[2013] UKUT 0393 (TCC)

**Appeal number: FTC/62/2012**

***VAT – zero-rating – evidence of export of goods – whether First-tier Tribunal erred in law in finding that the conditions for zero-rating were met in respect of certain invoices – Principal VAT Directive, articles 131 and 146 – VATA 1994, s 30 – VAT Regulations 1995, reg 129 – VAT Notice 703 – appeal dismissed***

***VAT – input tax – application for permission to appeal – whether arguable case that First-tier Tribunal erred in law in finding that an invoice was paid in full within 6 months of date of supply – VATA 1994, s 26A – permission refused***

**UPPER TRIBUNAL**
**TAX AND CHANCERY CHAMBER**

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

**- and -**

**ARKELEY LIMITED (in liquidation)** **Respondent**

**TRIBUNAL: JUDGE ROGER BERNER**
**JUDGE JOHN CLARK**

**Sitting in public at 45 Bedford Square, London WC1 on 16 July 2013**

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

**Laurence Onwufuju, former director, for the Respondent**

DECISION

1. The Appellants, HMRC, appeal against those parts of Arkeley's appeal to the First-tier Tribunal ("FTT") (Judge Wallace and Mrs Watts-Davies) that the FTT, in its decision released on 13 February 2012, decided in Arkeley's favour.

2. The appeal to the FTT was from decisions of HMRC, first to refuse zero-rating for VAT purposes in respect of certain alleged export transactions in pharmaceuticals, on the ground that the Commissioners were not satisfied that the goods had been exported, and secondly to disallow certain claims to input tax on the basis that the consideration for the supply had not, or had not fully, been paid within six months of the relevant date.

3. In respect of six of the invoices, the FTT found that the conditions for zero-rating were not met. But in respect of three invoices (numbered 176, 187 and 189) the FTT found that those conditions were met. As far as the zero-rating issue is concerned, it is that latter decision that HMRC seeks to overturn. Permission to appeal in that respect was given by Judge Bishopp in this Tribunal on 16 August 2012.

4. In respect of the input tax issue, the FTT dismissed Arkeley's appeal in respect of the supply to Arkeley from Primrose Pharma Ltd, but allowed the appeal in respect of a supply invoiced to Arkeley by LogiChem Ltd (under invoice 6119). Permission for HMRC to appeal the decision in relation to invoice 6119 was refused by both the FTT and on the papers by Judge Bishopp. We heard an oral application for permission in that respect at the same time as hearing argument on the substantive issues.

5. At the conclusion of Mr Singh's submissions we informed the parties that we would dismiss HMRC's appeal. We also refused HMRC permission to appeal in respect of invoice 6119. These are our reasons for coming to those conclusions.

## The zero-rating issue

*The law*

6. The domestic law is derived from Articles 146 (exemption on exportation) and 131 (exemptions: general provisions) of the Principal VAT Directive (2006/112/EC), the latter of which provides:

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

7. That domestic law is primarily contained in s 30 of the Value Added Tax Act 1994 ("VATA"). Section 30(6) provides that a supply of goods is zero-rated:

> "… if the Commissioners are satisfied that the person supplying the goods –
>
> (a) has exported them to a place outside the member States …
>
> and … if such other conditions, if any, as may be specified in regulations or the Commissioners may impose are satisfied."

8. Section 30(8) similarly provides as follows:

> "Regulations may provide for the zero-rating of supplies of goods, or of such goods as may be specified in the regulations, in cases where—
>
> (*a*) the Commissioners are satisfied that the goods have been or are to be exported to a place outside the member States or that the supply in question involves both—
>
> (i) the removal of the goods from the United Kingdom; and
>
> (ii) their acquisition in another member State by a person who is liable for VAT on the acquisition in accordance with provisions of the law of that member State corresponding, in relation to that member State, to the provisions of section 10; and
>
> (*b*) such other conditions, if any, as may be specified in the regulations or the Commissioners may impose are fulfilled."

9. The regulation in question, reg 129 of the Value Added Tax Regulations 1995 ("the VAT regulations"), adds nothing to s 30(6), referring as it does to the Commissioners being satisfied that goods have been supplied to a person (other than a taxable person) not resident in the UK and that the goods are exported to a place outside the member States. The supply is then zero-rated, subject to such conditions as HMRC may impose.

10. The relevant conditions are found in Notice 703 (August 2006), certain parts of which have the force of law. One such part is para 3.3, which provides as follows:

> "A supply of goods sent to a destination outside the EC is liable to the zero-rate as a direct export where you:
>
> - ensure that the goods are exported from the EC within the specified time limits (see paragraph 3.5)
> - obtain official or commercial evidence of export as appropriate (see paragraphs 6.2 and 6.3) within the specified time limits
> - keep supplementary evidence of the export transaction (see paragraph 6.4), **and**
> - comply with the law and the conditions of this notice."

