[2017] UKUT 245 (TCC)

Appeal number: UT/2015/0172

EXCISE DUTIES — whether assessment made within time limit — FA 1994 s 12 — when necessary facts came to the respondents' knowledge — whether F-tT's findings of fact open to it — yes — appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

LITHUANIAN BEER LIMITED **Appellant**

- and –

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

Tribunal: Hon Mrs Justice Asplin DBE
Judge Colin Bishopp

Sitting in public in London on 27 March 2017

Geraint Jones QC, instructed by Rainer Hughes, for the Appellant

Simon Pritchard, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant, Lithuanian Beer Limited ("LBL"), carries on a business which includes the import of flavoured ciders. It is common ground between LBL and the respondents, HMRC, that, because of their composition, the ciders attract excise duty at the rate applicable to made-wine, rather than the lower rate charged on conventional cider. However, by what HMRC accept was mistake rather than design, between December 2007 and January 2011 LBL imported flavoured ciders and paid duty on them at the rate applicable to cider. The mistake was discovered and on 14 November 2011 HMRC assessed LBL for the underpaid duty, amounting (after some downward adjustment) to £189,661.57. LBL appealed to the First-tier Tribunal ("the F-tT") against the assessment, on the sole ground that it was made out of time.

2. The appeal was heard by Judge Jonathan Richards ("the judge") who, in a decision released on 10 September 2015, found that the assessment was made within the relevant time limit, and dismissed the appeal. LBL sought permission to appeal to this tribunal against the F-tT's decision on three grounds which, shortly stated, were that the F-tT applied the wrong legal test, that it had mischaracterised certain evidence, and that it had failed to make a particular finding of fact. Permission was refused by the judge and again, on LBL's written application, by Judge Herrington in this tribunal. However, LBL exercised its right to renew the application orally, and Judge Herrington gave permission, but on only one of the grounds advanced. That ground was set out in the application for permission as "He [*ie* the judge] failed to apply the correct legal test in that he failed to apply the plain words of section 12(4)(b) VATA '94".

3. "VATA '94" is, of course, the Value Added Tax Act 1994 (hereafter, "VATA"). The reference to VATA is an error, since the relevant provision is to be found in the Finance Act 1994. Section 12 of that Act deals with the making of excise duty assessments, and sub-s (4), the only provision which is material for present purposes, is as follows:

> "An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say—
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> (a) … the end of the period of 4 years beginning with the time when his liability to the duty arose; and
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> (b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;
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> but this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making of an assessment under this section, to the making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment."

4. It was not in dispute before the F-tT that para (a) was not engaged, and the only question was whether the one-year time limit imposed by para (b) was breached.

The F-tT's findings of fact

5. The relevant events, as found by the F-tT, began with two visits by HMRC officers to LBL's premises: Miss Nurat Salami on an unspecified day in February 2010 and Mr Chris Ansah on 2 November 2010. As neither officer gave evidence, even in the form of a witness statement, it was not altogether clear what was the purpose of their respective visits, and what material they saw. The judge commented adversely on the absence of evidence from them, but found from the unchallenged evidence of Mr Egonas Jakimavicius, a director of LBL, that both officers told him that LBL was accounting correctly for duty on the flavoured cider it was importing even though LBL was at that time accounting for it at what is now agreed to be the wrong rate.

6. In October 2010 another officer who gave no evidence, Ms Joy Gower, asked a further officer, Mr Santaram Gowrea, to visit LBL. Mr Gowrea did give evidence, and told the judge, again in unchallenged evidence, that his visit was prompted by Ms Gower's having seen some invoices addressed by LBL to another trader, in respect of consignments of flavoured ciders. She was unsure how the commodity should be assessed for excise duty purposes, and asked Mr Gowrea to make enquiries. Why she did not ask Mr Ansah to make those enquiries at his visit in the following month is not evident. Mr Gowrea did not visit LBL until April 2011, when he met Mr Jakimavicius's wife. Mrs Jakimaviciene promised to provide further information and email exchanges followed, between Mr Gowrea and Mr Ashok Sonah, LBL's accountant. The last of Mr Sonah's relevant emails was sent on 31 May 2011. Attached to it were some "certificates of conformity" setting out the precise composition of the ciders and stating their alcohol content. On the following day Mr Gowrea sought advice from HMRC specialists, who told him that the goods were properly to be treated as made-wine. On 2 June 2011 Mr Gowrea emailed Mr Sonah to inform him of the advice he had received.

