee was required in accordance with Regulation 39, the person who provided the guarantee;
>
> (b) In a case where no guarantee was required – (i) the authorised warehouse keeper of dispatch (where the excise goods were dispatched from a tax warehouse in the United Kingdom); or (ii) the UK registered consignor …
>
> (2) Any other person who participated in the irregularity and who was aware, or should reasonably have been aware, that it was an irregularity, is jointly and severally liable to pay the duty with the persons specified in paragraph (1)."

71. Regulation 39 of the 2010 Regulations broadly follows Article 18 of the Directive. Except for movements between tax warehouses which the Commissioners specify in a notice (which is not relevant in this case), a guarantee must be provided by the authorised warehouse keeper of dispatch, the registered consignor or, if permitted by the Commissioners, the transporter, owner or consignee of the goods.

72. It is therefore apparent from these provisions that there is a limited class of people who are able to provide a guarantee. This was noted by the VAT and Duties Tribunal in *Anglo Overseas Limited v HMRC* (Decision number E01090 – Manchester – 27 February 2008) in which the Tribunal stated at [88] that:

> "I should, finally, deal with the use by Regulation 7 of [the 2001 Regulations] of the words … 'having arranged for the guarantee'. At first sight that phrase also suggests a third party guarantee. But if I am right in my interpretation of the Directive, what is meant is the person who has 'provided' a guarantee, by himself standing as guarantor. Box 10 of an AAD requires the insertion, if relevant, of the name of a guarantor if that is some person other than the dispatching warehouse keeper. The guarantor of all the relevant consignments is identified on the corresponding AADs as AOL, and not Hermes. Article 13 of the Directive permits the owner or transporter of goods to act as guarantor, and enables fiscal authorities to require a consignee to do so, but the class of possible guarantors is otherwise closed."

73. In *Anglo*, AOL arranged for the transport of goods. It was required to provide a guarantee. It arranged for a finance company, Hermes to give a guarantee of £100,000. The question was not whether AOL (as opposed to Hermes) was liable for the excise duty (it was accepted that AOL was liable and, indeed, its name was inserted in box 10 of the AAD) but instead was whether its liability was limited by reference to the £100,000 guarantee. The conclusion at [82] was that whoever is liable for the excise duty (whether that be the authorised warehouse keeper of dispatch or some other person) is liable for the whole amount of the duty. Any liability is not limited by the amount of any third party guarantee.

74. The Tribunal went on to explain at [83] that:

> "It is, I think, the use of the phrase 'provide a guarantee' which has led to the confusion. … but what is intended, in my judgment, is that the warehouse keeper is expected to guarantee the duty. … what the Directive does not do, in my judgment, is allow for the warehouse keeper (or other person assuming liability) to provide a third party 'guarantee', given (as in this case) by an institution such as an insurance company, to replace and, as it is suggested in this case, limit his own liabilities. There is nothing in the Directive or in [the 2001 Regulations] which, in my judgment, allows a guarantor to limit his liability, or which permits the fiscal authority to accept the guarantee for anything less than the full amount of the duty."

75. I am in full agreement with the Tribunal in *Anglo*. For the purposes of the relevant Directives and Regulations, the guarantor must be one of the people listed – normally the warehouse keeper of dispatch or the consignor but possibly also the transporter/carrier, the owner or the consignee. The guarantor may be required to provide security for its obligations under the guarantee and, to that end, may arrange for a finance or insurance company, such as Hermes in the *Anglo* case or Generali in this case, to issue a guarantee. That does not however

mean that whoever has given the security is a guarantor for the purposes of the Directives and the Regulations.

76. This conclusion is supported by the use of the phrase "arranged for the guarantee" in Regulation 7 of the 2001 Regulations. It is clear that, in *Anglo*, AOL arranged for a guarantee to be given by Hermes and, in this case, Cantina Levorato arranged for Generali to give a guarantee.

77. It is also supported by the notes to box 10 of the AAD which are annexed to Commission Regulation (EEC) 2719/92 which instruct the party completing the form to:

> "Identify the party or parties responsible for arranging the guarantee. Only 'consignor', 'transporter' or 'consignee' need to be entered, as appropriate."

78. Clearly a finance or insurance company providing security for a guarantee (even though that security may itself take the form of a guarantee) does not fall within any of those categories and it cannot therefore have been intended that such a person could be a guarantor for the purposes of the relevant Directives and Regulations.

79. Mr Beal places significant reliance on the fact that Regulation 7 of the 2001 Regulations clearly imposes liability on the person named in box 10 of the AAD. In support of this, he refers to the decision of the Upper Tribunal in *Butler Ship Stores Limited v HMRC* [2013] UKUT 564 (TCC) where, having reviewed the 2001 Regulations, the Tribunal concludes at [24] that:

> "The effect of these various Regulations, for present purposes, is that they make it clear that the warehouse keeper is the consignor for the purposes of the AAD. In terms of Reg 7, therefore, the warehouse keeper, as consignor, is the person liable to pay the excise duty in circumstances where the goods are lost or stolen in transit, unless he has procured that someone else has agreed to arrange the guarantee and is shown in box 10 of the AAD as having arranged for the guarantee."

80. In essence, Mr Beal's submission is that Generali "arranged for" the guarantee by issuing a guarantee and is therefore liable as the person named in box 10 of the AADs. He also notes that the Italian customs authorities apparently accepted this guarantee.

81. However, for the reasons set out above, I cannot accept this submission. It is crystal clear both from the Directives and from the Regulations that a guarantee may only be given by a limited class of persons which does not include an insurance company which otherwise has nothing to do with the movement of goods. In this case, the guarantee has been given by Cantina Levorato as the warehouse keeper of dispatch. As security for that guarantee, it has arranged for Generali to itself issue a limited form of guarantee.

82. The fact that the guarantee issued by Generali is only security for Cantina Levorato's own liability is also apparent from the terms of the guarantee itself. Under Article 1, Generali only becomes liable if Cantina Levorato does not meet its own obligation to pay the excise duty. It is therefore clear that Cantina Levorato has the primary liability to pay the excise duty whereas, if Generali were a "guarantor" for the purposes of the Directives and Regulations, it would itself be primarily liable for the excise duty.

83. In addition, Generali's liability is limited to €100,000. In this case, the assessments total approximately €1.5m. If Generali were the guarantor for the purposes of the Directives and the Regulations, this begs the question as to who (if anybody) would be liable to pay the remaining €1.4m. This again strongly indicates that a finance company who has given a limited

guarantee is not intended to be a guarantor for the purposes of the Directives and the Regulations and that the guarantor must instead be one of the people listed in those Directives and Regulations.

84. It follows from this that Generali has been named incorrectly in box 10 of the various AADs. I agree with Mr Singh that, in these circumstances, it should simply be ignored on the basis that Generali did not provide or arrange for the guarantee. Instead, the liability falls on Cantina Levorato either on the basis that it is the consignor or that it is the person who has provided or arranged for the guarantee and should therefore have been named in box 10 of the AAD, had it been completed correctly.

85. For completeness, I should mention that Mr Beal submitted that, based on the principle set out by the Court of Appeal in *HMRC v Ampleaward Limited* [2021] EWCA Civ 1459, it is not possible to "read down" the words in Regulation 7 of the 2001 Regulations so that it is interpreted in conformity with the 1992 Directive. However, as I hope I have made clear, Regulation 7 is, in my view, consistent with the 1992 Directive. Although Generali is named in box 10 of the AAD, it is not the person who has "arranged for" the guarantee and is not therefore liable for the excise duty in place of Cantina Levorato as a result of Regulation 7.

