Neutral Citation: [2023] UKFTT 404 (TC)

Case Number: TC08809

FIRST-TIER TRIBUNAL
TAX CHAMBER

By remote video hearing

Appeal reference: TC/2019/02697

VALUE ADDED TAX – case remitted by Upper Tribunal to same panel of FTT after original FTT decision set aside (error as to burden of proof) – Schedule 24 Finance Act 2007 - penalty for inaccuracy in VAT returns – personal liability notice on director – was there an inaccuracy in the VAT returns? – taxpayer challenging underlying assessment — was place of supply outside the UK? – burden of proof on appellant to show assessment incorrect – held (after weighing of evidence): appellant had discharged burden of proof – appeal allowed

Heard on: 13 February 2023
Judgment date: 28 April 2023

Before

TRIBUNAL JUDGE ZACHARY CITRON
MR LESLIE BROWN

Between

MOHAMMED ZAMAN

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr M Zaman represented himself

For the Respondents: Mr R Macleod, advocate, instructed by the Office of the Advocate General

DECISION

1. The form of the hearing was V (video) using the tribunal's video hearing service. A face to face hearing was not held because: the case had been remitted back to the tribunal for a fresh hearing before the same panel; the original hearing before the tribunal had been by video; it would have been disproportionate in the circumstances (including the disparate locations of the participants, including the panel) to hold a face to face hearing; and neither party objected.

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

BACKGROUND

3. On 24 June 2021 the First-tier Tribunal (the "**FTT**") issued its original decision (the "**original FTT decision**") in this case.

4. On 20 September 2022 the Upper Tribunal issued its decision (the "**UT decision**"), setting aside the original FTT decision and remitting the case back to the same panel of the FTT for reconsideration in light of the conclusions reached by the Upper Tribunal.

5. We use the same defined terms here as in the original FTT decision; and references here

   (1) to **[FTTX]** are to paragraph X of the original FTT decision, and

   (2) to **[UTX]** are to paragraph X of the UT decision.

THE UT DECISION

6. The UT decision explained the error of law in the original FTT decision as follows:

> 34. However, in our judgment, HMRC are plainly right that, as per their submissions that we have set out above, if the challenge to the PLN was brought on the basis that the assessment to VAT on Zamco was wrong, the legal rules relating to the way in which the assessment could have been challenged by Zamco if it had appealed the assessment remain in play in any appeal against the PLN. As we set out above, it is well-established law that it is for the taxpayer to prove, by evidence, that an assessment to VAT issued by HMRC is incorrect. HMRC do not have that evidential burden and that cannot sensibly be affected by the fact that the challenge to the assessment occurs in satellite litigation where, as in this case, a penalty charged on Mr Zaman is sought to be defended on the basis that the assessment to VAT on Zamco was wrong. In our judgment, it is clear that the FTT lost sight of the fact that after establishing whether the PLN was validly issued, the evidential burden in relation to the assessment to VAT on Zamco shifted to Mr Zaman when he sought to positively challenge the assessment as the sole basis on which the PLN was invalidly issued: see the FTT's overall conclusion at [96] as to whether HMRC had discharged the burden of proof: (emphasis added)
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> > "**We thus find that it has not been proven**, on the balance of probabilities, that the alcoholic goods in question were removed to the UK by Zamco or under its directions; and so, for the same reason, it is not proved that the place of supply of all of Zamco's supplies in the relevant period was the UK, such that its VAT returns in that period contained inaccuracies. **Given the burden of proof on HMRC, this means that we have to allow the appeal**…"
>
> 35. Read together with the FTT's other findings, we consider that [96] discloses an error of law in relation to the burden of proof. We also consider that this affected the way in which the FTT approached the appeal against the PLN in a materially relevant way.

7. The well-established law referred to in the second sentence of [UT34] as having been set out "above", was a reference to [UT17-20], which cited the Upper Tribunal and Court of Appeal judgements in *Awards Drinks v HMRC*; in particular, the Upper Tribunal decision in that case ([2020] UKUT 0201 (TCC)) commented (at [36], and cited with approval by the Court of Appeal ([2021] EWCA Civ 1235)) that the burden of showing an assessment is incorrect remains on the taxpayer throughout the appeal.