7. On 12 July 2011 Mrs Jakimaviciene sent a spreadsheet to Mr Gowrea; the spreadsheet listed LBL's imports of flavoured cider on which duty had been paid at the incorrect rate. Mr Gowrea proceeded to check the spreadsheet against records he obtained from LBL's shipping agents, Harbour Shipping. He found some, but only minor and, as he accepted, unintentional, discrepancies. He later proceeded to make the assessment on, as we have said, 14 November 2011. That was plainly less than a year after the provision of the spreadsheet by Mrs Jakimaviciene, and less than a year after Mr Sonah sent the certificates of conformity, and LBL's case before the F-tT therefore stood or fell by its ability to establish that, as sub-s 12(4)(b) puts it, "evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment", not including the spreadsheet or the certificates, came into HMRC's possession at an earlier time. In the circumstances we have outlined LBL needed to show that HMRC came into possession of the last of the necessary material on the occasion of either Miss Salami's or Mr Ansah's visit, or very soon after the latter.

8. The judge assessed the evidence available to him by reference to the observations of Dyson J, in *Pegasus Birds Ltd v Customs and Excise Commissioners* [1999] STC 95, on what the parties agreed was the materially identical provision of s 73(6)(b) of VATA. We shall come to the detail of those observations later. At [45] Judge Richards said that although it was necessary to consider what were the facts which, in the opinion of the assessing officer, Mr Gowrea, justified the making of the assessment, the critical question was when evidence of those facts reached HMRC as a body. At [46] he said:

"I will therefore adopt the following approach:

(1) I will first decide what were the facts which, in the opinion of Officer Gowrea, the officer making the Assessment, justified the making of the Assessment.

(2) I will then consider when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the Commissioners (whether or not to Officer Gowrea himself).

(3) If the Assessment was made more than one year after the date in (2) above, I will consider whether it was wholly unreasonable or perverse for the Commissioners not to make the Assessment earlier."

9. He then went on to set out his findings of fact. He was hampered by the absence not only of evidence from Miss Salami and Mr Ansah, but also by the fact that the notes of Miss Salami's visit produced to him were incomplete. Mr Jakimavicius said in his witness statement that Miss Salami had told him that she had been instructed to verify the rate at which LBL had accounted for duty on cider and beer, but the judge rejected that evidence because it was inconsistent with those of Miss Salami's notes which were produced, which indicated that she had done little more than check that LBL's duty returns matched the underlying records. At [59] the judge concluded that Miss Salami would not have realised from what she saw that LBL was paying duty at the wrong rate.

10. The notes relating to Mr Ansah's visit were complete, and they led the judge to the conclusion that he had been asked to ascertain whether the goods imported by LBL were subject to duty, and if so at what rate. As the judge said at [82], there was obviously a lack of coordination within HMRC at this point: Ms Gower clearly did not realise not only that Mr Ansah was to make a visit in the near future, but also that he would be undertaking the same enquiries as she had asked of Mr Gowrea. The judge described the relevant evidence relating to Mr Ansah's visit and then said, at [63]:

"I have therefore concluded that during his visit on 2 November 2010, the following information was made available to Officer Ansah:

(1) documentation that described the ciders as 'blueberry, strawberry and cherry fizz';

(2) invoices relating to imports of flavoured cider made between 17 November 2008 and the date of his visit; and

(3) certificates of conformity which, if compared against Excise Notice 162, would have made it clear that the flavoured cider in question should be categorised as 'made wine'."

11. Excise Notice 162 sets out the characteristics of alcoholic beverages by reference to which the rates of duty they attract are determined. Mr Ansah asked for copies of the documents he had seen at his visit to be sent to him. The judge said at [65]:

"However, in the absence of specific evidence as to when this copy documentation was sent or received, I am not satisfied on a balance of probabilities that any particular copy document was received 12 months or more before the Assessment was made."

12. He also made the point, at [64], that Mr Ansah did not see the spreadsheet, which was prepared and sent to Mr Gowrea only in 2011, and at [66] he said this:

> "Officer Gowrea said in his witness statement that, in his view, he needed both the certificates of conformity and the Spreadsheet in order to be in a position to make the Assessment. He also said that he needed to know the outcome of the 'crosschecking' exercise with Harbour Shipping. It was not suggested that Mr Gowrea did not genuinely hold this opinion. I find that he did."