86. I accept that this involves interpreting Regulation 7 as only displacing the liability of the consignor if the person shown in box 10 of the AAD is in fact the person who has arranged for the guarantee but it cannot in my view have been Parliament's intention that a person might be fixed with liability (nor that the consignor should be able to avoid liability) simply because box 10 incorrectly names a person who is not in fact the person who has arranged the guarantee. Such an interpretation would make no sense.

87. It is not therefore necessary to apply any principle of "reading down" to ensure that Regulation 7 is in conformity with EU law. However, if that were necessary or appropriate, this is clearly not a situation where Regulation 7 is incapable of bearing the meaning which I have concluded it has.

GROUND 3 – TIME LIMIT FOR ASSESSMENT AND NOTIFICATION

88. There are a number of aspects to Cantina Levorato's case in relation to this ground of appeal.

89. Cantina Levorato's primary position is that the making of the assessment and the notification of the assessment are part of a single process which must be completed within the statutory time limit and that, in this context, there is no notification unless the notice of assessment is received. It says that the notices of assessment were not received until March 2017, well beyond the relevant time limit.

90. Alternatively, if the making of the assessment and notification of the assessment are two different steps, with the time limit only applying to the making of the assessment, Cantina Levorato argues that, based on the EU principle of legal certainty, notification must take place within a reasonable time of making the assessment.

91. Finally, Cantina Levorato seeks to rely on a public law argument based on HMRC's published practice of calculating compliance with assessment time limits for excise duty and VAT by reference not to the making of the assessment but the notification of the assessment. This gives rise to the additional question as to whether the Tribunal can consider a public law argument along these lines.

Legal principles – time limits

92. Section 12 FA 94 deals with assessments to excise duty. To the extent relevant, this provides as follows:-

> **"12 Assessments to excise duty**
>
> …
>
> (1A) Subject to sub-section (4) below, where it appears to the Commissioners–
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
>
> (b) that the amount due can be ascertained by the Commissioners,
>
> the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.
>
> …
>
> (3) Where an amount has been assessed as due from any person and notified in accordance with this section, it shall, subject to any appeal under section 16 below, be deemed to be an amount of the duty in question due from that person and may be recovered accordingly…
>
> (4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say –
>
> (a) subject to sub-section (5) below, the end of the period of four years beginning with the time when his liability to the duty arose; and
>
> (b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;"

93. Section 12(1A) draws a clear distinction between assessing the amount of duty which is due and notifying that amount to the person who is liable. This distinction is maintained in s 12(3) so that enforcement action can only be taken once the amount has been both assessed and notified.

94. The time limits in s 12(4) however only apply to the assessment itself. There is no mention in s 12(4) of any time limit for notifying the amount which has been assessed to the person who is liable.

95. There are numerous authorities which have accepted this distinction. Mr Singh for example referred to the decision of the Court of Appeal in *Courts Plc v HMRC* [2004] EWCA Civ 1527, a case dealing with VAT. Section 73 Value Added Tax Act 1994 ("VATA") contains assessing provisions which are broadly similar to the excise duty provisions in s 12 FA 1994 (see s 73(1), (6) and (9) VATA).

96. The issues in *Courts* were different to those which are relevant in this case but, in the course of his discussion and review of the authorities, Parker LJ considered it quite clear that the making of the assessment and the notification of the assessment were two different matters and that the relevant time limits only applied to the making of the assessment, there being no time limit in relation to the notification. He observed at [106] that:

> "The statutory requirement for notification of an assessment to the taxpayer demonstrates that in enacting section 73 Parliament regarded the process of making the assessment itself as an internal matter for the Commissioners. However, given that the time limits in section 73(6) apply to the making of an assessment, as opposed to the notification of

> the assessment, it is clearly important that the Commissioners' internal processes and procedures in relation to the making of assessments should, so far as practicable, be standardised;… The absence of any statutory time limit within which an assessment, once made, must be notified to the taxpayer means that, in theory at least, it is open to the Commissioners to delay notification for some considerable time (see Lawrence Collins J's reference in para 19 of his judgment (quoted in para 43 above) to the observation of May LJ in *House (t/a P&J Autos) v Customs & Excise Commrs*.). However, it is clearly undesirable that that should occur, and the Commissioners' policy of not relying on any earlier date for the making of an assessment than the date on which the assessment was notified to the taxpayer ensures that no unfairness will be caused to the taxpayer in this respect."

97. A similar approach has been taken in relation to income tax (see the decision of the Court of Appeal in *Honig v Sarsfield* [1986] STC 246 at [249c and 250a]). The decision in *Honig* was (reluctantly) followed by the First-tier Tribunal in *Cirko v HMRC* [2019] UKFTT 0482 (TC), a case dealing with excise duty where the notice of assessment was not received by the appellant due to a defective address which was used by HMRC. In that case, it is not clear that Mr Cirko ever received a valid notification of the amount assessed. However, the Tribunal appears to have proceeded on the basis that Mr Cirko was notified of the amount approximately two years after the assessment was made, which was outside the statutory time limit for making the assessment. The Tribunal upheld the assessment, despite the delay in Mr Cirko receiving notification of the amount due, concluding at [50] that:

> "The delay in Mr Cirko receiving notification [of the assessment] has no bearing on the validity of that assessment or on the duty having become due."

98. The distinction between the making of an assessment and the notification of the assessment was also followed by the First-tier Tribunal in *Kothari v HMRC* [2019] UKFTT 0423 (TC) which concerned Stamp Duty Land Tax. The assessment and notification provisions relating to Stamp Duty Land Tax closely followed those in the Taxes Management Act relating to income tax. The Tribunal's conclusion at [56] was that:

> "…only the making of the assessment must be within the time limits. While issue and service of the assessment is a part of the procedure of assessment, they can occur at a point in time after the last date for the making of an assessment."

99. Mr Beal submits that the position is different in relation to excise duty and that the reference in s 12(4) FA 1994 to "an assessment" refers to the whole process of making the assessment, including notification of the amount to the person liable. He suggested that the previous authorities should not be followed on the basis that they deal with different taxes and, in some of those cases, the relevant issues did not relate to the time limit itself.

100. I cannot, however, accept this submission. It is quite clear from the wording of s 12 FA 1994 that there is a distinction between the assessment of duty on the one hand and the notification of the amount of the duty to the person who is liable on the other. Section 12(3) specifically provides that the duty is only deemed to be due (and can therefore be enforced) once it has been both assessed and notified. However, s 12(4) FA 1994 is equally clear that the time limits only apply to the assessment of the amount of the duty. Had Parliament intended the time limits to apply not only to the making of the assessment but also to the notification of

the assessment, it is clear that they would have specified this in s 12(4) just as they have done in s 12(3).

101. This conclusion is of course consistent with the decision of the Court of Appeal in *Court*s which, although relating to VAT and therefore the interpretation of different legislation, is highly persuasive given that there is no significant difference in the relevant provisions of s 73 VATA compared to s 12 FA 1994.

102. Although there is no specific statutory time limit for notifying the amount of excise duty to the person who is liable for that duty, the next question which arises is whether there is nonetheless any restriction on the time available to HMRC to make the notification. In this context, Mr Beal refers to the decision of the First-tier Tribunal in *Kothari*. In that case, the Tribunal found that the notices of assessment had never originally been sent by HMRC. The appellants only received the notifications when copies were provided some three years later. Having reviewed the authorities, the Tribunal concluded at [85] as follows:

> "We think that the provisions on service of both tax and VAT assessments were clearly intended to protect taxpayers and they should be interpreted in such a way to give them effect. If assessments can be made without any notification to the taxpayer for years, that makes the protection of the time limit on assessments illusory. It seems to us that although service of the assessments does not have to take place at the time by which the assessment must be made, nevertheless, service must be proximate to the making of the assessment."