The time limit both for exporting the goods and for obtaining the relevant evidence is in each case three months from the time of supply (para 3.5, which also has the force of law).

11. Paragraph 3.4 contains conditions for zero-rating indirect exports, which the FTT found at [123] was applicable in these cases:

> "A supply of goods to an overseas customer (see paragraph 2.4) sent to a destination outside the EC is liable to the zero rate as an indirect export where:
>
> your overseas customer:
>
> - exports the goods from the EC within the specified time limits (see paragraph 3.5), **and**
> - obtains and gives you valid official or commercial evidence of export as appropriate (see paragraphs 6.2 and 6.3) within the specified time limits,
>
> and you:
>
> - keep supplementary evidence of export transactions (see paragraph 6.4), **and**
> - comply with the law and the conditions of this notice,
>
> **and** the goods are not used between the time of leaving your premises and export, except where specifically authorised elsewhere in this notice or any other VAT notice."

The same three-month time limit applies.

12. Paragraph 6.5 also has the force of law. It sets out the evidential requirements as follows:

> "The evidence you obtain as proof of export, whether official or commercial, or supporting must clearly identify:
>
> - the supplier
> - the consignor (where different from the supplier)
> - the customer
> - the goods
> - an accurate value
> - the export destination, **and**
> - the mode of transport and route of the export movement."

That is the extent to which para 6.5 has the force of law. It goes on, however, to provide guidance to the following effect:

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

13. According to para 6.5, therefore, the required evidence may be provided from a number of sources. The evidence may be official (that category is not relevant to this

case), or it may be commercial or supporting. Paragraph 6.3 sets out, without the force of law, examples of commercial transport evidence describing the physical movement of the goods. This evidence can include certificates of shipment and Master air-waybills (MAWBs). Paragraph 6.4, likewise without the force of law, describes supplementary evidence likely to be held by the taxable person, including the customer's order, sales contract, export sales invoice, consignment note, packing list, and evidence of payment and of the receipt of the goods abroad.

14. Section 7 of Notice 703 does not have the force of law. It is stated to cover the specific evidence of export that the taxable person must obtain according to the method of export used. It says that in all cases the official or commercial transport evidence obtained by the taxable person must be supported by the supplementary information set out in para 6.4 to show that the transaction has taken place.

15. For groupage or consolidation transactions, para 7.4 provides as follows:

> "If you use a freight forwarder, consignments (often coming from several consignors) may be aggregated into one load, known as groupage or consolidation cargo. The freight forwarder must keep copies of the original bill of lading, sea-waybill or air-waybill, and all consignments in the load must be shown on the container or vehicle manifest. You will be issued with a certificate of shipment by the freight forwarder, often supported by an authenticated photocopy of the original bill of lading, a sea-waybill or a house air-waybill. Where such consignments are being exported, the forwarder is usually shown as the consignor in the shipping documents."

*Teleos*

16. In *R (on the application of Teleos plc and others) v Revenue and Customs Commissioners* [2008] STC 706, the CJEU considered questions arising from the application of s 30(8) VATA and the precursor to article 131 of the Principal VAT Directive. Although the context of *Teleos* was intra-community trade, the principles established by the CJEU in that case are relevant to the case, such as the present, of exports, where the goods move to a destination outside the EU.

17. In *Teleos* a UK trader sold mobile telephones to a Spanish company, for delivery in France or, in certain cases, Spain. The terms of the sale were ex works, that is the UK trader was required only to place the goods at the customer's disposal at a bonded warehouse in the UK. It was the customer who was responsible for arranging the transport of the goods to their destination. The UK trader received from the customer consignment notes (CMRs) which described the goods, stated the delivery address, the carrier's name and the vehicle's registration number.

18. Although the CMRs were initially accepted by HMRC as evidence of removal from the UK, and the supply of the mobile phones was zero-rated, subsequent checks led to the discovery that, in certain cases, relevant information stated on the CMRs was false. HMRC concluded that the mobile telephones had never left the UK and assessed the UK trader to VAT on the supplies.

19. Among the questions asked of the CJEU was one concerning the ability of the tax authority to go behind the evidence of export. On the one hand, the CJEU held that a declaration, such as the CMRs in *Teleos*, could not be regarded as conclusive proof for the purpose of the exemption (in the UK, zero-rating). On the other hand, it was held that it would be contrary to the principle of legal certainty if a member state which laid down conditions by prescribing, amongst other things, a list of documents to be presented to the authorities, and which had initially been accepted as sufficient evidence of export, could subsequently require the supplier to account for VAT, where it transpired that, because of the purchaser's fraud, of which the supplier had and could have no knowledge, the goods did not actually leave the territory of the member state. To oblige taxable persons to provide conclusive proof that the goods had physically left the member state did not ensure the correct and straightforward application of the exemptions.