8. The UT decision explained thus why the case was to be remitted to the FTT for reconsideration:

> 39. HMRC invited us to remake the [original FTT decision] in such a way that Mr Zaman's appeal against the PLN is dismissed. The FTT heard substantial evidence over the course of three days. We have not heard, or considered in detail, any of that evidence and in circumstances where the key issue is whether, on the basis of that evidence, Mr Zaman has discharged the evidential burden of challenging the assessment to VAT on Zamco, we consider it would be inappropriate for us to remake the [original FTT decision]. In our view the proper course is to remit the case back to the same panel of the FTT for reconsideration in light of the conclusion we have reached. As we record above, neither party challenged any of the FTT's underlying (or primary) factual findings and we should make it clear that the reconsideration of the appeal by the FTT is not an opportunity to ask the FTT to disturb those findings of primary fact or make new findings of primary fact.

9. In the final sentence above, the UT decision was referring to its having said at [UT31] that "the FTT performed a careful analysis of a number of transactions including the documentation pertaining to those transactions, cash movements, Zamco's customers and suppliers and warehousing. Neither party made any criticism of this analysis".

10. The UT decision said this as regards the alternative ground on which the appeal against the original FTT decision had been brought:

> 36. For the reasons that we have given, HMRC's appeal in relation to the burden of proof issue succeeds. In those circumstances, there is no need for us to address in any detail HMRC's alternative *Edwards v Bairstow* challenge to the FTT's evaluation of its factual conclusions.
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> 37. We simply note, in considering the evaluation of the facts in the light of the conclusion we have just expressed, the relevant question for the FTT was whether Mr Zaman had discharged the evidential burden of proof in relation to the assessment. The problem with the FTT's conclusion was not that its factual findings were wrong. Rather, it answered the question by reference to whether HMRC had discharged the burden of proof which, despite the FTT having expressed significant reservations about the reliability of Mr Zaman's evidence, led it to find in his favour.

RECONSIDERATION BY THE FTT

Parameters of our reconsideration

11. Our task is to reconsider this appeal in the light of the error of law in the original FTT decision as identified in the UT decision.

12. The only limitation on the scope of our reconsideration, per the directions in the UT decision, was that the underlying (or primary) factual findings of fact in the original FTT decision (as referred to in the UT decision at [UT39]) are not to be disturbed. Nor are we to make new findings of primary fact.

13. We find that the underlying (or primary) factual findings of fact in the original FTT decision are those at [FTT12-57].

14. Both parties considered that [FTT90-91] were also primary factual findings. We do not think those paragraphs can be so characterised, as

(1) [FTT90] is a factual "value judgment" by the FTT as to certain aspects of the business carried on by Zamco which the original FTT decision found to be odd; and

(2) [FTT91] contains findings of fact made by inference from the "oddities" set out at [FTT90] as well as the evidence set out at [FTT41] (the text messages found on Mr Ahmed's phone in May 2016);

we therefore interpret the parties' positions to be that they did not invite the FTT, in its reconsideration of the case, to alter the findings in [FTT90-91].

15. In contrast, HMRC did not accept that [FTT92 and 95] contained primary factual findings (whereas Mr Zaman argued that they did). In our view, [FTT92 and 95], much like [FTT91], are findings of fact made by inference from evidence and so are not what the UT decision meant by primary factual findings. Hence, they are findings of fact that are open to revision upon reconsideration by the FTT (and, indeed, they were challenged by HMRC).

16. The summary of the law regarding and time of supply of goods in the original FTT decision – at [FTT71-74], and summarised at [FTT80] – was not challenged on the appeal to the Upper Tribunal (or in the reconsideration proceedings before us) and we accordingly rely on it in this reconsideration decision.

