{2015] UKFTT 0482 (TC)

TC04648

Appeal No: TC/2011/03021

EXCISE DUTY-Assessment-preliminary issue-whether assessment made out of time-Section 12(4) (b) FA1994-held on the facts-yes

FIRST-TIER TRIBUNAL

TAX

JOHN COZENS **Appellant**

- and –

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

TRIBUNAL: JUDGE TIMOTHY HERRINGTON

Sitting in public at the Royal Courts of Justice, Strand, London WC2 on 22, 23 and 24 June 2015

Barrie Akin and Marika Lemos, counsel, instructed by the Bar Pro Bono Unit, for the Appellant

James Puzey, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to a preliminary issue as to whether application in respect a notification given to John Cozens ("the Appellant") of joint and several liability for an assessment raised by the Commissioners for Her Majesty's Revenue and Customs ("the Respondents") for Excise Duty in the sum of £6,128,138.68 ("the Assessment") was out of time. The assessment was made on 17 December 2010.

2. The issue turns on the interpretation and application of s 12(4) (b) Finance Act 1994 ("FA 1994").

Background

3. The Assessment was raised under the provisions of section 12(1A) of the Finance Act 1994 against STTM Ziegler France in respect of 58 excise duty suspended movements of goods which did not reach their stated destination but were, instead diverted in the United Kingdom. The Respondents allege that these movements were part of an irregular scheme ("the Scheme") to import loads of duty-suspended alcohol into the UK from a bonded warehouse in France, direct the alcohol away from the destination bonded warehouse stated on the accompanying documentation, break up or "slaughter" the loads at one or more unknown locations in the UK, thereafter allowing the sale of the alcohol within the UK and thereby avoiding payment of excise duty on those loads. As a consequence, the Respondents sought to assess STTM Ziegler France SA ("STM Ziegler") as the consignor of the goods in respect of the excise duties which became payable in respect of the goods upon the occurrence of each of the diversions. On 17 December 2010 the Respondents wrote to the Appellant notifying him that he was to be held jointly and severally liable for the amount of duty assessed with other named persons (hauliers and drivers) on the basis that the Appellant was involved in the movement of the goods. Consequently, it was contended by the Respondents that the Appellant had caused the occurrence of an excise duty point under Regulation 3(2) of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 ("the Regulations") and in accordance with Regulation 7(2) of the Regulations he was jointly and severally liable to pay the duty with STTM Ziegler and the hauliers and drivers involved.

4. On 21 December 2010 the Respondents sought and obtained a worldwide freezing order against the Appellant in support of a claim made by the Respondents in the Chancery Division of the High Court against the Appellant for the excise duty which was the subject of the Assessment (the "High Court Proceedings").

5. On 15 April 2011 the Appellant gave notice of appeal to the Tax Chamber of the First-tier Tribunal against the Respondents' decision to hold him jointly and severally liable for the Assessment. In his notice of appeal the Appellant denied any liability in respect of the Assessment and he continues to do so. This decision is concerned solely with the question as to whether the Assessment was made in time.

6. The Appellant's first contention is that the Assessment is a global assessment, that is one that covers a number of separate excise duty points in one assessment and is invalid on the grounds that at least some elements of it are out of time. This contention is based on the fact that in respect of most of the loads assessed the Respondents relied on their receipt of the relevant Accompanying Administrative Documents ("AAD") as being the last piece of evidence justifying the making of the Assessment, the Respondents in the High Court Proceedings contending that these documents were not received by them until 12 January 2010, a date that was within the limitation period, whereas it now transpires that in respect of some of the loads the relevant AAD was received at a time prior to that date with the result that in respect of those loads the Assessment was out of time. The consequence is, the Appellant contends on the basis of its analysis of the authorities, the whole Assessment, being a global assessment is out of time.

7. The Appellant's second contention is that in any event the Respondents had sufficient evidence to have assessed the Appellant more than one year before the Assessment was made in respect of some if not all of the excise duty points covered in the Assessment and the failure to do so was accordingly perverse.

8. The Respondents contend that properly analysed the Assessment is not a global assessment but amounts to a series of separate assessments in respect of each load and even if it is a global assessment it is in time for the whole of the duty assessed. They now accept that a number of loads were assessed out of time but if the Assessment is held to be a series of separate assessments those loads can be severed from the Assessment which can be adjusted accordingly. They contend that in respect of the remaining loads the Assessment was made within one year of the Respondents having the last piece of evidence of facts which was sufficient in their opinion to justify the making of the Assessment and it was therefore, in respect of those loads, made in time.

Relevant legislation

9. The Respondents contend that they were entitled to make the Assessment by virtue of the occurrence of an excise duty point in respect of each load pursuant to Regulation 3 of the Regulations which provides as follows:

> "
>
> 3 (1) This regulation applies where:
>
> (a) excise goods are:
>
> (i) subject to a duty suspended movement that started in the United Kingdom; or

(ii) imported into the United Kingdom during a duty suspended movement; and

(b) in relation to those goods and that movement, there is an irregularity which occurs or is detected in the United Kingdom.

(2) Where the Commissioners are satisfied that the irregularity occurred in the United Kingdom, the excise duty point shall be the time of the occurrence of the irregularity or, where it is not possible to establish when the irregularity occurred, the time when the irregularity first comes to the attention of the Commissioners."

The irregularity in this case contended for by the Respondents in relation to each load is therefore the diversion of the goods from their destined bonded warehouse in the United Kingdom stated on the relevant AAD.

10. Regulation 7 of the Regulations provides who is liable to pay excise duty following the occurrence of an excise duty point as follows:

"7 (1) Subject to paragraph (2) below, where there is an excise duty point as prescribed by regulation 3 or 4 above, the person liable to pay the excise duty on the occurrence of that excise duty point shall be the person shown as the consignor on the accompanying administrative document or, if someone other than the consignor is shown in Box 10 of that document as having arranged for the guarantee, that other person.

(2) Any other person who causes or has caused the occurrence of an excise duty point as prescribed by regulation 3 or 4 above, shall be jointly and severally liable to pay the duty with the person specified in paragraph (1) above."

The Respondents contend that the Appellant is jointly and severally liable for the excise duty concerned by virtue of his alleged involvement in the arrangements for the diversion of the loads.