20. On that basis, and having regard also to the principle of proportionality and that of fiscal neutrality, comparing the position of transactions within a state, the CJEU concluded that the authorities of the member state of supply were precluded from requiring a supplier, who acted in good faith and submitted evidence establishing, at first sight, his right to the exemption (zero-rating) of an intra-Community supply of goods, subsequently to account for VAT on those goods where the evidence was found to be false. This is the case unless it can be established that the supplier was involved in the tax evasion; or if the supplier did not take every reasonable measure in his power to ensure that the intra-Community supply he was effecting did not lead to his participation in such evasion.

21. Those principles, although expressed in the context of intra-Community trade are, in our judgment, equally applicable to this case, where the zero-rating is applied on an export of goods outside the EU. The provision allowing the imposition of conditions in relation to an exemption such as the zero-rating is the same in each case, namely article 131, from which there is derived the requirement that the conditions are for the purpose of ensuring the correct and straightforward application of, in the UK, zero-rating, as well as to prevent evasion, avoidance or abuse. In our view, *Teleos* establishes that, where there is no allegation that the taxable person was acting otherwise in good faith or that the taxable person failed to take reasonable steps to ensure that he was not participating in tax evasion, the focus must be on the evidence required to establish the right to zero-rating. The taxable person cannot be required to prove the fact of export in any other way.

22. What this means is that in a case where bad faith is not alleged, and where it is not argued that the taxable person was a participant in fraud, whether an actual participant or a participant by virtue of knowledge or means of knowledge of the fraud (see *Kittel v Belgium, Belgium v Recolta Recycling SPRL* (Joined cases C-439/04 and C440/04) [2008] STC 1537; referred to at [65] of the CJEU judgment), the only question is whether the documents received by the supplier are sufficient evidence of the export. That is the case whether or not the tax authority has itself accepted the evidence. If that evidence is sufficient, and that is a matter for the Tribunal in the case of dispute, the application of zero-rating will not be precluded even if it is later discovered that the goods have not been exported. Absent an

allegation of knowledge or means of knowledge of fraud, the only relevant factor is the evidence available to the taxable person that the goods have left the UK.

23. As Mr Singh pointed out, both s 30(8) VATA and reg 129 of the VAT regulations have two limbs. The first is that HMRC must be satisfied that there is an export to a place outside the member states, and the second is that the conditions imposed by HMRC must have been fulfilled. But that does not, having regard to *Teleos*, mean that there is any obligation on the part of the taxable person to provide anything beyond documentary evidence that, at first sight, provides sufficient evidence of export.

**The role of the appellate tribunal**

24. Before we move on to consider the specific criticisms that HMRC make of the findings of the FTT, we should pause to examine the proper approach in a case of this nature. This is important, because the approach will differ depending on the extent to which the findings can be regarded as findings of fact, or as findings of law.

25. In the latter case, the position is straightforward; if the case contains anything which is on its face an error of law and which bears upon the determination, that is an error of law (*Edwards v Bairstow and another* [1956] AC 14, per Lord Radcliffe at p 36). On the other hand, in the former case, a pure finding of fact may be set aside as an error of law if it is found without any evidence or upon a view of the facts which could not reasonably be entertained (*Edwards v Bairstow*, per Viscount Simonds at p 29), and an error of law may arise if the facts found are such that no person acting judicially and properly instructed as to the relevant law could have come to the determination under appeal.

26. Mr Singh put his argument in this respect in the alternative. His principal submission was that the requirement for conditions for zero-rating to be satisfied is a statutory condition. The FTT found that the statutory condition was met. Consequently, argued Mr Singh, if the FTT was wrong about this, then this was an error of law. Alternatively, if the question was one of fact, Mr Singh submitted, for the reasons we will come on to, that the FTT's finding was perverse, in the sense meant by *Edwards v Bairstow*, and thus amounted to an error of law.

27. It is of course the case that we are dealing here with the application of a statutory provision. But not every decision in that regard will be a finding of law. If a statutory condition is that a car must be red, a finding that it was red would be a finding of fact. If the clear evidence is in fact that it was green, then that finding of fact may be upset as an error of law. The FTT in this case was required to consider whether, on the facts that it found as to the evidence of export available to Arkeley at the material time, that evidence was sufficient to satisfy the statutory conditions. If the FTT made an error as to what the statutory conditions required, then we accept that would be an error of law. But if the only error asserted is that the FTT was wrong in its assessment of the sufficiency of the evidence, that would in our view fall into the category of a multi-factorial assessment based on a number of primary facts, or a value judgment.