Dicta about burden of proof

17. As the parties did not take us to any authorities about what is meant by discharging the evidential burden of proof, we have reminded ourselves of the following classic statements of the higher courts on this subject (and gave the parties the opportunity to make post-hearing submissions on the accuracy and completeness of these statements, which we summarise and discuss at [22-23] below).

18. In *Morris v London Iron and Steel Co. Ltd* [1987] 1 QB 493 (CA) the claim was of unfair dismissal but there was a dispute as to whether the claimant had been dismissed. The first-instance tribunal stated that, after considering all the evidence, it found the probabilities either way equally balanced. As the burden of proof to show dismissal was on the employee, the claim failed. The Court of Appeal upheld that decision. May LJ said, at 504C-G:

> "A judge or a tribunal of fact should make findings of fact in relation to a matter before it if they can. In most cases, although in some it may be difficult, they can do just that. Having made them, the tribunal is entitled to draw inferences from the findings of primary fact where appropriate. In the exceptional case, however, a judge conscientiously seeking to decide the matter before him may be forced to say "I just do not know": indeed to say anything else might be in breach of his judicial duty. In this connection, however, I would say this. Speaking from my own experience some people find it easier to make up their minds than others and it should not be thought that a swift reliance upon where the burden of proof lies and a failure to decide issues of fact in the case, ought in any way to be considered an easy or convenient refuge for anybody who does find it difficult to make up his mind in a particular case. Judges should, so far as is practicable and so far as it is in accordance with their conscientious duty, make findings of fact. But it is in the exceptional case that they may be forced to reach the conclusion that they do not know which side of the line the decision ought to be. In any event, where the ultimate decision can only be between two alternatives, for instance

negligence or not, or, as in the instant appeal, dismissal or resignation, then when all the evidence in the case has been called the judge or the tribunal should ask himself or itself whether, on that totality of the evidence, on the balance of probabilities, drawing whatever inferences may be thought to be appropriate, the alternative which it is necessary for the plaintiff to succeed is made out. If it is not, then the operation of the principle of the burden of proof comes into play and the plaintiff fails."

19. In *Stephens v Cannon* [2005] EWCA Civ 222, after reviewing a number of authorities, the Court of Appeal said this:

> "46. From these authorities I derive the following propositions:
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> (a) The situation in which the court finds itself before it can despatch a disputed issue by resort to the burden of proof has to be exceptional.
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> (b) Nevertheless the issue does not have to be of any particular type. A legitimate state of agnosticism can logically arise following enquiry into any type of disputed issue. It may be more likely to arise following an enquiry into, for example, the identity of the aggressor in an unwitnessed fight; but it can arise even after an enquiry, aided by good experts, into, for example, the cause of the sinking of a ship.
>
> (c) The exceptional situation which entitles the court to resort to the burden of proof is that, notwithstanding that it has striven to do so, it cannot reasonably make a finding in relation to a disputed issue.
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> (d) A court which resorts to the burden of proof must ensure that others can discern that it has striven to make a finding in relation to a disputed issue and can understand the reasons why it has concluded that it cannot do so. The parties must be able to discern the court's endeavour and to understand its reasons in order to be able to perceive why they have won and lost. An appellate court must also be able to do so because otherwise it will not be able to accept that the court below was in the exceptional situation of being entitled to resort to the burden of proof.
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> (e) In a few cases the fact of the endeavour and the reasons for the conclusion will readily be inferred from the circumstances and so there will be no need for the court to demonstrate the endeavour and to explain the reasons in any detail in its judgment. In most cases, however, a more detailed demonstration and explanation in judgment will be necessary."