11. The Respondents' power to assess the Appellant to Excise Duty arising under Regulation 7(2) of the Regulations is contained in s 12 (1A) FA 1994 which provides as follows:

"Subject to subsection (4) below, where it appears to the Commissioners–

(a) that any person is a person from whom any amount has become due in respect of any duty of excise; and

(b) that the amount due can be ascertained by the Commissioners,

the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative."

12. Section 12(4) FA 1994 provides the relevant limitation period as follows:

"(4) An assessment of the amount of any duty of excise due from any person shall not be made under this section at any time after whichever is the earlier of the following times, that is to say–

(a) subject to subsection (5) below, the end of the period of three years beginning with the time when his liability to the duty arose; and

(b) the end of the period of one year beginning with the day on which evidence of facts, sufficient in the opinion of the Commissioners to justify the making of the assessment, comes to their knowledge;

but this subsection shall be without prejudice, where further evidence comes to the knowledge of the Commissioners at any time after the making of an assessment under this section, to the making of a further assessment within the period applicable by virtue of this subsection in relation to that further assessment."

In this case, it is only the limitation period contained in s 12(4) (b) above that is relevant.

13. Section 12(6) clarifies when a liability to duty arises for the purpose of calculating the time limit in s 12(4) as follows:

"(6) The reference in subsection (4) above to the time when a person's liability to a duty of excise arose are references–

(a) in the case of a duty of excise on goods, to the excise duty point; and

(b) in any other case, to the time when the duty was charged."

14. The corresponding statutory provisions relating to assessments of VAT are relevant in assisting with the interpretation of the statutory provisions relating to excise duty. Section 73 (1) and (2) of the Value Added Tax 1994 ("VATA") provide as follows:

"(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.

(2) In any case where, for any prescribed accounting period, there has been paid or credited to any person–

(a) as being a repayment or refund of VAT, or

(b) as being due to him as a VAT credit,

an amount which ought not to have been so paid or credited, or which would not have been so paid or credited had the facts been known or been as they later turn out to be, the Commissioners may assess that amount as being VAT due from him for that period and notify it to him accordingly."

15. Section 73(6) VATA deals with the relevant limitation period as follows:

"(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,

but (subject to that section) where further such evidence comes to the Commissioners' knowledge after the making of an assessment under subsection (1), (2) or (3) above, another assessment may be made under that subsection, in addition to any earlier assessment."

The authorities and the correct legal test

16. As can be seen from the provisions set out above, Section 12(4) (b) FA1994 reproduces exactly the corresponding provisions for VAT assessments to be found in s 73 (6) (b) of the Value Added Tax Act 1994. It was common ground that the authorities on the latter provision, and in particular the leading case of *Pegasus Birds v CCE* at [1999] STC 95 and [2000] STC 91 (in the High Court and the Court of Appeal respectively), gives guidance which is directly relevant to the interpretation of s12(4)(b) FA 1994. However, as discussed below, Mr Akin submits that *Pegasus Birds* can be distinguished on the issue as to whether the tribunal's jurisdiction on s 12 (4) (b) is supervisory only because that case related to the application of the VAT provision in the context of a best judgment assessment, which is not the case in relation to the Assessment.

17. The legal principles to be applied in interpreting s 73(6) (b) were comprehensively set out by Dyson J in the High Court judgment in *Pegasus Birds* at pages 101g to 102 as follows:

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

2. The evidence in question must be sufficient to justify the making of the assessment in question (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 754 per Potts J).

3. The knowledge referred to in s 73(6) (b) is actual, and not constructive knowledge (see *Customs and Excise Comrs v Post Office* [1995] STC 749 at 755). In this context, I understand constructive knowledge to mean knowledge of evidence which the commissioners do not in fact have, but which they could and would have if they had taken the necessary steps to acquire it.

4. The correct approach for a tribunal to adopt is (i) to decide what were the facts which, in the opinion of the officer making the assessment on behalf of the commissioners, justified the making of the assessment, and (ii) to determine when the last piece of evidence of these facts of sufficient weight to justify making the assessment was communicated to the commissioners. The period of one year runs from the date in (ii) (see *Heyfordian Travel Ltd v Customs and*

Excise Comrs [1979] VATTR 139 at 151, and *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10).

5. An officer's decision that the evidence of which he has knowledge is insufficient to justify making an assessment, and accordingly, his failure to make an earlier assessment, can only be challenged on *Wednesbury* principles, or principles analogous to *Wednesbury* (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223) (see *Classicmoor Ltd v Customs and Excise Comrs* [1995] V&DR 1 at 10–11, and more generally *John Dee Ltd v Customs and Excise Comrs* [1995] STC 941 at 952 per Neill LJ).

6. The burden is on the taxpayer to show that the assessment was made outside the time limit specified in s 73(6) (b) of the 1994 Act."

18. In relation to principles 4 and 5 Dyson J held that the test is a subjective rather than an objective one. The person whose opinion is to be imputed to HMRC is the person who decided to make the assessment, regardless of which person within HMRC acquired the knowledge of the facts in question: see page 102c of the judgment. In relation to the circumstances in which it is possible to challenge the opinion of the assessing officer Dyson J said the following at page 102e to 103a of the judgment:

"In my judgment, as a matter of statutory construction, it is not possible to read into s 73(6) (b) the qualification that the opinion of the commissioners as to the sufficiency of the evidence must be reasonable. If that had been the intention of Parliament, it would have been simple so to provide. If the test had been objective, there would have been no need to refer to the opinion of the commissioners at all. Nor is there any problem about identifying the person whose opinion is to be determined. The person whose opinion is imputed to the commissioners is the person who decided to make the assessment. It does not matter that he or she may not be the person who first acquired knowledge of the evidence of the facts which are considered to be sufficient to justify making the assessment. The knowledge of all officers who are authorised to receive information which is relevant to the decision to make an assessment is imputed to the commissioners.

