Neutral Citation: [2024] UKFTT 00125 (TC)

Case Number: TC09067

FIRST-TIER TRIBUNAL
TAX CHAMBER

Taylor House, London

Appeal reference: TC/2019/00536

VAT – zero-rating – VAT Notice 705 – whether evidence of export - no – appeal dismissed

Heard on: 28 November to 1 December 2022
Judgment date: 7 February 2024

Before

TRIBUNAL JUDGE GERAINT WILLIAMS
DR CAROLINE SMALL

Between

H RIPLEY & CO LIMITED

Appellant

and

THE COMMISSIONERS FOR HM REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: Mr David Southern KC, of counsel, instructed by Plummer Parsons Accountants Ltd.

For the Respondents: Ms Laura Stephenson, of counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs.

DECISION

INTRODUCTION

1. This is an appeal by H Ripley & Co Limited ("HR") against the Commissioners for HM Revenue & Customs' ("HMRC") decision dated 17 July 2018 to deny HR's claim to zero rated output tax in the sum of £1,176,161.00 in respect of 72 separate supplies of scrap metal made by HR in the period 15 February 2016 to 1 September 2016. The claim was denied on the basis that HR had not provided evidence to satisfy the requirements of VAT Public Notice 725 "The Single Market" (June 2013) ("VN 725").

2. It is no part of HMRC's case that bad faith is alleged nor is it argued that HR was a participant in fraud. The question for determination by this Tribunal is whether HR held valid commercial evidence within three months of supply per the requirements of VN 725 to demonstrate that the 72 supplies of scrap metal had been removed from the UK. The 72 supplies were in respect of 91 loads of scrap metal.

3. There is no dispute between the parties that the additional output tax in the sum of £1,176161.00 is arithmetically correct.

BACKGROUND FACTS

4. The following background was not in dispute.

5. HR is a UK VAT registered trader which exports scrap metal to EU Member States including the supplies to which this appeal relates, the 72 supplies of scrap copper to Belgium.

6. On 27 March 2017, HMRC wrote to the HR and informed it that HMRC had received an information request from the Belgian tax authorities in respect of transactions between HR and Mr Gregory Callewaert ("GC") t/a Recyclink International ("Recyclink") BE0526723559. HMRC requested that HR provide information in respect of the company's invoices, contracts, orders, payments and transport documents, in connection with supplies made in 2016 to Recyclink.

7. Having received HR's response, on 12 May 2017 HMRC informed HR that in respect of all its transactions with Recyclink, the evidence provided to support a claim for zero-rating did not meet the requirements of VN 725. HR was referred to the requirements contained in VN 725 paragraph 5.1 and given an opportunity to provide further supporting evidence. The Appellant was informed that if this was not provided HMRC would make an adjustment to the latest repayment claim to account for the output tax due.

8. On 24 May 2017, HMRC wrote to HR and gave notice of adjusting HR's output tax records because HR had failed to provide sufficient evidence of removal from the UK in respect of particular transactions stated to be invoices of supplies to Recyclink. HMRC identified each transaction invoice number together with the date of supply given by HR and informed HR the input tax of £1,279,050.00 for the April 2017 VAT period would be withheld representing the output tax which should have been charged on the sales in 2016 and the amount of output tax adjusted to the HR's VAT return for the April 2017 period.

9. On 30 May 2018, HR via its representative Plummer Parsons, provided additional evidence to HMRC to support the zero-rating of 45 supplies of scrap copper which had been removed from the UK to Belgium and claimed repayment from HMRC of £778,451.37. Enclosed with the letter were boarding cards said to demonstrate removal of the scrap metal from the UK.

10. On 31 May 2018 (HMRC's letter crossed with HR's dated 30 May 2018), HMRC stated that having received no further information from HR, an adjustment would be made to HR's April 2017 reducing the output tax from £1,279,050.00 to £1,176,161.00.

11. On 17 July 2018, HMRC informed HR that after examination of the letter and documentary evidence provided, they did not agree that the evidence provided satisfied the substantive requirements for zero-rating.

12. HMRC refused HR's request dated 15 August 2018 for a review of the decision because the time limits to making such a request had passed under s 83B(2) Value Added Tax Act 1994 ("VATA 1994").

13. HR requested a further review of the decision on 29 October 2018, which was refused by HMRC on the basis that HR was out of time, because the relevant appealable decision was made on 24 May 2017.

14. HR filed an appeal on 21 January 2019.

15. On 18 March 2019, HMRC made an application to strike out HR's appeal. The application was heard and rejected by Judge Short on 16 January 2020. HMRC accepted before Judge Short that HMRC's original decision letter of 24 May 2017 did not contain an explanation of HR's review or appeal rights and that it did not constitute an appealable decision. The letter of 17 July 2018 did constitute an appealable decision, and HMRC did not object to HR being given extra time to appeal against that decision. Judge Short dismissed the application at [57]-[65]:

(1) (as was common ground) HR had not provided all the documents required by VN 725 for each of the 72 consignments;

(2) HR had provided alternative documentation;

(3) the strike-out application should be dismissed because HR had a reasonable prospect of success;

(4) the decision letter was (as agreed by HMRC at the hearing) the letter of 17 July 2018;

(5) the tax under appeal was output tax, even if the manner in which it had been collected was by withholding input tax; and

(6) revised Grounds of Appeal should be filed.

16. On 22 January 2020, HR served Revised Grounds of Appeal.

17. On 21 September 2020, HR provided witness statements from OR, SR and MB and made an application for a direction under Rule 5(3)(d) for the production of documents and information from P&O Ferries.

18. On 6 November 2020, the Tribunal (Judge Bailey) issued directions which included a direction that HR write to P&O Ferries, copying in HMRC, to make a request for documents within 14 days.

19. On 2 February 2021, HR stated in correspondence to HMRC that "*whilst* [we] *have been in correspondence with P&O, to date they have been unable to find the data that we had requested, due to the age of the records, disruption of work and ill-health of staff as a result of Covid-19 and above all the great increase in customs work in consequence of the end of the Implementation Period* …".

20. On 5 July 2021, HR sent an email dated 8 June 2021 to HMRC from P&O stating, "[I] *am afraid to report that we will not be able to supply the information you have requested because it is no longer available. The way the freight booking system works is that the number allocated to each freight movement (the waybill number) is recycled on a relatively frequent*

basis and so the waybill numbers associated with your clients transport movements from 2016 have long since been recycled a number of times".

21. On 28 September 2021, HMRC filed a second strike out application. The application was in identical terms to the first strike-out application. The application was withdrawn shortly after it was issued.

22. On 14 October 2021, HR served further evidence, including a supplementary witness statement of MB and a "Master Spreadsheet" excel document.

23. On 19 October 2021, HMRC informed HR that they maintained their position that on the evidence, HR is very far away from succeeding in the appeal, but on balance and bearing in mind the volume of evidence now served by the Appellant, the matter was no longer suitable for a summary exercise and the second application to strike-out the appeal was withdrawn.

24. The 72 transactions in respect of which HR's claim to zero-rate output tax in the sum of £1,176,161.00 are appended to this decision.

EVIDENCE

25. We were provided with an electronic hearing bundle comprised of 2,821 pages which contained the appeal documents, relevant correspondence, documents relied upon in support of the 72 consignments including copy invoices, weighbridge tickets, ferry boarding passes, WhatsApp messages, e-mails, CMRs, Annex VII documents, legislation, authorities and witness evidence.

26. The witness evidence relied upon was as follows:

(1) Witness statement of Mr Matthew Browning ("MB"), senior accounts assistant at Plummer Parsons, dated 17 September 2020 and supplementary witness statement dated 13 October 2021;

(2) Witness statement of Mr Obed Ripley ("OR") dated 18 September 2020;

(3) Witness statement of Mr Simon Ripley ("SR"), director of HR, dated 16 September 2020. Appended to the witness statement were details of the documents and information held in respect of each of the 72 consignments; and

(4) Witness statement of Ms Raffaela Lahi ("RL"), Officer of HMRC, dated 14 January 2021.

27. MB, OB, SR and RL all gave oral evidence and were cross-examined. We have set out the following summary of the witness statements and evidence relevant to this appeal.

MR OBED RIPLEY

28. OR's evidence consisted of a three-page statement setting out the history and background of HR. OR's evidence was not challenged and we accept his evidence. H. Ripley & Company was founded by Henry Ripley in Hailsham in 1928 as a recycler of scrap and waste metals. HR has been run by successive generations of Ripley males and, following OR's retirement in 2005, HR is owned by OR and his wife, Judith Ripley, Jason Ripley, SR, Benjamin Ripley and Martin Ripley

29. HR developed slowly in the earlier years, but since the 1980s it has steadily grown, adding new depots at Hastings, Ashford, Eastbourne, Crawley and an export terminal at Newhaven Port. Until the 1980s all scrap and waste materials were sold in the domestic UK market. Since then, an ever-increasing percentage of scrap and waste materials have been exported from the UK.

30. Due to the heightened risk exposure in maritime scrap export and the need to limit HR's liability, it was decided to sell the cargoes of steel scrap from Newhaven via a limited company which was incorporated in 2003 as H. Ripley & Co (Export) Ltd. After mounting pressure and eventual insistence from the company's bankers NatWest Bank Ltd, all scrap trading activity was transferred from the Partnership to the Limited company. The name was also changed to H. Ripley & Co Ltd in 2011 to mitigate any concerns of trading partners and any subsequent business disruption.

31. In 2015 Ripley Group Ltd was created as a holding company for H. Ripley & Co Ltd, and the Director's other associated companies and was registered as a VAT Group.

MR SIMON RIPLEY

32. SR's witness statement set out the background to HR's business and the manner in which it trades. SR is a director of HR who, alongside his brother Jason Ripley ("JR"), is responsible for the day-to-day running of the business. In evidence, SR confirmed that HR bought scrap at a price lower than the price it hoped to sell the scrap for to provide a sufficient margin to cover its costs and provide a profit. Both buyers and seller are well aware at the time of any transaction of the current scrap metal price. Prices are fixed by the London Metal Exchange and are available on a screen. Both buyers and sellers will be using the same screen service displaying current scrap metal prices. HR would, depending on the grade of scrap metal, try to negotiate a discount from the LME spot price and SR confirmed that an established client would expect a level of discount from the LME price. All scrap metal trades run to delivery, there is no futures market. Because prices are highly volatile and change by the second, there is a short interval between agreeing a transaction and completing it. The longer the gap, the greater the risk for both parties.

33. SR explained that volumes are crucial. Small quantities of scrap metal are more difficult to sell and so command a lower price, because (i) they are unsorted, and (ii) end users only buy in very large quantities. A business such as HR buys scrap metal in smaller, unsorted amounts, processes and sorts the items, and pools them so as to be able to sell on in larger quantities. Hauliers transporting scrap metal operate on extremely low margins and, to stay in business, they have to organise their drivers and vehicles to avoid, as far as possible, empty runs. The carriage of scrap metal causes considerable wear and tear to vehicles and only a limited number of haulage firms are prepared to transport scrap metal.

34. SR could not think of any circumstances in which it would be of financial benefit to a UK purchaser to purchase scrap metal without paying VAT because there is no retail market for scrap metal. If a customer is registered for VAT in another EU-member state, or is outside the EU, he will not pay UK VAT and will remove the goods from the UK. There is no conceivable financial advantage is doing otherwise.

35. In some cases, HR sell direct to end users and in other cases they sell up a chain of supply made up of other scrap metal merchants. The purchasers are often unwilling to disclose the identity of their customers for fear that the party from whom they purchase their stock will get in contact with their customers to try and cut them out from future transactions.