103. The Tribunal in *Kothari* also referred to the decision of the High Court in *Grunwick Processing Laboratories Limited v HMRC* [1986] STC 441, a case relating to VAT. No notification of the assessment had been given to the taxpayer. However, it had been given to its solicitor and the appellant had received the notification from the solicitor. It appears that formal notification was given to the taxpayer at the time of the hearing. The judge agreed that the assessment was unenforceable until proper notification had been given but considered that "the point has very little, if any, merit since the taxpayer company plainly got the assessment through their own solicitors". He accepted that the assessment became enforceable once the taxpayer had received the formal notification.

104. The Tribunal in *Kothari* distinguished *Grunwick* on the basis that, in that case, the taxpayer clearly did receive the notification promptly, albeit via its solicitors rather than direct from HMRC, stating at [86] that:

> "We do not see *Grunwick* as being authority for the proposition that a failure to issue and/or serve an assessment can be corrected at any point in time: *Grunwick* was a case where the taxpayer was effectively served shortly after the assessment was issued."

105. Cantina Levorato also rely on the EU principle of legal certainty. Mr Beal refers in particular to the decision of the Supreme Court in *FMX Limited v HMRC* [2020] UKSC 1. In that case, FMX had imported garlic into the UK which was said to be from Cambodia but was in fact from China. This resulted in a liability to anti-dumping duty. Article 221 of the EU Customs Code required the amount of duty to be communicated to the debtor. The normal time limit for communicating the debt was three years. However, as the acts in question gave rise to the possibility of criminal proceedings, the three year time limit was disapplied. Lord Bridge (with whom three of the four other Supreme Court Judges agreed) decided that, despite the absence of any time limit for notifying the debt, the EU principle of legal certainty required that it should be communicated within a reasonable time.

106. Lord Bridge referred at [16] to the description of the principle of legal certainty by Lord Sumption in *Test Claimants in the FII Group Litigation v HMRC* [2012] 2 AC 337 [t [146] as being a principle:

> "which lies at the heart of the EU legal order and entails (among other things) that those subject to EU law should be able clearly to ascertain their rights and obligations."

107. In relation to tax matters specifically, Lord Sumption went on at [149] to observe that:

> "Not only is limitation a feature of every national legal system of the EU, but the recognition of national rules of limitation as both necessary and desirable is treated as part of the principle of legal certainty in EU law. In *Rewe 1* [*Rewe –Zentralfinanz eG v Lanwirtschaftskammer für das Saarland* (33/76)] [1976] ECR 1989, one of the first cases to come before the Court of Justice about the application of limitation periods to claims to enforce directly effective rights in the area of tax, the court observed, at para 5, that 'the laying down of such time limits with regard to actions of a fiscal nature is an application of the fundamental principle of legal certainty protecting both the taxpayer and the administration concerned.'"

108. It is clear from this that the principle of legal certainty requires there to be some restriction on the ability of HMRC to give notice of the amount assessed where the legislation does not itself impose a time limit. As Lord Bridge observed at [45] in *FMX*:

> "Since the principle of legal certainty is one of those fundamental principles of general application in EU law I can see no good reason why it should not be generally applicable to any lacuna constituted by the absence of a sufficient time limit in relevant provisions in force, whether that is attributable to a failure by EU legislators to provide one (as in the discrimination cases) or to what I regard as a failure by the UK to provide one in the context of the Customs Code…"

109. Lord Bridge goes on to confirm at [46] that:

> "EU law has its own way of dealing with the need to avoid communication of the debt being delayed to an extent which undermines the principle of legal certainty, by the imposition of the requirement that it be made within a reasonable time…"

110. Mr Singh did not seek to argue against the proposition explained in *Kothari* that there must be some proximity or nexus between the making of the assessment and the notification or that, based on the EU principle of legal certainty, notification must take place within a reasonable time after the duty is assessed. His submissions instead focussed on notification have been made when the assessments were sent.

111. In my view, he was right not to do so. Following the decision of the Supreme Court in *FMX*, there seems little doubt that, as a matter of EU law, although there is no specific time limit contained in s 12 FA 1994 for notifying the assessment, legal certainty requires notification to be made within a reasonable time so that, as Lord Sumption said, those subject to EU law are able clearly to ascertain their rights and obligations.

112. Although EU rights were not relevant in *Kothari*, the effect of the conclusion reached by the Tribunal is much the same as the EU principle of legal certainty, requiring, as it does, there to be some proximity or nexus between the making of the assessment and the notification.

113. As has been pointed out in a number of cases (including by the Court of Appeal in *Courts* and in *House*), it cannot have been intended that HMRC could make an assessment, put it in a drawer or forget about it and then notify the assessment to the person liable many years later. Section 12(1A) requires HMRC to assess the duty and to notify that amount to the person liable (or to their representative). As the Tribunal in *Kothari* pointed out at [83], albeit in the context of different legislation, this makes it clear that, although separate steps, they are part of a single assessment process.

114. It follows from this that there must be some proximity or nexus between the two steps even though there is no strict deadline for the notification to take place. The EU principle of legal certainty reflects this in a different way by requiring the notification to take place within a reasonable time after the assessment is made, thus providing the necessary proximity or nexus. Of course, what will be a reasonable time or what will provide sufficient proximity or nexus in any given case will depend on the facts.

Legal principles – notification

115. The next question is whether s 12 FA 1994 requires the notification to be received by the person to whom it is sent or whether it is enough that it is dispatched. Mr Beal submits on behalf of Cantina Levorato that, in the absence of any specific rules governing notification in Finance Act 1994 or in the Customs & Excise Management Act 1979, normal principles should apply and that such principles require a notification to be received. In support of this, he refers to the decision of the Upper Tribunal in *HMRC v AG Villodre SL* [2016] UKUT 166 (TCC).

116. *Villodre* was another case involving the import of garlic and the requirement for the anti-dumping duty to be "communicated" to the debtor. It was common ground that the UK had not put in place any specific requirements or procedures for communicating the liability to the debtor. The Upper Tribunal therefore approached this question (see paragraph [35]) on the basis of general principles of English law. However, it did so against the background of comments made in two decisions of the European Court of Justice (*Belgische Staat v Molenbergnati NV* (Case C-201/04) and *Belgische Staat v Direct Parcel Distribution Belgium NV* (Case C-264/08)) that any general procedural rules of the relevant Member State must ensure that the debtor receives adequate information so as to enable him, with the full knowledge of the facts, to defend his rights.

117. On this basis, the Upper Tribunal concluded at [37] that "the concept of communication requires the relevant message to get through to the debtor". A document which is sent in the post to a debtor but which is lost in the post and never received by the debtor was not, in their view, communicated to the debtor.

118. *Villodre* was followed by the Upper Tribunal in *HMRC v Sharya UK Limited* [2019] UKUT 0143 (TCC). That case also dealt with the same provision of the EU Customs Code as *Villodre* (requiring a debt to be "communicated" to the debtor) but also dealt with its replacement, the Uniform Customs Code which refers to the debt being "notified" to the debtor. It was accepted by the Tribunal that there was no practical difference between the concept of communication and notification.