Moreover, I do not accept that, if an objective approach is not adopted, the protection afforded by the subsection to the taxpayer is illusory. This raises the question of the circumstances in which it is possible to challenge the opinion of the commissioners. It is common ground that, in forming their opinion of what evidence of facts is sufficient to justify making the assessment, the commissioners must have regard to their obligations to act to the best of their judgment as explained in *Van Boeckel v Customs and Excise Comrs* [1981] STC 290. Thus, they must perform their function honestly and bona fide, and fairly consider all the material placed before them, and, on that material, come to a decision which is reasonable. In some cases, the taxpayer may complain that the commissioners have made an assessment on insufficient material. In other cases, the complaint of the taxpayer may be that, in the light of the evidence of which they were aware, it was wholly unreasonable for the commissioners to delay making the assessment. In both cases, an appeal will succeed if it is shown that the commissioners' approach was wholly unreasonable, and fails to pass a test akin to the *Wednesbury* test. I recognise that this is a high hurdle for the taxpayer to surmount, but Parliament has [1999] STC 95 at 103entrusted these matters to the judgment of the

commissioners, and it is right that challenges to the exercise of judgment should only succeed when something has gone seriously wrong."

19. In the light of this he formulated the test to be applied at page 104d to e as follows:

> "The question for the tribunal on an appeal, therefore, is whether the commissioners' failure to make an earlier assessment was perverse or wholly unreasonable. In some cases, the position will be clear. Suppose that evidence of all the facts which in the opinion of the commissioners justified the making of the assessment was known to the commissioners at the beginning of year one, and the assessment was not made until the beginning of year three. Suppose further that the reason for the two-year delay is that the file was lost, or there was a change of staff with the result that the officer who had acquired the evidence did not pass it on to his successor. In those circumstances, the delay in making the assessment would be wholly unreasonable, and an appeal would succeed on the time-limits point."

20. The Court of Appeal approved the test formulated by Dyson J. Aldous LJ observed at page 97b:

> "Subsection (6) is to protect the taxpayer from tardy assessment, not to penalise the commissioners for failing to spot some fact which, for example, may have become available to them in a document obtained during a raid."

21. The Court of Appeal made it clear that it is the task of the tribunal to assess whether as a matter of fact the officer held the opinion in question. Aldous LJ said at page 97j to 98a :

> "An opinion as to what evidence justifies an assessment requires judgment and in that sense is subjective; but the existence of the opinion is a fact. From that it is possible to ascertain what was the evidence of facts which was thought to justify the making of the assessment. Once that evidence has been ascertained, then the date when the last piece of the puzzle fell into place can be ascertained. In most cases, the date will have been known to the taxpayer, as he will be the person who supplied the information."

22. Mr Akin accepts that the first four and the sixth of the principles set out by Dyson J in *Pegasus Birds* as set out at [17] above are applicable to an assessment under s 12(1A). He does not accept that the fifth principle is applicable. He submits that this principle only applies in the case of an assessment which has to be made to best judgment, as was the case in the assessment with which Dyson J was concerned in *Pegasus Birds.* He submits that the Tribunal has a *de novo* jurisdiction in relation *to* assessments made under s 12(1A) and whilst the test to be applied is an objective one the tribunal is able to substitute its own opinion for that of the officer and decide, purely objectively, whether the officer's decision not to make an earlier assessment was unreasonable on the facts.

23. Mr Akin notes that s12 contains two powers to make assessments; the first in s12(1) deals with defaults on the part of the taxpayer (specified in s 12 (2) such as those relating to the keeping of proper books and records and where the power to assess is to be exercised to best judgment. It is therefore understandable, as Dyson J held in *Pegasus Birds* that where the assessment is to be made to best judgment the

officer's opinion as to when the last piece of evidence sufficient to make the assessment was received should only be subject to challenge on the grounds of *Wednesbury* unreasonableness, as would be the case in relation to the question as to whether the assessment was made to best judgment, a situation the Tribunal is less equipped to adjudicate upon. Section 12 (1A), like s 73 (2) VATA in contrast to s 73 (1) VATA, is a more general power to assess where it appears that excise duty is due from a person. Mr Akin submits that where the power to assess is not constrained by the need to apply best judgment the Tribunal is well equipped to establish the underlying facts that might justify the assessment and come to its own decision. This case involved liability for a large amount of duty based on allegations of fraud, there is a wider power to assess and in those circumstances the Tribunal has a *de novo* jurisdiction rather than simply a review power.

24. Mr Akin relies on *John Dee Limited v CCE* [1995] STC 941 where Neill LJ in holding that on an appeal against a decision to impose a security requirement on a person registered for VAT the tribunal's jurisdiction was supervisory in nature said that the nature of the tribunal's jurisdiction in any VAT appeal depended on the nature of the decision appealed against and any special statutory provisions: see page 952 of the judgment.

25. Mr Akin submits that this makes it clear that the nature of the tribunal's jurisdiction should be determined by reference to the nature of the decision appealed against. He accepts that the issue does not appear previously to have been argued in the context of an assessment under s12(1A), although he observed that Judge Bishopp in the VAT and Duties Tribunal's decision in *Anglo Overseas Limited* (2004) E01090 accepted that the jurisdiction was supervisory in nature without the point being argued. In the same tribunal's decision in *Keyes Transport Limited* (2005) Judge Khan and Mrs Salisbury, in considering an assessment under s 12(1A) appeared to suggest at [4] and [5] of the decision that the tribunal had a *de novo* jurisdiction, but again the point was not argued .

26. I reject Mr Akin's submissions on this point. As Mr Puzey submitted, Mr Akin's analysis fails to give proper accord to the words "in the opinion of the commissioners". These were the words that led Dyson J in *Pegasus Birds* to conclude that it was not open to the tribunal to assess whether the officer's opinion was reasonable: see his judgment at page102e quoted at [18] above. Moreover, if it was the intention of Parliament that a different test should apply to assessments under s12 (1) and those under s12 (1A) it would have been easy to have done so by specifically providing different wording in s 12(4) in relation to the latter by omitting the wording referring to the opinion of the Commissioners. In my view it is clear therefore that Parliament did not intend a different test to apply to the two provisions. The passage from *John Dee* referred to at [24] above makes it clear that it is necessary to look at the statutory provisions in this case, which means it is necessary to look at s12(4) in the context of s 12 as a whole.