28. Where the finding comprises the application of a legal standard involving no question of principle, but is simply a matter of degree, an appellate tribunal should be very cautious in differing from the evaluation by the tribunal below. Where a decision involves the application of a not altogether precise legal standard to a combination of features of varying importance, that will fall within the class of case in which an appellate court should not reverse the lower tribunal's decision unless it has erred in principle (*Proctor & Gamble UK v Revenue and Customs Commissioners* [2009] STC 1990, per Jacobs J at [9] – [10]; *Designers Guild Ltd v Russell Williams (Textiles) Ltd* [2000] 1 WLR 2416, per Lord Hoffman at p 2423).

29. As this Tribunal is, in common with the First-tier Tribunal, a specialist tribunal, its appellate function may permit us to venture more freely into the "grey area" separating fact from law, than might an ordinary appellate court. Issues of law in this context can, arguably, be interpreted as extending to any issues of general principle affecting the specialist jurisdiction (see *Jones (by Caldwell) v First-tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19, per Lord Carnwath at [46]).

**An issue of principle?**

30. With this guidance in mind we turn to consider whether the FTT made an error of principle. In this respect we should first consider HMRC's second ground of appeal, which is in essence that the FTT erred in finding that the goods described in the relevant invoices had been exported.

31. The basis for this particular criticism is that the FTT stated, at [111], that counsel for HMRC had "said that he was not suggesting that the goods did not go to Nigeria and Ghana", and then at [140] had gone on to say that, although HMRC had pleaded in their statement of case that they were not satisfied that the goods had ever been exported,

> "… the appeal was conducted simply on the basis that the conditions in Notice 703 as to export had not been satisfied. As recorded at paragraph 111 above Mr Singh stated that good faith was not in issue and that he was not suggesting that the goods did not go to Nigeria and Ghana."

32. Mr Singh submitted that the FTT had misunderstood HMRC's position. It would, he submitted, have been illogical for HMRC to have accepted that the goods had been exported, at the same time as arguing that the conditions for zero-rating were not met because the evidence of alleged export that Arkeley relied upon did not clearly identify the goods described in the invoices as having been exported.

33. Mr Singh argued that it was implicit in the FTT's decision that the FTT was satisfied that the goods described in the relevant invoices had been exported. That followed from the statutory requirement that the goods could not be zero-rated unless HMRC, or the FTT on appeal, were satisfied both that the goods had been exported and that any conditions imposed by HMRC had been fulfilled. But, as Mr Singh recognised in making his oral submissions, an argument that the FTT was wrong to

find that the goods were exported goes no further than the argument (which is HMRC's first ground of appeal) that the FTT was wrong to find that the conditions for zero-rating were met in respect of the particular supplies.

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

35. That was the way in which the FTT approached the issue. It did not base its findings on any misconceived assumption that HMRC had agreed that the goods had been exported. It examined, as it was required to do, the evidence of export, and reached its findings on that basis. This ground of appeal is not therefore, in our view, an independent ground, but it is subsumed in the argument that the FTT was wrong to make the findings that it did on the sufficiency of the evidence of export.

36. In making his submissions on the question of the evidence of export, Mr Singh did not expressly argue that the FTT had made an error of principle. Nevertheless, we detected in his submissions a thread which arguably amounted to such a position. He placed considerable reliance on what he submitted was an absence of clear identification of the goods said to have been exported. He pointed to the descriptions of goods on Master Air-waybills (MAWBs), and the absence of manifests setting out individual consignments within a groupage cargo.

37. To the extent that this was an argument that the FTT could not as a matter of principle have reached the conclusions that it did in the absence of specific descriptions of the invoiced goods in any particular export documentation, we reject that submission.

38. The approach adopted in this respect by the FTT was in our view correct. It considered those requirements of Notice 703 that had the force of law, in particular para 6.5. It said in that regard, at [127]:

> "Paragraph 6.5 of Notice 703 does not require that the necessary proof of export must all be contained in one document. In our judgment provided that the documents can be linked together a number of documents may together 'clearly identify' the necessary matters under paragraph 6.5. Where there is a conflict between documents this may prevent the necessary linkage and may result in the matters not being clearly identified. While Mr Onwufuju [representing Arkeley] is correct in saying that Notice 703 did not stipulate that everything in the documents must be correct, the evidence of export must read as a whole clearly and correctly identify all the matters specified in paragraph 6.5. Under paragraph 3.4 which is binding the evidence of export must include either official or commercial evidence of export."

39. Mr Singh did not seek to challenge this passage of the FTT's decision. We think he was right not to do so. We would only add that there is no requirement that the matters required by para 6.5 to be clearly identified should be in any particular document or should all be in the official or commercial documentation. All the documentation obtained within the relevant time limit, including supporting documentation, should be considered in determining whether, taken as a whole, those matters have been so identified.