20. In *Verlander v Devon Waste Management* [2007] EWCA Civ 835, having cited the passage from *Stephens v Cannon* above, Auld LJ reduced the analysis to two main propositions:

> 19. …First, a judge should only resort to the burden of proof where he is unable to resolve an issue of fact or facts after he has unsuccessfully attempted to do so by examination and evaluation of the evidence. Secondly, the Court of Appeal should only intervene where the nature of the case and/or the judge's reasoning are such that he could reasonably have been able to make a finding one way or the other on the evidence without such resort.
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> …
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> "24. When this court in *Stephens v Cannon* used the word "exceptional" as a seeming qualification for resort by a tribunal to the burden of proof, it meant no more than that such resort is only necessary where on the available evidence, conflicting and/or uncertain and/or falling short of proof, there is nothing left but to conclude that the claimant has not proved his case. The burden of proof remains part of our law and practice -- and a respectable and

> useful part at that -- where a tribunal cannot on the state of the evidence before it rationally decide one way or the other. In this case the Recorder has shown, in my view, in his general observations on the unsatisfactory nature of the important parts of the evidence on each side going to the central issue, particularly that of Mr Verlander, that he had considered carefully whether there was evidence on which he could rationally decide one way or the other. It is more than plain from what he has said and why, that he concluded he could not. Further, more detailed analysis by him of the evidence and rehearsal of his views on it would, in my view, have been otiose."

21. We take it from the dicta above that, on reconsideration of this case with the correct allocation of the burden of proof (as per the UT decision), our essential task is:

(1) to decide whether

(a) on all the evidence before the FTT,

(b) applying the civil standard of proof (balance of probabilities), and

(c) drawing appropriate inferences

we can, rationally and in accordance with our conscientious duty, make a finding on the essential issue of fact as regards the correctness of the assessment (being whether the goods were removed to the UK (by Zamco or under its directions) as part of Zamco's sales – and, if they were not, their physical location at the time they were made available to the buyer: see [FTT80], based on the law as set out [FTT72-74]); and

(2) if the answer to the above question is "no", by reason of the evidence being so inadequate, or so finely balanced, that we cannot make a finding on the essential issue, then we must correctly apply the "burden of proof" (which, in the context of this case, would result in finding that Mr Zaman has not discharged the burden of proof in showing that the assessment was incorrect, and so dismissing the appeal).

22. HMRC in their written post-hearing written submissions on the dicta at [18-20] above:

(1) highlighted that the subject matters of the cases involved were different to the present case as none concerned tax (let alone an appeal against the issuing of a PLN (following un-appealed assessments to VAT));

(2) submitted that whereas, in general terms, the cases may vouch general propositions of law, little weight ought to be attributed to the application of propositions in this appeal given that the cited cases do not concern fiscal matters, and in light of the clear guidance of *Awards Drinks* – as specified by the UT decision;

(3) submitted that consideration of the cases referred to was unnecessary and the FTT should not embark on such an exercise;

(4) submitted, in summary, that, having regard to the UT decision

(a) the FTT's recourse to the dicta is unnecessary; and

(b) reliance on the dicta would be at odds with the scope of the remit from the Upper Tribunal.

23. Mr Zaman also commented that the cases cited did not concern tax or VAT.

24. We are unable to accept these submissions. In our view, the core principles regarding discharging the burden of proof apply equally to cases involving tax and to other civil cases. Furthermore, the law as set forth in the cited cases is entirely consistent with the UT decision

and with the decisions in *Awards Drinks* – their utility, and relevance, is in explaining in more detail how discharging of the burden of proof works.

The parties' cases

25. Mr Zaman was not legally represented and so did not present his arguments in legal parlance. However, the gist of his case, expressed in the terminology of the classic authorities on burden of proof cited above, was that [FTT92-95] contained valid findings of fact made on the balance of probability after weighing up the conflicting evidence; the original FTT decision had not needed to resort to the rules on burden of proof in making these findings; it would therefore be wrong to change these findings of fact on reconsideration.

26. Mr Macleod submitted that the findings of fact, and reasoning, in [FTT92-95], should be revised on reconsideration, because they

(1) placed too much reliance on the documentation (HMRC emphasised the evidential weaknesses set out at [FTT86(1)-(3)], supplemented by the two points made at [31] below); more generally, Mr Macleod questioned the "genuineness" of the documentation, submitting that it was used to cover up illicit activity by Zamco; and

(2) did not place enough weight on the evidence listed at (4) and (6) of [FTT81] (payment made by Sterling cash deposit at UK bank branches, and the text messages on Mr Ahmed's phone being indicative of his involvement in the illicit alcohol market).

