



TC06744

**Appeal numbers: TC/2014/05870
TC/2015/00425**

VAT – Best judgment assessments – Various deposits into appellant’s UK bank account – Whether from Sales of alcohol to cash and carry outlets in France – Whether sufficient evidence to displace assessments – No – Appeal dismissed

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

AWARD DRINKS LIMITED (IN LIQUIDATION) Appellant

- and -

**THE COMMISSIONERS FOR HER MAJESTY’S Respondents
REVENUE & CUSTOMS**

**TRIBUNAL: JUDGE JOHN BROOKS
 ELIZABETH BRIDGE**

Sitting in public at Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 11 – 15 June 2018 with further written submissions received from the Respondents on 18 July 2018 and Appellant on 15 August 2018

Joseph Howard, Counsel, instructed by TT Tax, for the Appellant

Brendon McGurk, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. The appellant, Award Drinks Limited (in liquidation) (“Award Drinks”), appeals against assessments to VAT issued by HM Revenue and Customs (“HMRC”) under s 73 of the Value Added Tax Act 1994 (“VATA”) on 30 September 2014 in the sum of £1,543,714 in relation to its VAT accounting periods between September 2012 and June 2013 and on 6 January 2015 in the sum of £3,029,677 in relation to VAT periods between December 2010 and June 2012. These assessments were made on the basis of 1,311 separate deposits made between 4 January 2011 and 27 December 2012 at 42 different UK branches of Barclays Bank into an account held by Award Drinks totalling £32,650,305.89. The assessments were reduced on 23 December 2015, “leaving only those transactions where HMRC consider that the origin of the payments has not been sufficiently evidenced”.

2. The ground of appeal initially advanced by Award Drinks, and maintained until its closing submissions, was that these sums deposited into its UK bank accounts by couriers were payments for in-bond sales of alcohol from bonded warehouses in France to cash and carry operators in France. The money was paid in pounds sterling as that was the currency accepted by these outlets from UK “booze cruise” tourists. Award Drinks contends that as there were no taxable supplies in the UK its appeal against the assessments should succeed.

3. However, HMRC do not accept that this is the case and contend that, having traced the relevant supply chains, the goods sold by Award Drinks had entered the UK as a result of an inward diversion fraud and supplies were made in the UK and therefore taxable but, as made unequivocally clear in a letter to the Tribunal of 9 May 2017, HMRC makes no allegation of fraud against Award Drinks.

4. In a highly contentious and often somewhat fractious hearing, Award Drinks was represented by Mr Joseph Howard with Mr Brendan McGurk appearing for HMRC.

5. Before considering the relevant legislation and its application to the evidence and our findings of fact, it is convenient to first describe the nature of inward diversion fraud and deal with the issue of the burden of proof in circumstances in which an allegation of fraud has arisen. We should also mention at this stage that, although carefully considered, we have not found it necessary to refer to every argument advanced by or on behalf of the parties in arriving at our conclusions.

Inward Diversion Fraud

6. We gratefully adopt the following succinct and helpful description of inward diversion fraud given by the Tribunal (Judge Falk and Mr Simon) in *Dale Global Ltd v HMRC* [2018] UKFTT 363 (TC):

“50. In outline, alcohol diversion fraud is used to evade excise duty and VAT through abuse of the Excise Movement and Control System (“EMCS”), which permits authorised warehouse keepers to move excise goods from warehouse to warehouse within the EU on behalf of account holders, in duty suspense. Any movement requires the generation of an Administrative Reference Code (“ARC”) within the EMCS, which must travel with the goods. The system has operated in electronic form since January 2011. An ARC number will typically last for a few days, and expires when the load is recorded on the system by the receiving warehouse as having been delivered.

51. Inward diversion fraud, which is the type of fraud potentially relevant in this case, operates as follows. Alcohol originating in the UK is supplied under duty suspension to tax warehouses on the near continent, principally in France, the Netherlands and Belgium (what follows uses the example of France). Once in the tax warehouse they will usually change hands a number of times and will often be divided up before being reconstituted. A supply chain is set up with a purported end customer based in France. Some of the goods will be consigned back to the UK in duty suspense using an ARC number. This is the “cover load”. Within the lifetime of the ARC number further consignments of goods of the same description will purportedly be released for consumption in France, attracting duty at low French rates, but will in fact be smuggled to the UK using the same ARC number. These are the “mirror” loads, and this will carry on until the ARC number expires or one of the loads is intercepted by Customs, following which a new ARC number will be generated in a similar manner.

52. Mirror loads are typically sold immediately following their arrival in the UK for cash. This process is known as “slaughtering”. The UK customers may create false paper trails to generate the impression that the goods were supplied to them legitimately.”

Burden of Proof

7. This is not a case where it is alleged that Award Drinks knew or should have known that its supplies were connected to the fraudulent evasion of VAT in which the burden of proof would be on HMRC (see *Axel Kittel v Belgium*; *Belgium v Recolta Recycling* (C-439/04 and C-440/04) [2006] ECR I-6161 and *Mobilx Ltd & Ors v HMRC* [2010] STC 1436). Rather, as we have already observed, HMRC are not making any allegation of fraud against Award Drinks and therefore the position is as described by Dillon and Mustill LJ in *Brady v Group Lotus Car Companies plc* [1987] STC 635 (“*Brady*”) in which Dillon LJ said, at 639-640:

“Where the assessments are made in time, however, as these were, the burden lies on the taxpayer from the start to displace the assessments: see *Hudson v. Humbles* at 384 and *Haythornthwaite and Sons Ltd. v. Kelly* 11 Tax Cas. 657, a decision of this court. This ruling on onus was founded on the statutory provisions for appeals against assessments, now in section 50 of the Act and especially in subsection

(6) of that section: see the statement of Lord Hanworth MR in *Haythornthwaite* at page 667 as follows:

‘Now it is to be remembered that under the law as it stands the duty of the Commissioners who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to the majority of the Commissioners by examination of the Appellant on oath or affirmation, or by other lawful evidence, that the Appellant is over-charged by any assessment, the Commissioners shall abate or reduce the assessment accordingly: but otherwise every such assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment standing good unless the subject – the Appellant – establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced...’

Estimated assessments may be made by an inspector where the taxpayer has failed to make any Return at all and the inspector has no idea what the taxpayer's taxable income truly is, or they may be made where the inspector suspects that the taxpayer has concealed part of his income, whether by fraud, wilful default or mere mistake. In either case, if the assessment is made in due time, the onus to displace the assessment is on the taxpayer throughout.”

8. Mustill LJ observed, at 643-644 (with emphasis added), that:

“... It is a commonplace that, if there is a disputed question of fact admitting of only two possible solutions, X and Y, with party A having the burden of proving X in order to establish his case, if A produces credible evidence in favour of X and B produces none in favour of Y, it is very likely that A will win. B must therefore exert himself if he wishes to avoid defeat. But this does not mean that B ever has the burden of proof. So also here. **It may well be that, if the appellants' version does not correspond with the true facts, it must follow that someone was guilty of fraud. This does not mean that, by traversing the appellants' case, the Revenue have taken on the burden of proving fraud.** Naturally, if they produce no cogent evidence or argument to cast doubt on the appellants' case, the appellants will have a greater prospect of success. But this has nothing to do with the burden of proof, which remains on the appellants because it is they who, on the law as it has stood for many years, are charged with the task of falsifying the assessment. **The contention that, by traversing the appellants' version, the Revenue are implicitly setting out to prove a loss by fraud, overlooks the fact that, in order to make good their case, the Revenue need only produce a situation where the Commissioners [Tribunal] are left in doubt. In the world of fact, there may be only two possibilities: innocence or fraud. In the world of proof, there are three: proof of one or other possibility, and a verdict of not proven. The latter will suffice, so far as the Revenue are concerned.**”