36. Scrap metal is very expensive to transport because of its bulk and weight. HR were only able to develop the scrap metal export business because its yards at Hailsham and Ashford are close to the commercial ports of Dover and Newhaven.

37. The normal load of scrap metal is 20 to 25 metric tonnes transported on an articulated tractor and trailer. The industry standard is 25 metric tonnes (the global standard weight of a container). SR confirmed that the weighbridge system was central to the operation of HR's business. Typically, a lorry would enter HR's yard unloaded and would be weighed. This

provides the tare i.e. the weight of the conveyance for the load. The lorry is then loaded and reweighed on leaving the yard: the difference between the laden weight and the tare is the weight of the load. The weighbridge system is operated by HR staff and is a fully electronic and automated system called "FRED", this ensures that the turnround time for lorries is kept to a minimum and also provides HR with essential accounting information. All paper records were kept for the lifetime of the site and all digital records were kept and backed up.

38. SR confirmed that it would be wholly impractical for HR to organise the international haulage of loads of scrap metal following their sale as buyers wish to protect their markets and arranging transportation requires resources and specialist skills that HR does not possess. Arranging transportation would require HR to agree transport costs with purchasers, which would add an additional dimension to pricing and customers would suspect that the price of the scrap metal and the price of the transport were linked.

39. All payments for purchases and sales are made by bank transfer, scrap metal dealers are not allowed to purchase scrap metal for cash. HR did not supply any goods on credit and all the 91 consignments of scrap metal were paid for in full. In cross-examination, SR was certain that all the payments received in respect of the 91 consignments to Recyclink were made to HR's bank account by a Belgium Bank, this was confirmed by the SWIFT code and the translation from Flemish to English.

40. Suppliers have to be paid before HR are paid by their customer. HR has high fixed costs partly because, for commercial reasons, HR find it works better to have its own employed staff rather than use self-employed contractors. In order to finance the business on a day-to-day basis HR is wholly dependent upon its bank overdraft and VAT repayments. The majority of HR's UK and overseas customers have become well established customers providing a high level of mutual confidence and trust. SR confirmed that HR only purchase scrap metal from VAT registered traders who issue a VAT invoice to be able to offset their input tax against the VAT which they charge on their sales. They can then recover their input tax in full. Similarly, all of HR's purchasers require VAT invoices, either to recover UK VAT (if based in the UK) or to document the purchase to their domestic authorities (if based outside the UK). The commercial risks of selling outside the UK are significantly higher than selling to UK customers, because it is more difficult to check the creditworthiness of a non-UK customer. This was the principal reason why NatWest Bank insisted that export business should be conducted through a company, not a partnership. Consequently, establishing the initial status of a new export customer is crucial to HR's business. Because of the size of HR's export business, HR has have become repayment traders in VAT terms.

41. SR confirmed that a typical HR export transaction of scrap metal is as follows:

(1) Individual sales are agreed and recorded by e-mail and WhatsApp. There is a constant stream of such communications, often on a daily basis and several times a day. Because of the risk of price changes, the intention is always to complete the transaction within a short time.

(2) Prices are largely governed by the current scrap metal rates fixed at the LME. Goods are not normally released until HR has been paid but as the large majority of customers are repeat customers this does not present any difficulties.

(3) All loads are for between 20- 25 tonnes, this is maximum load capacity of a single lorry or trailer. It is unusual for HR to organise collection of the load, normally the customer will arrange transport and tell the yard when the lorry will arrive. Lorries only arrive at the yard by arrangement to even out the flow of business and avoid delays. Most of the hauliers are known to HR because of the volume of sales and the limited number

of hauliers willing to transport scrap metal. The load is sorted before the arrival of the customer's transport in order that it is ready for collection.

(4) The lorry is weighed empty on arrival and then loaded. On leaving the yard the lorry is weighed again on the weighbridge, and the difference between the laden (or gross weight) and the unladen (or tare weight) is the net weight and is the quantity of metal sold. The weighbridge generates a weighbridge ticket on the FRED system. On completion of the sale, and having received payment, HR issues an invoice against the details on the weighbridge ticket.

(5) Following collection of the load, the haulier will then book a ferry crossing unless the ferry crossing had been booked prior to collection of the load. The booking is for the next available space on the ferry after arrival at the port. P&O issue a boarding card which records the date and time of the booking and the details of the load. The boarding card is collected by the driver upon arrival at the port. For loading purposes P&O has to know the weight of the loaded lorries, so that the cargo is distributed evenly in the ship and the overall loading limit for the ferry is not exceeded. It is not possible for P&O to reweigh the load. Instead the standard amount of 18 metric tonnes of tare is added to the load reported by the driver. This affords a sufficient measure of safety for the ferry operator.

42. SR's witness statement explained that it follows that each sale of scrap metal by HR is evidenced by a suite of documents which can be matched to each transaction:

(1) The sales invoice. This is produced by HR.

(2) Bank statement. The payments to HR's account from a particular customer may not match the invoices because a running account is maintained.

(3) Weighbridge ticket. This records the net weight of the load and is automatically produced by the FRED system.

(4) CMR. This produced by the haulier.

(5) Annex VII statement. This is information required to accompany shipments of waste and is completed by HR using information given in advance by the customer and from the haulier.

(6) Boarding card. This is produced by P&O.

43. HR have dealt with Recyclink (as both principal and agent) since 2000 and they had always been a reliable and efficient customer. When a sale has been agreed, Recylink did not make a specific payment for the load as it has a running account with HR and "topped" up its balance with a sum corresponding to the price of the load. HR is always paid in full before the transfer of the load to the customer.

44. Recyclink arranged the transport of all the loads that it purchased and mainly used a Belgium haulier "Mattheeuws". All the sales in issue were made from HR's yard at either Ashford or Hailsham and the ferry port used was Dover.

45. In response to cross-examination, SR accepted that the following:

(1) The boarding cards did not contain a vehicle registration number nor provide a record of a vehicle boarding the ferry;

(2) Of the 80 Annex 7 documents available, 47 of the 80 listed the mode of transport as a shipping container with a destination as UK to UK. SB stated that he recognised the signatures of the HR employees on the Annex 7 documents. He explained that Meager (a HR employee) at Ashford had used the HR Word template used to produce the Annex

VII document but had failed to adjust and save the change of details from shipping container to a top bulker lorry;

(3) The duties of the weighbridge operator were to capture the lorry registration number, weight the unladen lorry, the reference number used, find out what load the driver was collecting, reweigh the loaded lorry and facilitate the lorry leaving the yard.

(4) The Annex VII documents were completed on the basis of information given in advance and from information provided by the haulier.

46. In SB's witness statement, he stated that he was satisfied that HR's systems and the combination of documents complied with the substantial requirements of VN 725. Sales to EU Member States were recorded on HRs monthly VAT returns, HR always had a valid EU VAT registration number for its customers in the EU before any sales were made. Paper documents and electronic records were retained by HR for a significant period and included transport and route details. No sales to a UK VAT registered customer were zero-rated nor were supplies collected by on or behalf of UK VAT registered customers.

47. SB, in evidence, read through para 5.5 of VN 725 and confirmed HR's compliance with those requirements was satisfied as follows:

(1) E-mails from GC, show the company name and VAT number providing confirmation of the VAT status and address;

(2) HR's sale invoice;

(3) Covered by weighbridge ticket, sales invoice, Annex VII document, CMR and boarding cards;

(4) The reference on the Annex VII document;

(5) The registration number of the vehicle is contained on the weighbridge ticket and there is a name and signature of the haulier on the Annex VII document;

(6) P&O boarding cards;

(7) P&O boarding cards;

(8) P&O boarding cards;

(9) Not used in the UK, not under VOSA;

(10) If a container was used the reference was always kept; and

(11) n/a.

48. SB, in response to cross-examination, confirmed that he was responsible for obtaining the relevant information to support the zero-rating of the supplies. The relevant information consisted of e-mails, correspondence and WhatsApp messages. Jason Ripley has set-up a WhatsApp group comprised of himself, SB and GC as they were in different locations. SB did not accept that there had not been any e-mails between HR and GC, he stated there were e-mails where HR had been copied in as they referred to collection and payment confirmation. SB accepted that it appeared that the e-mails were between GC and Terence Everett (the owner operator for MD Transport based in Rainham, Essex). He stated that he had requested the e-mails from GC to know who was collecting the loads but could not recall when that was. He then stated that he had requested the e-mails from GC as he had found out there were "gaps" in the documentation held by HR. In response to cross-examination, he confirmed that HMRC's letter dated 27 March 2017 referring to a request from the Belgian tax authorities for information and documents regarding HR's transactions with GC trading as Recyclink was the first time that he became aware that evidence of export was required. SB stated that he could

not remember if the e-mails had been sent by GC to SB in one go but he did recall that the boarding cards all came together from GC. He did not accept that the information provided by GC to HR was new information but that he was obtaining confirmation from GC to provide to HMRC. SB said he was requesting e-mails so he knew who was collecting, that is when he noticed the gaps in the information.

MR MATTHEW BROWNING

49. MB's witness statement confirmed that, at the time of making his witness statement, he was employed by Plummer Parsons Accountants as a senior accounts assistant. He had been tasked with preparing a spreadsheet that cross-referenced the various available documents to show how the scrap metal had been sold by HR and transported out of the UK. MB's evidence was that he had had collected the original documentation from HR's office in Hailsham and he had later visited the office to discuss the relevance of the documents and to determine what information was likely to be required. It was from those discussions that he was able to obtain copies of WhatsApp conversations and e-mails. In response to cross-examination he confirmed that he had no previous experience of the scrap metal industry. He could not recall when the first meeting with HR took place and he accepted the suggestion in cross-examination that it may have been March 2019. He further accepted that at the first meeting he was provided with invoices, weighbridge tickets, CMRs, Annex 7s and boarding cards. His recollection was that he was provided with the e-mails by SB and that this was at a subsequent meeting.

50. His witness statement explained that he sorted through the documents to remove any duplicates and the remaining documents were then sorted and compiled so that the correct documentation for each sales invoice was grouped together to create a trail for each of the transactions. Attached to his witness statement were the documents that he had used to create a trail for consignment number 9 ("#9"). The documents that he had used were: Sales invoice, weighbridge ticket, CMR, Annex 7 documents, P&O boarding card and an e-mail. He had also relied upon the following documents to show the existence of #9: WhatsApp conversations, bank receipts, Sage 200 sales ledger transaction reports, Barclays Bank transaction searches for receipts, P&O Ferries information, European Wast Catalogue and Hazardous Waste List, copy VAT certificate for Recyclink International and correspondence. The same procedure was followed in respect of the other 71 transactions and all the information inserted into the Excel master spreadsheet.

51. His witness statement attached an example of the documents he had used to identify #9 together with the other documents that he had relied upon:

Sales Invoice INV003053 dated 15/3/2016

52. The invoice included the date, HR reference number, name and address of the customer, account reference and customer's VAT registration number.

(1) Ref - This is alphabetical and numerical, e.g. "INV003053"

(2) Description - This is both numerical and chronological and has two separate references for the Gross and Tare weight. It also describes the load purchased, e.g. "Copper scrap as per ISRI Milberry".

(3) The European Waste Catalogue (EWC) Code is listed on the invoice and again repeated on the Weighbridge Ticket In this case the code used is: 170401 - Copper, bronze, brass. The alternative code used on the relevant documents is: 170411 - Cables other than those mentioned in 170410.

(4) On certain invoices the Seal number is listed under the description – Ripleys seal 000185

(5) Units - This is blank

(6) Weight - This shows the Gross weight (40.38 tonnes) and Tare weight (15.28 tonnes) as well as the physical weight of the scrap sold to the customer (25.1 tonnes). These details are obtained automatically from the Weighbridge Ticket.