13. However, at [69] he added that:

> "Officer Gowrea also accepted in cross-examination that the Spreadsheet was not essential to the making of the Assessment. He accepted that the Spreadsheet simply pulled together in one place information as to the amount of cider imported which could have been obtained from invoices and information as to the rate of duty applied, and the amount of duty paid, that could be gleaned from HMRC's own systems. In that sense, therefore, Officer Gowrea accepted that, since Ms Jakimavicius had put together the Spreadsheet, it had saved him work. However, he maintained that the Spreadsheet still fulfilled a useful function as it made it easier for him to cross-check information that Mrs Jakimavicius had provided with that provided by Harbour Shipping and he emphasised that the process of cross-checking had enabled him to uncover some anomalies."

14. At [70] the judge added that he had concluded, contrary to the evidence of Mr Gowrea, that not only the spreadsheet but the certificates of conformity too were not essential to the making of the assessment. At [73] he mentioned that Miss Salami had seen the certificates of conformity and invoices describing the goods as "blueberry, strawberry and cherry fizz", and from that he concluded that the information was for that reason communicated to HMRC, but at [74] he said:

> "I am not satisfied, however, that evidence of the precise quantities of cider that had been imported and which were covered by the Assessment was 'communicated' to Officer Salami (or, that such information 'came to her knowledge' within the meaning of s12(4)(b) FA 1994) during, or subsequent to, her visit. As I have found at [56], invoices were available in lever arch files for Officer Salami to inspect if she chose to. However, I do not consider that this of itself means that the contents of all those invoices came to her knowledge or were communicated to her. If Mr Jakimavicius had said to Officer Salami that she could review any document on the company's premises, that could not have brought the contents of all the company's documents to Officer Salami's knowledge and I do not see how the position is any different if some of those documents happened to be located in lever arch files in the room she was sitting in. Moreover, given the findings I make at [51] and [52] as to the purpose of Officer Salami's visit, I conclude that she would not have read every invoice in order to build up a picture of the precise quantities of cider the appellant was importing, Finally, I note my conclusion at [57] that a full set of invoices was not copied and sent to Officer Salami after her visit."

15. That analysis led him to the conclusion, at [75], that the evidence to justify the making of the assessment was not in HMRC's possession following Miss Salami's visit. It appeared initially that this finding was not challenged on this appeal, and that the focus of LBL's challenge to the F-tT's decision was, instead, Mr Ansah's visit. However, on 10 March 2017, that is 17 days before the hearing of this appeal, LBL made an application for permission to adduce further evidence in the form of a statement made by Mrs Jakimaviciene relating to the material seen by Miss Salami during her visit in February 2010.

The application for permission to introduce new evidence

16. The essence of the argument in support of that application advanced by Mr Geraint Jones QC was that it could not have been anticipated when the matter came before the F-tT that the judge would wrongly focus, as he did, on the date when documents were sent by LBL, or on its behalf, to HMRC rather than on (as the statutory test requires) the date when they came to the Commissioners' knowledge: see the observation of Potts J in *Customs and Excise Commissioners v Post Office* [1995] STC 749 at 755:

> "The question for the tribunal was not, 'when the error in the computations should have been found' by Customs officers, but when 'evidence of facts sufficient in the opinion of the Commissioners to justify the making of the assessment' came to their knowledge."

17. It would, Mr Jones said, be quite unfair to exclude evidence which meets the judge's unexpected approach, thus affording HMRC a windfall. Although, in the courts, there are strict criteria for the admission of new evidence after judgment, identified by the Court of Appeal in *Ladd v Marshall* [1954] 1 WLR 1489, those criteria should not be applied in this tribunal, because of the terms of rule 15(2)(a)(ii) of the Tribunal Procedure (Upper Tribunal) Rules 2008. For the provision to be understood in its context we need to set out rather more of rule 15 than merely that subparagraph:

> "(1) Without restriction on the general powers in rule 5(1) and (2) (case management powers), the Upper Tribunal may give directions as to—
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> (a) issues on which it requires evidence or submissions …
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> (2) The Upper Tribunal may—
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> (a) admit evidence whether or not—
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> (i) …
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> (ii) the evidence was available to a previous decision maker …; or
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> (b) exclude evidence that would otherwise be admissible where—
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> (i) …
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> (ii) …
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> (iii) it would otherwise be unfair to admit the evidence.
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> (2A) In an asylum case or an immigration case—
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> (a) if a party wishes the Upper Tribunal to consider evidence that was not before the First-tier Tribunal, that party must send or deliver a notice to the Upper Tribunal and any other party—
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> (i) indicating the nature of the evidence; and
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> (ii) explaining why it was not submitted to the First-tier Tribunal; and
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> (b) when considering whether to admit evidence that was not before the First-tier Tribunal, the Upper Tribunal must have regard to whether there has been unreasonable delay in producing that evidence."