9. Also, as Henderson J (as he then was) said in *Ingenious Games LLP v HMRC* [2015] STC 1659 at [15]:

“...the fundamental principle, well known to tax lawyers but sometimes a cause of initial surprise to a lay person, that if an assessment to tax (or, nowadays, an amendment to a self-assessment return) is made within normal time limits, the burden of proof is on the appellant taxpayer to show that the assessment (or amendment) is incorrect: see section 50(6) of the Taxes Management Act 1970 and authorities such as *Brady v Group Lotus Car Companies Plc* [1987] STC 635 (CA) at 639j to 640c per Dillon LJ, 642c-d per Mustill LJ and 646g-647a per Balcombe LJ. As the decision in *Brady* shows, this is so even if the circumstances of the case are such that there either must, or may, have been some fraudulent conduct on the part of the taxpayer which is relevant to the tax liability. As Mustill LJ said at 644g:

‘The fact that the possibility of fraud is on one side of the case will of course require the tribunal to take particular care when weighing the evidence, given the seriousness of any finding which puts in question the honesty of a party to a civil suit (see *Hornal v Neuberger Products Ltd* [1957] 1 QB 247). At the same time, I cannot accept that this bears on the burden of proof.’”

10. Although *Brady* and *Ingenious* concerned direct tax assessments the same principles apply in the case of VAT assessments. This is clear from the comments of Carnwath LJ (as he then was) in *Khan (t/a Greyhound Dry Cleaners) v Customs and Excise Commissioners* [2006] STC 1167 (“*Khan*”), where commenting both on the burden of proof and the “best judgment” issue he said:

“[69] There is no problem so far as concerns the appeal against the VAT assessment. The position on an appeal against a 'best of judgment' assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:

'The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right (See *Bi-Flex Caribbean Ltd v The Board of Inland Revenue* (1990) 63 TC 515 at 522–523 per Lord Lowry).'

That was confirmed by this court, after a detailed review of the authorities, in *Customs and Excise Comrs v Pegasus Birds Ltd* [2004] EWCA Civ 1015, [2004] STC 1509. We also cautioned (see [2004] STC 1509 at [38]) against allowing such an appeal routinely to become an investigation of the bona fides or rationality of the 'best of judgment' assessment made by Customs:

'Evidence to the tribunal

[38] ... (i) The tribunal should remember that its primary task is to find the correct amount of tax, so far as possible on the material properly available to it, the burden resting on the taxpayer. In all but very exceptional cases, that should be the focus of the hearing, and the tribunal should not allow it to be diverted into an attack on the Commissioners' exercise of judgment at the time of the assessment ...!

It should be noted that this burden of proof does not change merely because allegations of fraud may be involved (see eg *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635 at 642, [1987] 3 All ER 1050 at 1057–1058 per Mustill LJ.)”

11. We now turn to the relevant legislation, evidence and our findings of fact.

Relevant Legislation

12. The legislation, European and domestic, in force at the material time provided as follows:

Principal VAT Directive (2006/112/EC)

Article 2

1. The following transactions shall be subject to VAT:

- (a) the supply of goods for consideration within the territory of a Member State by a taxable person acting as such;
- (b) the intra-Community acquisition of goods for consideration ...;
- (c) the supply of services for consideration within the territory of a Member State by a taxable person acting as such;
- (d) the importation of goods.

...

Article 14

1. 'Supply of goods' shall mean the transfer of the right to dispose of tangible property as owner.

...

Article 31

Where goods are not dispatched or transported, the place of supply shall be deemed to be the place where the goods are located at the time when the supply takes place.

...

Article 63

The chargeable event shall occur and VAT shall become chargeable when the goods or the services are supplied.

...

Article 65

Where a payment is to be made on account before the goods or services are supplied, VAT shall become chargeable on receipt of the payment and on the amount received.

Article 66

By way of derogation from Articles 63, 64 and 65, Member States may provide that VAT is to become chargeable, in respect of certain transactions or certain categories of taxable person at one of the following times:

- (a) no later than the time the invoice is issued;
- (b) no later than the time the payment is received;

...

Value Added Tax Act 1994

1. Value added tax

(1) Value added tax shall be charged, in accordance with the provisions of this Act—

- (a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply) ...

...

4. Scope of VAT on taxable supplies

(1) VAT shall be charged on any supply of goods or services made in the United Kingdom, where it is a taxable supply made by a taxable person in the course or furtherance of any business carried on by him.

(2) A taxable supply is a supply of goods or services made in the United Kingdom other than an exempt supply.

...

5. Meaning of supply...

(1) Schedule 4 shall apply for determining what is, or is to be treated as, a supply of goods or a supply of services.

(2) Subject to any provisions made by that Schedule ... –

- (a) “supply” in this Act includes all forms of supply, but not anything done otherwise than for a consideration;
- (b) anything which is not a supply of goods but is done for a consideration (including, if so done, the granting, assignment or surrender of any right) is a supply of services.

6. Time of supply

(1) The provisions of this section shall apply...for determining the time when a supply of goods or services is to be treated as taking place for the purposes of the charge to VAT.

(2) Subject to subsections (4) to (14) below, a supply of goods shall be treated as taking place—

- (a) if the goods are to be removed, at the time of the removal;
- (b) if the goods are not to be removed, at the time when they are made available to the person to whom they are supplied;

(c) if the goods (being sent or taken on approval or sale or return or similar terms) are removed before it is known whether a supply will take place, at the time when it becomes certain that the supply has taken place or, if sooner, 12 months after the removal.

(3) Subject to subsections (4) to (14) below, a supply of services shall be treated as taking place at the time when the services are performed.

(4) If, before the time applicable under subsection (2) or (3) above, the person making the supply issues a VAT invoice in respect of it or if, before the time applicable under subsection (2)(a) or (b) or (3) above, he receives a payment in respect of it, the supply shall, to the extent covered by the invoice or payment, be treated as taking place at the time the invoice is issued or the payment is received.

...

7. Place of supply of goods

(1) This section shall apply...for determining, for the purposes of this Act, whether goods are supplied in the United Kingdom.

(2) Subject to the following provisions of this section, if the supply of any goods does not involve their removal from or to the United Kingdom they shall be treated as supplied in the United Kingdom if they are in the United Kingdom and otherwise shall be treated as supplied outside the United Kingdom.

...

73. Failure to make returns etc

(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

...

(6) An assessment under subsection (1), (2) or (3) above of an amount of VAT due for any prescribed accounting period must be made within the time limits provided for in section 77 and shall not be made after the later of the following-

- (a) 2 years after the end of the prescribed accounting period; or
- (b) one year after evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge,

...

77. Assessments: time limits and supplementary assessments

- (1) Subject to the following provisions of this section, an assessment under section 73... shall not be made-
- (a) more than 4 years after the end of the prescribed accounting period or importation or acquisition concerned...

Schedule 4 Matters to be treated as a supply of goods or services

1. –

(1) Any transfer of the whole property in goods is a supply of goods; but, subject to sub-paragraph (2), below, the transfer–

- (a) of any undivided share of the property, or
- (b) of possession of the goods

is a supply of services.

(2) If the possession of goods is transferred–

- (a) under an agreement for the sale of the goods, or
- (b) under agreements which expressly contemplate that the property will also pass at some time in the future (determined by, or ascertainable from, the agreement but in any case not later than when the goods are fully paid for),

it is then in either case a supply of the goods.

