[2015] UKUT 0167 (TCC)

Appeal number: FTC/142/2013

Excise Duty and Value Added Tax - Alleged release to the home market of duty suspended whisky and vodka despatched from the Appellant's warehouse – exercise of powers under section 12 Finance Act 1994 - Appeal dismissed

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

TDG (UK) LIMITED **Appellant**

- and -

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

TRIBUNAL: MRS JUSTICE ROSE DBE

Sitting in public at the Rolls Building London EC4A on 23 and 24 February 2015

Geoffrey Tack of DLA Piper for the Appellant

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

DECISION

1. This is an appeal against the decision of the First-tier Tribunal (Judge Nowlan and Mrs Watts Davies) released on 10 October 2013 in which the Tribunal dismissed the appeal from the Appellant ('TDG') against HMRC's assessment that it is liable for excise duty in the sum of £369,223.95 and also to pay VAT of £84,275.30.

2. The events giving rise to the assessment date back to April 2000. The delay in these proceedings was in part due to the case awaiting the result of the House of Lords decision in *Greenalls Management Ltd v Customs and Excise Commissioners* [2005] UKHL 34 which I will refer to later.

3. TDG's business was providing logistical services including operating an HMRC approved excise warehouse in Stevenage, Hertfordshire. In that warehouse goods can be stored under suspension of excise duty for both domestic and export markets. This dispute relates to a consignment of whisky and vodka which was stored in TDG's warehouse in April 2000 on behalf of a firm called MD Trading operated by Mr Michael J Downer. It is not clear to me whether MD Trading is a company or just a trading name for Mr Downer. M D Trading's goods left the warehouse on four separate occasions on 3, 4, 6 and 7 April 2000 supposedly bound, still under duty suspended status, for a warehouse in Cadiz in Spain. The Cadiz warehouse was owned by a company called Iberia Shipping Agencies SL ('Iberia'). The haulier engaged by Mr Downer to collect and transport the spirits was Mr Clifford Eaton who runs a transport firm called JWT Transport.

4. Each of the four consignments was accompanied by Administrative Accompanying Documents ('AADs') deposited in the lorries. These AADs indicated that the spirits were to be taken to Iberia's warehouse in Cadiz. TDG received receipted copies of the AADs which purported to show that the spirits had been received by Iberia. However, HMRC noticed discrepancies in the AADs and made enquiries of the Spanish authorities. They were told that the spirits had never been received in Spain and they have concluded that the stamps on the receipted AADs were forgeries.

5. The relevant tax framework for the assessment of excise duty as at April to October 2000 is as follows. The *vires* for HMRC's excise duty assessment as a matter of EU law is Directive 92/12 EEC on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products, *Official Journal* 1992, L 076 p 1 ('the Directive'). Article 6(1) of the Directive provides that excise duty shall become chargeable at the time of 'release for consumption' of the goods. That phrase includes any departure, including an irregular departure, from a suspension arrangement. A 'suspension arrangement' is defined in Article 4(c) of the Directive as being a tax arrangement applied to the production, processing, holding and movement of products, excise duty being suspended. There are various types of suspension arrangements but the one relevant to the present dispute is where goods are held in an excise warehouse without payment of duty.

6. The levying and collection of excise duty must be in accordance with a procedure set out by the Member State.

7. The issue in this case is whether there was an irregular departure from the suspension arrangement and hence a release for consumption of the spirits within the meaning of Article 6. If there was, then as a matter of European law, the excise duty becomes chargeable at the time of the irregular departure. Article 20(1) of the Directive provides that where an irregularity or offence has been committed in the course of a movement involving the chargeability of excise duty, the excise duty shall be due in the Member State where the offence or irregularity was committed from the natural or legal person who guaranteed payment of the excise duties. Further, Article 20(3) provides that when products subject to excise duty do not arrive at their destination and it is not possible to determine where the offence or irregularity was committed, it is deemed to have been committed in the Member State of departure unless evidence is produced to the satisfaction of the competent authority of the place where the offence or irregularity was actually committed.

8. TDG guaranteed the payment of excise duties in this case and so under Article 20(1) the excise duty was due from them. The UK is the Member State of departure.