27. Mr Macleod emphasised certain other evidence and factual findings in the original FTT decision:

(1) the discrepancies between the cash movements from and to Zamco, and the documentation, as set out in [FTT20-23];

(2) the findings about Zamco's customers as set out at [FTT24-26]; in particular that

(a) every one of Zamco's customers was deregistered for VAT in their home country at some time after their purchases from Zamco (as reflected in the documentation): see [FTT24];

(b) information provided by foreign tax authorities regarding EDS, one of Zamco's top four customers, indicated that the relevant database did not show intracommunity acquisitions of goods from Zamco; data collected from authorised warehouses in northern France did indicate that EDS acquired large quantities of alcohol between November 2015 and May 2016, but Zamco is not shown as the supplier; see [FTT25(1)];

(3) the manager of one of the warehouses involved in Zamco's transactions, Ariane, told the German tax authorities, subsequent to the relevant period, that it had not heard of Zamco (even though, according to the documentation, Ariane was involved in 116 Zamco transactions totalling some £3 million): see [FTT27(1)(b)];

(4) the French tax authorities had said of Tamaz France, another of the warehouses involved in Zamco's transactions, that "the fraudulent nature of Tamaz's activities is without doubt": see [FTT27(1)(d)];

(5) four of Zamco's suppliers were VAT deregistered subsequent to their transactions with Zamco: see [FTT29(2)-(5)];

(6) HDL had records of 42 sales to Zamco in August 2016, with "movement paperwork" to customers (all but one of which was a customer of Zamco in another deal) – but Mr Zaman said these purchases and sales did not take place. The documents for these sales resembled the documentation of the other transactions (see [FTT30]);

(7) the seizure of cash from Mr Ahmed in May 2016 and its forfeiture under the Proceeds of Crime Act 2002: see [FTT40-41].

28. Mr Macleod also emphasised that Mr Zaman did not himself "lead" the documentation as evidence (it was HMRC's witness who produced the documentation as evidence, albeit that HMRC had received the documentation from Zamco in the course of their enquiries); and that the only evidence "led" by Mr Zaman was his own oral evidence (about which the original FTT decision commented at [FTT83-85]).

Discussion

29. For convenience and efficiency, we structure our reconsideration by reference to the paragraphs in the original FTT decision that reflect that decision's analysis of the evidence (chiefly, the "Discussion" section of the original FTT decision under the sub-heading "The 'inaccuracy' issue", spanning [FTT80-96]). In doing so, we keep firmly in mind the UT decision's findings about the burden of proof in this appeal, as well as the fact that our task is, except as set out at [12] above, to carry out an entirely fresh reconsideration i.e. we are not limited to "reviewing" the original FTT decision.

[FTT80-91]

30. HMRC's submissions indicated that, with regard to [FTT86-87] (headed *Weight to be placed on the documentation as regards place of supply*), we should, on reconsideration, in addition to the evidential weaknesses described in [FTT86(1)-(3)], also take into consideration

(1) that the provenance of the documentation was Zamco, a company that, per the findings at [FTT91], was involved in supply chains in which there was illicit activity (albeit that the purpose of Zamco's involvement, per those findings, was to "cover up" or obscure illicit activity elsewhere in the supply chain (Zamco not itself being the initiating or driving force in the illicit activity)); and

(2) that there was no third party witness evidence (e.g. from suppliers or customers of Zamco's) to speak to the "genuineness" of the documentation.