(7) Rate - This is the price per tonne- £3,440.00

(8) Amount - This is the total amount payable for the invoice - £86,344.00.

Weighbridge ticket

53. The weighbridge ticket includes the date (15/3/2016), reference number, name and address of the customer, account number and the vehicle registration number of the vehicle used for the collection and transportation of the listed scrap material (YX11 ANV). The details of the purchase/load are then listed under the following headings:

(1) Ref - This shows the reference as the International Consignment Note (COB) No. which then relates to a later document (CMR)- COB 0654.

(2) Description - This matches the description listed on the Sales Invoice with the numeric and chronological reference numbers repeated as well as the EWC code- "Copper Scrap as per ISRI "Millberry"" EWC Code 170401.

(3) Units - This is blank.

(4) Weight - This matches the weights listed on the Sales Invoice: Gross (15/3/2016 timed at 9.37.06 40.38 Tonnes), Tare (15/3/2016 timed at 7.06.45 15.28 tonnes) and actual scrap weight (25.10 tonnes).

(5) Signatory section - This is signed by representatives of both HR as seller (Henry Lloyd) and on behalf of Recylink International, the purchaser.

54. MB confirmed that he had used the above information to cross-reference it to the sales invoice to confirm that the load collected from the yard is the same as the load listed on the sale invoice. In cross-examination, MB accepted that there was no full name below the signature and the author of the signature could not be identified. He further accepted that the weighbridge ticket was signed on behalf of HR by whoever was in the yard and that it was his understanding that whoever was collecting the load signed the weighbridge ticket as representative of Recyclink.

CMR

55. This is completed by the haulier and HR have no control over how well this has been completed. There are two boxes which are completed by HR and these set out below. The information held on the CMR document totals 24 separate boxes and amongst other information, this includes:

(1) CMR number- COB 0654. This is shown as the reference number on the Weighbridge Ticket.

(2) Box 1 - Sender name and address which corresponds to the address of the specific yard listed on the Weighbridge Ticket -Ashford, Kent.

(3) Box 6 to 9 - A description of the load which is brief and may or may not exactly match the wording on other documents- 1 x Load Dry Bright Wire.

(4) Box 1 1 - Gross weight in kilograms/tonnes- 25.1 tonnes.

(5) Box 13 - Sender's instructions, in the attached example this states "Ripleys Seal 000185".

(6) Box 22 - This shows the signature and stamp of the sender and is one of the boxes completed by HR -signed by S.A. Stacey, HR Ashford Kent dated 15/3/16.

(7) Box 23 - This shows the signature of the carrier which matches the one shown on the Weighbridge Ticket completed by the Carrier.

56. In cross-examination, MB confirmed that the CMR did not have the name or stamp of the carrier, the place of delivery was blank and it was not possible to tell from the signature in box 23 who had signed as the carrier.

Annex VII

57. The Annex VII document comprises 14 boxes under the general heading of "Consignment Information" and includes:

(1) Box 1 - The Person Who Arranges the Shipment. This is HR and includes the address and contact details of the business. JR's details are provided as the contact person and his e-mail address is included.

(2) Box 2 - The Importer/consigned. This is shown as Recylink International and includes the address of the business. No contact details are provided.

(3) Box 3 - Actual Quantity. This can be cross referenced to all of the previous documents and states: 25.100

(4) Box 4 – Actual date of shipment. This states: 15.03.2016

(5) Box 5 - The carrier. This information is typed and states: MD Transport, Freightmaster Estate Ferry Lane, Rainham, Essex RM13 9bj. No contact details are provided, the means of transport is "Shipping Container", is dated 13.8.2015 and is signed by the representative of the transport company which is collecting the scrap on behalf of Recylink International. The signature shown is the same as that on the CMR Document and the Weighbridge Ticket.

(6) Box 9 - Usual description of the waste. This is often a standardised description of the goods which either matches or is similar to the description on the Sales Invoice and Weighbridge Ticket. The description states "96% Copper as per ISRI "Birchcliffe".

(7) Box 10 - This shows various "Waste Identification" codes - 170411.

(8) Box 11 - Countries/States concerned. This shows the Export/Dispatch country as the UK and in this case, it also shows the Import Destination as the UK. It is an intentional trait of the scrap metal trade to try and hide the final destination of the goods from the seller in this case. It is done to prevent the Seller (in this case HR) from finding out who the final purchaser of the material is. This way the transporter/importer (in this case Recylink International) are protected from being cut out of the future transactions.

(9) Box 12 - Declaration of the Person who arranges the shipment. This is signed (Sandra Stacey) and dated (15.03.2016) by a representative of HR and can be matched against the name and signature shown on the CMR Document in Box 22.

58. In cross-examination, MB confirmed the following. Boxes 1 and 2 were always typed and always contained the same information: box 1 gave HR's name as the "Person who arranges the shipment" and box 2 gave Recylink International as "Importer/consignee". MB had not noticed that date of transfer in box 5(a) was 13 August 2015 but the date of the actual shipment in box 4 was 15 March 2016. He had also not noticed this occurring in eight other Annex VII documents and he confirmed this was not recorded on the master spreadsheet. Box 12 "Declaration of the person who arranges the shipment" was always signed and dated by a HR employee but he could not recall if he had seen any Annex VII documents with box 13

"Signature upon receipt of the waste by the consignee" completed. He recalled that a "fair number" of Box 11s "Countries/states concerned" were completed with the UK as the export and import destination to conceal the final destination to avoid Recylink being cut out from future transactions, he confirmed that he obtained this information from conversations with work colleagues and HR. He explained that he did not know if HR knew what the final destination was.

P&O boarding card

59. This is the documents which is supplied to the transport company and/or customer once they have arrived at their chosen port ready to export the goods using P&O Ferries for the crossing. In the example used the following definitions apply:

(1) Reference: DO33303298 - This is a specific reference given where the lettering denotes the port of departure, in this case DO = Dover and then numbering which follows a sequential system.

(2) Lead Name: HUGGINS T - The person who either called through with details or the vehicle driver if this was not completed until arriving at the port.

(3) 16 Mar 07:40 - The date and time of the intended crossing. This is not guaranteed depending on the port and frequency of crossings per day. In Dover there is a roll on/roll off system in place as the rate of crossings is high.

(4) AD:1 - A coding system used by P&O Ferries which denotes whether or not the load is hazardous waste.

(5) TT (16.00m) - 07LS3261 - 43100KG - I have broken this down into the three separate items below:

(a) TT (16.00) - The type and length of vehicle. In this example it is a tractor/trailer and a length of 16.00m. The length given is standardised to fit the type of vehicle and is set by P&O Ferries.

(b) 07LS3261 = The vehicle registration number.

(c) 43100KG - The total weight of the load. As explained previously this is includes a set weight of 18000kg being allocated for each vehicle of this type which is added to the net weight of the scrap copper being exported.

(6) SCRAP COPPER - A brief and simplified description of the goods that are being exported.

(7) DOCA 16MAR .7:40-1 have broken this down in to three separate items below:

(a) DOCA = A reference of the ferry route. In this example it is Dover to Calais.

(b) 16MAR - The date of the crossing.

(c) 07:40 - The time of the crossing.

60. A standardised amount of 18. tonnes are added to the actual weight which enabled MB to cross reference the ticket and link it to each invoice. In this example the total weight is 43.100 tonnes which after deducting the 18. tonnes leaves the actual weight of 25.100 tonnes. This matches the weight listed through all of the previously mentioned documents. The docket also has the date of the crossing and reference to the route "DOCA" e.g. Dover to Calais.

61. The P&O Ferries dockets were obtained from GC of Recylink International as HR would not normally have these. It is the customers responsibility to contact and inform P&O Ferries with the details needed to book the crossing.

62. In cross-examination, MB confirmed the following. He had been provided with the original boarding cards that were relied upon. He confirmed that none of the reference numbers on the top of the boarding card matched those used in any of the other documents. None of the lead names on the top of the boarding card matched any of the other names in any other document. He confirmed that none of the registration numbers on the boarding card matched any of the registration numbers on the weighbridge tickets and he had made an assumption that they did, he accepted that what he thought was a vehicle registration number on the boarding card did not have the same number of digits for a UK vehicle registration.

E-mail narrative

63. MB had matched these up where it had been possible to do so by relating the conversation, dates and prices mentioned in the narrative of the e-mail. This showed the intention of the purchaser to export the loads of scrap metal out of the UK. In response to cross-examination, MB confirmed the following. He accepted that it looked as though all the e-mails had the same heading and the same paragraph from the buyer to the carrier asking if it could collect a load from HR for delivery to Mattheeuws in Veurne. He accepted that the majority of the e-mails were undated and, whilst the e-mails referred to a specific type of copper, there was no reference to price. MB confirmed that when matching the e-mails to the transactions he had had to make some assumptions based upon a reference to a price or invoice number that related to other documents.

Conversation with Astrid Mayo of P&O Ferries

64. MB's witness statement confirmed that he had spoken to Astrid Mayo at 9.30am on Monday, 14 September 2020. Ms Mayo explained in detail the what the information on the boarding card meant and that explanation is at paragraph 59 above. Ms Mayo explained how the P&O system worked and which documents are provided to the transporter. A freight customer can only obtain a boarding pass on arrival at the port, it cannot be forwarded or e-mailed to the customer. The boarding pass is required to board the ferry. Identification is required to be provided at check-in; it does not have to be the named person on the boarding pass but must show the identity of the person making the crossing. The booking system does not allow a ferry to be pre-booked at Dover, all are operated as "roll-on/roll-off". P&O have a system to ensure to record the cancellation of boarding cards that are issued but the vehicle does not board a ferry. All ferry crossings are paid for in advance or on account.

65. In his second witness statement, MB stated that following receipt of the Tribunal direction on 6 November 2020, a request for information from Ms Mayo, P&O, was drafted on 17 November 2020 and sent on 23 November 2020. The response from P&O confirmed that they would be unable to supply the information requested as it was no longer available following an update and changes to their software systems and the re-use of waybill numbers which prevented any searches of movements from 2016 being completed.

66. MB confirmed that he had been able to obtain further information from P&O. P&O confirmed that the time printed on the boarding cards relates to the booking request which can be made by telephone prior to arriving at the port. The time does not relate to the time of the ferry crossing. The named person on the boarding card is the name given by the person making the initial booking, so does not have to be the driver of the vehicle. The boarding card is only issued on arrival at the port after providing driver information during check-in. It is at this point that the driver is advised as to which ferry to board using the roll on roll off system.

OFFICER RAFFAELA LAHI

67. RL's unchallenged evidence was as follows. In her witness statement, she confirmed that she had been a member of HMRC's Fraud Investigation Service ("FIS") since April 2012. In response to cross-examination, RL confirmed that whilst she was a member of FIS and her

duties included visiting VAT registered businesses, inspecting premises, verifying VAT returns (including zero-rating), and examining business records and transactions with the objective of ensuring the correctness of legal requirements relating to VAT and the trading activities of the business, nothing untoward or bad faith was alleged in respect of HR. RL, in response to cross-examination confirmed that the sale of scrap metal could (and had been) used in MTIC fraud.

68. A link to VN 725 was sent to HR (George Deaves) on 16 August 2016 by Officer Yeoman. On 4 November 2016, Officer Yeomans sent a letter to HR requesting a list of all EU supplies between March 2016 and July 2016 for which evidence of removal from the UK has not been obtained. Officer Yeomans advised that these supplies will now be treated as standard rated and will issue an assessment for the VAT due, if subsequently they did obtain enough evidence of removal, they would be able to make an adjustment to the VAT return.