119. The Upper Tribunal in *Sharya* approved the reasoning of the Upper Tribunal in *Villodre*. The result was however different as, although the notification had not been received by any individual representing the company, it was established that it had been sent to, and arrived at, the address which had been given by the company to HMRC. It had therefore been received by the company even though it had not been read by any individual on behalf of the company. However, some of the notices, which were sent to an old address after the company had informed HMRC of a change of address, were held not to have been valid notifications or communications as they had not been received by the company.

120. Mr Singh sought to distinguish these cases on the basis that they deal with a different sort of duty, that there was a time limit for making the notification and that, unlike s 12 FA 1994, the relevant provisions did not state who had to provide the notification. Mr Singh also makes the point that it is clear from *Sharya* that notification can take place even though the communication has not been read by any individual representing a company. In addition, Mr Singh suggests that, it is in any event sufficient to show that a notification has been sent to the right address, as is made clear in the context of VAT by s 98 VATA. If this were not the case, he points out that would be uncertainty as to whether notification had taken place as well as the ability for taxpayers simply to claim that any notification had not been received.

121. Despite this, my conclusion is that there is only a valid notification for the purposes of s 12 FA 1994 if the communication has been received by the person to whom it is sent. That does not mean that it has to be read by the recipient (as is made clear by *Sharya*) but it must have been sent to the correct address and it must have arrived at that address.

122. Whilst I am not bound by the decisions of the Upper Tribunal in *Villodre* and *Sharya* (given that they do not deal with the same statutory provision), it must in my view be right that, where no specific provision is made about the circumstances in which a decision is to be treated as communicated or notified to a taxpayer, it will only have been communicated or notified if it is actually received. That is the natural meaning of the words.

123. That this is right is supported by the need for s 98 VATA which specifically permits a notification to be given by sending it by post to a particular address. The same is true for direct taxes where a similar provision is included in s 115 Taxes Management Act 1970. If notification could be made simply by sending the notice, even if it was shown not to have been received, s 98 VATA and s 115 TMA would be unnecessary. For whatever reason, Parliament has chosen not to include any similar provision in FA 1994 or in the Customs & Excise Management Act 1979.

124. This interpretation is also reinforced by the decisions of the ECJ referred to in *Villodre* at [35]. The purpose of the notification must be to enable the person who has been assessed to defend their rights with full knowledge of the facts. Clearly this is not possible if the notification has not been received.

125. In conclusion, in order to comply with the provisions of s 12 FA 1994, it is in my view necessary for any notification to have been received by Cantina Levorato.

126. I accept that this leaves HMRC with some uncertainty as to whether a notification has been received. However, as Mr Beal pointed out, there are ways of communicating which can provide greater certainty such as registered post or electronic communication where receipts can be provided.

127. There will also no doubt be taxpayers who say that post has not been received when in fact it has. However, the burden of proof will be on the taxpayer to satisfy the Tribunal on the evidence that this is the case. This sort of enquiry is nothing new for the Tribunal and is unlikely to cause problems in practice.

128. For completeness, I should mention that both parties agreed that s 7 Interpretation Act 1978 is not relevant in this case. As explained in *Villodre* at [41], in circumstances where the date of service is important (as it is in this case given that the time for appealing against the assessment runs from the date of the notice), if it is shown that the notice has not been received, that provision will not assist HMRC.

129. It is relevant to consider briefly what a notification must contain in order to satisfy the requirements of s 12 FA 1994. On the face of it, the only notification required is the amount of the duty. Mr Beal however referred to the decision of the Court of Appeal in *Aria*

Technology Limited v HMRC [2020] EWCA Civ 182, a case dealing with a VAT assessment under s 73 VATA. As already mentioned, provisions of s 73 VATA are very similar to the provisions of s 12 FA 1994. In this respect, s 73(1) allows HMRC to "assess the amount of VAT due from [the relevant person]... and notify it to him.". Again, on the face of it, the requirement is simply to notify to the taxpayer the amount of the VAT due.

130. Although it was not a point he needed to decide, in *Aria*, Singh LJ in principle accepted that the minimum requirements for the notification of an assessment were those set out by the High Court in *House [t/a P&J Autos] v HMRC* [1994] STC 211 at [223h], being the name of the taxpayer, the amount of tax due, the reason for the assessment and the period of time to which it relates at [43]. He did however caution that the Court had not heard full argument on this point.

131. For my part, I see no reason to disagree with this proposition. What is important is that the taxpayer knows how much tax has been assessed, what it relates to and the reason for the assessment. This is the minimum information needed by the taxpayer in order to determine whether they agree with the assessment and, if not, whether they wish to challenge it. Again, this chimes with the comments of the ECJ in the cases I have mentioned at [116] above that any notification must ensure that the taxpayer receives sufficient information to enable him, with the full knowledge of the facts, to defend his rights. However, as will become apparent, it is also unnecessary for me to reach a final decision on the precise requirements for notification and, like in *Aria*, I did not hear full argument on the point.

Did Cantina Levorato receive the letters sent by HMRC in March and April 2013?

132. I am satisfied that Cantina Levorato did not receive the pre-assessment letters sent by HMRC on 12 March 2013 and the notices of assessment sent by HMRC on 26 April 2013.

133. None of these letters was correctly addressed. They did not include the town (Dolo) nor the region (VE - short for Veneto). The evidence of Carlo Levorato, having discussed the position with postal employees in Italy, was that these are important parts of the address. It is also clear that, although the letters included a zip code, unlike in the UK where the postcode relates to a relatively small number of properties, usually in a single road, the zip code in Italy covers a much larger area. The evidence shows that in this case the zip code covered not only the whole of the town of Dolo but also two neighbouring towns.

134. Both Carlo Levorato and Marco Levorato have given evidence that they were the only people who dealt with incoming post on behalf of Cantina Levorato, that one of them was working at Cantina Levorato's office on each working day between March – May 2013 and that the letters in question were not received by them. In response to questions put to him in cross examination, Carlo Levorato confirmed that he had spoken to other members of the office staff at Cantina Levorato who had not seen the letters. He accepted that there was a secretary who worked in the office in 2013 but who no longer worked for the company when he prepared his first witness statement in February 2018 and so had not been questioned about the letters. However, he remained clear that, in any event, it was only he and his brother who opened the incoming post.

135. Mr Singh conceded that he was not in a position to challenge the evidence of Carlo Levorato and Marco Levorato in this respect.

136. This evidence is supported by the events which took place in 2016/2017 following the notification served by the Italian tax authorities in June 2016. A note from Cantina Levorato's Italian lawyer confirms that the main ground on which the 2016 enforcement proceedings were resisted was that Cantina Levorato had never received the original assessments in 2013. Similarly, on 9 December 2016, Eversheds LLP wrote to HMRC on behalf of Cantina Levorato

confirming that no notification of the assessments had been received and asking for copies of the assessments.

137. Based on all of this evidence, it is clear to me that, no doubt as a result of the defects in the addresses used by HMRC, neither the pre-assessment letters nor the notices of assessment themselves were received by Cantina Levorato in 2013. The first time they were seen by them was therefore when they were sent to Eversheds LLP under cover of Ms MacLean's letter of 15 March 2017.

Notification of the assessments

138. I have already explained the reasons why, in my judgement, notification of an assessment for the purposes of s 12 FA 1994 requires the notification to have been received by the person liable to the duty. I have found as a fact that the notifications which were sent in April 2013 were not received by Cantina Levorato and do not therefore constitute notifications for the purposes of s 12 FA 1994.