Evidence

13. In addition to the documentary evidence, which included, *inter alia*, the pleadings, photographs of locations in France, HMRC Money Laundering Regulations 2003 Visit Reports and correspondence between the parties, we heard from Mr Paul Judd, who was the director of Award Drinks, HMRC Officers Guy Baily, Ryan Martin, Zoe Kenning, Ian Cathie, Ebrahim Soleman, former HMRC Officer Elaine Emery and Mr Stephen Llewellyn an Officer of the UK Border Force (“UKBF”).

14. We were also provided with a witness statement made by Mr Manuel Gluck, the Warehouse Manager of Import Export Fonderies De Wimille (“IFEW”) a bonded warehouse in Wimille, France with which Award Drinks is said to have had an account. Documents summarising transactions concerning Award Drinks, but not the original documents underlying the summaries, was exhibited to the statement. However, Mr Gluck did not give evidence. While we admitted his witness statement as hearsay evidence (ie a statement made otherwise than by a person while giving oral evidence in proceedings, which is tendered as evidence of the matters stated) we attach less weight to it than would have been the case had Mr Gluck given oral evidence which could have been tested under cross-examination.

15. Although there was a reluctance on the part of HMRC’s witnesses, other than Ms Kenning and Mr Llewellyn, to provide direct and straightforward answers to

questions which they perceived as unhelpful to HMRC's case we do not have any particular issue with their evidence. However, the same cannot be said of Mr Judd who we did not find to be a convincing or indeed a truthful witness. He appeared to change his evidence during cross-examination, eg initially saying that customers of Award Drinks were cash and carry retailers who accepted cash in sterling from their "booze cruise" customers and describing how he had seen couriers collecting cash but subsequently saying that they were wholesalers supplying the cash and carry outlets but being unable to name the managers or operators of these businesses or the cash and carry operators they supplied. Also, his evidence was inconsistent eg he said both that he knew who his customers were as they were selling to booze cruise day trippers and that he had no knowledge of what happened to the goods after they left the account of Award Drinks at the warehouse.

16. Additionally, Mr Judd gave new evidence when cross-examined, eg he made serious allegations against a former employee of Award Drinks in connection with criminal activities. He asserted that Award Drinks had received of a letter from Banque du Scalbert in Calais withdrawing account facilities (a letter which he did not produce) and he said that he had been told by HMRC that it "was for me to decide" whether to make customs declarations, as required under French law, when he couriered large sums of cash from France to the UK. His evidence was also inconsistent, eg after stating that he had made "loads of declarations" to French Customs he subsequently said that did so "infrequently". However, there was no evidence of any such declarations having been made by him or by the couriers said to have been sent to Award Drinks.

17. Further, Mr Judd's assertions that HMRC officers had mis-stated the facts in almost every note of meeting or visit that had taken place, that letters from HMRC following such meetings or HMRC visits would only "include what they wanted to put" and would "never include everything" that he said and that a description of the business of Award Drinks in a FAME Report that was exhibited to his witness statement was "not correct", was, in our view, simply not credible.

18. Accordingly, when there was a conflict, we preferred the documentary evidence and the evidence of other witnesses to that of Mr Judd.

Facts

Background

19. Award Drinks was incorporated on 11 June 2002. Its directors included Mr Judd and, between April 2005 and June 2006, a Mr Jason Horlick. Between April 2005 and June 2006 Mr Horlick was also a director of Ampleaward Limited ("Ampleaward"), a company established on 5 May 1995 of which Mr Judd was a founding and continuing director. Mr Judd was also the founding director of PSA Trading Limited ("PSA") which was incorporated on 27 September 1994 and operates from the same premises as that used by Award Drinks.

20. A FAME Report, which appears to date from 2013, provides the following "Full overview" of the business of Award Drinks:

“The company, based in the United Kingdom, is engaged in the wholesale distribution of wines and other alcoholic beverages. It was incorporated in June 2002 and conducts its business from its registered headquarters located at Westcliff-on-Sea, South East England.

The company distributes a wide range of alcoholic beverages such as red wines, white wines, grape wines, gins, rums, beers, brandies, champagnes, whiskeys, cocktails, neutral spirits, and other distilled alcoholic beverages. The company primarily distributes its products in the United Kingdom.”

21. The Report records Award Drinks as having six employees. These included a Ms Shasna Kay who was responsible for the company’s accounts and banking and a Ms Nicola McCardell whose responsibilities included dealing with the couriers who brought large quantities of cash in sterling from France.
22. Award Drinks was registered for VAT with effect from 1 August 2002. Its application for registration (on form VAT1), completed by Mr Judd on 15 August 2002, described its business as “wholesalers of beers, wines and spirits” and gave an estimate for its an annual turnover at £10m.
23. In addition to being registered for VAT, Award Drinks was registered as a “high value dealer” under the Money Laundering Regulations 2003 with effect from 1 April 2004 and remained so registered (under the applicable legislation) until 14 February 2014.
24. Following a members voluntarily liquidation Award Drinks, on 26 June 2013, appointed a liquidator. At that time its director was Mr Judd and the Company Secretary was Mrs Tanya Judd. Award Drinks ceased to be registered from VAT with effect from 2 July 2013 on the basis that it had stopped trading.

Contact with HMRC

25. Having been registered under the Money Laundering Regulations and being registered for VAT Award Drinks was subject to several visits from and meetings with officers of HMRC.
26. On 15 October 2004 HMRC officers visited Award Drinks. The purpose of the visit was to ensure that systems and processes were in place to detect, report and prevent money laundering and to educate the trader in the requirements of the Money Laundering Regulations and confirm it was operating all aspects of CATCH, an acronym for the following actions to be undertaken by a trader:
 - (1) Control of business by having anti-money laundering systems in place;
 - (2) Appointment of Money Laundering Reporting Officer;
 - (3) Training of staff;
 - (4) Confirming the identity of customers; and
 - (5) Holding of all records for at least five years

27. Mr Judd, who was interviewed at the 15 October visit, told the officers that the business bought and sold wines, beers and spirits for trade to Europe, mainly to public cash and carry companies in Calais. Although the visit report notes that there were “no suspicious transactions to report” it noted that the majority of cash paying customers cash and carry stores in France and that “one person is employed to collect the money for goods delivered from the bonded warehouses in France to cash and carries.”

28. The report notes that it was:

“... emphasised that he [Mr Judd] must explore and confirm the legitimate source of the cash and the motive/reason for [the] transaction with the customer and suggested that this be included on the report sheet for making a decision to report to NCIS. Transactions must be judged against standard or routine transactions.”

In relation to compliance it was observed that:

“Mr Judd is aware of the requirements to comply with MLR2003/POCA 2002 [Money Laundering Regulations 2003/Proceeds of Crime Act 2002] and the STRs [suspicious transactions] must be reported to NCIS. Procedures in place to prevent and forestall money laundering – the company has a policy of requesting detailed information to identify customers as bona fide companies and Mr Judd will visit them personally prior to the acceptance of a trading agreement. Only Mr Judd and one employee are involved in the receipts of payments and the employee is to receive full training following my visit. Letter issued highlighting the points of weakness in compliance identified.”

In conclusion it was noted that the:

“Trader is fully aware of the requirements but is not compliant with all aspects of CATCH. Areas of non-compliance are being addressed.”

29. The letter referred to in the report is, dated 22 October 2004, from HMRC to Mr Judd at Award Drinks and states (with emphasis as in the letter):

“As you are now aware the Money Laundering Regulations 2003 (MLRs) require you to maintain systems and training to prevent money laundering. These include internal reporting procedures, customer identification procedures and record keeping procedures. The purpose of my visit was to ensure that you understood the regulations and that you were operating effective anti-money laundering controls.

...

We reviewed your anti-money laundering (AML) policies and procedures and identified several areas where improvement must be made to comply with your legal responsibilities and I am now formally bringing these to your attention.