69. On 10 March 2017 Officer Yeomans sent a Standing Committee on Administrative Cooperation (SCAC) request for the Belgium Authorities, via HMRC's official gateway, for information regarding transactions relating to the 06/16 VAT period between HR and GC trading as Recylink International. The request was sent to the Belgian Authorities on 16 March 2017.

70. On 27 March 2017 Officer Yeomans wrote to H Ripley and requested sales invoices, contracts, orders, payments, transport documents details of the name address and registration number of the transporter, the owner of the means of transport and the identity of the individual who ordered and paid for the transportation in respect of transactions with GC trading as Recylink International for 2016. On the same day SR forwarded Officer Yeomans' e-mail containing her letter of the same date to GC to provide the information requested by HMRC.

71. On 10 April 2017 GC replied to SR stating:

(1) The name of the transportation company was: T. Everett (first name Terry). Haulage contractors, Freightmaster Estate, Coldharbour Lane, Rainham, Essex RM13 9BJ. Tel: 01268470851. VAT: 853539209.

(2) The haulage payment was done by MTL Trading, (buyer) in Dubai, together with the payment of the goods.

(3) The order was to load at your premises and deliver to Mattheeuws in Veurne, where buyer would collect goods. GC advised SR that he would check the details from MTL and forward them to SR.

72. On 19 April 2017 SR sent Officer Yeomans two emails and provided the following documents:

(1) a snapshot of a contract spreadsheet of 25 sales to Recylink for the period 08/12/2015 to 20/04/2016.

(2) Details of the transportation company T. Everett (first name Terry), Haulage contractors, Freightmaster Estate, Coldharbour Lane, Rainham, Essex RM13 9BJ Tel: 01268470851 & VAT: 853539209.

(3) A spreadsheet of sales from Ashford and Hailsham sites.

(4) A Sales Ledger Transaction Report for Recylink International account.

(5) A similar spreadsheet of sales from Ashford and Hailsham sites but with the addition of the haulier's names MD Transport (also based at T. Everett address in Rainham) and Mattheeuws Eric Transport based in Belgium (there is also a company, Mattheeuws Eric UK Ltd, based in Dover).

(6) Credit transaction through HR's Barclays Bank account from 01/01/2016 through to 30/09/2016.

(7) A completed HR KYC Questionnaire for Recylink International.

It was unclear to Officer Yeomans when the documents i.e. sales invoices, weighbridge tickets, CMRs and Annex VII documents were received by HR and if a covering letter accompanied them.

73. On 12 May 2017 Officer Yeomans informed HR that in respect of all transactions with GC trading as Recylink BE0526723559, the evidence that had been provided to show that transactions were eligible for zero-rating were insufficient and did not meet the requirements contained in Notice 725 paragraph 5.1 and gave them opportunity to provide further supporting evidence and if this was not provided an adjustment to the latest repayment claim would be made to account for the output tax due.

74. On 24 May 2017 Officer Yeomans wrote to the HR stating that as they had failed to provide enough evidence of removal from the UK in respect of the supplies made to Recylink totalling £7,674,302.02 she would amend the VAT return for April 2017 to reflect the output tax of £1,279,050.00.

75. On 31 May 2017 Officer Yeomans sent a letter to HR stating that she was making an adjustment to the April 2017 VAT return to account for the supplies to Recyclink for which there was no evidence of dispatch. Officer Yeomans also advised that she had amended the amount previously notified in her letter of 24 May 2017 from £1,279,050.00 to £1,176,161.00 to reflect the three credit notes supplied by HR.

76. On 13 June 2017, HR provided Officer Yeomans with copies of sales invoices, weighbridge tickets, CMRs and Annex VII documents in respect of 56 supplies to Recylink.

77. On 30 May 2018 Plummer Parsons responded to Officer Yeomans' letters of 24 May 2017 and 31 May 2017 with regards to the further evidence that 74 consignments of scrap metal sold by HR to GC/Recylink International had been removed from the UK, in order to be able to allow recovery of input VAT incurred in order to make these sales. Plummer Parsons stated that in order to provide the additional evidence required, they had conducted extensive research in order to obtain and match the shipping documents to the sales invoices, but their work had not been completed. However, Plummer Parsons stated that they were satisfied that in relation to 45 out of the 74 consignments they had enough evidence to show removal from the UK in order to seek recovery of £778,451.37.

78. In that same letter Plummer Parsons advised that their client had obtained alternative evidence of removal from the UK. This was in the form of boarding cards from the shipper/customer in respect of many of the sales invoices. The boarding cards related to P&O ferries, and gave the routes, undertaken by P&O, which referred to Dover to Calais crossings.

79. On 26 July 2018 Officer Yeomans replied to Plummer Parsons letter of 30 May 2018 and stated that after examination of the letter and documentary evidence provided, Officer Yeomans did not agree with the claim that the substantive requirements for zero rating had been satisfied and referred to VN 725.

80. On 28 August 2018, Officer Lahi was provided with additional documents from HR:

(1) WhatsApp correspondence No.1 between Recylink/GC and HR (JR and SR) from 22 February 2016 to 19 September 2016.

(2) WhatsApp correspondence No.2 between Recylink/GC and HR (JR). There were no dates, names or times shown.

(3) E-mails between GC/Recylink and HR (SR, JR and Andy Westlake) from 31 March 2016 to 13 May 2016.

(4) Sale Ledger Transaction Report (Dated 18 April 2017, time stamped 15:05:10) from 3 October 2016 to 30 December 2016.

(5) P&O Ferries contact details.

(6) European Waste Catalogue & Hazardous Waste List (valid from 1 January 2002)

81. Officer Lahi reviewed the additional documents and provided her observations:

WhatsApp messages

(1) Overall, the WhatsApp messages state details of the types of metals purchased by Recylink, the price fixed (in accordance with the London Metal Exchange (LME), places of pick-ups i.e. Hailsham or Ashford and the chasing of outstanding payments, request for metals. Only 20 messages relate to the supply of trucks.

(2) The trucks arranged by GC indicates only one number plate, YX11 ANV. This was checked on the DVLA website where it showed the vehicle as a white, Renault Truck (Diesel), 3 axle + 3 axle Artic first registered March 2011. The status is shown as SORN (Statutory Off-Road Notification) with no MOT details held.

(3) The only haulier mentioned is "Mattheeuws"- Mattheeuws Eric, Nijverheidsstraat 2 B-8630 Veurne Belgium and in the UK at Palmerston Road, Dover Port Zone, Whitfield, Dover, Kent CT16 2HQ. This haulier is also mentioned on various CMRs.

(4) The other known haulier MD Transport, Freightmaster Estate, Ferry Lane, Rainham, Essex RM13 9BJ is mentioned in various CMRs but is it is not mentioned in the WhatsApp messages.

(5) There is no clear indication which haulier/driver/transport type picked up the metal and no handover documents were mentioned. The WhatsApp messages do not define if the goods were removed from the UK.

Sales Ledger Transaction Report

(6) This document reflects a summary of the invoice amounts and the payments received from GC. The amount of £7,904.21 is outstanding as at 5 September 2016. This report does not indicate whether the goods were removed from the UK.

Barclays Transaction Search

(7) This document shows payments received in and paid out of HR's bank account in respect of suppliers and customers for a specific time period. This Barclays Transaction Report does not indicate whether the goods were removed from the UK.

P&O Ferries information

(8) This is the P&O Ferries sailing timetable for Dover to Calais in 2016 from 1 January 2016 to 30 September 2016. This timetable had already been presented to HMRC. It does not give an indication that the goods were removed, by ferry, from the UK. The contact for the Dover Operations does not indicate that the specific goods were removed, by ferry, from the UK.

European Waste Catalogue and Hazardous Waste List

(9) This list is used for the classification of all wastes and hazardous wastes and is designed to form a consistent waste classification system across the EU. This list does not define if the goods were removed from the UK.

RELEVANT LAW

European Law

82. Article 131 Council Directive 2006/112/EC of 28 November 2006 on the Common System of Value Added Tax ("PVD") provides:

> "The exemptions provided for in Chapters 2 to 9 shall apply without prejudice to other Community provisions and in accordance with conditions which the Member States shall lay down for the purposes of ensuring the correct and straightforward application of those exemptions and of preventing any possible evasion, avoidance or abuse."

83. Article 138(1) of the PVD requires Member States to exempt from VAT goods that are transported to another member state. Regulation 138(1) replaced Article 28c(A)(a) of the Sixth Directive:

> "Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began."

UK Law

84. Section 30 Value Added Tax Act 1994 ("VATA"), so far as it is material provides:

> "30— Zero-rating.
>
> (1) Where a taxable person supplies goods or services and the supply is zero-rated, then, whether or not VAT would be chargeable on the supply apart from this section— (a) no VAT shall be charged on the supply; but
>
> (b) it shall in all other respects be treated as a taxable supply; and accordingly the rate at which VAT is treated as charged on the supply shall be nil.
>
> …
>
> (8) Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where— (a) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member States or that the supply in question involves both—
>
> (i) the removal of the goods from the United Kingdom; and
>
> (ii) their acquisition in another member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that member State corresponding, in relation to that member State, to the provisions of section 10; and (b) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled."

85. Regulation 134 of the VAT Regulations 1995, so far as is material, provides:

> "Where the Commissioners are satisfied that –
>
> (a) a supply of goods by a taxable person involves their removal from the United Kingdom;
>
> (b) the supplies are to a person taxable in another member State;
>
> (c) the goods have been removed to another member State ...
>
> the supply, subject to such conditions as they may impose shall be zero rated."

86. VAT Notice 725 "The single market" ("VN 725") (parts of which have force of law) and relevant guidance is contained in Paragraphs 4.3, 4.4, 5.1, 5.2, 5.5, 16.12 and 16.13.

Paragraph 4.3, which has the force of law, states:

> "4.3 When can a supply of goods be zero-rated?
>
> A supply from the UK to a customer in another EC Member State is liable to the zero-rate where:
>
> You obtain and show on your VAT sales invoice your Customer's EC VAT registration number, including the 2-letter country prefix code, and
>
> The goods are sent or transported out of the UK to a destination in another EC state, and
>
> You obtain and keep valid commercial evidence that the goods have been removed from the UK within the time limits set out at paragraph 4.4"

Paragraph 4.4 also has the force of law, and states:

> "4.4 Time limits for removal of goods and obtaining evidence of removal
>
> … For goods removed to another EC Member State the time limits are as follows:
>
> (a) Three months (including supplies of goods involved in groupage or consolidation prior to removal)"

Evidence of removal is addressed in Paragraph 5.1:

> "5.1 Evidence of removal
>
> A combination of these documents must be used to provide clear evidence that a supply has taken place, and the goods have been removed from the UK:
>
> - the customer's order (including customer's name, VAT number and delivery address for the goods)
>
> - inter-company correspondence
>
> - copy sales invoice (including a description of the goods, an invoice number and customer's EC VAT number etc)
>
> - advice note
>
> - packing list
>
> - commercial transport document(s) from the carrier responsible for removing the goods from the UK, for example an International Consignment Note (CMR) fully completed by the consignor, the haulier and signed by receiving consignee
>
> - details of insurance or freight charges
>
> - bank statements as evidence of payment
>
> - receipted copy of the consignment note as evidence of receipt of goods abroad
>
> - any other documents relevant to the removal of the goods in question which you would normally obtain in the course of your intra-EC business
>
> Photocopy certificates of shipment or other transport documents are not normally acceptable as evidence of removal unless authenticated with an original stamp and dated by an authorised official of the issuing office."

Paragraph 5.2, which has the force of law, states:

"What must be shown on documents used as proof of Removal?