40. There is, in particular, no requirement in principle that the goods should be identified by reference to a MAWB or a manifest. This is borne out by para 7.3 of Notice 703. That paragraph, which relates to consignments that are aggregated together (groupage or consolidation transactions), requires the freight forwarder (and not the supplier) to keep copies of the MAWB, and states that all consignments must be shown on the container or vehicle manifest. The supplier will be issued with a certificate of shipment by the freight forwarder, but para 7.3 says only that this will often (not invariably) be supported by an authenticated photocopy of a document such as the MAWB. It is recognised that in some cases the supplier will receive only the certificate of shipment, and not the MAWB.

41. We therefore conclude that the FTT made no error of principle. There is accordingly no error of law in that respect. We must therefore now turn to the individual transactions. The question in that respect is not whether we would have reached the same, or a different, conclusion from that of the FTT. It is whether the finding of the FTT is such that, on the evidence before it, no reasonable tribunal could have reached that conclusion, or as Mr Singh submitted that finding was perverse.

**The individual transactions**

*Invoice 176*

42. As the FTT described in [14] of its Decision, invoice 176 was dated 17 January 2007 and was addressed to Ajibola Akporero, Benin City, Nigeria. The goods in question were 2040 Inexium 40 mg and 500 Bandalet Onetouch Ultra BT 100. The invoice price was £63,063.

43. A number of certificates of shipment were produced by Arkeley:

(a) Originally, a certificate of shipment by Reliance Freight showing loading at Heathrow, MAWB No 208 LHR 40071452. The FTT found that this expressed 17 January 2007 as the date of export. Our own review of the document suggests that this might have been in error; the reference to that date is more likely, in our view, to have been to the invoice date than the date of export. This view is supported by the MAWB, which shows a date of "26th", which must refer to 26 January 2007. There was no manifest attached to the MAWB that identified the pharmaceutical goods described in invoice 176.

(b) Subsequently, in March 2009, Mr Onwufuju, on behalf of Arkeley, produced a certificate of shipment in which it was stated that the goods

were shipped on 26 January 2007, consistently with the MAWB originally supplied.

(c) In August 2010, Mr Onwufuju produced a copy of the certificate of shipment produced in March 2009, with handwritten amendments. The date of shipment had been amended from 26 January 2007 to 19 January 2007, and the MAWB reference number had been changed to 208LHR40071334. That MAWB identified the goods that had been shipped as "urgent courier materials, books, computer supplies, machine spares, copiers". Once more there was no manifest identifying the goods in the invoice.

44. The FTT concluded, at [150], that the original documents would potentially have sufficed as evidence of export. The invoice described the goods, and the certificate of shipment referred to those goods by reference to the invoice number. Mr Singh criticised that conclusion, on the basis that there was no manifest attached to the MAWB that identified the goods that were the subject of invoice 176. We reject that argument. As we have described, the absence of a manifest is not conclusive. There is no absolute requirement that the certificate of shipment should be accompanied by a copy of the MAWB or that the MAWB should be supported by a manifest. The question whether the evidence is satisfactory is one on which the tribunal is required to exercise a value judgment. The FTT did so in this case and, in our judgment, it was entitled to conclude that the original certificate of shipment and the MAWB were sufficient evidence of export.

45. The FTT also considered, at [150], whether the conflict between the original documents and those produced later affected the position. It referred to its finding that the only differences were in the flight dates (that was certainly the case in relation to the manuscript amended version, but less clearly as between the original certificate of shipment and that produced in March 2009) and the MAWB numbers. The FTT found that those were not matters that required to be identified under paragraph 6.5 of Notice 703, and that consequently the original documents could be accepted as sufficient evidence.

46. Mr Singh submitted that the FTT was wrong to conclude on this basis that the conditions for zero-rating were met. He argued that the FTT had overlooked that if something as basic as the date of export of the goods was not consistent in the documents relied on by Arkeley, this brought the reliability of the documentation as a whole into question, and ought to have made the FTT particularly cautious in accepting it as satisfactory evidence of export. He submitted further that the original certificate of shipment (which had been obtained and produced within the three-month time limit) was a certificate that Arkeley had, by producing further certificates and other documentation, ceased to rely upon.

47. We do not consider it is right to characterise the production by Arkeley of further documentation as its ceasing to rely upon the original evidence of export. The FTT was entitled to consider the evidence that was produced and evaluate it in light of the circumstances. We agree that where there is conflicting evidence, that is a circumstance to be considered, with the usual care, by the tribunal. But we do not

accept that the FTT failed to take account of all relevant matters, or that its approach can be said to have been wrong in law. The FTT addressed the discrepancies between the various documents and concluded that they did not prevent the original documents being accepted as satisfactory proof of export. That is a conclusion the FTT was entitled to reach on the evidence, and as such it does not disclose any error of law.