139. Although Cantina Levorato received the UIPE from the Italian tax authorities in September 2013 and the UIPE stated that it related to customs duty in respect of wine and stated the total amount assessed by HMRC, Mr Singh concedes that this document does not constitute a notification for the purposes of s 12 FA 1994 as the notification did not come from HMRC but from the Italian tax authorities. He does however say that the UIPE contained all the important details about the duty in question and that the fact that Cantina Levorato was clearly aware from at least September 2013 that HMRC were seeking to enforce an excise duty assessment and that it had the contact details for HMRC to find out more information about this if it chose to do so is relevant to the question as to whether there has been a valid notification of the assessments.

140. Given Mr Singh's acceptance that the receipt of the UIPE from the Italian tax authorities was not a notification for the purposes of s 12 FA 1994, it is therefore the case that the assessments were not formally notified to Cantina Levorato until March 2017, approximately four years after the assessments were made. The question is whether, in all of the circumstances of the case, the notification was made within a reasonable time after the assessments were made so that it can be said that the notification had some nexus with, or was proximate to, the making of the assessments.

141. Leaving aside for one moment the existence of the UIPE which was received by Cantina Levorato in September 2013, it is clear to me that notification of the assessments in March 2017 was, on any basis, beyond what could be considered to be a reasonable time after the making of the assessments and had insufficient proximity or nexus with those assessments.

142. In this context, it is relevant that the time limit for making the assessments was, at the latest, September 2013, being one year after HMRC had evidence of the facts sufficient to justify the making of the assessments (20 September 2012 being the date that Mr Daglish requested Ms MacLean to assess the duty). The purpose of this time limit is to bring finality, both for the taxpayer and the Tax Authority. As observed by the Tribunal in *Kothari*, that protection is lost as far as the taxpayer is concerned if the assessments can nonetheless validly be notified to the taxpayer some four years after the assessments are made. For the same reason, such a lengthy period would offend the EU principle of legal certainty.

143. Mr Singh however seeks to draw a distinction between this case and the situation in *Kothari* on the basis that, in *Kothari*, it was found as a fact that HMRC never sent the notices of assessment. He argues that any requirement for HMRC to take action within a reasonable period after the assessments are made is to prevent unfairness as a result of HMRC simply doing nothing and then notifying the assessments at a much later date (in the case of *Kothari*,

being three years after the assessments were made). In this case, he points out that HMRC did in fact send the notices of assessment (even though they were not received) and did follow that up by issuing the UIPE which was received by Cantina Levorato. On this basis, he submits that there is no unfairness in the delay in receiving the formal notices of assessment until March 2017.

144. In support of this, Mr Singh refers to the decision of the High Court in *Grunwick* where the taxpayer received a copy of the notice of assessment from its solicitor shortly after the assessment was made. The Judge therefore accepted that any defect in notification could be cured by a formal notification being given to the taxpayer at the hearing of the appeal.

145. In my view there is however a significant difference between a case where the taxpayer has received a copy of the actual notice of assessment in a timely fashion, albeit not direct from HMRC and the present case where, all that Cantina Levorato received, was a notification from the Italian tax authorities that it had a liability to the UK tax authorities together with a copy of the UIPE issued by HMRC.

146. I make no finding as to whether the UIPE contains sufficient information to amount to a notification for the purposes of s 12 FA 1994 (had the notice been given by HMRC) as this was not a point addressed in any detail in the submissions of either party. However, I observe that the notices of assessment contain significantly more information including, in particular, the fact that the duty resulted from an irregular movement of duty suspended goods, the dates of each of the consignments and how the duty had been calculated as well as explaining the right to a review either by HMRC or by the Tribunal.

147. The key point is that, whereas in *Grunwick*, the taxpayer had received the notice of assessment itself and therefore was in exactly the same position as if it had received it direct from HMRC, Cantina Levorato had significantly less information as a result of receiving the UIPE than would have been available to it had it received the notices of assessment. It was not therefore in a position, as the ECJ considered important (see [116] above), to defend itself with full knowledge of the relevant facts.

148. I accept that Cantina Levorato could have contacted HMRC to find out more details and it could perhaps be criticised for failing to do so. However, the evidence is that it did consult its lawyers in Italy and followed their advice. In this context, it is important to note that the effect of the UIPE is to enable to Italian Tax authorities to collect the duty as if it were an Italian liability (see Article 13(1) of Council Directive 2010/24/EU). It is therefore understandable that Cantina Levorato should be guided by its Italian lawyers in relation to what was an enforcement process and not part of the assessment process.

149. In any event, it is clear that the UIPE depends entirely on what is referred to as the "initial instrument", being in this case the notices of assessment. The UIPE states that it is issued on the basis that the initial instrument has been notified by HMRC to Cantina Levorato. There is a space in the UIPE for the date of the notification of the initial instrument but this has not been completed by HMRC. In these circumstances, in my judgment, the onus is on HMRC to ensure that the assessments have been properly and promptly notified.

150. For these reasons alone, I would conclude that the receipt by Cantina Levorato of the UIPE is insufficient to provide the necessary link between the making of the assessments and the subsequent receipt of the formal notifications in March 2017.

151. There is however a further reason why, in my judgment, there is in this case, insufficient proximity or nexus between the making of the assessments and their notification to enable it to be said that the notifications were made within a reasonable time. This results from the apparent delay on the part of HMRC in following up the assessments or the UIPE. There is no

evidence that HMRC took any action at all after they issued the UIPE in July 2013 and sent it to the Italian tax authorities. Once the UIPE was delivered to Cantina Levorato in September 2013, nothing at all happened until June 2016 when the Italian tax authorities apparently made further efforts to enforce the liability.

152. Whilst there is no evidence one way or the other, it may be inferred that the enforcement efforts in June 2016 resulted from a further request made by HMRC to their Italian counterparts. However, the question which must arise is why HMRC apparently make no effort to follow up on their assessment or the initial enforcement request to the Italian tax authorities for almost three years. In these circumstances it cannot be said that, even taking into account the receipt by Cantina Levorato of the UIPE, there is the required nexus or proximity between the making of the assessments and the formal notification, nor that the notifications were made within a reasonable period after the assessments. Had HMRC taken action to follow up the liabilities at an earlier stage, the result may well have been different. However, as I have said, there is no evidence that they did so.

153. For these reasons, I find that the assessments have not been notified to Cantina Levorato for the purposes of s 12 FA 1994. The result of this is that the statutory requirements are not satisfied and so the assessments should be quashed.

Effect of HMRC guidance

154. Given my conclusion, it is not strictly necessary to consider whether Cantina Levorato is able to rely on HMRC's guidance indicating that it will apply the time limit for making assessments based on the date on which the assessment is notified and not the date on which it is made. This would only be relevant if I had found that the formal notification in March 2017 was otherwise valid. However, in case I am wrong in the conclusion I have reached on the question of notification, I will consider this briefly. I should also make it clear that the submissions made by the parties on this aspect were relatively limited.

155. Mr Beal relies on the decision of the Upper Tribunal in *KSM Henryk Zeman SP Z.o.o. v HMRC* [2021] UKUT 182 (TCC) for the proposition that the Tribunal can, in certain circumstances, take into account public law arguments. That case related to an appeal against a VAT assessment. One of the grounds of appeal was that, as a result of a letter written by HMRC, the taxpayer had a legitimate expectation that it would not be assessed to tax.

156. The Upper Tribunal in *Zeman* relied heavily on the comments of Simler LJ *in Beadle v HMRC* [2020] EWCA Civ 562 in which she observed at [44] that:

> "Where a public body brings enforcement action against a person in a court or Tribunal (including a court or Tribunal whose only jurisdiction is statutory) the promotion of the rule of law and fairness means, in general, that person may defend themselves by challenging the validity of the enforcement decision or some antecedent decision on public law grounds, save where the scope for challenging alleged unlawful conduct has been circumscribed by the relevant statutory scheme, which excludes a challenge."