The documents you use as proof of removal must clearly identify the following:

- the supplier

- the consignor (where different from the supplier)

- the customer

- the goods

- an accurate value

- the mode of transport and route of movement of the goods, and

- the EC destination

Vague descriptions of goods, quantities or values are not acceptable. For instance, 'various electrical goods' must not be used when the correct description is '2000 mobile phones (Make ABC and Model Number XYZ2000)'. An accurate value, for example, £50,000 must be shown and not excluded or replaced by a lower or higher amount.

If the evidence is found to be unsatisfactory you as the supplier could become liable for the VAT due."

Paragraph 5.5, which does not have the force of law, states:

5.5 What if my customer collects the goods or arranges for their collection and removal from the UK?

If your VAT registered EC customer is arranging removal of the goods from the UK it can be difficult for you as the supplier to obtain adequate proof of removal as the carrier is contracted to your EC customer. For this type of transaction the standard of evidence required to substantiate VAT zero-rating is high.

Before zero-rating the supply you must ascertain what evidence of removal of the goods from the UK will be provided. You should consider taking a deposit equivalent to the amount of VAT you would have to account for if you do not hold satisfactory evidence of the removal of the goods from the UK. The deposit can be refunded when you obtain evidence that proves the goods were removed within the appropriate time limits.

Evidence must show that the goods you supplied have left the UK. Copies of transport documents alone will not be sufficient. Information held must identify the date and route of the movement of goods and the mode of transport involved. It should include the following:

Item	Description
1	Written order from your customer which shows their name, address and EC VAT number and the address where the goods are to be delivered.
2	Copy sales invoice showing customer's name, EC VAT number, a description of the goods and an invoice number.
3	Date of departure of goods from your premises and from the UK.
4	Name and address of the haulier collecting the goods.
5	Registration number of the vehicle collecting the goods and the name and signature of the driver and, where the goods are to be taken out of the UK by

a different haulier or vehicle, the name and address of that haulier, that vehicle registration number and a signature for the goods.

6 Route, for example, Channel Tunnel, port of exit.

7 Copy of travel tickets.

8 Name of ferry or shipping company and date of sailing or airway number and airport.

9 Trailer number (if applicable).

10 Full container number (if applicable).

11 Name and address for consolidation, groupage, or processing (if applicable).

Paragraphs 16.12-16.13 provide:

> "16.12 How do I adjust my accounts if goods are not removed or I do not receive evidence of removal?
>
> Whether you or your VAT registered EC customer arranges for the removal of goods to another EU member state, you can only zero-rate the supply in your records when the goods are supplied to your customer and you meet the conditions set out in paragraphs 4.3 and 4.4.
>
> If the goods have not been removed or you do not have satisfactory evidence of removal within 3 months (6 months for goods involved in processing or incorporation before removal) and the goods would be subject to VAT in the UK, you must account for VAT. You must amend your VAT records and account for VAT on the invoiced amount or consideration you have received. For a VAT rate of 17.5% the VAT element would be calculated at 7/47 and for the 20% rate (from 4 January 2011) at 1/6.
>
> To amend your VAT records, you must make an entry equal to the tax on the supplies concerned on the 'VAT Payable' side of your VAT account. Include this amount in box 1 of your VAT Return for the period in which the time limit expires. If you do not, you're likely to be assessed for tax due on the supplies and may incur default interest and a financial penalty.
>
> 16.13 What do I do if the goods are later removed or I receive evidence of removal after I have accounted for VAT?
>
> If the goods are subsequently removed from the UK and/or you later obtain evidence showing that the goods were removed, you may zero rate the supply and adjust your VAT account for the period in which you get the evidence. This is provided that the goods have not been used in the UK before removal, unless specifically authorised."

Case law

87. The Court of Justice of the European Union ("CJEU") has established that the term "dispatched" used in article 138 PVD must be interpreted to mean that the right to dispose of goods as owner has been transferred to the purchaser and the supplier establishes that as a result of the dispatch or transport, the goods in question have physically left the territory of the member state of supply, *R (on the application of Teleos plc and others) v Revenue and Customs Commissioners* (Case C-409/04) [2008] STC 706) ("*Teleos*") at [42].

88. In *Teleos*, the CJEU also held that a supplier's and purchaser's intention to effect an intra-Community transaction is not sufficient for its classification as such. Requiring the tax authorities to carry out inquiries to determine the intention of the taxable person would be

contrary to the objectives of the common system of VAT of ensuring legal certainty and facilitating the measures necessary for the application of VAT by having regard, save in exceptional circumstances, to the objective character of the transaction concerned, at [39]. At [45], the CJEU said that if a Member State accepts alternative evidence to verify supplies, the general principles of EU law (including effectiveness and proportionality) are engaged.

89. The physical movement of goods from one Member State to another is a condition precedent to the application of the exemption under article 138 PVD (*Teleos* at [37]) and consequently zero rating in the UK. As such that is a substantive requirement of zero-rating.

90. Where the substantive requirements for exemption under article 138 PVD are satisfied, exemption cannot be denied where there is failure to comply with some formal requirement. This is not the case where non-compliance with formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied (paragraph [46] of the CJEU's decision in *Vogtländische Straßen-, Tief- und Rohrleitungsbau GmbH Rodewisch v Finanzamt Plauen* (Case C-587/10) [2013] STC 198 ("VST")).

91. Where evidence of removal has not been obtained within three months of the time of supply, the VAT must be accounted for at that time, and the VAT due attracts interest (*Customs and Excise Commissioners v Musashi Autoparts Europe Ltd (formerly TAP Manufacturing Ltd)* [2003] EWCA Civ 1738 [2004] STC 220).

92. The Upper Tribunal in *HMRC v Arkeley Limited (in Liquidation)* [2013] UKUT 0393 (TCC) considered the conditions for zero-rating and confirmed that "*the only question [for the Tribunal] is whether the documents received by the supplier are sufficient evidence of the export*":

> "34. It is clear from *Teleos* that proof of export depends on there being sufficient evidence of export in the hands of the taxable person at the relevant time. Absent fraud or bad faith, such evidence will result in the application of zero-rating even if it is later established that the goods were not exported. No question of bad faith or fraud on the part of Arkeley, or knowledge or means of knowledge of fraud, was alleged in this case. Accordingly, the question for the FTT was not whether it was satisfied that the goods were exported, but whether it was satisfied that there was sufficient evidence of export in the hands of Arkeley within the prescribed time limit."

93. It is therefore unnecessary for the Tribunal to establish whether an export has actually taken place.

94. An analogous two stage approach, where the Tribunal sought to establish whether a supply had taken place before determining whether HMRC's discretion under Regulation 29(2) of the VAT Regulations 1995 had been exercised reasonably, was deprecated in *Scandico v HMRC* [2017] UKUT 467 TCC.

SUBMISSIONS

95. Mr Southern's submissions on behalf of HR are summarised as follows.

96. The questions for determination are: (1) is the evidence relied upon by HR sufficient to demonstrate on the balance of probabilities that each of the 72 consignments were removed from the UK and (2) having regard to the answer to (1), has HR made an overpayment of output tax and, if so, by how much?

97. Evidence of removal of the goods from the UK is demonstrated by the production of a combination of documents and the inferences to be drawn from them. The documents are consistent with each other and so corroborate each other and accurately document the 72 transactions. The master spreadsheet sets out all the documentary information which has been

obtained in respect of each transaction, SR and MB in their evidence explain how the information was collected and correlated.

98. The grounds of appeal are that there is abundant evidence to establish that all 72 consignments were removed from the UK. There is no evidence to the contrary. None of the documentary evidence can be or has been challenged by HMRC. The matters not capable of dispute include the identification of the customer for all 72 consignments as being Recylink, a VAT registered business in Belgium.

99. All of the sales are documented by a variety of documents. There is no question of non-receipt of the goods by GC as he would not be prepared to pay invoice number 44 if he had not received the previous 43 consignments and HR would not be prepared to sell the goods to HR if it was not paid.

100. No question of bad faith or fraud or knowledge of fraud on the part of HR arises. The problem (if any) appears to have been in the area of Belgian VAT.

101. HMRC attach particular importance to paragraphs 4.3, 4.4, 5.1, 5.2 and 5.5 of VN 725. The documents produced and the evidence in support satisfy the formal and substantive requirements of 4.3, 4.4 and 5.2. Paragraph 5.1 takes an inclusive view of what is acceptable evidence of removal and says that a combination of the documents specified (but not a complete suite) may be used to prove removal. The appropriate documents included "*any other documents relevant to the removal of the goods in question which you would normally obtain in the course of your EU business*". Paragraph 5.5, which does not have the force of law, is headed "What if my customer collects the goods or arranges for their collection and removal from the UK"; HR have complied with all of the relevant provisions.

102. The right to recover overpaid output tax is a directly effective EU law right, a San Giorgio right which engages the general principles of EU, in particular effectiveness and proportionality. The CJEU in *Teleos* at [45] confirmed that if a Member State accepts alternative evidence to verify supplies, the general principles of EU law (including effectiveness and proportionality) are engaged. VAT Notice 703, Goods exported from the UK, has much in common with VN 725. Paragraph 6.1 of PN states:

> "For VAT zero rating purposes you must produce either official evidence as described in paragraph 6.2 or commercial evidence as described in paragraph 6.3. Equal weight is put on official and commercial transport evidence but both must be supported by supplementary evidence to show that a transaction has taken place, and that the transaction relates to the goods physically exported. If the evidence of export provided is found to be unsatisfactory, VAT zero rating will not be allowed and the supplier of the goods will be liable to account for the VAT due (see paragraph 11.2).

103. In *R & C Comrs v NHS Lothian Health Board* [2022] UKSC at [63]-[68], the Supreme Court stated that the effectiveness principle does not displace the obligation on the taxpayer to provide sufficient evidence to enable his claim for recovery of tax to be quantified; however, that statement was made in reference to a global claim where, unlike here, limited documentary evidence was available and the claim could not be calculated with arithmetic accuracy.

104. Once HR has put forward substantial and reliable evidence, the burden of proof shifts to HMRC to dispute it. HMRC have not produced (i) any evidence which seeks to disprove the Appellant's evidence; (ii) any evidence to show that any of the consignments were not removed from the UK; (iii) any witness to speak to any evidence which HMRC have. Further, as noted, the validity of all documents which the Company relies upon is unchallenged.

105. On the balance of probabilities, having regard to the quantity and quality of the evidence relied upon, documentary and oral, both regarded separately and in combination, the Company can establish that all 72 consignments were removed from the UK shortly after leaving the Company's yards. This is alike a matter of direct evidence and reasonable inference. All the transactions in question were correctly classified as zero-rated, because the goods were removed from the UK. Accordingly, no output tax was due in respect of them, and the attributable input tax was recoverable in full. In addition, HMRC are liable to repay the overpaid output tax VATA s 80(2A) and accordingly the Company is entitled to interest under VATA s 78(1)(a).

106. On 22 March 2023, HR provided written submissions to the Tribunal relying upon the Tribunal decision in *Pavan Trading Limited v HMRC* [2023] UKFTT 79 (TC) ("*Pavan*"). Mr Southern submitted that although *Pavan* was concerned with VAT Notice 703, the time limits were identical to those in PN 703. Reliance was placed upon *Pavan* to counter HMRC's submission that evidence of export must be provided to HMRC within three months of the date of supply and all the documents relied on must in any event be obtained within three months of supply and documents not obtained before the end and held at the end of that period cannot be used as or in support of evidence or export/removal from the UK. *Pavan* at [29] stated:

> "Given that the crucial word in section 3.5 of Notice 703, which has the force of law says "obtain", we found these curious submissions, as did Mr Bedenham. His view, as was ours, was that this simply meant that the taxpayer had to have obtained and have in his possession valid evidence of export within the 3 months from the time of supply."