*Invoice 187*

48. Invoice 187 was dated 16 January 2007 and made out to "Sundry Customers, Techfarm Limited (sic)" at an address in Accra, Ghana. The goods were 480 Aricept 10 mg tabs x 28 and 710 Combivir 150 mg/300 mg x 60 at a total invoice price of £106,505 (FFT, at [18]).

49. A number of documents were produced by Arkeley in support of its claim for zero-rating of these supplies:

(a) In March 2007 Arkeley produced the same MAWB as had been originally produced in relation to invoice 176, which was, as we have described above, for a shipment to Nigeria. The carrier was stated to be Bellview Airlines, the shipper was stated to be Reliance Freight Services, the airport of departure was Heathrow and the airport of destination was Lagos, Nigeria. The goods were described in the MAWB as "personal effects", and there was no document identifying the pharmaceutical goods described in invoice 187 as having been carried on this flight.

(b) In August 2008, as an exhibit to his witness statement at that time, Mr Onwufuju produced a certificate of shipment by World Express International Ltd dated 16 February 2007 showing the goods on invoice 187 as having been shipped from Heathrow to Ghana on 13 January 2007. The certificate described the MAWB as numbered 0746247613. It was accompanied by a MAWB with the number 07462474613 (this number differing from that on the certificate by having one additional digit, a '4' between '7' and '6'). The MAWB was issued by KLM, the carrier, was dated 16 February 2007, and showed the shipper as World Express and the destination airport as Accra, Ghana. The goods were described as "courier material" and there was no accompanying manifest.

(c) Mr Onwufuju produced an amended certificate of shipment in August 2010. This was the original certificate, but amended by Mr Onwufuju in August 2010 in two respects: first, the number had been changed to accord with the number on the MAWB; secondly, the shipment date had been altered to 16 February 2007.

50. The conclusion of the FTT, at [159], was that the MAWB originally produced by Arkeley was not related to the goods referred to in invoice 187. However, it decided that the certificate of shipment by World Express, exhibited in August 2008, did provide the necessary details. It was satisfied that the MAWB, which had been captured by the Customs Handling of Import and Export Freight ("CHIEF") system, evidenced the export from Heathrow. It then concluded that what it had identified as errors in the certificate (the date of shipment being before the date of invoice and the

error in the MAWB number) did not prevent the certificate and the attached MAWB from constituting sufficient evidence for zero-rating purposes.

51. Mr Singh submitted that the FTT was wrong so to have concluded. He argued that the details of the alleged export relied upon by Arkeley were inherently unreliable as they had been substantially amended without any satisfactory explanation being provided for how the earlier details could have been so inaccurate. Mr Singh also refers to the absence of a manifest clearly identifying the goods described in invoice 187.

52. As we have earlier found, the absence of a manifest does not lead to the conclusion that the FTT made an error of law. The FTT relied upon the certificate of shipment and the MAWB provided in August 2008. Mr Singh's argument at one level seeks to confine the relevant document to the amended certificate produced in August 2010, on the basis that this is the document ultimately relied upon by Arkeley. As we described in relation to invoice 176, we do not consider the scope of the enquiry was so confined. The FTT was entitled to consider all the evidence before it. It expressly rejected the original MAWB as irrelevant, and it clearly had in mind the August 2010 amended version of the August 2008 certificate, to which it had referred in [18] when making its findings of fact, when it concluded that, despite the errors it had identified, the certificate of shipment produced in August 2008, and the attached MAWB, constituted sufficient evidence.

53. Mr Singh's submissions can also be regarded as arguing that the FTT was not entitled to reach that conclusion because of the inherent unreliability of that certificate and the MAWB. We reject that argument. In our judgment, having considered all the evidence, including the various discrepancies, the FTT was entitled to make the finding that it did, and there is no error of law in that respect.

*Invoice 189*

54. At [19], the FTT summarised the documents relating to invoice 189. That invoice was dated 28 January 2007 and was addressed to "Sundry Customers, Caelyn Company Ghana Limited in Accra, Ghana. The invoice related to 380 Aricept 10 mg tabs x 28 and 487 Combivir 150 mg/300 mg x 60(G) at a total invoice price of £75, 794.30.

55. Once again there was a trail of documentation:

> (a) A certificate of shipment issued by World Express dated 30 January 2007 was produced by Arkeley in March 2007 identifying the goods in the invoice and the customer. The shipment date was stated as 30 January 2007, the carrier as KLM, and the airport of loading as Heathrow. The certificate further stated that the MAWB was numbered 07462475560. However, as the FTT recorded, the copy of the MAWB was of very poor quality, and virtually illegible. Nevertheless, the FTT was able, at [161], to decipher the MAWB to the extent that it could find that it had the number referred to in the certificate of shipment, and related to a cargo

flight to Accra. On the other hand, the date of execution – which had been written in manuscript in the absence of any decipherable date – was 30 January 2006, and not 30 January 2007, the date of the certificate of shipment. There was no accompanying manifest.