27. I accept Mr Puzey's submission that Dyson J at page 102e of *Pegasus Birds* was not intending to confine his reasoning to s 73 (1) of VATA and his references to the best judgment test at bottom of page 102 were intended to reinforce the conclusion of

general application that he had already reached. I see nothing in *Keyes Transport* to cast doubt on this analysis; it appears the tribunal at [4] and [5] was intending to provide only a summary of the *Pegasus Birds* test and it engaged in no detailed analysis of the reasoning in the judgment and how, if at all, the test was to be applied differently in the case of a s12 (1A) assessment. Indeed at [16] the tribunal observes that :

> "We cannot substitute our view for that of the HMCE but can decide that an assessment is perverse".

This language gives the clear impression that the tribunal did in fact accept that the conclusion in *Pegasus Birds* that the officer's opinion could only be challenged if it were perverse or wholly unreasonable was applicable to an excise duty assessment.

28. I shall therefore proceed in this case to test the opinion of the Respondent's officer in this case, Susan Grimshaw, on the question as to when she received the last piece of evidence sufficient in her opinion to justify the assessment by asking the following questions:

> (1) Did Officer Grimshaw hold the opinion that the last piece of evidence of sufficient weight to justify the Assessment was the material that she said she relied on in this regard in her evidence to the tribunal?
>
> (2) If the first question is answered in the positive was her opinion perverse or wholly unreasonable?

29. It is well established in respect of VAT assessments that if the assessment concerned is to be construed as being a single, global assessment covering a number of different prescribed accounting periods rather than as being a series of separate assessments in respect of each of the prescribed accounting periods then the whole assessment will be invalid on grounds of being out of time if any one of its elements is shown by the taxpayer to be out of time.

30. This principle was established in the Court of Appeal's judgment in *S J Grange Limited v CEE* [1979] STC 183. Lord Denning MR, having found that there was no reason why a single assessment could not be made covering a number of prescribed accounting periods rather than having to issue separate assessments in respect of each period, that the long stop date for an assessment now contained in s 73 (6) (a) VATA was to be measured by reference to the end of the first prescribed accounting period included in the assessment: see page 193 of the judgment. He said that in all cases where it is impossible for the commissioners to split the assessment up into the prescribed accounting periods (for example where the Commissioners were unable to say with certainty which accounting period the liability fell within) the Commissioners could assess for any period of time they specified covering multiple accounting periods.

31. Templeman LJ elaborated the test a little more at page 195 when dealing with the objection that if a global assessment were permitted it could lead to stale demands being included in the assessment as follows:

> "There are two ways of dealing with that. The first way is to do what counsel for the company would have us do, and that is to make us do violence to sub-s (1). The second way is to fit the expression 'prescribed accounting period' used in sub-s (2) to the actual periods covered by the assessment which has been made under sub-s (1). If the latter course is followed, far from this being disadvantageous to the company, it means that the limitation period starts with the very earliest prescribed accounting period of three months which is covered by the assessment which has been made on him, so that if the commissioners take that course under no circumstance can the company be prejudiced."

32. The question as to whether there is a global assessment or a series of individual assessments in a single notification given to a taxpayer is a question of fact in each case to be resolved by looking at all the relevant documentation. This was established in the Court of Appeal's judgment in *CEE v Le Rififi* [1995] STC 103 where Balcombe LJ said at page 107:

> "It is undoubtedly permissible for the commissioners to make a single or 'global' assessment which covers more than one accounting period. In practice this may be necessary when it is impossible or impracticable for the commissioners to identify the specific accounting period or periods for which the tax claimed is due (see *S J Grange Ltd v Customs and Excise Comrs* [1979] STC 183 at 193, [1979] 1 WLR 239 at 242–243; *International Language Centres Ltd v Customs and Excise Comrs* [1983] STC 394 at 396). In such a case the six-year time limit prescribed by s 22(1) of the 1985 Act runs from the end of the first prescribed accounting period included in that assessment. The power for the commissioners to make a global assessment is, however, not confined to those cases where it is impossible or impracticable to identify the specific accounting period or periods for which the tax claimed is due.
>
> So it is a question of fact in any case whether there has been one global assessment or a number of assessments notified together. Where the commissioners adduce no evidence before the tribunal of the making of the assessments, then the only material available will be, as here, the form of the notice notifying the taxpayer of the assessment(s)."

33. In that case the Court of Appeal concluded that a notice of assessment, consisting of three pages containing 24 separate lines in all, each representing a separate accounting period and quantifying separately the tax assessed for each period without stating the total amount of the entries made on the separate lines embraced 24 assessments for each of the accounting periods listed in the notice.

34. It is clear from the first paragraph of the quotation from *Le Rififi* set out at [32] above that it is entirely a matter of choice on the part of the Commissioners as to whether they make a single or a global assessment which covers more than one accounting period; the power to make a global assessment is not confined to those cases where it is impossible or impractical to identify the prescribed accounting periods for which the tax is due.

35. *International Language Centres Limited v CEE* [1983] STC 394 is authority for the proposition that the principle established in *Grange* is equally applicable to assessments where the time limit in s 73 (6)(b) is in issue; it is not confined to cases where the time limit in s 73(6) (a) is being considered. Woolf J said at page 396:

"The *Grange* case, unlike the present case, did not concern an issue as to whether or not s 31(2) (*b*) applied. However, where a global assessment is made, assessment is made, it seems to me that the commissioners can only take advantage of sub-s (2) (*b*) to make an assessment in time if the facts (which came to their knowledge within the period of one year) are sufficient to justify the making of the assessment for the whole of the sum which is thereby assessed.

May I illustrate what I mean? If, for a period or periods, an identifiable sum has become due, but the commissioners are out of time for assessing that sum, because two years have elapsed, they cannot when they find out facts which justify making an assessment for a different sum, then make up a global sum by combining the sum which was time-barred and the new sum. All they can do is limit the assessment to the new sum. If they make the assessment within one year after the evidence has come to their knowledge with regard to that sum, then they will be in order. It seems to me that in applying s 31(2) (*b*) to a global assessment, one must look at the assessment as a whole."

36. This reasoning was approved by Simon Brown J in *Spillane v CEE* [1990] STC 212 at page 215 d where he said:

"Although, as stated, this was a global assessment in respect of the entire 16 month period of trading, the year in question could on the authorities start to run before such period ended. That is to say, if for any component period within the global assessment, the commissioners knew of facts sufficient for the making of the assessment that would set time running."