107. The Tribunal in *Pavan* pointed out that such a narrow reading would also be inconsistent of the UT in *Arkeley*, the UT stated that the evidential requirements had to be approached in a flexible and pragmatic manner and evidence from a combination of documents could be relied upon including official, commercial and supplementary material, at [38].

108. Ms Stephenson's submissions on behalf of HMRC are summarised as follows.

109. The question for determination by the Tribunal is did the Appellant hold valid commercial evidence to demonstrate that the goods have been removed from the UK within three months of supply per the requirements set out in VN 725 paragraphs 4.3 and 4.4. In considering whether the evidence of removal meets this test the Tribunal will consider the requirements which must be met contained at paragraph 5.2 of VN 725 and the documents which may be used as proof of removal at paragraph 5.1 of VN 725. Paragraph 5.5 of VN 725 sets out the evidence required where a company is claiming zero-rating but is not arranging transport of the goods following sale. Paragraph 5.2 has the force of law, paragraphs 5.1 and 5.5 do not.

110. The proper test to be applied is not whether the goods were in fact removed from the UK but rather whether the Appellant was entitled to claim zero-rating on those goods, having met the requirements of VN 725. The onus is on the company claiming zero-rating to gather sufficient evidence of removal within three months. If they do not do so, they are simply not entitled to rate the supplies in that way. The Appellant cannot circumvent the proper requirements of VN 725 by substituting them for the Appellant's novel test that the Tribunal can rely on "*direct evidence and reasonable inference … documentary and oral*" to determine whether the goods were removed from the UK.

111. HMRC's approach is supported by the UT decision in *Arkeley Limited (in Liquidation)* [2013] UKUT 0393 where the UT considered the distinction between the Tribunal being asked to decide (i) whether goods had been exported, and (ii) whether there was sufficient evidence of export held by *Arkeley* within the relevant time limit. The UT stated:

> "22. What this means is that in a case where bad faith is not alleged, and where it is not argued that the taxable person was a participant in fraud, whether an actual participant or a participant by virtue of knowledge or means of knowledge of the fraud … the only question is whether the documents received by the supplier are sufficient evidence of the export. That is the case whether or not the tax authority has itself accepted the evidence. If that evidence is sufficient, and that is a matter for the Tribunal in the case of dispute, the application of zero-rating will not be precluded even if it is later discovered that the goods have not been exported …
>
> 34. It is clear from *Teleos* that proof of export depends on there being sufficient evidence of export in the hands of the taxable person at the relevant time. Absent fraud or bad faith, such evidence will result in the application of zero-rating even if it is later established that the goods were not exported. No question of bad faith or fraud on the part of Arkeley, or knowledge or means of knowledge of fraud, was alleged in this case. Accordingly, the question for the FTT was not whether it was satisfied that the goods were exported, but whether it was satisfied that there was sufficient evidence of export in the hands of Arkeley within the prescribed time limit.
>
> 35. That was the way in which the FTT approached the issue. It did not base its findings on any misconceived assumption that HMRC had agreed that the goods had been exported. It examined, as it was required to do, the evidence of export, and reached its findings on that basis ..."

112. The UT in *Scandico v HMRC* [2017] UKUT 467 TCC at [39] – [44] condemned the "two stage approach" followed by the Tribunal of deciding first whether there was in fact a taxable supply, and only if the FTT concluded that there was, then going on to consider whether HMRC had acted reasonably in rejecting alternative evidence where valid invoices were not held.

113. HMRC are not required to conduct independent investigations to verify or challenge evidence which purports to meet the requirements of VN 725, see *Angela McCamiley v HMRC* [2016] UKFTT 0701 (TC) at [44]. HMRC do not need to produce evidence that the goods in question did not leave the UK in order to undermine HR's case. HMRC's position, which has remained unchanged throughout the dispute, is that HR did not hold valid commercial evidence that the goods had been removed from the UK within the requisite time limit. HMRC do not have to prove a negative to undermine HR's case: the evidence presented by HR is simply insufficient. There is no burden on HMRC to demonstrate that the goods did not leave the UK: that is not the issue before the Tribunal. HMRC do not accept that the documentation presented by the Appellant demonstrates sufficient evidence of export in the hands of the Appellant within the prescribed time limit. In those circumstances the legal test is not met and no 'reverse burden' can arise in relation to the reliability of the evidence.

114. HR has presented the following documents as valid commercial evidence that the goods had been removed from the UK: invoices; weighbridge tickets, bank statements, CMRs, Annex VII forms, P&O boarding cards, e-mails from GC to Terence Everett and WhatsApp messages.

115. The boarding cards and e-mails were not obtained and retained within the three-month time limit in VN 725, which has the force of law. They cannot be used to support an argument that HR were entitled to zero-rate the goods in this appeal. Even if they were within the time limit, the boarding cards and e-mails do not provide the detail required VN 725. The CMRs and Annex VII forms might be capable of being useful, had HR obtained complete copies from the consignee which showed export and/or the route of export. In their current state they do not perform this function. The weighbridge tickets, invoices and bank statements, and to some

extent the WhatsApp messages, demonstrate that the goods were sold to a company registered in Belgium, but not that they were exported.

116. Ms Stephenson referred to HR's closing in which it was submitted that in relation to the three month time limit: "*documents showing export had to be brought into existence in that period*" and that all documents that HR relies on were "*produced within this three-month period. In effect they've got to be contemporaneous*". It is HMRC's case that the wording of paragraph 4.4 VN 725 is unambiguous: the three-month time limit applies to "the removal of goods and obtaining valid evidence of removal". HR's submission is simply not supported in case law.

DISCUSSION

BURDEN OF PROOF

117. Mr Southern submitted that once HR has provided substantial and reliable evidence the burden of proof shifts to HMRC. We do not accept that submission and agree with HMRC that there is no "reverse burden" of proof on HMRC to conduct independent investigations to verify or provide evidence which challenges or undermines evidence which HR asserts meets the requirements of VN 725. The burden of proof is on HR to show that they have satisfied the conditions set out in VN 725 to zero-rate their supplies and provided documentation to show that the goods were removed from the UK. We agree with the Tribunal in *Angela McCamley v HMRC* [2016] UKFTT 0701 (TC) where it stated at [44]:

> " … The requirements for zero-rating supplies of exported goods are set out in legislation; it is not the role of HMRC to make up for the shortcomings of taxable persons in complying with those requirements, as is clear from the *Twoh International BV v Staatssecretaris van Financien* case, which is binding upon this Tribunal."

118. We further agree with HMRC that even when the Tribunal does not regard evidence as challenged that does not mean that HMRC are unable to undermine HR's case, see *Peter Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442 at [69] (Asplin LJ) and [81] (Nugee LJ):

> "81 As a matter of basic principle it is the function of trial judges to evaluate all the evidence before them in reaching their conclusions on the factual issues. That includes deciding what weight should be given to the evidence. I see nothing in the authorities that suggests that that obligation to assess the evidence falls away if it is "uncontroverted"; uncontroverted evidence still has to be assessed to see what assistance can be derived from it, viewed in the context of the circumstances of the case as a whole. Uncontroverted evidence may be compelling, but it may not be: it may be inherently weak or unhelpful or of little weight for other reasons."

TIME LIMITS

119. There was no disagreement between the parties that the UK tax authority is entitled to set out conditions which attach to the entitlement to zero-rate supplies. We did not understand Mr Southern to be arguing that the requirements of VN 725 were disproportionate but rather HMRC's conduct during the course of the dispute was disproportionate. That point is considered below.

120. Mr Southern submitted that HMRC had sought to rely upon the position that VN 725 paragraph 4.4 required that the taxpayer had all the evidence in its hands within three months of the sale and that evidence could not be added to or supplemented by additional evidence. As HMRC had not relied upon that argument in its Statement of Case it is simply too late for HMRC to rely upon that argument. Paragraph 6 of HMRC's Statement of Case set out the case that has to be met: "It is common ground that the issue before the Tribunal is whether the

conditions for zero rating have been satisfied and in particular whether sufficient evidence has been provided by the Appellant that the goods in question were removed from the United Kingdom." We reject Mr Southern's submission, it is clear from HMRC's Statement of Case at paragraphs 25, 30, 43(2) and 50 that HMRC relied upon the three months' time limit. If any doubt remained, HMRC's skeleton served on in advance of the hearing originally listed to be heard on 4 July 2022 made HMRC's position clear at [61] under the heading of "Conclusion":

> "The Respondents rely on Notice 725 para 4.4, which has the force of law: the time limit for obtaining valid evidence of removal in this situation is three months and the Appellant did not meet it."

121. We did not understand HMRC's position to be that supplementary evidence could not be provided post the three months period but rather it was HMRC's position that it was not disproportionate for HMRC to decline the additional evidence in light of the circumstances of this appeal where the evidence was provided some 18 to 30 months after the three month period. Mr Southern, in oral closing stated that, in relation to the three month time limit, "documents showing export had to be brought into existence in that period" and that all the documents that HR relied upon were "produced within this three month period … the documents on which you rely to show removal have to come into existence within three months, in effect they've got to be contemporaneous". Reliance was placed on *Arkeley* at [47] for the proposition that information could be added to subsequently:

> 47. We do not consider it is right to characterise the production by Arkeley of further documentation as its ceasing to rely upon the original evidence of export. The FTT was entitled to consider the evidence that was produced and evaluate it in light of the circumstances. We agree that where there is conflicting evidence, that is a circumstance to be considered, with the usual care, by the tribunal. But we do not accept that the FTT failed to take account of all relevant matters, or that its approach can be said to have been wrong in law. The FTT addressed the discrepancies between the various documents and concluded that they did not prevent the original documents being accepted as satisfactory proof of export. That is a conclusion the FTT was entitled to reach on the evidence, and as such it does not disclose any error of law."

122. We do not accept Mr Southern's submissions.

Paragraph 4.3 (which has the force of law) of VN 725 states:

> "… You obtain and keep valid commercial evidence that the goods have been removed from the UK within the time limits set out at paragraph 4.4"

Paragraph 4.4 (which has the force of law) of VN 725 states:

> "4.4 Time limits for removal of goods and obtaining evidence of removal
>
> In all cases the time limits for removing the goods and obtaining valid evidence of removal will begin from the time of supply. For goods removed to another EC Member State the time limits are as follows:
>
> 3 months"

We agree with HMRC that it is clear from paragraph 4.3 in VN 725 that the evidence of removal has to be obtained within three months and not that the valid evidence is brought into existence within the three month time limit and obtained at some future date.

123. The UT in *Arkeley* considered VAT Notice 703, Goods exported from the UK, which has much in common with VN 725. At [34] the UT referred to the possession, not the creation, of the documents:

> 34. It is clear from *Teleos* that proof of export depends on there being sufficient evidence of export in the hands of the taxable person at the relevant time. Absent fraud or bad faith, such evidence will result in the application of zero-rating even if it is later established that the goods were not exported. No question of bad faith or fraud on the part of Arkeley, or knowledge or means of knowledge of fraud, was alleged in this case. Accordingly, the question for the FTT was not whether it was satisfied that the goods were exported, but whether it was satisfied that there was sufficient evidence of export in the hands of Arkeley within the prescribed time limit.

124. We do not accept that *Arkeley* at [47] is authority for the general proposition that there is flexibility as to the timescale for the taxpayer to obtain additional further documentation that was brought into existence within the three-month time limit. The UT in *Arkeley* was considering the status of further and corrected versions of a certificate of shipment that Arkeley had in its possession within the three month time limit but which contained errors but had been provided to HMRC. The UT concluded that the FTT, having addressed the discrepancies between the various documents and concluded that they did not prevent the original documents being accepted as satisfactory proof of export, was entitled to reach that conclusion.