31. We agree that the points above should be taken into account, along with the other points made in [FTT86-87], in deciding what evidential weight to accord to the documentation. However, in our view, the circumstances that

(1) the documentation was provided by Zamco,

(2) as found at [FTT91], Zamco was involved in supply chains that included illicit activity (and that the purpose of Zamco's involvement in such chains was to "cover up" or obscure the illicit activity elsewhere in the chain), and

(3) we were wary of putting significant weight on Mr Zaman's oral evidence unless corroborated or clearly in line with "common sense" or what was likely (see [FTT83])

do not have the "automatic" consequence that the documentation has no material evidential weight and/or is not "genuine". Rather, they must be weighed up against the evidential strengths of the documentation, as set out below; in this regard, we reiterate

(a) the factors mentioned in [FTT83] which would cause us to put weight on Mr Zaman's oral evidence (corroboration and inherent likelihood); and

(b) the finding at [FTT91] was that the purpose of Zamco's involvement in supply chains that included illicit activity was to "cover up" or obscure the illicit activity *elsewhere in the supply chain;* it was not a finding that Zamco itself was carrying out illicit activity (albeit that it may, or should, have been aware of the illicit activity elsewhere in the supply chains with which it was involved).

32. The same point applies to the circumstance that there was no third party witness evidence before the tribunal in support of the documentation. It is also relevant to this point that many of the counterparties in the documentation (i.e. the suppliers, customers and warehouses) had, some time after the transactions in question, been VAT-deregistered and/or gone out of business; and so, realistically, they would be unlikely to attend as witnesses at a hearing.

33. The evidential strengths of the documentation were that

(1) the documentation was extensive (over 1,500 pages) and detailed in that (as one would ordinarily expect of purchase and sale invoices) it contained dates, names of products, prices and amount of goods sold; it was also, on its face, contemporaneous with the events it described;

(2) whilst there were discrepancies between the documentation and the bank account records (see [FTT21] and [FTT23], the scale of the discrepancies was not such as to indicate that the documentation had no material evidential value and/or was not genuine. For example, the "shortfalls" identified at [FTT23] amount to about 8% of the total purchases, and about 5% as regards total sales: these are not insignificant (and this is why they are noted at [FTT86(2)]) – but neither are they so large and/or significant to justify dismissing the documentation altogether; to put this in another way, it seems to us that the documentation is corroborated by the bank account records to an extent that cannot simply be ignored or dismissed;

(3) whilst HMRC's enquiries (including with foreign tax authorities) revealed that all Zamco's customers (per the documentation), and some of the warehouses involved in its transactions (per the documentation), were VAT-deregistered some time after the relevant transactions (per the documentation) occurred (and some were suspected by foreign tax authorities of being involved in illicit activities) – and this is noted and taken account of at [FTT86(3)] – those enquiries also confirmed the existence and trading activity of some of these counterparties in the relevant period: see, for example,

(a) [FTT25(1)]: EDS acquired large quantities of alcohol between November 2015 and May 2016

(b) [FTT25(2)]: Dany Direct carried on a business near Calais

(c) [FTT27(2)(a)]: IEFW provided documents such as receipts on behalf on Zamco, deliveries requested by Zamco, and invoices for service delivery and excise duties

(d) [FTT27(2)(b)]: RM Trading provided documents mentioning Zamco in receipt notes, transfer notes and delivery notes (and email instructions from Zamco)

(e) [FTT29(1)]: Jassim Ltd provided documents referring to Zamco

(f) [FTT29(3)]: confirmation was received of Zamco's trading with Licores

(g) [FTT29(5)]: confirmation was received on Zamco's trading with Oviestro

(h) [FTT29(7)]: HDL answered HMRC's questions about its trading with Zamco;

In other words, it seems to us that the documentation is corroborated by HMRC's enquires with third parties to an extent that cannot simply be ignored or dismissed.