18. It is clear from the manner in which the rule is worded, said Mr Jones, that this tribunal has a wide discretion to admit evidence, and that the fact that it was or was not

available to a previous decision maker—here the F-tT—is merely one matter to be taken into account. It follows that the *Ladd v Marshall* criteria are displaced, and that if the need to adduce new evidence is adequately explained as, he submitted, it was in this case there should be a presumption in favour of admitting it.

19. Mr Simon Pritchard, for HMRC, opposed the application. It was, he argued, made late, over 18 months after the release of the F-tT's decision, and less than three weeks before the hearing before this tribunal. No mention was made in LBL's application for permission to appeal of its having been taken by surprise and it was remarkable that Mr Jones' skeleton argument, served shortly after the application, did not even mention it (Mr Jones did subsequently submit a revised skeleton). It was also conspicuous that the original skeleton argument did not attack the judge's findings about Miss Salami's visit, yet the purpose of Mrs Jakimaviciene's evidence, if admitted, was to demonstrate that Miss Salami had seen all the relevant documents, and also to establish that the documents requested by Mr Ansah were sent to him on 8 or 9 November 2010 and would have reached him more than a year before the assessment was made. Even if the *Ladd v Marshall* criteria were not binding on the Upper Tribunal (which he did not concede), Mr Pritchard argued that they contained useful and persuasive guidance.

20. The *Ladd v Marshall* criteria were spelt out by Denning LJ at 1491:

> "To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible."

21. While we are willing to assume for the purposes of this application, without deciding the point since it is unnecessary to do so, that Mr Jones's argument that the wording of rule 15 affords us a wider discretion than the *Ladd v Marshall* criteria would permit is correct, we do not consider that those criteria are irrelevant—we agree with Mr Pritchard that they contain helpful guidance—nor do we consider that the threshold for the application of rule 15, even if he is right on the scope of the discretion, is as low as Mr Jones' arguments imply.

22. We have included sub-rule (2A) in the extract of the rule we have set out above in order to demonstrate that in a particular type of case the rules make special provision for the admission of evidence not before the F-tT. The criteria set out in the sub-rule are not identical to the *Ladd v Marshall* criteria, but they bear some similarity to them. It is conspicuous that the sub-rule refers to evidence that was not before the First-tier Tribunal, whereas sub-rule (2), on which Mr Jones relies, refers to evidence which may or not have been "available to a previous decision maker". It is not altogether clear whether that phrase is intended to encompass only bodies, for example the Financial Conduct Authority, whose challenged decisions must be referred to this tribunal rather than the F-tT, or it is intended to extend in addition to the F-tT, but we will again assume in LBL's favour, without deciding the point, that it does so extend. If that is right it is clear that the rules do not impose any restrictions such as those of sub-rule (2A), and that the discretion is at large.

23. However, whether or not the *Ladd v Marshall* criteria are binding on us it is an obvious question, when considering an application such as this, why the evidence sought to be introduced was not produced to the F-tT, and despite what he said about *Ladd v Marshall* Mr Jones offered an explanation, as we have said. We do not find the explanation convincing. As we mentioned at the beginning of this decision, the only question before the F-tT was whether the assessment was in time. We shall come to the factors which it is necessary to examine in answering that question later, but the test itself is not obscure. If, as Mrs Jakimaviciene's witness statement suggests, Miss Salami and Mr Ansah saw, or were provided with, all the necessary documents more than a year before the date of the assessment it is impossible to understand why evidence to that effect was not before the F-tT. None of the information set out in Mrs Jakimaviciene's statement is new, in the sense that it was unknown to LBL at the time of the hearing before the F-tT, and there is no evident reason why Mrs Jakimaviciene did not give evidence to the F-tT; according to her witness statement she is the company secretary of LBL, it was she who dealt with Miss Salami's visit and it was she who prepared and sent the documents requested by Mr Ansah. Whether or not the judge focused on the wrong question Mrs Jakimaviciene's evidence was plainly relevant and important. If, as Mr Jones argued, the F-tT would have been likely to accept Mrs Jakimaviciene's evidence as truthful because it had accepted the evidence given by her husband it is all the more surprising that it was not tendered.