125. In *Pavan* (relied upon by Mr Southern in supplemental written submissions) at [29] the Tribunal stated that it was abundantly clear from the UT decision in *Arkeley* that the Tribunal must consider all the documentation which was in the taxpayer's possession within the three month time limit:

> 29. Given that the crucial word in section 3.5 of Notice 703, which has the force of law says "obtain", we found these curious submissions, as did Mr Bedenham. His view, as was ours, was that this simply meant that the taxpayer had to have obtained and have in his possession valid evidence of export within the 3 months from the time of supply. This enables a taxpayer to obtain the information if it is using an independent exporter (not the situation in this case where the appellant exported the goods itself via the Post Office).
>
> 32. We are bound by *Arkeley*. It is abundantly clear from that decision that we must consider all the documentation which was in the appellant's possession within 3 months from the time of supply."

HMRC APPROACH TO THE APPEAL DISPROPORTIONATE

126. Mr Southern submitted that HMRC's approach to the appeal had been wholly disproportionate and heavy-handed: it had twice applied to strike out the appeal (the second strike out application dated 28 September 2021 contained identical grounds to those dismissed by Judge Short on 31 January 2020 and was withdrawn shortly after the application was made), it was only at the hearing of the first strike out application on 16 January 2020 that HMRC agreed that the decision letter was the letter dated 17 July 2018, there had been unreasonable delay and HMRC had not properly considered the information provided. We have no general "supervisory" jurisdiction to consider claims based on public law concepts such as fairness or inappropriate conduct by HMRC, such matters are properly a matter for judicial review proceedings and/or a complaint to the Adjudicator's Office. The Tribunal has the power to order costs under Rule 10 of the Tribunal Rules when a party or its representative had been unreasonable in "bringing, defending or conducting proceedings", such applications are required to be made no later than 28 days after the release of the Tribunal decision. We note that HR's application for costs on an indemnity basis in respect of the additional costs incurred by the second strike out application has yet to be determined and that application will be considered together with any subsequent application for costs (if any) made by either party after the release of the Tribunal decision.

EVIDENCE OF REMOVAL

127. VN 725, at 86 above, sets out the conditions which attach to the entitlement to zero-rate supplies. In our judgment, it is clear from paragraph 4.3 and 4.4 VN 725 (which are stated to have the force of law) that, as stated by HMRC, that the onus is on HR (as the company claiming zero-rating) to gather sufficient evidence of removal within three months of the date of the supply. If HR do not do so, they are not entitled to zero-rate the supplies. That position was made clear in *Customs and Excise Commissioners v Musashi Autoparts Europe Ltd (formerly TAP Manufacturing Ltd)* [2003] EWCA Civ 1738 [2004] STC 220) at [23] that where evidence of removal has not been obtained within three months of the time of supply the VAT must be accounted for at that time. Para 9.4 provided that "If you are subsequently able to meet all the conditions, e.g. you later obtain evidence of removal of the goods from the UK, you can then zero-rate the supply and adjust your VAT account for the period in which the conditions were met." Para 16.12 and 16.13

128. The UT in *Arkeley* at [39] stated: "All the documentation obtained within the relevant time limit, including supporting documentation, should be considered in determining whether, taken as a whole, those matters have been so identified". HR has relied upon the following documents as evidence of removal of the goods within the three month time limits: sales invoices, bank statements, weighbridge tickets, CMRs, Annex VII forms, P&O boarding cards, e-mails and WhatsApp messages. We have considered those documents by reference to consignment number nine ("#9") that was exhibited to SB's first witness statement as a sample consignment. We have set out our findings of fact in respect of each category of document. The findings of fact are equally applicable to the documents in the same category in respect of all the other consignments.

SALES INVOICES

129. The contents of the sales invoice for #9 are set out at paragraph 52 above. The Sales Invoice for #9 is numbered INV003053, dated 15 March 2016 and is addressed to "Recyclink International, Eduard Hammanstraat 31, B-8400, Oostende, Belgium" and contains Recyclink's VAT number "BE0526723559". We accept that the Sales Invoice contains the information set out in para. 5.1 of VN 725. However, in our judgment, the Sales Invoice does no more than show that a sale of "Milberry" scrap copper was made to Recyclink. It does not on its own provide clear evidence that the goods were removed from the UK, it merely confirms that a HR agreed the sale of scrap metal to a purchaser who is a Belgium VAT registered company. Despite the invoice confirming the sale of scrap metal to a Belgium registered company it does not automatically follow and nor can it be inferred that the address of the purchaser is the same address as the destination that the goods were sent to.

BANK STATEMENTS

130. SR, in his evidence, confirmed that a "running account" was maintained by Recyclink with HR which was "topped-up" with a sum corresponding to the value of the load and therefore the payments made by Recyclink to HR's Barclays' account would not exactly match the sale figure contained on the invoice. In respect of transaction #9 two transfers were received from "Gregory C" for £86,000.00 and £162,500.00 on 15 March 2016. Both transfers contained the transaction reference "1/DE H Gregory C *561699*PAYMENT FO*TFR". The same transaction reference was used for all transfers from Recylink to HR. We accept SR's evidence that Recyclink maintained a "running account" with HR such that the balance was always sufficient to ensure that HR were in funds to the value of the scrap metal load before it was released from HR's yard. We accept SR and MB's unchallenged evidence that HR's Barclays' bank statements show that that all the bank transfers made by Recyclink to HR were sent using a Belgium SWIFT code and a translation from Flemish to English was provided in the transaction narrative in the Barclays' bank statements. Whilst we accept that HR's

Barclays' bank statements show that all the payments made by Recyclink to HR were made from Recyclink's Belgium bank account, we do not accept that HR's Barclays' bank statements evidence the export of the load of scrap metal in #9 nor evidence the export of the loads of scrap metal scrap in any of the other transactions: HR's Barclays' bank statements only evidence that payments for loads of scrap metal were received from Recyclink's Belgium bank account.

131. Mr Southern relied upon the fact that HR had received payment from Recyclink for all the loads and rhetorically asked "Why make payments if the goods were not received?". We did not understand HMRC's case to be that the loads of scrap metal were not ordered and paid for by Recyclink but rather that receipt of payment for the loads was not on its own evidence of export. We agree. We accept that payment was made by Recyclink to HR for each load but do not accept that it therefore follows that the loads were received by Recyclink in Belgium. We accept GC must have been satisfied that the loads had been received by his customers otherwise the payments would not have been made. We accept that payment is proof of receipt of the goods; however, that does not confirm who received the goods nor where the goods were delivered.

WEIGHBRIDGE TICKETS

132. The contents of the weighbridge ticket for #9 are set out at paragraph 53 above. SR's evidence, which we accept, is that the weighbridge tickets were automatically produced by the FRED system which, having weighed the unladen and laden lorry, recorded the nett weight of the scrap metal load. The information obtained from the weighbridge machine was used to automatically populate the invoice subject to the agreed sale price per tonne being inputted. The vehicle registration shown on the weighbridge ticket, YX11 ANV, is a UK vehicle registration number. A UK vehicle registration number is shown on every weighbridge ticket where the vehicle no. box has been completed. In total, four different UK registration numbers are shown on the weighbridge tickets. In #9, no details of the carrier are provided nor is a name provided beneath the signature given on behalf of the carrier said to be representing Recyclink. A significant number of the weighbridge tickets are unsigned and do not contain a carrier name.

133. SR in his evidence confirmed that the weighbridge tickets and invoices were produced regardless of whether the scrap metal load was being exported or sold to a buyer within the UK. We do not accept that the weighbridge ticket in #9 nor the weighbridge tickets in any of the other transactions is evidence of export. The weighbridge ticket merely confirms what is apparent from the face of it: a consignment of scrap metal was sold to a Belgium based company that is registered for VAT in Belgium and the consignments of scrap metal were collected by a UK registered vehicle (where a registration number is provided). We note that the UK vehicle registration numbers entered on the weighbridge tickets do not appear in any subsequent documents provided by HR as evidence of export.

CMRs

134. The CMR for #9 is set out at paragraph 53 above. The CMR is stamped with HR's Ashford yard details and is again stamped at the bottom of the document where it is dated and signed on behalf of HR by an employee, "S A Stacey". Box 23 provides for the "Signature and stamp of the carrier" and contains an unidentified signature but no carrier stamp. Relevantly, in our judgment, the following boxes have not been completed and are blank: Box 3 – "Place of delivery of the goods (place, country); Box 4 – "Place of delivery of taking over the goods (place, country, date); Box 16 – "Carrier (name, address, country); Box 17 – "Successive carriers (name, address, country) and Box 24 – "Goods received" with space for insertion of the place and date and "Signature and stamp of the consignee". As submitted by Ms Stephenson, paragraph 5.1 of VN 725 provides that a CMR may be relied upon as evidence of removal of good from the UK, paragraph 5.1 relevantly states: "*commercial transport*

document(s) from the carrier responsible for removing the goods from the UK, for example an International Consignment Note (CMR) fully completed by the consignor, the haulier and signed by the receiving consignee." [emphasis added].

135. All the CMRs that were in evidence were completed at HR's premises and contained HR's details as consignor and the destination and consignee name entered in Box 2 was either Recyclink or "Mattheeuews N.V.". SR's evidence was that where "Mattheeuews N.V." was stated to be the consignee this was not the destination of the goods but the name of a freight provider. Where Box 16 had been completed and the carrier name and address inserted it was, bar one instance in #3, always a UK carrier, M D Transport based in Rainham, Essex. In #3, Mattheeuews N.V was stated as the carrier.

136. None of the CMRs were, as required by paragraph 5.1 of VN 725, fully completed by the haulier and signed by the receiving consignee. In the absence of details of the carrier (Box 23) and consignee (Box 24), the CMRs merely record that a load of scrap copper metal was sold to a company registered for VAT in Belgium and the loads were to be collected (with one exception) by a UK based carrier, MD Transport. We do not accept that the CMRs, as completed, evidence the export of the loads of scrap copper.

ANNEX VII DOCUMENTS

137. The Annex VII document for #9 is set out at paragraph 57 above. MB's evidence was that Boxes 1 and 2 were always typed by HR and contained the same information: Box 1 gave HR's name, address and telephone, fax and e-mail contact details, Box 2 contained Recyclink's name and address as "Importer". No contact details for Recyclink are provided. MB accepted in cross-examination that he had not noticed that in respect of #9, the date of transfer was recorded as 13 August 2015 whereas the actual date of shipment in Box was stated as 15 March 2016 nor had he noticed seven other instances of the same error. Box 11 in respect of #9 recorded the UK as both the exporting and importing country.

138. His first witness statement stated at [8]: "*It is an international trait of the scrap metal trade to try and hide the final destination of the goods from the seller in this case. It is done to prevent the seller (in this case H Ripley and Co. Ltd) from finding out who the final purchaser of the material is*". He explained in oral evidence that, following conversations with colleagues and directors of HR, he understood that the UK was deliberately stated as both the exporting and importing country in order to conceal the final destination to prevent Recyclink from being cut-out by HR from future transactions. SR offered a different explanation: the UK was shown as the destination as the Word template used by HR to produce the Annex VII document pre-populated the export destination as the UK and this had not been changed and saved by the employees completing the document. We agree with HMRC's submission that, regardless of which explanation is accepted for the UK being incorrectly stated as the export destination, the errors undermine HR's position that that Annex VII documents can be relied upon and evidence the export of the scrap metal consignments. We consider it of note that none of the Annex VII documents have Box 13 completed: "Signature upon receipt of the waste by the consignee". We do not accept that the Annex VII documents, as completed, evidence the export of the loads of scrap copper.