9. HMRC's domestic power to assess TDG for excise duty comes from section 12 of the Finance Act 1994. The excise duty point is determined by the Excise Goods (Holding, Movement, Warehousing and REDS) Regulations 1992 (SI 1992/3135) ('the 1992 Regulations'). Regulation 4 of the 1992 Regulations provided at the relevant time as follows:

> "**4.**—(1) Except in the cases specified in paragraphs (2) to (6) below, the excise duty point in relation to any Community excise goods shall be the time when the goods are charged with duty at importation.
>
> (2) If any duty suspension arrangements apply to any excise goods, the excise duty point shall be the earlier of—
>
> (a) the time when the excise goods are delivered for home use from a tax warehouse or are otherwise made available for consumption, including consumption in a warehouse;
>
> (b) the time when the excise goods are consumed;
>
> …
>
> (f) the time when the excise goods leave any tax warehouse unless—
>
> (i) the goods are consigned to another tax warehouse in respect of which the authorised warehousekeeper has been approved in relation to the deposit and keeping of those goods, and the goods are moved in accordance with requirements prescribed in regulations 9 and 10 below;

(ii) the goods are delivered for export, shipment as stores, removal to the Isle of Man; or

(iii) any relief is conferred in relation to the goods by or under the customs and excise Acts."

10. Also relevant in this case is paragraph (8) of regulation 4 which provides:

"(8) Where the Commissioners issue a notice requiring an authorised warehousekeeper to produce for their inspection a certificate of receipt with respect to any excise goods which were held by him in a tax warehouse, and where the authorised warehousekeeper fails to produce such a certificate of receipt within 6 months of the date of the notice, or within such period as the Commissioners may specify in the notice, and where the authorised warehousekeeper does not otherwise account for the excise goods to the satisfaction of the Commissioners, the excise goods shall be deemed to have been released for consumption and to have been so released on the day that the goods were dispatched from the tax warehouse or the day that the notice was issued, whichever is the earlier; and that day shall be the excise duty point."

11. As to who is liable to pay the excise duty, this is dealt with in regulation 5 of the 1992 Regulations. Regulation 5(4) provides that where the excise duty point is the one specified in paragraph 2(a) of regulation 4, the person liable is the authorised warehouse keeper. Paragraphs (5) and (6) of regulation 5 render the owner of the goods and the transport firm jointly and severally liable for the duty. Where the duty point is that specified in regulation 4(8), the person liable is also the authorised warehouse keeper specified in the notice issued by HMRC. It was common ground between the parties that the effect of the House of Lords decision in *Greenalls* is that liability under regulation 4 does not depend on any wrong doing on the part of the authorised warehouse keeper.

12. The time limit for HMRC to make an assessment is the earlier of three years from the time the liability to pay the duty arose or one year from the date on which evidence of the facts sufficient in HMRC's opinion to justify the making of the assessment came to their knowledge.

13. So far as the assessment for VAT is concerned, HMRC's power to assess TDG for VAT comes from section 73(7B) of the VATA 1994 which provides that where it appears to HMRC that goods have been removed from a warehouse without payment of the VAT payable under section 18(4) or section 18D on that removal, they may assess to the best of their judgment the amount of VAT due from the person removing the goods or other person liable and notify it to it. It is accepted by HMRC that if the spirits were exported from the UK then no VAT is payable.

14. HMRC issued an assessment to TDG on 18 October 2000 in respect of VAT (£84,275.30) and excise duty (£369,223.95). The excise duty assessment referred to the four consignments of spirits consigned to Iberia under duty suspension from TDG's premises and attached details of the AADs and the description of the goods. It

stated that confirmation of the receipt of the goods in Spain had been sought from the Spanish Customs but that they had confirmed that no declaration had been made for receipt of the consignment of the goods. This meant that the goods were unaccounted for. The assessment continued:

> "As per the Excise Goods (Holding Movement, Warehousing & REDS) Regulation 1992 [HMWR], regulation 4(8), ".. where the authorised warehousekeeper does not otherwise account for the excise goods to the satisfaction of the Commissioners, the excise goods shall be deemed to have been released for consumption and to have been so released on the day that the goods were dispatched from the tax warehouse…". This means that excise duty points were created for each of the four dispatches."

15. The assessment then referred to regulation 5(7) as stipulating that TDG was liable to pay the excise duty in respect of the four consignments.

16. It is now accepted by HMRC that the reference to regulation 4(8) of the 1992 Regulations was mistaken. That regulation only applies where HMRC has issued a notice requiring a certificate of receipt and no such notice had been issued. It is not clear when the error came to the attention of HMRC but in 2007 HMRC wrote to TDG's lawyers confirming that no notice had been given and referring to TDG's liability as arising under regulation 4(2)(a) of the 1992 Regulations.