157. The Upper Tribunal considered that an appeal against an assessment is, in substance, a defence to an enforcement action by HMRC (see [34]). The conclusion of the Upper Tribunal was that there was nothing in the statutory scheme of appeals against VAT assessments which excluded the ability to raise a public law defence. In particular, the Upper Tribunal considered at [79-81]) that any appeal was not only against the assessment but also against the decision to assess.

158. FA 1994 makes it clear that an appeal to the Tribunal is an appeal against an HMRC decision. Section 16(1B) refers to an appeal against a "relevant decision". Under s 13A(2)(b), a relevant decision includes "so much of any decision by HMRC that a person is liable to any duty of excise, or as to the amount of his liability, as is contained in any assessment under s 12 above".

159. Section 16(5) provides that the power of the Tribunal on an appeal includes a power to quash or vary any decision.

160. Following the logic of the Upper Tribunal in *Zeman*, it is therefore even more clear on the face of the legislation in this case that the Tribunal should be able to entertain public law arguments in the context of any appeal against HMRC's decision to assess the duty.

161. The legitimate expectation in this case does not however relate to HMRC's decision to assess but to the mechanics for the notification of any assessment. Given that the right to appeal relates to the decision to make the assessment and the amount of the assessment, it is less clear that any legitimate expectation as to the timing of the notification of the assessment is something which the Tribunal can properly take into account.

162. Having said that, I have no doubt that a failure to notify the assessment in accordance with s 12 FA 1994 is a reason for the tribunal quashing the assessment (and therefore the decision to assess). I also accept that there is nothing in the scheme of the legislation which, on the face of it, excludes a challenge on public law grounds. Mr Singh did not suggest that the Tribunal lacks jurisdiction to take into account HMRC's guidance to support a legitimate expectation argument on the part of Cantina Levorato and so I will proceed on the basis that the Tribunal has such a power in this case.

163. I was taken to a number of HMRC notices, some dealing with excise duty and some with VAT. By way of example, Notice 208 relating to excise assessments states at [2.3] that:

> "although the time limit rules apply to the 'making' of an assessment, in practice we will apply them to the date the assessment is notified. The 'notified date' for this purpose is the date on which the assessment is sent to you…"

164. Similarly, HMRC's manual (Excise Assessments Interim Guidance) states at [EAIG 9200]:

> "… for all assessments made on or after 1 March 2001 as a matter of policy we will rely on the date of notification of an assessment as the material date for time limit purposes.
>
> It is consequently essential that assessments are notified within the statutory time limits prescribed by the Finance Act for the making of assessments."

165. Mr Beal submits that these are clear and ambiguous statements which give rise to a legitimate expectation in accordance with the comments made by the Supreme Court in *R (Davies) v HMRC* [2011] UKSC 47 at [27 and 70].

166. Mr Singh's response to this argument is that the guidance in question merely refers to notification, which means the date on which a notification is sent, as is clear from paragraph 2.3 of Notice 208. On this basis, he submits that the terms of the guidance have been complied with given that the notices of assessment were sent (albeit not received) within the relevant time limit.

167. The problem with this argument is that, in this case, the notices were not sent to the right address. Even if Mr Singh were right that, for the purposes of the guidance, the assessment is notified when it is sent, this must at the very least require that it is sent to the correct address; otherwise HMRC could argue that an assessment has been notified even if it is sent to an entirely incorrect address (for example that of a different taxpayer). This cannot be right.

168. The initial attempt to notify of the assessments was not therefore a valid notification for the purposes of the guidance and HMRC cannot rely on them as the address to which they were sent was defective in material respects.

169. Therefore, if it is right that the Tribunal can take into account any legitimate expectation arising from HMRC's guidance, I find that the notification of the assessments was only made when the notices were sent by HMRC to Eversheds LLP in March 2017 and so was not therefore within the time limit which HMRC made it clear they would apply in their guidance. In these circumstances, it is not open to HMRC to resile from their guidance and nonetheless enforce the assessments.

GROUND 4 - IRREGULARITY DEEMED TO TAKE PLACE IN ITALY

170. There are two aspects to this ground of appeal. The first is whether the irregularity which resulted in the goods not arriving at Plutus' warehouse in Liverpool took place in the UK, thus entitling the UK tax authorities to assess the duty. Cantina Levorato says that, on the evidence, the Tribunal cannot be satisfied that this is the case.

171. The second aspect is whether, in order to displace the provision which deems the irregularity to have taken place in Italy, the UK tax authorities must first notify their Italian counterparts of their belief that the irregularity took place in the UK.

LEGAL PRINCIPLES

172. The key provisions are contained in Article 20 of the 1992 Directive and Article 10 of the 2008 Directive. These two provisions have broadly the same effect although there are some differences in the wording which I shall refer to later.

173. What the two articles are dealing with is which Member State has the right to assess any duty where there has been an irregular departure of goods from a duty suspended movement. The general scheme is as follows:

> (1) The primary rule is that duty is due in the Member State where the irregularity occurred.
>
> (2) Where an irregularity has been detected but it is not possible to say where the irregularity occurred, the duty is due in the Member State where the irregularity was detected.
>
> (3) If the goods do not arrive at their destination but no irregularity is detected, the irregularity is deemed to have taken place (and excise duty therefore due) in the Member State of dispatch (in this case Italy) unless, within four months of the start of the movement it is shown where the irregularity occurred.
>
> (4) This deeming provision is however overridden if, within three years of the start of the movement of the goods, it is ascertained in which Member State the irregularity actually occurred. In those circumstances, the primary rule is reinstated so that the duty is due in the Member State where the irregularity occurred. This last provision is contained in Article 20(4) of the 1992 Directive and Article 10(5) of the 2008 Directive which provide as follows:
>
> 1992 Directive

"Article 20

4. If, before the expiry of a period of three years from the date on which the accompanying document was drawn up, the Member State where the offence or irregularity was actually committed is ascertained, that Member State shall collect the excise duty at the rate in force on the date when the goods were dispatched. In this case, as soon as evidence of collection has been provided, the excise duty originally levied shall be refunded."

2008 Directive

"Article 10

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

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

174. Mr Beal suggested that some light is shed on the question as to whether the UK can only assess duty once HMRC have notified the Italian tax authorities that they have ascertained that an irregularity has occurred in the UK by the decision of the Court of Appeal in *Logfret (UK) Limited v HMRC* [2020] EWCA Civ 569.

175. In that case, goods were being moved from the UK to Belgium. *Logfret* had provided the guarantee which, as we have seen, is required for a duty suspended movement of goods. HMRC were relying on the provision which deems the irregularity to have taken place in the Member State of dispatch (in that case, the UK) on the basis that no irregularity has been detected. *Logfret's* main argument was that the deeming provision did not apply in circumstances where the goods had in fact reached their destination, albeit outside the relevant four month period. However, before the Court of Appeal, it also attempted to rely on Article 10(5) on the basis that HMRC were in possession of information within the relevant three year period showing that the irregularity had occurred in France.

176. The Court of Appeal declined at [65] to allow *Logfret* to raise this point for the first time on a second appeal as it would have affected the way in which the evidence was given in the proceedings before the First-tier Tribunal. It did not therefore express any concluded view on the true construction and effect of Article 10(5). However, Sir Timothy Lloyd did express some tentative views on HMRC's submission that Article 10(5) did not apply in circumstances where there was no evidence that duty had been levied in the other Member State (in that case France).