Systems and Training

Regulation 3 requires you to set up procedures of internal control and communication as may be appropriate for the purposes of forestalling and preventing money laundering. To enable the business to identify suspicious activity you must firstly assess and evaluate the risk of being used by money launderers. This means identifying how, where and from whom cash can be accepted, and ensuring that a coherent framework is in place to protect the business. You are strongly advised to record these arrangements. Alongside this is the importance of the provision of reliable data on all large cash payments to manage and test your procedures cannot be understated.

...

Internal Reporting Procedures

... You were strongly advised to create an internal report form to record full details on the circumstances involving large cash payments to enable you to make informed decisions on the legitimacy of each transaction. Your judgements and opinions on the status of the transactions should be included. Authorised disclosures to NCIS should provide complete details of the customer and the reasons for your suspicion. Consent obtained from NCIS and/or given to staff must be recorded as evidence.

Customer Identity

I have read HVD [High Value Dealer] Guidance (MLR 7) and Para 9.12 indicates the procedure you need to adopt for dealing with another business. The information you have already taken from your customers would appear to be sufficient to comply with the Regulations.

30. A subsequent visit to Award Drinks by HMRC officers to review the commerciality and appropriateness of procedures in the light of the increased understanding of the type of trade undertaken took place on 23 June 2005. The report of the visit notes that the officer was told that Award Drinks:

“trade exclusively in France. Buys and sells stock under bond in France. Goods sold out of bond mainly to cash and carry outlets based in Calais.”

31. It was also noted that, “Mr Judd displayed good knowledge of legislation and legal responsibilities.” In relation to the operation of CATCH the report noted that:

“(i) Control of business by having anti-money laundering systems in place (reg 3)

Confirmed all departmental guidance received and held. Mr Judd displayed good knowledge of legislation and legal responsibilities

Control activity is focused on acquisition of customer ID (see below) and managing cash collection and delivery.

When self collected, cash is declared to French Customs and a certificate obtained (example in folder) as evidence of legitimate commercial payment if stopped by UK Customs.

Payment by customer courier: due to security issues the same courier is normally used by a customer and evidence of identity is obtained and held by trader. A fax is also required from customer advising the amount of payment and when. However, fax does not provide name of courier. Break in audit trail and a specific risk when “relief” couriers are occasionally used but are not identified. Also certificates from French customs not obtained.

...

(iv) Confirming the identity of customers (reg 4)

Trader has a small base of regular customers – approx. 8 and others come and go.

Mr Judd claims to travel to Calais every other week and routinely visits customers, covering all in 3 month period. New customers are said to be vetted by Mr Judd and TVR numbers verified on Europa web site. Customer binders are maintained containing TVA cert, business utility bill, French cert of incorporation, and evidence of ID for key personnel, couriers.

Is this sufficient to meet due diligence to ensure customers, and their representatives, are legitimate business people????”

32. Following the visit, a letter, dated 19 July 2005, was sent to Mr Judd at Award Drinks. It contained recommendations to improve compliance with the Money Laundering Regulations 2003 (the regulations then in force).

33. The material parts of that letter state:

“As a dealer in excise goods you operate in an industry that is at high-risk of being used by money launderers. An initial visit was made to your premises in October 2004 to review your anti money laundering (aml) procedures, resulting in a letter dated 22 October providing guidance in specific areas. The purpose of my visit was to consider progress on the improvement of aml procedures in light of the growing experience of the HVD [High Value Dealer] regime.

In order to ensure compliance with, and avoid any penalties under aml legislation relevant businesses must undertake appropriate due diligence with respect to customers as well as agents and representatives acting on their behalf. This is best accomplished by performing background checks on customers wherever possible. Effective “know your customer” (kyc) procedures are a fundamental risk-control measure for organisations vulnerable to money laundering. Procedures should ensure that customers are legitimate business people and have a valid reason for paying in cash. Audit trails should also be created to evidence the movement in cash and demonstrate that all payments originate from a legitimate customer.

Systems and Procedures of Internal Control

I reviewed again how you control your business with a view to forestalling and preventing money laundering. The stated reasons for the high levels of cash transactions within your business are:

- You deal predominantly with cash & carry warehouses based in Calais
- Your customers chose to pay you in cash because they themselves are paid in cash sterling by the ultimate customer (British tourists in foreign cash and carries)
- Cash is transported across the English Channel to avoid payment of sterling into French banks and save on currency exchange costs”

In evidence Mr Judd accepted that this was him telling HMRC that Award Drinks was paid in sterling because the cash and carry outlets were receiving all of their trade from UK “booze cruisers, day trippers” who paid in sterling. The letter continues:

“The movement and handling of such large amounts of cash pose significant security issues and health and safety concerns. However, I am still uncertain on the commercial justification for taking such risks. Please provide details of the cost differences and/or commercial benefit of transporting cash for paying into a UK bank as opposed to banking in France. It would also be prudent to obtain evidence from your customers to substantiate the high throughput of cash sterling through their outlets.”

Such evidence was not obtained nor were details of the cost differences and/or commercial benefit for paying cash into a UK bank provided in response to this letter or at all. The letter continued noting that:

“Business records are maintained using Sage 50 accounting software. As an invoice based system you state that there is no field to record the method of payment which undermines your ability to monitor and control relevant business. Lack of access to transaction dates also hinders official testing of your aml procedures and will reduce the level of assurance obtained. You agreed to contact your supplier as a matter of urgency to explore improvements to your system. Please advise the outcome of your enquiries.

It is also important to have audit trails in place that evidence the amount of cash and demonstrate that all payments originate from your customers in France.

For cash payments collected by you (or you employee), a declaration of all cash being carried is made to customs on export from France (under Article 464). A certified document is obtained for inclusion in your records. This is seen as good practice and it is strongly recommended that you extend this procedure to obtain and hold a certified document from French Customs for all cash payments received ie ensure this protection is adopted by your customers when using their own couriers.

The practice of obtaining an advance notice of payment by facsimile from your customer in France is also considered to be good practice. To further reinforce audit trails I recommend that the notice includes the name and status if the courier in all cases.”

In evidence, Mr Judd confirmed that, in addition to not always obtaining such documents himself or from the couriers it instructed, Award Drinks did not obtain French Customs certified documents from those couriers employed by his customers either. He said, “they had their own security problems and their own issues [and] ultimately it is them – the customers who instructed the couriers” and not for Award Drinks to instruct them to obtain the certificates.

34. After a paragraph on “Staff Training”, the lack of any evidence on the employees said to have been trained and a warning of penalties should the failure to provide such information to HMRC persist, the letter of 19 July 2005 continued, addressing “Identification Procedures”:

“I reviewed your arrangements for establishing the identity of your customers. Your stated procedures require customers to produce commercial documents to confirm their credentials as an active trading enterprise. These include certificates of incorporation, utility bills, and French VAT numbers. Additionally you travel to France and make at least one personal visit to all customers within a period of 3 months. You also call for evidence of identification of couriers regularly used by customers.

However you have yet to establish the identity of the beneficial owner(s) of each business. Another weakness is that you do not call for evidence of identity of all couriers. You must have checks in place to establish and record the authenticity of the businesses you are trading with, the responsible person you are dealing with in that business and any person making payment on their behalf. You should ensure that any representative or courier holds evidence that he is acting on the authority of your customer.

...