The Tribunal's decision

17. The Tribunal referred to the critical factual point in the case being whether the spirits had in fact been exported from the UK. If they had reached Calais and then been diverted, the excise duty would not be chargeable in the UK. The Tribunal noted that the burden was on TDG to show, on the balance of probabilities, that the spirits had been exported either to Calais or somewhere else, even if they had not been received in Cadiz. The Tribunal heard evidence from two witnesses from the parent company of TDG. They also had before them a transcript of a police interview given in July 2000 by Mr Downer and the witness statement of a Mr Keith Wyles who had collected one of the consignments from TDG's warehouse and, he said, been instructed by Mr Eaton of JWT Transport to take it to a depot in Brentwood rather than to Cadiz.

18. The Tribunal had directed that Mr Eaton give evidence before them. Mr Eaton's evidence was to the effect that his drivers took the goods to Calais using different trucks from those with the registration numbers in the TDG paperwork. That was why the original truck registration numbers were not recorded as passing through Dover on the relevant dates. The trailers had then been collected at Calais by another transporter who had taken them to Cadiz. In more detail his evidence as to what had happened to the loads was as follows-

> (1) Consignments 1 and 3 had been collected from TDG's warehouse by truck registration number S553UUG, that truck had then gone to JWT Trading's yard rather than to Calais and the consignment had been unhitched and attached

to a different truck owned by JWT Trading, and then taken to Calais. In Calais it had been unhitched again and transported from Calais to Cadiz by another company run by a man called Stevie Ellis.

(2) Consignment 2 had been collected from TDG's warehouse by Mr Wyles in his truck registration T93JBD; it had been taken to JWT Transport's yard and transferred to a truck owned by Stevie Ellis who had taken it across the Channel and down to Cadiz.

(3) Consignment 4 had been taken by truck registration number L324HKM; that truck had then gone to JWT Trading's yard rather than to Calais and the consignment had been unhitched and attached to a different truck owned by JWT Trading, and then taken to Calais. In Calais it had been unhitched again and transported from Calais to Cadiz by Stevie Ellis.

19. Mr Eaton could not produce any paperwork showing the numbers of the trucks which had actually carried the goods to Calais because, he said, the tacho records or vehicle movement records for the critical week had been destroyed. So it was impossible for HMRC to corroborate or disprove his evidence by checking the records of truck movements at the Channel ports or Eurotunnel.

20. The Tribunal agreed with HMRC's assessment that the evidence in support of TDG's claim that the goods were exported to Calais was 'risible'. They held that everything hinged on the evidence of Mr Eaton because TDG had no idea what had happened to the spirits after they left its warehouse. The factors on which the Tribunal relied in concluding that TDG had failed to show that the spirits were exported were:

(1) Although the departure and arrival records at the port of Dover or at Eurotunnel showed that some of the various trucks which Mr Eaton claimed had transported the goods across the Channel had left the UK, the times recorded did not tally with the required dates for the supposed further swaps at Calais and their arrival in Cadiz on 10 or 11 April. In any event the trucks were recorded as going to Zeebrugge not Calais.

(2) The Tribunal regarded it as 'highly suspicious' that the JWT Trading tacho records or vehicle movement records for the critical week had been lost or destroyed. It appeared that this destruction had been targeted on these particular records and must have been deliberate. The lack of any other documentation supporting Mr Eaton's version of events also lessened the chance of establishing that the spirits had been exported.

(3) Mr Eaton had not given the explanation about the vehicle swaps in his police interview. This explanation was first put to the Tribunal in an email sent by Mr Eaton to them in 2011. They said 'It seems extraordinary that Mr. Eaton would not have remembered some of this information, utterly vital as it was to the explanation of why the tractors mentioned in the AADs had not left the UK, when asked the crucial questions in September 2000…'.

(4) Mr Wyles' evidence about being told to take consignment 2 to JWT Trading's depot was truthful and was inconsistent with that of Mr Eaton. The Tribunal doubted whether Stevie Ellis existed at all.

(5) It was 'decidedly curious' that all these trailer swaps had been carried out for no apparent reason when the goods were only being taken as far as Calais by JWT Transport.

21. The Tribunal stated its conclusion as follows:

"66. Our conclusion, on the evidence, is that Mr. Eaton's story is sufficiently curious for us to require at least some documentary or other evidence to support it before we can accept it. There is absolutely no such evidence or corroboration. We conclude that the Appellant has failed to demonstrate that the claimed chain of events occurred, and that it has not been demonstrated that the goods were moved to Calais, with any diversion then occurring outside the UK."