37. The question as to whether a particular assessment is a global assessment or not is not to be determined by reference to the intentions of the person making the assessment; it is to be determined objectively. This was established in *Courts plc v CEE* [2005] STC 27, where Jonathan Parker LJ said at [99] and [100]:

"[99] In my judgment, therefore, if what Mr Gurd did in December 1999 amounted, on an objective analysis, to the making of an assessment (as to which, see below) then there can be no room for any further inquiry as to whether he had decided to do what he did. Conversely, if on an objective analysis what Mr Gurd did in December 1999 did not amount to the making of an assessment, his state of mind cannot alter that fact.

[100] I bear in mind that the 'best judgment' requirement in s 73(1) may introduce subjective considerations to the extent that (as Chadwick LJ explained in *Pegasus Birds*, in the paragraphs from his judgment quoted in para 48 above) an issue may arise as to whether in making an assessment in a particular case the assessing officer had '"closed his mind" to material which did not fit his case'. However, that does not in my judgment affect my conclusion that the question whether an assessment has been made is an objective question, to be resolved by reference to what the commissioners have in fact done."

38. There is no prescribed form of assessment for either VAT or excise duty assessments. Consequently, in considering whether what was sent to the taxpayer was a global assessment or not regard must be had to all of the documents which were sent and not just the notice of assessment, such as schedules specifying in detail how the total amount of tax arrived at was calculated: see *House (t/a P &J Autos) v CEE* [1994] STC 211 at page 222.

39. Nevertheless, it is important that the person who is being assessed is given all the necessary information he needs in order to challenge its propriety. This point was considered in relation to an excise duty assessment made on a person alleged to have caused an excise duty point to have occurred by the Court of Appeal in *Re The Arena Corporation Limited* [2004] EWCA Civ 371 where the Vice-Chancellor said at [92] :

> "In circumstances such as these it is essential that the procedure is fair. I understand that there is no prescribed form of assessment and no complaint was made about the form used in this case. Nevertheless it is important that the Commissioners should specify either in the assessment or a letter accompanying it what irregularity they rely on and the facts said to support the contention that the person assessed caused it. This would enable a person in receipt of such an assessment to challenge its propriety. If no such information is given and the person assessed merely appeals then the onus is on him to disprove causation without knowing what he is alleged to have caused. This could be oppressive, the more so as he is required to pay the assessed duty before appealing unless the Commissioners agree or the Tribunal orders otherwise."

40. Mr Akin drew my attention to two cases decided in the VAT and Duties Tribunal where the question as to whether an assessment was a global assessment has been considered. As can be seen from the VAT cases reviewed above a global assessment is a single assessment covering more than one prescribed accounting period. In the excise duty cases the tribunal approached the issue on the basis that a global assessment is a single assessment covering several excise duty points.

41. The first of these cases, *Keyes Transport Limited*, referred to at [25] above, involved an assessment for excise duty in relation to fuel imported into the UK on a number of occasions in enlarged fuel tanks installed on the taxpayer's lorries and which was subsequently decanted into other vehicles in the UK. The tribunal directed itself as to the test to be applied in order to determine whether the assessment was a global assessment as follows:

> "The next issue concerns whether there was a global assessment or series of individual assessments. The law in this area is clear. Whether the Commissioners have made a global assessment or a series of individual assessments is a question of fact, which is resolved by looking at the relevant documentation (*C&E Commissioners v. Le Rififi* [1995] STC 103 at 107). A global assessment is a single assessment for several excise points or, in the case of value added tax, for more than one accounting period. The Commissioners can choose whether to make a global assessment or a series of separate assessments (*House (t/a P&J Autos) v. C&E Commissioners* [1994] STC 211 at 233). In assessing the facts to decide if a global assessment was made one has to be objective and the state of mind of the person making the assessment is not relevant. It is important to look at what was done by the assessing officer, not what he intended to do (*Courts v. Commissioners of Customs & Excise* [2005] STC 227, per Jonathan Parker L.J. at para. 99). In our case, we shall need to look at the EX 601 Form, the Schedules attaching to that form and the Guidance Letter provided by HMCE on 25 January 2005 ("Guidance Letter") explaining the completion of the form. The Tribunal's role is to look at the facts and not to assist the Commissioners with any deficiencies in their work."

42. In analysing the documents it decided, as indicated above, constituted the assessment, the tribunal noted that a single figure for the duty assessed was included in one of eight lines on the form EX 601 alongside an entry stating a single date for the "start" of the assessment and a single date for the "end" of the assessment. The schedules attached to the form identified the total litres of fuel purchased between the start and end dates identified above and the calculation of the total of the excise duty due in respect of that fuel. There were 126 excise duty points but there was no disclosure of the duty payable in respect of each excise duty point so the reader did not know by looking at the form and schedules what duty was payable at each excise duty point.

43. The tribunal concluded as follows:

> "We can infer from the layout of the form that if one line is completed there is one assessment and if several lines are completed there are several assessments. Even if we accept the argument of the Respondent, there is only one global figure for tax due and if there were a series of assessment one would expect to see the individual tax levied at each excise duty point. In the Schedules attached to the form the date fuel is purchased is given in one column and in the next column is given the invoice amount for the fuel purchased e.g. 19/05/02, £1,960.00 but there is no figure given for the duty assessed at that excise duty point. An individual assessment would have to show the excise duty assessed and not aggregate on the individual assessments into one global figure, as was done in this case.
>
> The Schedules attaching to the form are meant to give information to the taxpayer and should be read with the assessment form which should be completed to show the assessment or assessments made. (See *International Language Centres Limited v. Customs & Excise* [1993] STC. 394 at 396-398).
>
> In conclusion, we believe that the assessment is global since the completion of the form and the way the information was presented would support the making of a global assessment.
>
> The Schedules attached to the form were not meant to be individual assessments but rather information schedules which explained the assessment. There was one reference number for the assessment and one global figure for tax due and the Guidance Letter suggests that the formation of the EX 601 Form allows for individual assessments if the individual lines and amount of tax due is completed. Based on the facts objectively assessed, one can only conclude that the assessment was a global assessment.
>
> It is our conclusion that the assessment, which is to say the entire assessment, is out of time and the appeal should be allowed."