Record Keeping Procedures

Regulation 6(2)(b) [of the 2003 Money Laundering Regulations] requires you to maintain a record containing details relating to all transactions involving high value payments. Currently the Sage 50 software cannot meet this requirement, as it cannot produce a detailed report of cash payments received. Consequently you rely on hard copy monthly summaries of invoices raised to your cash customers, plus copy receipt books. You offer undefined credit facilities to your customers resulting in sporadic bulk cash payments that require breakdown and allocation to respective invoices. The resulting audit trail is difficult and time consuming to follow and I recommend that you also record the receipt number against the relevant invoice.

Your transaction record must contain details of every high value payment accepted and provide a clear and visible audit trail of supplies made to payments received.”

The letter concludes, after stating that arrangements will be made for a further visit in three months to review anti-money laundering procedures in the light of the recommendations made, with a reminder that a penalty of up to £5,000 can be imposed for each failure to comply with the Money Laundering Regulations.

35. In reply, by a letter dated 28 August 2005 but stamped as received by HMRC on 21 October 2005, Award Drinks addressed staff training explaining that a “qualified accountant” has been employed who is responsible for looking after record keeping and training staff on money laundering requirements. In relation to the movement of cash from France to the UK, the letter explains that this was due to the high exchange costs and the closure of its account with the Banque du Scalbert in July 2004 which, like most banks in Calais, refused to handle large amounts of sterling. However, the letter did not refer to the French Customs declarations for cash payments brought into the UK.

36. A further visit to Award Drinks, which had by then moved to new premises, was arranged for 25 November 2005. The purpose of the visit was to review the due diligence and customer identification procedures that had been adopted.

37. The report of that visit recorded that:

“Trader remains non compliant in a high risk trade sector. Trader has failed to identify his customers and has not mitigated high risk by undertaking additional due diligence checks regarding commerciality and origin of funds. HIGH RISK.”

It is also noted in the report, under the sub-heading “Compliance points”, that:

“Trader is not fully aware of the requirements of CATCH. Trader has failed to implement systems and procedures to comply with CATCH.”

38. Further details of HMRC’s concerns are apparent from the letter, dated 20 December 2005, sent to Award Drinks following the visit. This concludes that Award Drinks had failed to establish procedures of internal control and communication appropriate for the purposes of forestalling and preventing money laundering as well as having failed to maintain identification procedures requiring its customers to provide satisfactory evidence of identity. Only facsimile copies of documents were kept rather than the originals as required by the regulation.

39. The letter records that HMRC were told that Award Drinks only accepted high value cash payments from customers who operated cash and carry businesses in France. The explanation given was that it was common for such businesses which sold predominantly to booze cruise customers from the UK to accept cash payments in sterling as credit or debit cards were not generally accepted. French banks were not willing to accept large quantities of cash in sterling and had withdrawn account facilities. The letter also refers to the three methods for accepting cash adopted by Award Drinks, collection by Mr Judd or his courier from customers in France, payment by the French customer or its courier and remote payment into its bank account. In relation the first of these methods HMRC had been told it was the policy of Award Drinks to issue a receipt to the customer on acceptance of payment and declare all monies to French Customs and obtain a certificate of exportation for its records. However, as a result of enquires subsequently made by HMRC of the French Authorities (see below) it transpired that no such declarations made by Award Drinks.

40. As a result of the letter Award Drinks instructed a Mr Alec Leighton of Charterhouse International, a former officer of the Metropolitan Police, to produce an anti-money laundering guidance. Although an undated copy of such guidance was produced there was no evidence that it had been applied in practice or, as Mr Judd asserted, that Mr Leighton had provided any training for the staff of Award Drinks.

41. On 30 November 2006 HMRC conducted a further visit to Award Drinks and met with Mr Judd and Mr Leighton. The visit report notes that “new guidance” had been provided and that Award Drinks confirmed that “payments (in cash) brought by courier from France” must be lodged, ie declared to French Customs. Under the sub-heading “comments on compliance” the report states:

“Trader has designed new anti aml procedures which are to be implemented for all new customers, this includes obtaining additional information on source of funds. Currently trader has obtained ID of the owners and the premises in most cases but the information is limited to passports, utility bills and company registration documents. Trader must undertake further checks because of the risks involved in this trade sector. A further visit will be made to review evidence received for customers under the new procedure. Trader remains HIGH RISK.”

It is also noted that Award Drinks is “fully aware of the requirements with all aspects of CATCH” and that “areas on non-compliance are being addressed.”

42. On 4 May 2007 HMRC (Officer Kenning) wrote to Award Drinks to advise that new anti-money laundering guidance was to be produced following the introduction of the Money Laundering Regulations 2007 and recommended that this guidance be reviewed and that it update its anti-money laundering procedures accordingly. The letter continued:

“It has also been brought to my attention that movements of cash and securities from France totalling or exceeding €7,600 must be declared to French Customs. As a responsible trader, you must ensure that you or your customers comply with this legal requirement where cash originating from France forms all or part of a High Value Payment to you. ...

As part of a risk based approach, you must obtain and hold a copy of the declaration certified by French customs as part of your records of due diligence. It should form a key part of the audit trail of checks and balances in place. You should now take immediate steps to ensure your procedures comply with this requirement and mitigate the risk of money laundering.”

43. On 22 July 2009 HMRC officers visited Award Drinks in relation to supplies made to a non-UK customer. The report of the visit records that they were told by Mr Judd that Award Drinks supplied the French market with alcoholic and soft drinks using French and Belgian bonded warehouses.

44. A report of a subsequent visit, which took place on 31 March 2010 and refers to Award Drinks and Ampleaward, records that:

“The traders receive the payments from their customers by TTS [telegraphic transfer] and by Cash. They have registered as High Value Dealers. The Courier company “Roy Little” from France used to deliver the cash at their office premises. But last year there was a robbery in their office and the traders lost £100,000. After this incident the traders don’t keep the cash in their office. The same courier brings the cash and deposits into the account of the companies at different branches like Blackheath etc.”

45. Award Drinks was notified by letter of 23 December 2011 that it was being included in the HMRC Monitoring Project. This was in part due to its links with other alcohol supply chains which had been noted by HMRC as risks in its particular trade sector. A follow up visit took place on 11 January 2012. The report of that visit records that the officer was told that Award Drinks sold, under bond in France, to cash and carry retailers who paid for the goods in cash (sterling) which was brought to Award Drinks by courier. It refers to the robbery in 2009 and the loss of £150,000 and that to prevent a re-occurrence the cash and carries had arranged for third party payments to be made by bank transfer.

46. Although the report of the money laundering compliance visit of 30 November 2006 stated that Award Drinks should be subject revisited “in three months”, the next such visit HMRC took place on 19 January 2012. The report for that visit records that Mr Judd informed the officers that there were at that time only two customers paying in cash and that that by the end of February 2012 all payments would be by bank statement or cheque and that high value cash payments would cease. The report concluded that, given the explanations provided by Mr Judd, its customer due diligence, reporting, record-keeping, internal control risk assessment and management and monitoring and management of compliance was “satisfactory”. In evidence Ms Kenning was critical of this saying that she would not have reached the same conclusions. However, it is clear from the recommendation for a further visit to be carried out “within 12 months” if Award Drinks continued to trade, that the report had been written on the understanding that Award Drinks would cease to receive high value case payments. However, this did not prove to be correct,

47. HMRC expanded the monitoring of Award Drinks to gather additional information and obtained details of deposits made into its account with Barclays Bank over the period from 1 January 2011 to 28 December 2012 from the bank statements for that period. A HMRC Computer Audit Team visited Award Drinks in June 2012 and downloaded Sage accounting data and uplifted business records for analysis.