22. So far as the legal points raised were concerned the Tribunal's conclusions were:

(1) That the reference in HMRC's 18 October 2000 assessment to the wrong paragraph of regulation 4 of the 1992 Regulations did not render the assessment void: see paragraphs 74 onwards of the Decision.

(2) That the inability of HMRC to produce the assessments it said it had issued to MD Trading or Mr Downer asserting their joint and several liability did not prevent TDG from claiming a contribution from them towards the tax and duty it has in fact paid.

(3) The failure of HMRC to serve a notice of the kind referred to in regulation 4(8) of the 1992 Regulations had not deprived TDG of the opportunity to pursue inquiries to find the goods. There is no duty on HMRC to issue such a notice.

(4) As regards the liability to VAT, the Tribunal rejected two contentions which it described as 'strange', one relating to the nature of the commercial enterprise carried on by TDG and one relating to a deduction of input tax: paragraphs 84 to 87.

23. TDG accepted for the purposes of the appeal that the liability to VAT followed upon the liability for excise duty and no separate submissions were made to me as regards the VAT liability.

Ground 1: failure to assess under the correct provision

24. The first ground of appeal concerns the identification of the excise duty point in this case. The submission developed by Mr Tack of DLA Piper appearing for TDG was more complicated than the argument that had been made to the Tribunal. TDG argued that *Greenalls* could not be relied on in this case as establishing that the appropriate excise duty point was regulation 4(2)(a). He argued that *Greenalls* was distinguishable because there the House of Lords, rightly or wrongly, proceeded on the basis that the goods had definitely been diverted for consumption within the

United Kingdom and had not been exported. In the present case, by contrast, HMRC accepted that they did not know where the goods had been diverted. Mr Tack said that if HMRC wanted to rely on regulation 4(2)(a) they should have made the assessment on the basis that they were satisfied that the goods were made available for home use. But the transcript of the interview of Mr Eaton shows that HMRC told him that they did not know what had happened to the goods. In those circumstances, Mr Tack, submitted, the only available route for HMRC was to serve a notice under regulation 4(8) and wait to see if the warehouse keeper could account for the goods to the Commissioners' satisfaction. If he could not, then HMRC are entitled to assume that the goods have been released on the day when the goods were dispatched from the tax warehouse. He submitted therefore that where HMRC cannot prove that the goods were diverted in the United Kingdom, they cannot rely on regulation 4(2)(a).

25. Mr Tack also submitted that the mistaken reliance on the excise duty point referred to in regulation 4(8) was more fundamental than was recognised by the Tribunal because it meant that a different statutory power of assessment was relied on by HMRC. The powers to assess to excise duty are set out in section 12 of the Finance Act 1994. Section 12(1) deals with the situation where there is a person from whom any amount of duty has become due and there has been a default by that person of a kind set out in subsection (2). Four kinds of default are set out in subsection (2) including in subsection (2)(a) a failure to make, keep, preserve or produce as required or directed any returns, accounts, books, records or other documents and in subsection 2(b) any omission from or inaccuracy in any returns etc which any person is directed or required to make, keep, preserve or produce. Where section 12(1) applies, the Commissioners are empowered to assess the amount of duty to the best of their judgment and notify that amount to the person liable to pay.

26. The second power to assess is set out in section 12(1A) and covers the situation where there is a person from whom any amount of excise duty has become due and that amount can be ascertained by the Commissioners. Where section 12(1A) applies, the Commissioners may assess the amount of duty due and notify that amount to the person liable to pay.

27. Mr Tack argued that if the assessment relies on the excise duty point in regulation 4(2)(a) then that assessment must be made using the power in section 12(1A). This is because in those circumstances it would be possible to ascertain the amount of tax due. If, however, the assessment relies on the excise duty point in regulation 4(8), then the power of assessment exercised by HMRC would be the power under section 12(1) relying on the default in section 12(2)(b), that default occurring when the warehouse keeper fails to respond to the notice issued to him under regulation 4(8). In those circumstances, Mr Tack submits, there can be no ascertained amount of duty within the meaning of section 12(1A)(b) because HMRC does not know precisely how many of the goods were diverted in the United Kingdom and how many were exported. Given therefore that the reliance in the notice of assessment on the wrong excise duty point in regulation 4 means that HMRC exercised the wrong power under section 12, this is not something that can be corrected as a technical error.