P&O BOARDING CARDS

139. The details contained in every P&O boarding cards are set out at paragraph 59 above. RL's unchallenged evidence was that the P&O boarding passes were provided to HMRC shortly after they were provided by GC to HR some 18 to 30 months after the disputed consignments took place. In our judgment it is clear from VN 725 and, as confirmed in *Pavan* and *Arkeley*, that the taxpayer had to have in its possession valid evidence of export within three months from the time of supply. We accept that on 12 May 2017, Officer Yeomans gave

HR the opportunity to provide further supporting evidence of export; however, the boarding cards were not provided to HMRC until 30 May 2018. We do not accept HR's submission that it was disproportionate for Officer Yeomans to respond stating that the time limit for obtaining valid evidence of removal was three months and to disagree that the substantive requirements of VN 725 had not been met. HMRC relied upon the decision of the Tribunal in *CPR Commercials Limited v HMRC* [2021] UKFTT 408 (TC) at [111] to [119] in support of the submission that it was not disproportionate to state that the boarding cards had been provided too late. We agree with the Tribunal in CPR Commercials and adopt their reasoning:

> "Breach of principle of proportionality
>
> 111. CPR contended that they had broadly complied with the requirements of the VAT Notice and that it was disproportionate for HMRC to insist upon being provided with specific documents where there was evidence that the vehicles had been exported.
>
> 112. CPR also argued that it was disproportionate for HMRC to require that the evidence be obtained within three months of the date of supply, where the goods could be shown to have been removed from the UK. The decision in *Collée* (Case C-146/05) indicated (§§29-31) that the principle of fiscal neutrality required that the exemption (zero-rating in the case of the UK) should be allowed where the substantive requirements had been met, even if some of the formal requirements had not been met. In this context, it was argued that the three month limit for obtaining information was a formal requirement, not a substantive requirement.
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> 113. The decision in *Mecsek-Gabona Kft* was also noted (§§34-35) to have concluded that it is "the vendor's obligation to establish that the goods have been dispatched or transported to a destination outside the Member State of supply. … it has been difficult since the abolition of border controls between the Member States for the tax authorities to check whether or not the goods have physically left the territory of that Member State. As a result, it is principally on the basis of the evidence provided by taxable persons and of their statements that the national tax authorities are to carry out the necessary checks". Further (§43), "once the vendor has fulfilled his obligations relating to evidence of an intra- Community supply, where the contractual obligation to dispatch or to transport the goods out of the Member State of supply has not been satisfied by the purchaser, it is the latter which must be held liable for the VAT in that Member State" and (§42) "account must be taken of the fact that the evidence that the vendor might submit to the tax authorities depends essentially on information that it receives for those purposes from the purchaser".
>
> 114. However, we consider that it is also important to note that in *Mecsek-Gabona Kft* the vendor had CMRs returned by the purchaser from its address which stated that the goods had been transported to Italy. The vendor had also shown that the goods were collected by foreign- registered vehicles and the registration numbers of these vehicles had been provided to the supplier in advance. That is considerably more evidence of export than has been provided in this case.
>
> 115. As set out above, we find that CPR has shown only that they delivered vehicles to a UK port and left them there. They have no evidence as to what happened to the vehicles thereafter, although in some cases CPR appear to have been aware that vehicles were shipped to Northern Ireland. As also set out above, the fact that CPR advised the DVLA that the vehicles had been exported is not evidence that the goods were in fact exported. The sale of

vehicles to an entity or person with a non-UK VAT number is, similarly, not evidence of export.

116. In this context, we do not agree that there has been any breach of the principle of proportionality: CPR has provided nothing other than their assumption that, as the vehicles were delivered to a port and had been purchased by someone with a non-UK VAT number, those vehicles had been exported from the UK. In contrast to the position in *Mescek-Gabona Kft* CPR have received no information from their purchasers that states where (and when) the vehicles were taken after being left at the port.

117. It is clearly not a breach of the principle of proportionality for a taxpayer to provide clear evidence of export in order to be able to zero-rate a sale as an export. Indeed, the CJEU in *Mescek-Gabona Kft* concluded (§55) that:

" Article 138(1) of Directive 2006/112 is to be interpreted as not precluding … refusal to grant a vendor the right to the VAT exemption for an intra-Community supply, provided that it has been established, in the light of objective evidence, that the vendor has failed to fulfil its obligations as regards evidence".

118. As set out above, we consider that CPR has failed to provide objective evidence that the substantive requirement, that the vehicles have been exported, has been met. They are therefore not entitled to zero-rate the relevant supplies. As also set out in *Collée* (§31), fiscal neutrality does not permit exemption where "… non-compliance with such formal requirements would effectively prevent the production of conclusive evidence that the substantive requirements have been satisfied".

119. We find that there has been no breach of the principle of proportionality in this case in requiring evidence of export."

140. Even if we are wrong on that point, we do not accept that the boarding cards evidence the exports of the scrap metal. SB confirmed in his evidence that none of the reference numbers on the boarding card match those used in any of the other documents, none of the lead names on the boarding cards match any of the other names in any other document, what SB had understood to be vehicle registration numbers did not contain the required digits and format for a UK vehicle registration number and, in any event, none of the vehicle registration numbers recorded on the weighbridge tickets were contained on the boarding cards. SR confirmed in cross-examination that there were too many digits for the number to be a Belgium vehicle registration number and it was also not the correct format for a trailer registration number. SB further accepted, as confirmed by Ms Mayo of P&O, that the date (just the day and month were stated) and time stated on the boarding cards recorded the date and time that the booking was made and does not refer to a particular ferry departure time. SB's evidence was that the boarding cards were provided to HR by GC, there was no evidence as to how GC came to be in possession of the boarding cards.

141. In any event, as HMRC submitted, we accept that the boarding cards do not have any identifying features such that that they may be matched with any of the disputed consignments. SB accepted that when he had "matched" the boarding cards to particular consignments he had relied upon various assumptions and largely relied upon the weight of the load as contained in the weighbridge tickets as a determinative factor. We do not accept that the weight of the load is a determinative factor as the evidence was that a load weight of 25.00 tonnes is the global standard for a fully laden lorry or container which, when added to the standard tare of 18.00 tonnes will invariably provide a total weight that is the region of or identical to the 43.00 odd

tonnes weight stated on the boarding card. We do not accept that the boarding cards evidence that the consignments were exported.

E-MAILS

142. As set out at paragraph 63 above, MB had, where possible, matched up the e-mails to the consignments by making assumptions based upon any reference to dates and prices mentioned in the e-mails. MB accepted in his evidence that it appeared that all the e-mails had the same heading and the same paragraph from the buyer to the carrier asking if it could collect a load from HR for delivery to Mattheeuws in Veurne, the majority of the e-mails were undated and, whilst reference was made to a specific type of copper, there was no reference to price. SR's evidence was that he requested the e-mails a week or two after the first transaction with Recyclink as he had realised that he had not been copied in and HR, for security and administration purposes, needed to know who would be arriving at the yard and at what time to collect the load. We do not accept that the e-mails were in HR's possession within the three-month time period required by VN 725 nor that they were provided by GC to SR as confirmation, we find that it is clear from the evidence that the e-mails were only provided to SR by GC in March 2017, some 18 to 30 months after the disputed transactions, when it was realised that HR needed to provide evidence of export to HMRC.

143. We do not accept that the e-mails evidence that the loads were exported. At the highest, the e-mails evidence a request from Recyclink to a carrier to collect goods from HR's yard and deliver them to Mattheeuws in Veurne.

WHATSAPP MESSAGES

144. The unchallenged evidence of Officer Lahi was that she was provided with copies of the WhatsApp messages by HR on 28 August 2018, some 18 to 30 months after the dates of the disputed consignments. The WhatsApp correspondence No. 1 was between Recyclink/GC and HR (JR and SR) for the period 22 February 2016 to 19 September 2016 and the WhatsApp correspondence No. 2 was between Recyclink/GC and HR (JR). The WhatsApp correspondence No. 2 messages did not contain any dates, time of messages or any names. It is unclear why the WhatsApp messages were not provided to HMRC until 28 August 2018 rather than when additional information was requested in March 2017. Despite that delay, we have considered the WhatsApp messages as the messages would have been in HR's possession during the three-month time limit as JR and SR were part of the two WhatsApp "chats" and the messages available to them.

145. The WhatsApp messages confirm, as submitted by HMRC, that HR was trading with GC on a frequent basis and that collections of loads of scrap metal from the yards at Hailsham or Ashford were being arranged. The messages (with GC's mobile telephone number redacted) confirm that GC was as acting as a middleman and buying on behalf of unidentified third parties:

> "[13.39, 10/03/2016] + 32 XXX XX 92 70: Will contact the buyer and revert
>
> [13.33, 04/04/2016 +32 XXX XX 92 70: I contacted the buyer. He will send more funds tomorrow. He told me their buyers of cathodes are very slow in payment for the moment. But today I can not do any more payments.
>
> [09.31, 05/09/2016] Jay: whats [sic] being collected today
>
> [09.32, 05/09/2016] + 32 XXX XX 92 70: Trying to get hold of my customer. He is somewhere travelling in China but can't get hold of him for the moment. Hope to know very soon.
>
> No payment received yet by customer from his Chinese customer."

146. We accept, as confirmed by RL in her unchallenged evidence, that the WhatsApp messages referred to the following: the types of metals purchased by Recyclink, the price fixed by reference to the LME spot prices, locations of HR's yards for collection of the loads, requests by Recyclink to purchase specified metals, requests for payment of outstanding payments and references to the haulier named in the messages, Mattheeuws. We further accept, as confirmed by RL's unchallenged evidence, that the WhatsApp messages do not state which haulier, driver or mode of transport collected the loads of scrap metal nor are any handover documents referred to in any messages. We consider it of note that the WhatsApp messages are wholly silent on whether the loads were exported from the UK. The WhatsApp messages confirm that GC was acting as a middleman in the trades and, despite Mr Southern's urging, we do not accept that it is implicit that as Recyclink was located in Belgium and had Belgium VAT registration number, the loads were exported. The WhatsApp messages do not identify GC's clients nor the destination for the loads. We find that the WhatsApp messages do not evidence that the loads were exported.

147. The WhatsApp message do; however, confirm that HR was aware that it did not hold sufficient information to justify the zero-rating of the loads. On 19 September 2016 at 15.41, JR sent a message to GC stating: "We have been told by the UK VAT office that we need to now invoice you for VAT for the loads without documents." The subsequent messages are all from WhatsApp correspondence No.2 and are all undated and without times and names. The messages state:

> "Are you availability [sic] yet.
>
> Still busy. Will call you directly when out.
>
> Will you call today, it's better we talk.
>
> I am with a customer. Will call you back.
>
> Can you call please.
>
> Please call me.
>
> Gergory please call urgently we need to produce evidence together or issue proceedings against you. We want to avoid but lack of information is putting us in a position.
>
> Can I call you.
>
> Still going through my files. Will get back to you tomorrow. At a reception for the moment. Will call you in the morning. Hope we can sort this out properly.
>
> We have a similar situation with a company in Spain which has gone legal we really want to avoid with you.
>
> Me too. Wait till I call you in the morning. We need to act similarly.
>
> Please call me, I'm available now
>
> are you available now
>
> Will you be sending stuff to us this week"

DECISION

148. For all of the reasons set out above, we find that none of the documents (individually or taken as a whole) relied upon by HR evidence the export of the loads of scrap metal per the requirements of VN 725. Accordingly, we dismiss the appeal and uphold the assessments.

RIGHT TO APPLY FOR PERMISSION TO APPEAL

149. 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.

GERAINT WILLIAMS
TRIBUNAL JUDGE

Release date: 07th FEBRUARY 2024