48. A further visit by HMRC, in connection with excise matters, took place on 19 February 2013. During this visit Mr Judd told Officers Steve Munn and Ebrahim Soleman that Award Drinks supplied beers wines and spirits and traded in Belgium and Northern France. He described how sales were in-bond and that the location of the supplier was irrelevant as the stock was held in warehouses IEFW in France and MBK in the Netherlands. Mr Judd told the officers that the goods were supplied to cash and carry operators. The note of the visit (taken by Officer Munn) records:

“ES [Officer Soleman] asked PJ [Mr Judd] what cash and carries are goods delivered to. PJ replied Mammouth, Atout Commerce, P and P and Scorpion. PJ advised some companies are also based in UK. These are Scorpion Trading Company and Canyon Trading Company based in Rochester Kent. ES asked PJ to define trading company. PJ defined it as a company that never sees its products. PJ went on to elaborate on the French cash and carries. He advised that Mammouth had ceased trading. Others were B and A, Boissant, Embassy, DPC. Referring to Mammouth PJ advised that it was a cash and carry and as far as he was concerned when the goods were sold to Mammouth they were sold on to other companies. ES asked PJ to describe the procedure. PJ advised that once the sale had happened Mammouth would instruct to deliver to bond or to deliver out of bond. When this happens PJ will arrange for the French Duty to be paid.

...

ES asked which companies pay in cash. PJ replied Mammouth and Atout Commerce. PJ advised that he had ceased trading with Mammouth Trading who had disappeared and left him with a bad debt. Another company that pays by cash is B and A. They use the same courier.

49. After referring to the robbery that had taken place at Award Drinks and confirming that there was no insurance in place, Mr Judd told the officers that the courier for Mammouth was a David Charles Luff, who also acted as courier for Atout Commerce. He said that Mammouth would inform Award Drinks, by fax or email, of the courier’s details, the amount of cash and details for whom the payment was being made. Following the robbery, Mr Judd said that the courier would deposit the cash in Award Drinks’ bank account and, for security purposes, would use various branches although the main branches used were Eltham and Blackheath. Sample paying-in slips shown to the officers although sequentially numbered did not show Mr Luff to have been the person making the deposit.

50. The note of the meeting records that the officers were told by Mr Judd that Mr Luff normally travelled:

“... through Euro tunnel. PJ assumed he drives. Once he was over he would present the cash in to the bank using paying in books. PJ then showed ED examples of tickets given to PJ to support proof of travel. However none of these tickets had any printed names on them. ES asked how these tickets were delivered to PJ. PJ advised stubs were brought in by the courier on an infrequent basis but not on the date of travel.”

The “tickets” provided to support proof of travel were in fact “hangers” to be put on a rear view mirror of a car and although he had considered it as proof Mr Luff had travelled, in giving evidence, Mr Judd accepted that it could only establish that “somebody’s travelled”.

51. Following an analysis of the information obtained from Award Drinks HMRC issued the assessments, to which we have already referred (in paragraph 1, above) on

30 September 2014 and 5 November 2014 on the basis of the gross amounts of cash deposited into Award Drinks' bank account at various branches (which we consider in greater detail below). These assessments were upheld on 6 January 2015, following a review and subsequently reduced following an analysis of the Sage accounting data by HMRC which identified £5,158,144.85 as being received from customers with a UK trading address.

Deposits and Cash Movements

52. In addition to the records uplifted from Award Drinks, HMRC were able to obtain further information, including bank statements, from Barclays Bank. An analysis of this information indicated that between 1 January 2011 and 28 December 2012 there had been 1,311 separate deposits totalling £32,650,305.89, into the Barclays Bank account of Award Drinks at various branches, with an average deposit being £22,500, as shown in the table below:

Barclays Bank Cash Deposits	
Branch	Number of Deposits
Eltham	318
Blackheath	287
Barking	222
Swanley	83
Chislehurst	76
Rainham	60
Kempston	57
Tilbury	42
Chatham	29
Thorpe Bay	24
Downham Market	15
Lower Tottenham	15
Sockets Heath	14
Westcombe Park	9
Dagenham	5
West Swindon	5
Daub Hill	4
Ilford	4
Lea Bridge Road	4
St Johns	4
Cousidon	3
Leigh Lancashire	3
Winchmore Hill	3
Woolwich	3
Beacontree	2
Downham Market	2
Temple Fortune	2
Wanstead	2
Blackwood	1
Chelmsford	1

Colchester	1
Edgware	1
Golders Green	1
Hayes	1
Milton Keynes	1
Birmingham Northfields	1
Palmers Green	1
Shoreham by Sea	1
Smethwick	1
Southall	1
Team Valley	1
Wembley Park	1
Total number deposits	1311

53. As the table illustrates deposits were made throughout the UK from Leigh in Lancashire to Blackwood in South Wales to Colchester in Essex. Indeed, on 18 October 2012, £20,000 was deposited at the Birmingham Northfield branch of Barclays Bank, £20,000 into the Blackwood branch in South Wales and deposits of £25,000 and £15,000 into the bank in Eltham. All were stated as being cash from Mammouth which, Mr Judd had advised HMRC (see paragraph 49) used a single courier, Mr David Luff.

54. It was accepted that a reconciliation of Award Drinks' Sage and bank records indicated that deposits into its bank account had been made the in the sums and from the entity shown below:

- (1) £3,095,725 in cash by UB Negociant of 245 Rue Costes Bellonte, 62100, Calais;
- (2) Cash deposits £1,119,000 from Romtrad of 1320 Route de St Omer, 62100, Calais, France;
- (3) £23,000 in cash from Forever Drinks of Rue du Cap Blanc Nez Partie A, Coquelles, France;
- (4) £4,000 in cash from Vins Mons Chers of Magnesia 1 – travee C, 215 Route de Saint, 62100, Calais, France;
- (5) £2,316,290 in cash from Atout Commerce of the Boozers Business Centre, 1320 Route de St Omer, 62100, Calais, France;
- (6) £8,807,355 in cash from Mammouth Trading of 1320 Route de St Omer, 62100, Calais, France;
- (7) £3,901,220 in cash from Eurl Clockwork Distribution of Magnesia 2 – travee C, 215 Route de Saint, 62100, Calais, France;
- (8) £752,235 in cash from H.A.M. Distrinord of 1320 Route de St Omer, 62100, Calais, France;
- (9) £311,900 in cash from Premier Cash & Carry of Rue du Cap Blanc Nez, Coquelles, France;

(10) £334,899 in cash and £859,416 by cheque from Champion Drinks of Rue du Cap Martin Batiment, Coquelles, France;

(11) £866,231 in cash and £3,182,854 by cheque from Glass of 9005 Rue des Sycomores, 62231, Sangatte, France; and

(12) £2,850 in cash and £1,626,689 by cheque from Oversea of Boulevard Jacquard, 62100, Calais, France.

55. However, it was not possible to trace the actual deposits to any of the transactions that Mr Judd said Award Drinks had entered into. None of the paying-in books which were said to have been provided to the couriers were produced and there were a number of paying-in slips relating to UB Negociant which showed the payee to be a sequence of numbers but did not identify of the payee or customer. The sort code and account numbers were written in manuscript and appear to have been faxed to Award Drinks by "Discount Land". Other than it being located in Barking, London, there no was no further evidence produced in relation to Discount Land.

56. Further analysis of Award Drinks' records show that the sequence of numbers noted for a payee were likely to related to unique numbers provided by Barclays for paying-in wallets used for deposits into branches via its "Business Cash Advantage" scheme. Under this scheme cash deposits between £4,000 and £25,000 were placed in a secure self-sealed, bar coded and tamper evident wallet together with two copies of a credit slip which could be handed over the counter or, where available, placed in self-service devices without having to wait for the contents to be checked. In the event of an error the bank issued a "Cash Advance Discrepancy Advice". A number of such advices within the records of Award Drinks state a wallet number which was similar to the numbers recorded on the paying-in slips for UB Negociant. In all, it appears that £4,145,000 was deposited in Award Drinks' bank account through the "Business Cash Advantage" scheme.