24. We agree with Mr Pritchard too that the fact that the application was made only days before the hearing before us is a material consideration. If it is the case that LBL thought, once his decision was released, that the judge unexpectedly addressed the wrong question and that LBL was disadvantaged by its not having produced evidence to deal with that wrong question it is difficult, if not impossible, to understand why the point was not made in the application for permission to appeal. Here, LBL had three opportunities of advancing that argument—on the application to the F-tT, on the written application to this tribunal and on the oral renewal—yet it took advantage of none of them. Although *Ladd v Marshall* did not deal with the question of delay, it is in our view a material factor. Mr Jones was unable to offer any explanation of LBL's failure save that the need to make the application was identified only when he was instructed for this appeal. We find that an unsatisfactory explanation, the more so when Mr Jones represented LBL before the F-tT and again on the oral renewal of the application for permission to appeal.

25. For all those reasons we did not consider that there was any sufficient reason for us to admit Mrs Jakimaviciene's evidence and we declined to do so.

The parties' submissions on the appeal

26. Both parties based their arguments on the timeliness of the assessment on the observations of Dyson J on s 73(6)(b) of VATA in *Pegasus Birds*, at p 101. Those observations, later approved by the Court of Appeal in the same case (see [2000] STC 91), were as follows:

> "1. The commissioners' opinion referred to in s 73(6)(b) is an opinion as to whether they have evidence of facts sufficient to justify making the assessment. Evidence is the means by which the facts are proved.

> 2. The evidence in question must be sufficient to justify the making of the assessment in question (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 754 per Potts J).
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> 3. The knowledge referred to in s 73(6)(b) is actual, and not constructive knowledge (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 755). In this context, I understand constructive knowledge to mean knowledge of evidence which the commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.
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> 4. The correct approach for a tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from the date in (ii) (see *Heyfordian Travel Ltd v Customs and Excise Comrs* [1979] VATTR 139 at 151, and *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10).
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> 5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on *Wednesbury* principles, or principles analogous to *Wednesbury* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223) (see *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10–11, and more generally *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941 at 952 per Neill LJ).
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> 6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s 73(6)(b) of the 1994 Act."

27. Mr Jones did not challenge the judge's analysis, at [46] (see para 8 above), derived and distilled from those observations, of the approach to be adopted. He also did not contend, once we had rejected his application to admit further evidence, that he could challenge the finding that Miss Salami did not acquire knowledge of the relevant evidence. His argument, rather, was based on the proposition that the material listed at [63] (see para 10 above), seen by Mr Ansah on the occasion of his visit, was all that was necessary to enable an officer to make the assessment. Although Mr Gowrea said in his witness statement that he needed the certificates of conformity and the spreadsheet in order to make the assessment that was irrelevant because, as he conceded in cross-examination, the certificates were not, in fact critical and the spreadsheet did no more than bring all the information together. The assessment could, therefore, have been made from the material available to Mr Ansah. It is no answer that Mr Ansah may not have examined that material during his visit; he would still have knowledge of the facts contained in the documents. Such knowledge would not be the constructive knowledge to which Potts J referred in *Customs and Excise Commissioners v Post Office* or, as Dyson J put it, knowledge "which the commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it"; it was material they had already acquired. For that proposition Mr Jones relied on an observation by Birss J, sitting in this tribunal, in *Revenue and Customs Commissioners v Royal College of Paediatrics and Child Health* [2015] UKUT 0038 (TCC), [2015] STC 1243 in which, at [48], he said that the key question was "when the important documents … were provided to the Commissioners".

28. The error in the judge's approach is revealed, Mr Jones said, by what he said at [76]:

> "As I have noted at [65], a full set of documentation was made available for Officer Ansah to review during his visit on 2 November 2010. For reasons set out at [64], I am not satisfied that merely making this documentation available during that visit amounted to communication of the contents of all documents that were made available. However, I have found that copies of all documents were sent to Officer Ansah after his visit. At some point the contents of that copy documentation were 'communicated' to Officer Ansah and came to his knowledge. I express no view on whether that happened as soon as the documents were received. However, even if I did, for reasons set out at [65], I am not satisfied that any particular copy document was received one year or more before the Assessment was made and so it follows that I am not satisfied that the information contained in any particular document was communicated to Officer Ansah, or came to his knowledge, on or before 14 November 2010."