Discussion

28. I do not accept that these provisions operate in the way put forward by Mr Tack. The *Greenalls* case establishes that when goods are diverted within the United Kingdom, the excise duty point in regulation 4(2)(a) occurs even if the warehouse keeper is not at fault. If there is a dispute between HMRC and the warehouse keeper as to whether as a matter of fact the goods were exported, then that dispute is resolved by HMRC issuing an assessment setting out the liability arising based on HMRC's assertion that the goods were not exported; by the warehouse keeper disputing the liability on the grounds that the goods were exported and by the statutory procedure for review and appeal from the assessment then being invoked. I do not accept that regulation 4(2)(a) can only apply if either HMRC can prove incontrovertibly that diversion occurred in the UK or if the warehouse keeper does not contend otherwise. There is nothing in the provision to indicate that it is so limited. Any dispute as to whether one or more of the factual underpinnings of regulation 4(2)(a) has been established can be raised by the tax payer and will ultimately be determined by the tribunal or the court. If the tribunal or court finds that the goods were exported then that means they were not made available for consumption and the excise duty point in regulation 4(2)(a) does not occur. If the tribunal or court ultimately finds in favour of HMRC then the excise duty point did occur. The existence of such a factual dispute does not, of itself, rule out the application of regulation 4(2)(a).

29. Further I do not accept that the link between the two assessment powers in section 12 of the Finance Act and the two excise duty points exists as Mr Tack submitted. The enactment of section 12(1) and (1A) addresses a different problem, namely that which arises, for example, when a taxpayer fails to maintain proper records and thereby prevents HMRC from being able to calculate precisely what tax he owes. Both subsections apply only when it is already clear that the taxpayer is a person from whom an amount has become due in respect of any duty of excise. That is the prior question with which this appeal is concerned. If the amount of tax can be ascertained then the assessment is of that amount and is made under section 12(1A). If it cannot be ascertained because of the taxpayer's default, then HMRC are empowered by section 12(1) to assess the amount payable to the best of their judgment. In the present case there was nothing wrong with TDG's record keeping. HMRC know exactly how much alcohol was released from the warehouse and of what kind. They can therefore ascertain the amount of duty owed by TDG to the last penny. The uncertainty over whether all or part only of the consignment was made available for consumption does not affect HMRC's ability to ascertain the amount of tax due because HMRC contend that all the alcohol was made available. Any dispute over whether or not that is true must be resolved by the mechanisms in place for resolving factual disputes and this may or may not lead to an adjustment of the duty ultimately payable. That is not the kind of difficulty of ascertainment to which section 12(1A) is directed.

30. I consider that the Tribunal was undoubtedly right to hold that the mistake in referring to regulation 4(8) in the original notice of assessment did not render that notice invalid. As the Tribunal held, there is no obligation on HMRC to identify the excise duty point in making their assessment. Section 12 of the Finance Act only

requires that HMRC can establish that TDG is a person from whom any amount has become due. An assessment may be overturned on appeal if the tax payer succeeds in showing that the factual basis for the assessment is not made out. That does not mean that the assessment is regarded as having been invalid from the outset.

31. Mr Tack submitted that TDG had been disadvantaged by the mistake made because if a notice had been issued by HMRC pursuant to regulation 4(8), the company would have been able to investigate what had happened to the goods. I do not accept that any such disadvantage occurred here. HMRC did not simply issue the assessment and leave TDG to try to find out what had happened to the goods. HMRC made inquiries at the Channel ports and at Eurotunnel to determined whether the relevant trucks' vehicle registration numbers had crossed the Channel. They contacted their Spanish counterparts to investigate whether the goods had arrived in Cadiz. HMRC also pursued the matter with Mr Downer and Mr Eaton. The assessment for excise duty and the demand for VAT both issued on 18 October 2000 identified what goods were being assessed and set out the basis on which the assessment was made, namely that the goods had not reached Spain and were unaccounted for. There was nothing to prevent TDG from making whatever inquiries it thought appropriate to find out what had happened to the goods so that it could contest the assessments. There was no time limit on them doing so.

32. Mr Tack also referred me to Case C-233/98 *Haupzollamt Neubrandenburg v Lensing & Brockhausen GmbH* [1999] ECR I-7365 as authority for the proposition that where the relevant statutory provisions set a period within which the tax payer is given an opportunity to prove that the goods were exported, then the Member State must comply with that time limit. He argues that regulation 4(8) allows the warehouse keeper six months to account for the excise goods to the satisfaction of the Commissioners. By purporting to rely on regulation 4(2)(a) instead, HMRC deprived TDG of this six month period.