57. Although Mr Judd asserted that the cash was brought to the UK from France by couriers, a Mr David Luff for Mammouth, Atout Commerce and B and A, a Mr Paul Carrington for Oversea and Mr Roy Little for other unidentified companies, in an "Official Report" dated 13 March 2014 provided to HMRC, the French authorities (Direction Generale Des Douanes Et Droits Indirects) confirmed that there was no record of any declaration being made by any of these individuals (or by Award Drinks) to French customs, as required under Articles 464 and 465 of the French National Customs Code, of an amount made in movement of capital exceeding €10,000. Neither were there any records of any declarations by any of the companies to which Award Drinks is said to have sold goods.

58. Analysis of cheque payments by HMRC Officer Ryan Martin showed that the account holders named, all of which were UK businesses, did not correspond with the names of the customer said to have made the payments. Although Award Drinks had declared several third party payments it had received these did not include the payments identified by Officer Martin. Of the declared third party payments these were said to have been received from three customers, Oversea, UB Negociant and Clockwork Distribution but were said to have been paid by Jackson & Co, an estate agents and AF Wholesale. However, none of the payments that Officer Martin queried

with Barclays had originated from accounts held in the name of either business and neither business had any connection to the alcohol trade. Additionally, cheque payments purportedly from Champion, Glass and Ducain all originated from the same UK bank account.

“Customers” of Award Drinks

59. The market for “booze cruising” from the UK to cash and carry outlets in and around Calais appears to have peaked during the late 1990s and early 2000s when large British companies such as Tesco opened its own cash and carry outlets to cater for the high demand. However, since its heyday there has been a decline in that market which appears to have been attributable to several factors including the strength of the pound against the euro, the increasing availability of cheaper alcohol in UK supermarkets, the effect of rising travel costs and the increased control activity from HMRC and the UKBF. This is apparent from the evidence of Officer Bailey who visited Calais in 2013 (see below) and observed that by then there had been a marked decline in the market with many outlets, including Tesco, having closed and the areas from which they operated had become run down.

60. On 31 July and 1 August 2013, which it is accepted was after the period with which this appeal is concerned, HMRC Officer Guy Bailey visited Calais with a colleague, Officer Chapman, together with two officers of the French Service Regional D’Enquete des Douanes based at Dunkirk. They went to the given addresses of various alleged customers of Award Drinks in the Calais area. These included:

- (1) 215G Route De Saint Omer;
- (2) 1320 Route De Saint Omer;
- (3) Rue Sycomores; and
- (4) Parc Eurocap.

61. 215G Route De Saint Omer was the address given for Eurl Clockwork Distribution and Sarl Vins Moins Chers. It is some distance from the ferry port and Eurostar terminal and is approached via a side road which opens into a small industrial estate with approximately ten units many of which were in a semi-derelict state when visited by the HMRC officers. One unit had its door open through which a pallet of shrink-wrapped cans of beer could be seen, seeming to be in use. Mr Judd had described it as having been a “very busy area” with cash and carry businesses operating there as it was equidistant from the ferry and tunnel and near the Boozers’ cash and carry “which is where a lot of the booze cruises started from.”

62. Although there was a sign marked “Vins Moins Chers’ there did not appear to be any sign of that business at the time of the officers’ visit. Similarly, at that time, there was also a sign for “Clockwork Distribution” but not a trace of that company either.

63. A report obtained by HMRC from the French tax authorities on 23 January 2103 notes that Clockwork Distribution was deregistered because:

“... from June 2011, the company ceased all contact with the authorities and, in particular failed to comply with obligations to file returns.”

The report continues stating that the company was required to file a declaration of turnover each month and that:

“... it regularly file its declarations in 2010 but stopped doing so after June 2011. It declared intra-Community acquisitions over this period. However, it systematically and artificially adjusted the amount of VAT recoverable to the amount of the gross VAT due, although it has never paid VAT.

...

[The French authorities] carried out, in 2011/12, an audit on CLOCKWORK DISTRIBUTION EURL covering the period from 01/11/2009 to 31/05/2011. As we were unable to meet the director or his authorised representative, in order to gain access to accounting records and documents, and in order to be able to speak with him, we drew up on 13/12/2011 an official report of the failure to cooperate with a tax audit. On 27/04/2012 we notified the company of assessment of unpaid VAT: on intra-Community acquisitions not declared: €0.12 million – on sales not entered in the accounts or not invoiced; €0.73 million. We refused the deduction of VAT for €3.14 million. We imposed a surcharge of 100% (€3.8 million) for failure to cooperate with a tax audit. Despite our recover action, the tax debt of CLOCKWORK DISTRIBUTION (€7.8 million = €3.8 million of VAT + €4.0 million of penalties and interest) has not been recovered.”

64. 1320 Route De Saint Omer is the address given for Atout Commerce, Romtrad, H.A.M. Distrinord and Mammouth Trading. Officer Bailey did not find any trace of these companies on his visit to this address which was a little further from the centre of Calais along the Route De Saint Omer from number 215G. The only building at this address, which he described as a “hexagonal-shaped”, was a serviced office with a number of post boxes outside. The only reference to any business was a sign for Vins Moins Cher.

65. In his evidence Mr Judd said that companies operating out of 1320 Route de Saint Omer, the “Boozers Business Centre”, were not cash and carry outlets (although he had previously asserted that, like all of Award Drinks customers, they were cash and carry outlets). The centre, which the French tax authorities report, as “a building which accommodates several different companies at the same time” and “well known to the department”, had no storage space. The companies operating from it acquired goods which they directed be supplied directly to customers operating cash and carry outlets customers who Mr Judd said would be paid in cash sterling and, using these cash sums, pay Award Drinks.

66. An undated report from the French tax authorities provided to HMRC records that:

“After investigation, it turns out that ATOUT COMMERCE has not visible activity, despite its “active” status on the companies register. It has been impossible for investigation officers to contact the company’s manager despite many tries ... his whereabouts can’t be found”

With regard to Mammouth Trading the French tax authorities in undated report comment that it:

“... had no visible activity at its headquarter address: 1320 route de Saint Omer, 62100 CALAIS. Nevertheless, this company is still active regarding the French commercial registration. We unfortunately have tried several times to contact the manager of this company ... and were unable to locate this person”

67. A letter to HMRC, dated 4 July 2013 from the [French] Ministère de L’Économie et des Finances in response to a request from HMRC, “... pertaining to investigations into a suspected tax evasion Involving wholesale cash & carry trade of alcohol notes that:

“Our French Customs colleagues have done checks and can confirm the following:

The three French companies stated on the request, namely ATOUT COMMERCE, MAMMOUTH TRADING and B+A Importation do not exist anymore

The directors of those companies are not French nationals and it is this highly unlikely that our colleagues manage to obtain anything from them

They have no traces of David Charles LUFF and no cash declarations have been made by this person in France.”