29. That paragraph shows, Mr Jones argued, that the judge attached too much importance to the use by Dyson J of the word "communicated" in para 4 of his analysis in *Pegasus Birds*. The correct test, however, is not when the evidence was communicated to HMRC, but when the evidence of the relevant facts came to their knowledge. In the context in which Dyson J used the word it made no difference because communication and coming to HMRC's knowledge were simultaneous; here it did matter because the judge had taken communication as meaning, not provision of the information, but its examination by an officer. At [77] the judge, inconsistently, said that "The contents of the underlying invoices had already been communicated to HMRC and came to HMRC's knowledge when Mrs Jakimavicius sent copies of them to Officer Ansah". If that was so it was difficult to understand why the invoices did not come to HMRC's knowledge when they were placed before Mr Ansah at LBL's premises. It was illogical to say that HMRC acquired knowledge of them only when copies were supplied, and unsustainable to say that HMRC acquired knowledge of them only when an officer took the trouble to examine them in detail. Yet that was the fundamental basis of the judge's reasoning.

30. Despite Mr Jones' concession in respect of it Mr Pritchard's response began with Miss Salami's visit. She had been asked, as the judge found at [51] and [52], to undertake an arithmetical exercise, not including a check that LBL was paying duty at the correct rate, and it could not be said that all of the information necessary to raise an assessment came to her knowledge on the occasion of the visit. The argument that, because she was sitting in a room containing files of the relevant invoices, the contents of those invoices came to her knowledge was self-evidently wrong, and was rightly rejected by the judge. It would be necessary for her to read and absorb the information in the invoices in order to acquire the requisite knowledge, but there was no evidence that she had looked at all of the invoices, and at [74] the judge concluded that she had not.

31. The circumstances of Mr Ansah's visit, Mr Pritchard said, were very similar. He saw various documents but it did not follow that the contents of those documents came to his knowledge at the time. Instead, he asked for copies to be sent to him for perusal. Importantly, the judge found, at [65], that a complete set of documentation had yet to be provided at 29 November 2010, a date less than a year before the making of the assessment; it was not until 3 December that Mr Ansah received everything he had

requested. That is a finding of fact which LBL cannot challenge in this appeal. If one rejects the proposition that simply making documents available to an officer at a visit is enough to bring their contents to HMRC's knowledge, as the judge did at [76], it follows that HMRC cannot have acquired the relevant knowledge until the copies were provided. As that occurred less than a year before the assessment was made it follows that it was in time.

32. Notwithstanding Mr Gowrea's concession in cross-examination, as it was claimed to be, Mr Pritchard also relied on what the judge said at [66]:

> "Officer Gowrea said in his witness statement that, in his view, he needed both the certificate of conformity and the Spreadsheet in order to be in a position to make the Assessment. He also said that he needed to know the outcome of the 'cross-checking' exercise with Harbour Shipping. It was not suggested that Mr Gowrea did not genuinely hold this opinion. I find that he did."

33. That led the judge to his conclusion at [72], which he headed "The facts which, in Officer Gowrea's opinion justified the making of the Assessment":

> "As I have found at [66], I have concluded that these were (i) the information contained in the certificates of conformity, (ii) the information contained in the Spreadsheet and (iii) the information that Officer Gowrea obtained from cross-checking the information in the Spreadsheet with Harbour Shipping."

34. The judge's critical conclusion was set out at [78]:

> "Overall, I have concluded that the last piece of evidence to justify the making of the Assessment was communicated to the Commissioners when [the] contents of the copy documentation sent to Officer Ansah following his visit on 2 November 2010 came to his knowledge. For reasons set out at [76], I am not satisfied this was on or before 14 November 2010. It follows that, on a balance of probabilities I have concluded that the Assessment was made within 12 months of the last piece of evidence being communicated to the Commissioners."

35. That was a conclusion to which the judge was entitled to come, said Mr Pritchard: it was supported by and consistent with the evidence before him, and it was impossible to attack it in this tribunal.