177. In support of this submission, HMRC referred to Regulation 82 of the 2010 Regulations (relating to repayment of duty) which only requires HMRC to repay duty in circumstances where duty has been paid in the Member State where the irregularity occurred or no duty was due under the laws of that Member State (Regulation 82(1)(c)). Sir Timothy Lloyd accepted at [64] that this paragraph does indeed support the argument that Article 10(5) does not apply unless there is evidence that the excise duty has been levied in another Member State or that no duty was in fact due in that Member State.

178. In my view, the comments of the Court of Appeal were not only tentative but do not assist in determining the question as to whether in this case Article 10(5) only permits the UK to assess the duty in circumstances where they have first notified the Italian authorities that they have ascertained that an irregularity in fact occurred in the UK. The comments in *Logfret* were dealing with an entirely different point which is whether Article 10(5) could apply (and therefore deprive the UK of its ability to assess the duty) in circumstances where there was no evidence as to whether duty had in fact been assessed in France (or that there was in fact no duty due in France). It says nothing about any requirement for the UK tax authorities to be notified by the French authorities that an irregularity had taken place in France.

179. In my judgment, the requirement in Article 10(5) of the 2008 Directive for the Tax authorities in the Member State where the irregularity occurred to inform the competent authorities of the Member State where the excise duty has been levied is nothing more than a mechanism to ensure that there is a refund of the excise duty which has already been paid in that Member State in order to avoid excise duty being paid twice. It is not a pre-condition to the levying of excise duty by the Member State in which the irregularity occurred.

180. It is absolutely clear from Article 20(4) of the 1992 Directive that this is the case. Assuming the conditions are satisfied, the Member State where the irregularity occurred is positively required to levy the duty ("that Member State shall collect the excise duty at the rate in force at the date when the goods were dispatched"). It is only once the excise duty has been collected that evidence can then be provided to the other Member State in order to enable a refund to be made ("as soon as evidence of collection has been provided, the excise duty originally levied shall be refunded").

181. There is no evidence that Article 10(5) of the 2008 Directive was intended to change the position. The ability for the Member State where the irregularity occurred to assess the duty is contained in the first paragraph of Article 10(5). The requirement to notify the Member State where the excise duty was originally levied is in a separate paragraph. Nowhere is it said that this requirement to notify is a pre-condition to making an assessment.

182. Mr Beal also refers to Regulation 80(4) of the 2010 Regulations. This provides that, in circumstances where an irregularity has occurred in the UK or is detected in the UK, HMRC must inform the competent authorities of the Member State of dispatch. This is no doubt designed to reflect the second paragraph of Article 10(5) of the 2008 Directive. However, again, there is no suggestion that this requirement to inform the Member State of dispatch is a pre-condition to the assessment by HMRC of any duty which is due in the UK.

183. Support for this interpretation can also be derived from Regulation 82 of the 2010 Regulations dealing with the refund of duty by the UK where, within three years at the start of the movement, it is ascertained that the irregularity has in fact taken place in another Member State. There is no requirement in Regulation 82 that HMRC is informed by the Member State where the irregularity occurred of that fact. The only requirement is that HMRC ascertain that the irregularity actually occurred in another Member State. However, it is a requirement under Regulation 82 that duty has been paid in the other Member State (if it is due). This strongly suggests that there is no requirement for the other Member State to have notified the UK that it is making the assessment before the excise duty is levied.

184. It is also worth noting that, to the extent that Sir Timothy Lloyd deals with the point at all, he does not suggest that the requirement to notify the tax authorities where the irregularity occurred is anything other than a mechanism to enable a refund to be obtained. He observes at [20] that:

> "Each of paragraphs (2) and (4) is subject to an overriding provision in paragraph (5). By this paragraph, if before the expiry of three years

> from when the movement began it is ascertained in which Member State the irregularity actually occurred, then paragraph (1) is to apply, and there is provision for the refunding of excise duty paid under paragraph (2) or (4) as the case may be."

185. For all of these reasons, my conclusion is that, as long as HMRC have ascertained that an irregularity occurred in the UK within the relevant three year period, they are entitled to assess the duty. There is no requirement to notify the tax authorities in Italy (as the Member State of dispatch) as a pre-condition to making an assessment.

186. Even if I am wrong on this, it seems to me that the HMRC did notify the Italian authorities as they clearly stated when requesting information about the guarantor from the Italian authorities in early 2013 that they intended to issue an assessment under Article 10 of the 2008 Directive. Whilst not explicit, this clearly implies that they had discovered an irregularity which took place in the UK. This was not however a point raised by Mr Singh and so I do not make any finding as to whether this would be a sufficient notification.

187. I therefore now need to go on to consider whether the irregularities in question took place in the UK and, if so, when HMRC ascertained that this was the case.

WHERE DID ANY IRREGULARITY TAKE PLACE?

188. Based primarily on the information contained in the documents provided by the Slovenian tax authorities, HMRC say that, in relation to the relevant consignments, an irregularity has occurred in the UK, being the delivery of the goods to an address other than Plutus' approved warehouse in Liverpool.

189. In support of this, HMRC also rely on the fact that the documentation for the majority of the loads (24 out of the 38 consignments in question) include a Eurotunnel safety check stamp applied in Coquelles. The evidence before the Tribunal includes email correspondence from a representative of Eurotunnel confirming that the stamp is applied at their terminal in France for vehicles travelling to the UK. The relevant individual also explains that not every vehicle is checked by Eurotunnel. They are either selected at random or the driver can elect for the vehicle to be checked (which some transport companies require their drivers to do).

190. Mr Beal draws attention to three aspects which, he submits, suggests that any irregularity did not take place in the UK. The first is that it is apparent that, in a number of cases, the tractor unit has been swapped. For example, in relation to consignment 14, the invoice identifies the vehicle with registration number GO M6-979. This is the identification number initially inserted into box 17 of the CMR. However, this has been crossed out and replaced with the registration number GO AO-652. The driver's log supplied for the journey relates to tractor number GO AO–652 and does not include a stop in Dolo. The notes on the driver's log suggest that this vehicle took over from vehicle number GO M6-979 in Calais on 11 April 2010 with the goods then being delivered to Manchester on 12 April 2010.

191. The second point referred to by Mr Beal is that the drivers' logs evidence frequent trips between France and England which might suggest that something untoward is taking place outside the UK. For example, again in relation to load 14, the driver travelled from Resped's base in Slovenia to Manchester on 8 April. The vehicle then drove to Dieppe on 9 April and back to Manchester on the same day. On 10 April, the vehicle travelled to Calais and then returned to Manchester on 11/12 April.

192. Finally, Mr Beal draws attention to the fact that, one of the reasons for the seizure of consignment 42 was the fact that there was no seal on the trailer and the load did not tally with the invoice provided by Cantina Levorato in that, although there were the correct number of cases of wine, the number of cases of white wine and red wine respectively were different. He

suggests that this indicates that the load may have been tampered with outside the UK and that it can be inferred that the same may be true of the other loads.

193. Despite this, I am however satisfied that any relevant irregularity took place in the UK. It is clear that Cantina Levorato contracted to sell the wine to a UK company, 13 Ten. It is equally clear that, as far Cantina Levorato was concerned, the goods were destined for the UK, being Plutus' warehouse in Liverpool.

194. Although I accept that the evidence produced by the Slovenian authorities from Resped must be treated with some caution, the invoices, maps and drivers' logs are all consistent with the transportation of the goods to the UK although, in most cases, as I have said, not to Plutus' warehouse in Liverpool but to other addresses, mostly in Manchester.