34. Although we were not taken to this point by either party at the hearing, we are aware that, in the *Awards Drinks* judgements referred to in the UT decision as regards "burden of proof", the Upper Tribunal held (at [83]) that the strength of the "countervailing evidence" in that case was such that a tribunal that relied only on the "documentary evidence" presented in that case,

so as to find that possession and control of the goods had been lost, would have erred in law by reaching a decision that no reasonable tribunal, properly directed, could have reached. The context was similar to this case, in that HMRC had assessed the taxpayer on the basis that it had sold for consideration alcoholic goods within the UK, based on numerous Sterling deposits made into UK bank branches; whereas the taxpayer contended that the deposits were payments for sales of alcohol from bonded warehouses in France to French cash and carry operators. The "documentary evidence" in that case were copies of various transaction documents said to be examples of the sales carried out by the taxpayer in France. The "countervailing evidence" to which the Upper Tribunal referred was

(1) the following findings by the tribunal:

(a) the lack of payment link to purported French customers e.g. an absence of evidence that any couriers were bringing money from France to the UK

(b) the circumstances concerning purported French customers e.g. lack of any sign that the customers were trading from the premises, when HMRC officers visited shortly after the end of the relevant period; and for some purported customers the premises were unsuitable for a cash and carry business

(c) the implausibility of cash and carry market servicing 'booze-cruise' still existing in volume

(d) none of this evidence supported the proposition that the sales recorded in the documents took place: no payments were made and the customers lacked an obvious means of making payments; the purported customers were not trading, and in some cases lacked suitable premises;

(2) numerous additional factors for treating the documents with caution and attributing little if any weight to them;

(3) there being no evidence from other bonded warehouses, or from suppliers, hauliers or the alleged cash couriers.

35. Whilst, inevitably, there are factual differences between *Awards Drinks* and this case, the essential point for us, upon reconsideration, was that we should not rely only on the documentation in making findings of fact: in particular it is important to consider, as we have in our reasoning above, whether the documentation is corroborated by other evidence which we consider reliable.

36. Finally, as regards the evidential value of the documentation, we do not regard it as significant in our weighing up of the evidence, that Mr Zaman did not himself "lead" the documentation as evidence before the FTT; this is because

(1) per the authorities as to discharging the burden of proof (see our summary at [21] above), what is important is the evidence that is before the tribunal, rather than which party "led" it;

(2) the FTT regulates its own procedure; and it would be contrary to the overriding objective of the FTT's procedure rules – to deal with cases fairly and justly – to "catch out" a litigant in person, such as Mr Zaman, for not himself "leading" evidence, in circumstances where (i) Mr Zaman had himself provided that evidence to HMRC as part of their enquiries and (ii) Mr Zaman was aware that HMRC were providing the documentation to the FTT as evidence.

37. We otherwise make no changes to [FTT80-91]. In particular, we do not consider that change be made

(1) to the list at [FTT81] of the evidence to be weighed up in determining the key issue as set out at [FTT80]. We note that this list includes the documentation as well as the fact that payment for Zamco's sales was made by deposit of Sterling cash at bank branches in the UK, and text messages from Mr Ahmed's phone that HMRC alleged (before the magistrates court) were indicative of his involvement in the illicit alcohol market; or

(2) to the findings at [FTT90-91], under the heading *Our findings as to the general circumstances of Zamco's business* (on grounds that they were "infected" by the error of law as to "burden of proof" identified in the UT decision) – and are fortified by the fact that neither party challenged these findings (see [14] above). We note that these findings expressly took into account the cash seizure (see [FTT90(5)] and Mr Ahmed's text messages showing communication with Mr Tuppen who, HMRC said, had been arrested in 2015 on suspicion of involvement with inward diversion fraud (see [FTT91], second sentence).

[FTT92-93]

38. [FTT92] is a finding of fact made on the basis of the documentation and the fact that Zamco had no premises in the UK to store the goods. [FTT93] considers (potentially contrary) evidence (including in the documentation) – namely, evidence suggesting the non-involvement of Zamco in transactions involving French and German warehouses – and records what the original FTT decision made of that evidence (namely, that the more likely explanation for this evidence was the "insubstantial" nature of Zamco's role (rather than that the goods sold by Zamco were never held in French and German warehouses)).