33. In my judgment, however, such an argument is inconsistent with the House of Lords' decision in *Greenalls*. That case decided that where there has been an irregular departure from suspension and hence a release for consumption, then regulation 4(2) determines when the excise duty point occurs. Lord Hoffmann said that if paragraph (a) of regulation 4(2) did not cover what had happened then there was no other paragraph of regulation 4(2) that did. An interpretation of paragraph (a) which covered the facts of that case was therefore not only in accordance with the ordinary meaning of the language but required by the duty of the domestic court to interpret legislation, so far as possible, to comply with the terms of the directive.

34. I therefore reject this ground of appeal.

Ground 2: failure to assess Mr Downer

35. TDG's second ground of appeal is that HMRC failed to assess Mr Downer as being jointly and severally liable to the duty under regulation 5(5) of the 1992 Regulations even though he was, on HMRC's analysis of the case, liable with TDG.

TDG contends that this prevented TDG from relying on that regulation to exercise its right of recourse against Mr Downer.

36. There are two answers to this. First the Tribunal found that HMRC had in fact issued an assessment to Mr Downer. In paragraph 79 they found that HMRC had issued an assessment against M D Trading which is either the relevant corporate entity (if it is a corporate entity) or is the trading name for Mr Downer (if it is not a corporate entity). TDG complain in the Grounds of Appeal that this finding was based on 'absolutely no evidence' but in my judgment the Tribunal was entitled to rely on the statement of HMRC that their records showed that they had issued the assessment.

37. Mr Tack also refers to the passage in *Greenalls* where Lord Hoffmann was explaining the justification for holding the authorised warehouse keeper liable for the diversion of the goods even if he was not at fault. Lord Hoffman said:

> 17. … If someone else was responsible, the warehouse keeper is not without remedy. By virtue of the joint and several liability created by regulations 5(5) and (6), he has a right of recourse against those primarily responsible for the diversion. Of course he may in practice find it difficult to pursue them. But the commissioners are in the same position. The warehouse keeper can reduce the commercial risk by requiring a bond or guarantee. Whether he does so or is content to run the risk of having to pay the duty without effective recourse is a matter for him. No one is obliged to run an excise warehouse. It is a privilege which carries obligations."

38. I do not read this statement as indicating that Lord Hoffmann had concluded that an assessment must be issued by HMRC against the persons liable under regulation 5(5) and (6) before the warehouse keeper can have recourse to them. In any event, I do not consider that the primary liability of the warehouse keeper under regulation 5(4) can be affected by anything that does or does not happen with regard to the others who might also be liable. I reject this ground of appeal.

Ground 3: *Edwards v Bairstow*

39. TDG argues that the Tribunal acted perversely in rejecting Mr Eaton's evidence before them. Mr Tack points to a supposed inconsistency between the Tribunal's statement in paragraph 63 that -

> "We both agreed that, ignoring the content of what he said and the glaring oddities of some of the claims, we would not have found Mr. Eaton to be a dishonest or untrustworthy witness."

and their conclusion that despite Mr Eaton's evidence about the switching of the trailers, TDG had failed to show that the goods had been exported.

40. Mr Tack also criticised the Tribunal for disbelieving Mr Easton's evidence even though that must mean that he had been party to the diversion of the goods and it was

not put to Mr Eaton squarely in cross-examination that he had been involved in the fraud.

41. In my judgment there is nothing in this point. The Tribunal explained in some detail the basis on which they rejected Mr Eaton's evidence as implausible and, having considered those reasons, I regard their rejection of that evidence as entirely justified. They did not conclude that Mr Eaton was honest and trustworthy because their assessment in paragraph 63 was made ignoring what he said. They could not, of course, ignore what he said as that was the evidence in the case.

42. There was no need for HMRC to cross-examine Mr Eaton on the basis that he had been involved in the fraudulent diversion of the goods. That is not the issue which the Tribunal was addressing. That issue was rather whether TDG had discharged the burden of showing that the goods had been diverted only once they had left England. The evidence relied on by TDG to discharge that burden was that of Mr Eaton and the Tribunal held that his evidence did not discharge that burden.

Disposal

43. I therefore dismiss the appeal.

TRIBUNAL JUDGE: MRS JUSTICE ROSE

RELEASE DATE: 20 April 2015