44. It is clear from the findings of fact that the tribunal made that it came to the conclusion that the whole assessment was invalid because the Commissioners had

sufficient information to make an assessment in relation to some of the excise duty points included in the assessment more than a year before the assessment (which it held to be a global assessment) was made.

45. In the second of these cases, *Morris Young (Perth) Limited v HMRC* (2007) E01032, a case which involved an assessment to hydrocarbon oil duty in respect of the improper use of "red" diesel, the tribunal adopted the same approach as was taken in *Keyes Transport*. The tribunal regarded the failure to specify the excise duty points in respect of which the assessment was made as being fatal. Its reasoning was as follows:

> "Firstly, in my view the original assessment was a global one and accordingly not severable into distinct parts, and in particular into pre and post 1 May 2000 segments. This distinction is a question of fact and in the present case depends on the proper interpretation of the relative documentation (Documents nos 3-6) provided with the assessment. While it may set out the methodology of the calculation of the assessment, it cannot crucially be broken up and the pieces attributed to tax or excise "points". Here, the statutory provisions indicate as excise "points" the driving of the vehicle or its tank being filled (Section 12(2) (a) and (b)). The purchase of the fuel, founded on here, is not an excise "point". The supply is not even apportioned between specified vehicles. The documentation to which the Tribunal was referred indicates one assessment as a *unum quid* and indivisible. It follows that it cannot be cured by reduction, by severing and cancelling that part referable to the period before 1 May 2000."

46. It follows from this review of the authorities that key issues to be decided on this case are first whether the analogy of equating excise duty points in the excise duty context with prescribed accounting periods in the VAT context is a correct one and secondly whether this is issue is relevant in a case where the relevant limitation period is, as in this case, determined by reference to when sufficient evidence to make the assessment was received by the Respondents rather than by reference to the time elapsed since the accounting period or excise duty point in question. I will turn to these and the other issues which arise later but now turn to my findings of fact.

Evidence

47. Susan Grimshaw, the Respondents' officer with day to day conduct of the investigation, provided a witness statement prepared specifically for the preliminary issue (on which she was cross-examined) explaining why, at the time she prepared her statement, she believed that sufficient evidence to justify the making of the Assessment were not known to the Respondents before 12 January 2010 at the earliest, that being the date that Officer Grimshaw believed was when the AADs were received from the French authorities. Her witness statement also stated that in relation to some of the loads sufficient evidence was not received until after that time, following a check on the irregularities in the movements of those loads. As will be seen later, Officer Grimshaw's evidence on this point changed and the Respondents now concede that some AADs were received prior to this date.

48. Officer Grimshaw has now spent four years in the special investigations team dealing with alcohol but her involvement with the Scheme was the first time she had

been involved with an investigation of this type. Officer Grimshaw was under the supervision of a more senior officer, Alan Duxbury, but Officer Grimshaw largely worked alone on the investigation on a day to day basis, working only two days a week. I am surprised that the Respondents devoted so little resource to the investigation of the Scheme, bearing in mind Officer Grimshaw's inexperience in relation to such matters and the complexity of the Scheme. It also appears that before this appeal Officer Grimshaw has not given evidence before a court or tribunal in relation to such matters and that she had prepared her witness statement herself. Possibly as a consequence of these factors I found some of Officer Grimshaw's evidence to be confused.

49. I was also provided with the pleadings and evidence filed in the substantive appeal, including a witness statement prepared by Officer Grimshaw and its exhibits, some of which I was referred to during the course of the hearing, and some of the pleadings and evidence filed in relation to the High Court Proceedings, including a witness statement from Officer Duxbury.

Findings of Fact

50. Before turning to the specific findings relevant to the preliminary issue, it is helpful to give some further detail as regards the operation of the Scheme as it informs the decision of Officer Grimshaw as to the evidence which in her opinion was necessary to found an assessment against the Appellant. I do so on the understanding that in both his defence to the High Court Proceedings and his notice of appeal to this tribunal (which incorporated his defence to the High Court Proceedings by reference) the Appellant, whilst not putting a positive case to the contrary, put the Respondents to proof as to whether there was a scheme amounting to an inward diversion fraud of non-UK duty paid alcohol into the UK as alleged by the Respondents. He also disputed, and continues to dispute, the extent of his own knowledge at the time and the level of his participation. However, in his defence he admits that he was likely to have been an unwitting agent for Mr Toby Price for whom he worked in the latter's alcohol import and export business. I therefore proceed on the basis that what is said at [51] to [57] below is based on the allegations made by the Respondents in their Statement of Case in this appeal, as helpfully summarised by Mr Puzey in his skeleton argument, and those allegations are yet to be tested.

51. Between 9 October 2008 and 27 October 2009 76 lorry loads of alcohol were consigned to the UK from a tax warehouse in Bordeaux operated by STTM Ziegler. They were consigned by one of three hijacked or fraudulent entities. The Scheme involved the misuse of AADs, the documents required by law to be provided when excise goods cross national frontiers under conditions of duty suspension in the EU.

52. It is helpful to describe the AADs issued in respect of the assessed loads in more detail at this point. In respect of each of the loads STTM Ziegler issued an AAD in quadruplicate, as required by the relevant regulations. It retained copy 1 as the consignor. Copies 2, 3 and 4 were provided by STTM Ziegler to the driver collecting the load and were required to accompany the load. Copy 3 of the AAD has to be

returned to STTM Ziegler, stamped by the bonded warehouse stated on the AAD to be the destination of the load, so as to demonstrate that it has been received.

53. The information included on each of the relevant AADs in this case issued by STTM Ziegler includes the following:

- The date of its issue and date and time of dispatch from STTM Ziegler
- The consignor, in this case one of the three entities mentioned at [51] above
- The consignee, in this case one of three bonded warehouses in the UK, namely Aabsolute Bond Limited,("Aabsolute") Abbey Forwarding Limited ("Abbey") and Seabrook Warehousing Limited ("Seabrook") and one in Italy, namely Magazzini and the person for whose account the load is to be held at the warehouse.
- The AAD reference number
- Details of the transport provider, including the truck and trailer registration number of the relevant vehicle
- Details of the alcohol transported, including type and brand of spirit, alcoholic strength, number of bottles and bottle size

54. Copy 3 of some of the AADs for the goods said to be destined for the UK bonded warehouses were returned to STTM Ziegler having been purportedly stamped or marked as received by the destined bonded warehouse. The Respondents allege that these AADs bore false stamps and false signatures. Consequently the Respondents allege that further to the evidence gathered by them, including investigation with and of the UK bonded warehouses and cross channel ferry manifests, and the reasonable and logical inferences to be drawn from that evidence it can be shown that whilst the excise goods arrived in the UK they did not arrive at those destination bonded warehouses. There was an inward diversion fraud of non-UK duty-paid alcohol into the UK. The Respondents contend that this purpose of the Scheme was demonstrated by the fact that for 15 of the 76 consigned loads the lorries were intercepted by the UK authorities after entering the UK and three more loads were intercepted by the French authorities en route to the UK. The inference that the Respondents draw is that where goods were consigned in this manner purportedly to the UK bonded warehouses but not intercepted the goods disappeared into the UK black market in non-UK duty-paid alcohol.