Discussion and conclusions

36. It will be apparent from what we have already said that the question in this appeal is essentially simple: did "evidence of facts" come to the knowledge of HMRC within the meaning of s 12(4)(b) when the documents containing that evidence were put in front of an officer, regardless of whether he or she examined them, or only when they were provided in copy form? We do not think that is a question susceptible of a universal answer, but that it is fact-sensitive with the consequence that the answer may differ from one case to another.

37. Although Mr Jones no longer argued that it was relevant, we think it appropriate to begin with Miss Salami's visit. The judge found as a fact that she did not read all of the relevant invoices, a conclusion which is unsurprising in the light of his earlier conclusion that she had not been asked to do more than match LBL's duty returns to the underlying records. If, as the judge also found, she would not have realised that LBL was paying duty at the wrong rate it is an inevitable conclusion that the necessary

information was not in HMRC's possession following Miss Salami's visit. She would not have been aware, and would not have any reason to be aware, that the invoices contained evidence relevant to a matter into which she was not enquiring. We do not see how it can be reasonably said that an officer pointed in the direction of certain documents (and it is not clear from the judge's findings that Miss Salami was pointed to them, as a matter of fact, rather than left in the room in which the invoices were kept) is fixed not only with the knowledge of their existence but also with knowledge of what they contain.

38. The position had changed materially, of course, by the time of Mr Ansah's visit. The judge found that he undertook the visit for the purpose of checking whether LBL was paying the correct amount of duty, and that he had available to him at the visit both the certificates of conformity which, when married up with HMRC's Excise Notice 162, would have shown him that LBL was paying at the wrong rate, and the invoices which, on examination, would reveal the scale of LBL's imports of the flavoured cider over the relevant period. It follows that, by the end of his visit, Mr Ansah must have realised that the material produced to him was relevant to his enquiry—and that is no doubt why he asked for copies to be provided to him.

39. If Mr Jones' argument is right that is enough: once an officer has identified material which contains the evidence on which an assessment can be based the one-year period begins to run. We do not agree. The statutory question focuses on the date on which HMRC acquire knowledge of the evidence itself, and not the date on which they become aware merely of its existence. Here, Mr Ansah identified the evidence he needed to examine (albeit the examination which led to the disputed assessment was later undertaken by Mr Gowrea) but we do not see how it could be said he had knowledge of the evidence itself. That, as we see it, is essentially the point Dyson J was making at para 3 of the extract of his judgment in *Pegasus Birds* we have set out above: Mr Ansah was not fixed with knowledge of the evidence until he had acquired it, and in this case he acquired it, not when it was identified to him in the course of his visit, and when (as we understand the judge's findings) he went no further than to satisfy himself that it was relevant, but when the copies sent to him were received.

40. We can illustrate that conclusion by a simple example. Suppose an officer has attended a trader's premises, as Mr Ansah did, with a specific enquiry in mind. He did not know, before he attended, what documents the trader might have which would assist him, but observed during his visit that the trader had various records which might or might not be relevant. As he did not have the time to examine them there and then he asked for copies to be sent. When the copies arrived the officer examined them, discovering that some were and some were not relevant to his enquiry. They reveal an underpayment of duty or tax which become the subject of an assessment. We do not see how it can reasonably be said that "evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment" came to their knowledge on the occasion of the visit; all the officer was able to do was determine that material which might contain evidence existed. That illustration is not quite parallel to the position here, as Mr Ansah identified material which was, rather than might have been, relevant, but the essential point remains the same: he identified the material, but was not in a position to identify the "evidence of facts" until the copies were supplied and he had the opportunity of examining them. That was, in substance, the conclusion of the F-tT, and we see no flaw in the judge's reasoning on that issue.

41. Even if we are wrong in that conclusion it seems to us that this appeal cannot succeed because of the judge's findings at [66] and [72] (see paras 32 and 33 above respectively). He seems, with respect, to have overlooked those findings when he came to [78] (see para 34 above), but it is quite clear that the checking exercise undertaken by Mr Gowrea followed the provision of the spreadsheet, which was supplied less than a year before the assessment was made, and if Mr Gowrea's opinion that the checking exercise was necessary before an assessment could properly be made was reasonable, as the judge found it was, it must follow on any view that the assessment was made in time.

42. We are satisfied therefore that the F-tT came to the correct answer. We detect no error of law in the judge's reasons, and the appeal must be dismissed.

Hon Mrs Justice Asplin DBE **Judge Colin Bishopp**

Upper Tribunal Judges
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