68. The report of the French tax authorities on Romtrad, dated 19 October 2012 refers to it being a “suspicious trader” against which “opposition to a tax inspection” action was initiated because of the inability to access its records or speak to a director or authorised representative. A report on H.A.M. Distrinord of 10 July 2010 records that the French tax authorities:

“... went to the address of the registered office, 1320 route de Saint Omer on several occasions, without being able to meet a single member of staff there. The registered letter with acknowledgement of receipt sent to the company in order to initiate proceedings to exercise our right to inspect goods, was returned to us bearing the statement “post box could not be identified”. This signifies that HAM Distrinord EURL does not even have a simple letter box in which it can receive its ordinary post in the normal way. At this time the company will have either ceased trading or will be in the process of doing so”

69. Rue des Sycomores, the address for Glass is located in Sangatte nearer the coast than Calais. On his visit, other than “a couple of pallets of beer abandoned outside the unit” Officer Bailey found no trace of the company or any activity even though Mr Judd had said that cash and carries were there. An undated report by the French tax authorities who visited Glass “last December 19th” found “no visible activity” and

were unable to contact its manager “despite many tries” and concluded that “in all likelihood” there was “no more activity” as another company had taken over the premises that had been used by Glass. A more detailed report states:

“The persons who were there stated that they were employees of another company, and that GLASS had permanently left the premises in March 2012. GLASS EURL thus unexpectedly terminated its business activities without notifying the authorities, or the secretariat of the Commercial and Company register. The company has no bank account in France. It has not filed any VAT returns since it was formed. It did not file an return for profits for corporation tax purposes. GLASS EURL may therefore be regarded as a suspect cash-and-carry trader. All action taken to contact the company failed. It has therefore not been possible to examine the books of accounts or any other documents which may be requested. On the grounds of this obstructive activity, we are considering initiating action for non-compliance with a tax inspection.”

70. Parc Eurocap is a large industrial estate in the Coquelles area and is the stated address of Champion Drinks. However, when he visited the unit was closed and Officer Bailey was unable to locate Champion. A report of the French tax authorities, dated 18 September 2012, notes that:

“The company CHAMPION DRINKS EURL was the subject of accounts verification proceedings covering the period from 01/06/2010 to 31/05/2011. During the first control session on 26/08/2011 we found that the premises of the registered office were closed and that the company was no longer carrying out any business activity there. We did not meet with any representative of the company. Under the circumstances we have been unable to obtain the books and accounting documents. Therefore, on 26/08/11 we initiated “opposition to a tax inspection” action against CHAMPION DRINKS EURL. At the close of these proceedings we proposed, on 29/05/2011, taking action against the company.”

71. In addition to the above reports on 23 November 2012 the French tax authorities informed HMRC that they were unable to provide any information from documents held by Oversea:

“... because when they went to the company’s registered office they were unable to meet with an authorised representative of the company.”

72. HMRC did not produce reports from the French tax authorities regarding the remaining businesses listed at paragraph 2, Forever Drinks, Vins Mons Chers and Premier Cash & Carry. The only information provided in regard to and UB Negociant was that it was struck off on 27 March 2014.

Seizure of Goods

73. On 28 August 2012 a consignment of 24,984 of mixed beer and the vehicle trailer was seized by the Revenue Fraud Detection Team of the UKBF, under the

Excise Goods (Holding Movement and Duty Point) Regulations 2010, at the UK inward freight control at Eurotunnel in Coquelles. The consignment had been made under an ARC number that had been used for an inward shipment of alcohol on 24 August 2012 for delivery to Charlton Cash & Carry at the bonded warehouse of Seabrook Warehousing Limited (“Seabrook”) and had not been delivered by 4 September 2012. Checks of the Departmental database by Officer Stephen Llewellyn of UKBF established that the haulage arranger, Scorpion in London Limited, Seabrook and Charlton Cash and Carry had all been involved in previous seizures.

74. A letter, dated 7 September 2012, requesting restoration of the goods was sent to the National Post Seizure Unit of UKBF by M&R Tax Advisers Limited on behalf of Scorpion of London Limited. This explained that:

“... the relevant goods were in the process of being transported from our client’s underbond account at Contrama Logistique in Saint-Martin Les Boulogne, France to the underbond account of our client’s proposed customer Charlton Cash and Carry Ltd at the UK excise bonded warehouse Seabrook Warehousing Ltd. Our client had purchased the goods from Award Drinks Ltd.”

75. However, in the absence of evidence of proof of ownership the request for restoration of the goods was refused. There has been no appeal against that decision.

Discussion and Conclusion

76. Although this appeal was highly contested over five days with further written submissions being provided on behalf of both parties we agree with Mr Howard, who in his “supplemental closing submissions” for Award Drinks, said that “at its heart this is a simple case” that has been made “needlessly complicated and confusing” by HMRC.

77. In essence, this case concerns an appeal, by Award Drinks, against “best judgment” assessments to VAT made by HMRC under s 73 VATA. We remind ourselves of what Carnwath LJ in *Khan* said about such cases (having already referred to this at paragraph 10, above):

“The position on an appeal against a 'best of judgment' assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:

‘The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right (See *Bi-Flex Caribbean Ltd v The Board of Inland Revenue* (1990) 63 TC 515 at 522–523 per Lord Lowry).’

That was confirmed by this court, after a detailed review of the authorities, in *Customs and Excise Comrs v Pegasus Birds Ltd* [2004] EWCA Civ 1015, [2004] STC 1509. We also cautioned (see [2004] STC 1509 at [38]) against allowing such an appeal routinely to become an investigation of the bona fides or rationality of the 'best of judgment' assessment made by Customs:

...

It should be noted that this burden of proof does not change merely because allegations of fraud may be involved (see eg *Brady (Inspector of Taxes) v Group Lotus Car Companies plc* [1987] STC 635 at 642, [1987] 3 All ER 1050 at 1057–1058 per Mustill LJ.)”

78. The assessments in this case were made on the basis of the deposits made at various branches of Barclays Bank throughout the UK into the account of Award Drinks which, HMRC say, relate to taxable supplies. These are, as in any other “best judgment” appeal, prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right.

79. The bona fides or rationality or the sum assessed by the “best of judgment” assessments in this case were not challenged. Award Drinks simply contends the assessments are wrong saying it did not make taxable supplies in the UK. It asserts that it sold goods in France and that the sums lodged in its bank account related to in-bond sales of alcohol to cash and carry outlets in and around Calais. These outlets accepted cash in pounds, sterling, from UK tourists and “booze cruise” day trippers (see eg paragraphs 33 and 39, above). Award Drinks asserts that it and its customers arranged for the cash to be delivered by courier and deposited at various branches of its bank.

80. There was no positive documentary evidence adduced by Award Drinks, and nothing from the entities from which Award Drinks was said to have received payments that they were genuine retail cash and carry operators or genuine wholesalers that had made any payments to Award Drinks. There was a distinct absence of cash declarations to French Customs by couriers, customers or appellant. Moreover, cheques said to be from three different French Customers, Champion, Glass and Ducain were drawn on same UK bank account.

81. There was also, in our judgment, a complete lack of commerciality in the transactions said to have occurred. No costs analysis was provided by Award Drinks comparing the costs of French banking facilities to cost of couriers despite this being requested by HMRC. It is, in our view, just not credible to contend, as Award Drinks does, that French cash and carry operators would bear costs of couriers to banks throughout the UK without any recompense from Award Drinks. Also, there was no rational explanation for cash deposits being made all around the UK but not in the branches nearest the channel ports or Eurotunnel terminus. In the absence of evidence, we cannot accept Mr Judd’s assertion that this was because the Dover branch of Barclays would not accept cash payments. In addition, there was no evidence to

connect any named courier with any of the deposits, nor was there any evidence of travel by any courier.

82. As a result, we find that the factual case advanced by and on behalf of Award Drinks is not supported by the evidence and does not hold water. In our judgment it is not sufficient to displace the assessment which therefore remains “right”. Having come to such a conclusion it is not necessary to address the legal submissions made on behalf of Award Drinks as these were advanced on the basis of facts which we have found not to have been established ie that Award Drinks sold the goods in France.

Decision

83. For the reasons above, the appeal is dismissed.

Appeal Rights

84. 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.

**JOHN BROOKS
TRIBUNAL JUDGE**

RELEASE DATE: 1 October 2018