55. In relation to the goods purportedly destined for Magazzini the Respondents contend that the relevant loads did not in fact travel towards Italy but were imported into the UK, the drivers carrying an entirely false set of AADs falsely showing the loads to have been despatched from Magazzini in Italy to a stated destination bonded warehouse in the UK. Copy 3 of some of the AADs returned to STTM Ziegler in respect of loads purportedly destined for Magazzini bear a false Magazzini stamp and the loads concerned were not received by Magazzini.

56. The Respondents infer that those loads in respect of which copy AADs were not returned to STTM Ziegler, consistent with the operation of the Scheme, also never reached their stated destination and were diverted and "slaughtered" in the UK.

57. The Respondents contend that the Appellant was instrumental in organising the despatch of alcohol from STTM Ziegler and that he was further involved by bearing responsibility for the transport of the goods to the UK and their subsequent diversion, being observed by the French authorities meeting drivers of the lorries in France, dealing with the provision of false AADs, their collection from drivers and their subsequent return to STTM Ziegler. His briefcase was recovered by the French Customs intelligence and investigation department ("DNRED") on 18 September 2009 from a hotel at which he was staying. It contained blank Italian AADs, AADS relating to loads which are the subject of this appeal as well as what the Respondents contend were forged ink stamps for Magazzini.

58. On 17 December 2010 the Respondents issued assessments against the Appellant and STTM Ziegler under s 12(1A) FA 1994 in respect of excise duty on the 58 loads of alcohol that arrived in the UK and which were not intercepted in the UK or France. The assessments were in the sum of £6,128,138.68 in respect of both parties.

59. It is important to analyse precisely the contents of the documents sent to each party in relation to these assessments.

60. STTM was sent the following:

- A letter dated 17 December 2010 signed by Officer Grimshaw.
- A form EX601, referred to in the letter as being enclosed, this form being headed "Officer's Assessment/ Civil Penalty Excise"
- A schedule containing the information detailed at [65] below.

61. The heading to the letter was "Notification of an Assessment of Excise Duty ". The first sentence of the letter read:

> "Please accept this letter as notification of a liability to Excise duty in the sum of £6,128,138.68 (see enclosed EX601…. and accompanying schedule)."

62. The letter stated that STTM Ziegler was liable for the excise duty as it was stated to be guarantor of the movements of the goods concerned on the relevant AADs. The letter went on to say that because others were jointly and severally liable pursuant to Regulation 7 (2) of the Regulations it was not proposed to collect the amount assessed from STTM Ziegler. The letter did not disclose the names of those held to be jointly and severally liable; as we shall see, that information was contained in the schedule.

63. The Form EX 601 starts with the words "…HMRC hereby assess the amount(s) of excise duty…due from you." It then sets out eight horizontal lines, numbered 1 to

8, which are crossed by various vertical columns. The first two vertical columns have a single heading worded "Period/ Default dates" under which there are two separate sub- headings of "From" and "To" under which can be completed a start and end date for the period or default dates to which the form relates. The next vertical column, under the heading "Duty/ Penalty due to HMRC" under which the relevant amount can be entered. At the bottom of this column, after the last of the 8 horizontal lines there is a box for completion of the total amount assessed, calculated by adding up the entries on each of the eight lines completed.

64. In this particular case only the first of the horizontal lines was completed. It showed a start date of 1 October 2008, an end date of 30 September 2009 and a single amount of duty due, £6,128,138.68, this figure being repeated in the total box referred to at [63] above. It is clear that from the structure of the form it would have been possible to specify each period or default separately, although as there were a large number of individual "defaults" in this case continuation sheets would have been necessary.

65. The schedule, which was referred to in the letter as showing who the goods were consigned from and to, but not at all in the Form EX 601, does give details of each load assessed. In respect of each load it contains the following information:

- The reference number of the relevant AAD and its date of issue
- The bonded warehouse to which the AAD stated the load was destined and, where completed, for whose account
- The commodity concerned, its quantity, size of bottle, alcoholic strength and the duty payable on that load
- Under a column with no heading, the name of the appellant, in some cases alone in other cases also with the name of Toby Price and Recette Limited, one of the three entities referred to at [51] above. It is clear that the purpose of this column is to indicate who the Respondents regard as jointly and severally liable for the duty.
- Details of the transport company and driver where completed.

66. I observe that the schedule did not contain any reference to the specific excise duty point which arose in relation to each load, as determined in accordance with Regulation 3(2) of the Regulations, and neither did the letter or the Form EX 601.

67. The Appellant was sent the following:

- A letter dated 17 December 2010 signed by Officer Grimshaw.
- A schedule containing the information detailed at [70] below.

68. The heading to the letter was "Notification of Joint and Several Liabilities in respect of an Assessment of Excise Duty". The first sentence of the letter read:

"Please accept this letter as notification of joint and several liabilities to Excise duty in the sum of £6,128,138.68 for an assessment issued to

STTM Ziegler France

You are also held jointly and severally liable with those named on the enclosed schedule."

69. The letter went on to explain that the Respondents believed that the Appellant was a person involved in the movement of the goods and as the goods failed to arrive at their stated destination he caused an excise duty point to arise and had been jointly and severally assessed along with STTM Ziegler, the hauliers and the drivers.