(b) Another copy of the certificate of shipment was exhibited to Mr Onwufuju's August 2008 statement. This was the same as that originally produced, but with the MAWB number altered in manuscript to 0746247613. The FTT noted that this was the number of the MAWB which had been stated (without the missing '4') on the certificate of shipment dated 30 January 2007 relating to invoice 187. No MAWB of that number accompanied the certificate produced in August 2008 in relation to invoice 189.

(c) In August 2010 Mr Onwufuju produced a further copy of the original certificate of shipment, this time amended again to provide the number for the MAWB as 07462474613 (the additional '4' having been added) and with the shipment date altered to 16 February 2007. The relevant MAWB (which, as the FTT noted at [163] was that for invoice 187) accompanied this certificate, describing the goods as "courier material" and without an accompanying manifest.

56. The FTT, at [164], focused on the certificate of shipment produced in March 2007. It noted that the contents were the same as in the copy provided in August 2008 (the FTT refers to August 2009, but it is the certificate that was exhibited to the August 2008 statement that it is referring to), with the exception of the manuscript change to the MAWB number. It reasoned that, if the MAWB number on the original certificate was incorrect, this could be explained by confusion between two assignments to the same place (Accra), by the same shipper (World Express) and the same airline (KLM). On the basis that there had been no allegation of bad faith and no suggestion that the goods had not been exported to Africa, and having regard to the need for a straightforward application of the exemptions (including zero-rating), the FTT concluded that the uncertainty as to the MAWB and the date of shipping, neither of which was required to be identified under paragraph 6.5 of Notice 703, prevented the conditions from being satisfied.

57. Although the FTT's conclusion in this regard could, we think, have been expressed more clearly, the FTT was essentially adopting the same approach as it had in the case of the other invoices before it. It reasoned that it could accept the originally produced certificate of shipment as sufficient evidence of export, and that the absence of supporting material, in this case a reliable MAWB and a certain date of shipping, did not affect that conclusion.

58. We accept that HMRC's case necessarily carried with it the argument that there was no proof of export. But, as we described earlier, the question for the FTT was not whether the goods had been exported – it is clear from *Teleos* that to require a taxable person conclusively to prove such a matter would be incompatible with the correct and straightforward application of the zero-rating in this respect – but whether Arkeley had obtained sufficient evidence of export within the three-month time limit. Even if the goods had not in fact been exported, then absent an allegation that the

supplier had not acted in good faith, or knew or should have known of fraud connected with the transaction, that would remain the sole question for the tribunal. The FTT's reference to there having been no suggestion that the goods had not been exported, although that may have misunderstood the effect of HMRC's case, could not undermine the decision of the FTT on the question of the sufficiency of the documentary evidence.

59. Mr Singh argued that the FTT erred in its finding that the conditions for zero-rating were met in relation to invoice 189. We do not agree. We do not accept that the absence of a reliable MAWB is sufficient to undermine the conclusion of the FTT based on the March 2007 certificate of shipment. That certificate, despite the production of altered versions in 2008 and 2010, was evidence on which the FTT was entitled to found its decision. Nor, for the reasons we have already given, is the absence of a manifest fatal to that conclusion.

**Conclusion on the zero-rating issue**

60. Mr Singh has failed to persuade us that there was any error of law in the FTT's decision on the zero-rating issue in respect of invoices 176, 187 and 189.

61. Accordingly we dismiss HMRC's appeal on the zero-rating issue.

**The input tax issue**

62. As we described earlier, HMRC renewed before us their application for permission to appeal on the ground that the FTT erred in finding that Arkeley paid LogiChem Ltd in full for the goods described in invoice 6119 on 26 April 2007 and that accordingly s 26A VATA did not apply.

63. So far as is material, section 26A VATA provides as follows:

> (1) Where—
>
> *(a)* a person has become entitled to credit for any input tax, and
>
> *(b)* the consideration for the supply to which that input tax relates, or any part of it, is unpaid at the end of the period of six months following the relevant date,
>
> he shall be taken, as from the end of that period, not to have been entitled to credit for input tax in respect of the VAT that is referable to the unpaid consideration or part.
>
> (2) For the purposes of subsection (1) above "the relevant date", in relation to any sum representing consideration for a supply, is—
>
> *(a)* the date of the supply; or
>
> *(b)* if later, the date on which the sum became payable.

64. The background to the disputed payment is that Arkeley had sought to recover input tax on a sales invoice numbered 6119 from LogiChem dated 2 April 2007, for £142,592 plus VAT of £24,953. HMRC accepted that Arkeley had paid £19,645 in

respect of this invoice, and so gave Arkeley the benefit of £2,925 in input tax. However, HMRC did not accept that the balance of the invoiced amount had been paid within six months of the date of the supply, and so disallowed the remainder of the input tax claim under s 26A.