39. On reconsidering [FTT92-93] in the light of our discussion of the evidential value of the documentation at [30-36] above – we make no change to the finding at [FTT92]. This is because

(1) the finding was not made solely on the basis of the documentation, but also on the basis of the fact that Zamco had no premises in the UK to store the goods once it acquired them;

(2) the evidence corroborating the documentation, listed at [33](3)(c) and (d)] above, relates to the fact found at [FTT92];

(3) the finding is entirely consistent with the assessment: as noted at [FTT56], the suspicion underlying the assessment was that "the alcohol being sold in bond in Europe to missing traders is actually smuggled back into the UK": this presupposes that the alcohol was in the European warehouses prior to being "smuggled back" – and [FTT92] is a finding to this effect.

[FTT94]

40. We have reconsidered [FTT94] and think that it may have been infected by the error of law (made expressly at [FTT96]) about the burden of proof. We now re-express [FTT94] as follows:

41. The finding at [FTT92] as to the location of the goods upon Zamco's acquiring them, means that the place of Zamco's own onward supplies was outside the UK if the evidence presented indicates, on the balance of probabilities, that the goods were not removed to the UK (by Zamco or under its directions) prior to, or as part of, Zamco's sales (we echo here the terms of the key question as posed at [FTT80]).

[FTT95]

42. We have reconsidered [FTT95] and think it too may have been infected by the error of law (made expressly at [FTT96]) about the burden of proof. We now re-express [FTT95] as follows:

43. We weigh up the evidence as follows:

(1) the facts that (i) payment was made by delivery of Sterling cash to the UK, and (ii) a few counterparties had UK connections, are suggestive of (but not direct evidence of) Zamco having moved the goods (or directed others to do so) from the French and German warehouses to the UK as part of its supply of the goods;

(2) the documentation indicates that the goods were in the French or German warehouses at the point of sale or, in some cases, were removed to customers' premises outside the UK: although this is direct evidence as to the location of the goods at the points of sale, it is subject to the evidential strengths and weaknesses of the documentation as discussed at [30-36] above;

(3) the finding at [FTT91] (taking into account evidence included that noted at [37(2)] above) that, on the one hand, that there was illicit activity in the supply chains with which Zamco was involved but, on the other, that the purpose of Zamco's involvement in the supply chains was to "cover up" or obscure illicit activity elsewhere in the supply chain (Zamco itself was not the initiating or driving force in the illicit activity). As noted there, this finding is consistent with impressions of Mr Zaman formed by HMRC at meetings during and just after the relevant period;

(4) Zamco's margin from the transactions of 2-3% – see [FTT19(3)] – seems to us, as a matter of commercial common sense, inconsistent with a role involving the smuggling of goods from French and German warehouses into the UK (i.e. the margin seems too small for the risks involved in such an operation); rather, the margin points towards a passive or insubstantial role, consistent with the finding at [FTT91] that the purpose of Zamco's involvement was to cover up or obscure illicit activity *elsewhere in the supply chain*.

The evidence as just summarised in our view supports a finding that, on the particular question articulated at [41] above, the documentation is, on the balance of probabilities, reliable, given the corroborating facts and findings; the balance of the evidence thus supports a finding that nothing changed as regards the location of the goods up to and at the point of Zamco's onward supply.

[FTT96]

44. The first two sentences of [FTT96] contain the express error of law identified in the UT decision. Upon reconsideration, we now re-express those sentences as follows:

45. We thus find, applying the principles set out at [21(1)] above, that

(a) on all the evidence before us,

(b) applying the civil standard of proof (balance of probabilities), and

(c) drawing appropriate inferences

we can, rationally and in accordance with our conscientious duty, make the finding that the alcohol sold by Zamco was neither located in the UK at the point of sale, nor removed (in the sense of dispatched or transported) to the UK as part of Zamco's sales. It follows that Zamco has discharged the burden of proof in showing that the assessment was incorrect. This means

that we have to allow the appeal – and, strictly speaking, need not consider the other issues in this appeal.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

46. 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.

ZACHARY CITRON
TRIBUNAL JUDGE

Release date: 28th APRIL 2023