195. This is further supported by the Eurotunnel stamps on the majority of the CMRs. This is clear evidence that the loads were in the process of being moved from France to England. Although the Eurotunnel stamp does not appear on all the documents for all of the consignments, this is to be expected given that a stamp would only appear if the vehicle had been randomly selected for a check or the driver had specifically asked for the vehicle to be checked. Given that the documents evidencing all of the movements are very similar in terms of the journeys which they show, the fact that the Eurotunnel stamps appear on the majority of the CMRs is strong evidence that all of the loads made their way to the UK.

196. Mr Beal may well be right that, in some cases, the tractor has been swapped outside the UK. Neither party was clear as to the extent to which this would constitute an irregularity for the purposes of the relevant directives and regulations. However, Article 10(6) defines an irregularity for the purposes of Article 10 as:

> "a situation occurring during a movement of excise goods under a duty suspension arrangement… due to which a movement, or part of a movement of excise goods, has not ended in accordance with Article 20(2)."

197. Article 20(2) states that a movement of goods ends when they are delivered to the consignee. The sort of irregularity in question is therefore one which results in the goods not being delivered to the intended address. Even if the tractor were swapped and even if this were some sort of irregularity, it is not one which resulted in the goods not being delivered to Plutus in Liverpool bearing in mind the evidence that the loads still made their way to the UK.

198. Whilst I accept that the frequent trips between the UK and France could indicate that something untoward was taking place, there is no evidence of this and certainly no evidence that, as a result of those movements, some irregularity occurred in France which resulted in the goods not being delivered to Plutus in Liverpool. Given the evidence supporting the transport of the goods to the UK, it is in my view much more likely that the irregularity which resulted in the goods not being delivered to Plutus in Liverpool was the fact that they were delivered to a different address in the UK.

199. I also accept that the inconsistency between what is shown in Cantina Levorato's invoice and the tally sheet produced by the Border Force officials in relation to consignment 42, coupled with the fact that the trailer was not sealed, might well indicate that the load had been interfered with outside the UK. However, the discrepancy was relatively minor being simply a difference in the number of cases of red wine and white wine and could just as easily be explained by a mistake when the goods were loaded or by an incorrect classification of the wine when it was tallied by the Border Force.

200. Even if there were an inconsistency, given the other evidence, it is impossible in my view to infer from this that the other consignments had been tampered with outside the UK and that

this was the reason why the goods loaded in Dolo did not arrive at Plutus' warehouse in Liverpool. Based on the evidence, it is much more likely that the goods were simply delivered to other locations in the UK, as indicated by the documents provided by Resped to the Slovenian tax authorities.

201. In my view, HMRC therefore correctly ascertained that the irregularity had taken place in the UK.

202. It is however important to determine when HMRC ascertained that an irregularity had taken place in the UK as this is relevant to the three year time limit in Article 20(4) of the 1992 Directive and Article 10(5) of the 2008 Directive. It is only if the irregularity is ascertained within three years of the start of the relevant movement that HMRC have the right to assess the duty.

203. The possible dates put forward by the parties are 20 September 2012 when Mr Daglish asked Ms MacLean to assess the duty having completed his investigation; 12 March 2013 when HMRC wrote to Cantina Levorato stating that "the UK authorities believe that the irregularity in cargo handling has been committed in the United Kingdom"; or 26 April 2013, being the date when the assessments were actually made.

204. As I have mentioned, HMRC accept that, on any basis, they cannot assess the first consignment as the movement started on 9 September 2010 which is more than three years before the earliest date when HMRC suggest that they ascertained the irregularity in the UK, being 20 September 2013.

205. Mr Beal argues that the relevant date is 26 April 2013, when the assessments were actually made. Although the letters of 12 March 2013 stated that HMRC believed that an irregularity has taken place in the UK, they invited Cantina Levorato to provide any information or explanation which might show that no irregularity has taken place in the UK. This, he submits, makes it clear that HMRC had not reached a final view until, having had no response, they decided to make the assessments. He also suggests that HMRC could not have ascertained that the irregularity took place in the UK at any earlier date as this would be an unlawful fetter on the discretion which was exercised when they made the assessments.

206. In support of this, Mr Beal referred to the evidence given by Ms MacLean who confirmed in cross examination that the assessment represented the time when she concluded that the liability had crystallised and when she finally determined that an excise duty point had arisen. She also accepted that when the pre-assessment letters were sent in March 2013, she had no concluded view given that she was open to considering any representations made by Cantina Levorato in response to her letter.

207. Mr Singh's submission as to the date HMRC ascertained that an irregularity had occurred in the UK is based on Ms MacLean's evidence that, on 20 September 2012, Mr Daglish forwarded all the relevant paperwork to her and advised her that 40 consignments of wine had failed to arrive at their declared destination. This was accompanied by a request for Ms MacLean to assess the outstanding UK excise duty.

208. Mr Singh points out that HMRC did not receive any further information about any irregularity between this date and the time when the assessments were issued on 26 April 2013. The only further information sought (and obtained) by HMRC related to the request made by Ms MacLean to the Italian tax authorities which concerned the identity of the guarantor so that Ms MacLean could be sure that she was assessing the right person.

209. On this basis, Mr Singh submits that, although Ms MacLean may have been open to being persuaded that no irregularity had occurred in the UK, there was no change in HMRC's view

or to the information available between 20 September 2012 and 26 April 2013 and so the irregularity must have been ascertained by HMRC on 20 September 2012.

210. My conclusion on this point is that HMRC had ascertained that an irregularity had occurred in the UK when Mr Daglish completed his investigation and asked Ms MacLean to assess the relevant duty. This is the date on which Mr Daglish had all the information available to him and when he had clearly reached the conclusion that an irregularity had occurred in the UK, thus justifying an assessment.

211. It is worth noting that Sir Timothy Lloyd in *Logfret* took the view at [64] that the question as to whether HMRC have ascertained that an irregularity has occurred in a particular place is "a subjective test which would not be satisfied by concluding that they had the information from which they might have come to given the conclusion if they had not done so in fact". It is clear to me that Mr Daglish had in fact come to the conclusion that an irregularity had occurred in the UK.

212. Whilst it is true that Ms MacLean was prepared to be persuaded to the contrary (and so did not fetter her discretion), it is equally clear that, based on the conclusion reported to her by Mr Daglish, she also held the view that an irregularity had occurred in the UK. Whilst she very fairly accepted that her view was not a concluded view until she actually made the assessments, the only reason for this is the possibility of Cantina Levorato providing some information which might make it clear that no irregularity had in fact occurred in the UK.

213. This does not however mean that HMRC cannot have ascertained that an irregularity took place in the UK until they had asked Cantina Levorato whether they had any information to the contrary. In my view, all that is required is a subjective conclusion based on the information available to them. The terms of the pre-assessment letter dated 12 March 2013 of course confirms that this is the conclusion which HMRC had come to as they state in terms that HMRC are satisfied that the irregularities took place in the UK. There is equally no doubt that this conclusion was reached on 20 September 2012.

214. The three year time limit must therefore be measured from that date. The result of this is that the first consignment is out of time as the movement started more than three years before the irregularity was ascertained by HMRC. However, all of the other movements are within the three year time limit as the movement of the second consignment did not start until 22 September 2009.

DECISION

215. This appeal succeeds in its entirety as the two assessments to excise duty dated 26 April 2013 totalling £1,294,028 have not been notified to the appellant for the purposes of s 12 (1A) FA 1994. HMRC's decision in relation to the assessments is therefore quashed and the assessments discharged.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

216. 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.

ROBIN VOS
TRIBUNAL JUDGE

Release date: 09 DECEMBER 2021