65. The FTT heard evidence in relation to the LogiChem payment from Mr Onwufuju and from Mr Hamid Reza, a director of LogiChem. On the basis of Mr Reza's evidence, and despite Mr Singh's submissions to it as to the inconsistency of that evidence with that of Mr Onwufuju, particularly Mr Onwufuju's witness statement in 2008, the FTT decided, at [177], that Arkeley had paid LogiChem in full in respect of invoice 6119 on 26 April 2007 (the FTT's reference to 2006 properly being understood as meaning 2007). Mr Reza's evidence, which the FTT recorded at [79] to [89], was that the amount of £167,545.89 on invoice 6119 had been paid in full through funds received on 26 April 2007 into LogiChem's bank account with HSBC (FTT, [80]).

66. Mr Singh sought to argue before us that it had not been open to the FTT to reach this conclusion. He argued that the FTT ought not to have considered Mr Reza's evidence in isolation from Mr Onwufuju's evidence, which in this respect (amongst others) the FTT, at [176], found to have been confused and contradictory. Mr Singh referred to the following claims made by Mr Onwufuju:

(1) In his witness statement dated 25 September 2008, Mr Onwufuju referred to invoice 6119 (along with invoice 101, which is not the subject of this appeal) and claimed that payment was not due until the first week of May 2007. He then stated that:

> "In addition, I have asked for an extension of time to make payment from the suppliers, which has been agreed."

This, argued Mr Singh, suggested that full payment had not been made at the date of this witness statement. Mr Singh also pointed out that Mr Onwufuju, in his oral evidence, stated that at the time he completed his statement, on 25 September 2008, he had not paid for invoice 6119.

(2) In a letter dated 3 March 2009 that Mr Onwufuju sent to HMRC, he had claimed that payments had been made to LogiChem between 24 March 2008 and 21 July 2008.

(3) In a letter dated 9 April 2009 sent by Mr Onwufuju to HMRC, he stated that payments to LogiChem for invoice 6119 had been made between 24 March 2008 and 5 June 2008.

67. Mr Singh also relied on discrepancies in correspondence from Mr Reza as to the date of payment of invoice 6119, namely whether this had been 24 or 26 April 2007.

68. In our judgment none of these criticisms can come close to meeting the test in *Edwards v Bairstow*. It is clear, reading the FTT's decision as a whole, that it carefully considered the relevant evidence in relation to invoice 6119, referring to the evidence of both Mr Onwufuju and Mr Reza. Mr Onwufuju's evidence that he had not paid the invoice at the time of his September 2008 statement is recorded by the

FTT at [52]. The FTT also referred, at [80] and [83] to the two dates in April 2007 which Mr Reza had identified in correspondence with Mr Onwufuju as the date of full settlement of the amount of the invoice.

69. Mr Singh's case essentially rests on the contradictory and inconsistent evidence of Mr Onwufuju, both on its own and when viewed in the light of Mr Reza's evidence. The FTT itself recognised those contradictions when it referred, at [176], to Mr Onwufuju's evidence in this respect as "confused and contradictory". The FTT was clearly entitled to reach that conclusion. However, it was equally entitled to find, at [177], that Mr Reza's evidence, even allowing for the minor discrepancy in the April 2007 dates which the FTT had clearly taken into account, was "clear and consistent". The FTT had heard the evidence, which this tribunal has not; in the case of Mr Reza the FTT records that Mr Singh had cross-examined him for 2½ hours. It was the task of the FTT to evaluate the evidence before it. It did so, and we can find nothing in Mr Singh's submissions to suggest that its decision in that regard was perverse or one that no reasonable tribunal could have reached.

70. In refusing permission to appeal on this ground, the Upper Tribunal judge, Judge Bishopp, said this:

> "I am not satisfied that ground 3 identifies any arguable issue of law. The First-tier Tribunal made a clear and properly reasoned finding of fact that the relevant invoice had been paid, and did so after reading and hearing evidence, and resolving conflicts and inconsistencies. It is not enough that another tribunal might have viewed the evidence differently; it has to be shown that the finding of fact was irrational in that it was contrary to the evidence, or based on no evidence. I do not see how it could properly be said that this finding was of such a character."

Having heard Mr Singh's submissions on this ground of appeal, we agree with Judge Bishopp. Accordingly, we refuse permission to appeal on that ground.

**Determination**

71. As we have indicated, we dismiss HMRC's appeal on the zero-rating issue.

72. We refuse HMRC permission to appeal on the input tax issue

**ROGER BERNER**
**JOHN CLARK**

**TRIBUNAL JUDGES**

**RELEASE DATE: 22 August 2013**