70. The schedule was not the same as that sent to STTM Ziegler in all respects. It does however give the same details of each load as was contained in the schedule sent to STTM Ziegler. Under a column with no heading in respect of each load the column is either left blank or has been completed with the name of Toby Price and Recette. It is clear that the purpose of this column is to indicate who, if anyone, the Respondents regard as being jointly and severally liable with the Appellant for the duty in respect of each load specified. There are further columns, as with the schedule sent to STTM Ziegler, completed in some cases with the names of the transport company and driver in respect of the load in question.

71. I observe that the schedule did not contain any reference to the specific excise duty point which arose in relation to each load, as determined in accordance with Regulation 3(2) of the Regulations, and neither did the letter. The letter did state that "the Excise duty point" had been fixed in accordance with Regulation 3(2) of the Regulations.

72. I turn now to review the evidence that Officer Grimshaw says that she relied on to justify the Assessment. Officer Grimshaw's evidence was that in order to justify raising an assessment she needed to establish:

- Whether there had been an irregularity
- Which loads were involved
- The amount of excise duty for each movement
- Who was liable

73. It was clear that the evidence to establish liability may be different in relation to each load and may have come to the Respondents' knowledge at different times. Officer Grimshaw took this into account her evidence.

74. Officer Grimshaw approached the issue of irregularity on the basis that in this case the irregularity was the departure from a duty suspension arrangement, namely that the excise goods were not delivered to the consignee in the bonded warehouse

stated on the AAD, being one of three UK warehouses in relation to 43 of the loads and Magazzini in relation to the remainder.

75. It is clear that evidence as to how the Scheme operated and in particular details of each of the loads connected with the Scheme built up over a period of time commencing in July 2009. I shall deal with the evidence in relation to each of the warehouses in turn.

Seabrook

76. In relation to those assessed loads purportedly destined for Seabrook, the Respondents first became aware of issues concerning some of these in July 2009. The Respondents visited Seabrook on 7 July 2009 and a fax from the visiting officer to a colleague sent the next day reveals that STTM Ziegler had been in contact with Seabrook chasing up 3 AADs in respect of which Seabrook had not received the goods. The visiting officer was given copies of these AADs and these show that the goods were despatched on behalf of Recette Limited to Seabrook, for the account of a company called Brank International.

77. By 18 September 2009 the Respondents had been given copies of 7 of the remaining 8 AADs in respect of the other loans purportedly destined for Seabrook, which had been issued either on 16 or 17 September 2009. On 30 September 2009 they were given a copy of the remaining AAD, which had been issued on 7 April 2009.

78. On 22 October 2009 the same officer who visited Seabrook on 7 July 2009 made a further visit to Seabrook and an email sent to the same colleague the next day, in relation to the AAD issued on 7 April 2009 referred to at [77] above which the colleague had asked the visiting officer to investigate, reveals that Seabrook had no record of the load arriving, the AAD had been stamped to show receipt by Seabrook of the goods with a false stamp and nobody by the name of the Seabrook employee who purportedly had signed the receipt worked for the company.

79. In the meantime DNRED had during September 2009 been investigating the alleged fraudulent smuggling of alcohol into the UK from France involving loads despatched from STTM Ziegler. The information obtained was shared with the Respondents, in particular a surveillance report dated 12 November 2009 which had attached to it a table showing details of all of the receipts and despatch of loads of spirits to and from STTM Zeigler's warehouse relating to the Scheme. This document ("the DNRED Schedule"), together with details of what DNRED had discovered regarding the Appellant's involvement, in particular observations regarding his contact with drivers transporting the loads and the contents of his briefcase obtained by DNRED, referred to at [57] above and a witness statement from Michael Lachaux of DNRED dealing with these matters had been received by the Respondents no later than 14 December 2009.

80. The DNRED Schedule contained some details of what was comprised in each load, in particular the brand of spirit and the number of bottles, although no details of the size of bottle or alcoholic strength of the spirit concerned was given.

81. On 12 January 2010 Officer Duxbury and Officer Grimshaw received from an official at the French Embassy in London copies of the AADs relating to all the assessed loads.

82. Officer Grimshaw's evidence in her witness statement was that the only AADs that the Respondents received in relation to the Scheme prior to 12 January 2010 were those in respect of loads which were intercepted and not assessed. Officer Duxbury's evidence in his witness statement filed in the High Court Proceedings makes it clear that in his opinion the Respondents were not in a position to make the Assessment until the AADs had been received as these documents contained details of the particular load, including its contents of the strength of the alcohol as well as evidence of the use of false stamps. The clear implication from Officer Duxbury's evidence was that no AADs in relation to the assessed loads were received before 12 January 2010.

83. Regrettably, as detailed at [76] to [77] above that evidence is incorrect. Officer Grimshaw stated that she realised this to be the case following the filing of Mr Akin's skeleton argument in relation to the hearing of this preliminary issue. Consequently, on the day of the hearing a schedule was filed showing that in total 11 AADs, all relating to loads purportedly destined for Seabrook, had in fact been received by the Respondents before 12 January 2010, and indeed before 14 December 2009, including those referred to at [76] to [77] above.

84. Officer Grimshaw's revised evidence into what she relied on as the last piece of evidence received to justify the making of the Assessment in relation to the Seabrook loads was therefore as follows.

85. Her evidence was that she relied on the material received from DNRED on 14 December 2009 as establishing the Appellant's potential liability. As regards which loads were involved and the amount of duty payable she said that she relied on the AADs which detailed not only the spirit involved, but its alcoholic strength and the number and size of bottles, typically being sold in 0.7 litre and 1 litre bottles. It was only with this complete information that she said that she could calculate the correct amount of duty to be assessed. On the basis of the revised evidence as to the date of receipt of the AADs it follows that on the basis of what Officer Grimshaw said she relied on in calculating the amount of duty to be assessed the Respondents had all the necessary material to do so by 18 September 2009.

86. As far as evidence of an irregularity in relation to the movement of the Seabrook loads was concerned, Officer Grimshaw's evidence was that she required evidence that the load had not arrived at its destination. In that regard, Officer Grimshaw accepted that by 22 October 2009 Seabrook had confirmed that to be the case in respect of six of the loads.

87. It therefore follows that as the Respondents had evidence sufficient in their opinion to hold the Appellant jointly and severally liable by 14 December 2009 at the latest that the Assessment in relation to the six loads mentioned at [86] above is out of time.

88. On 18 September 2009 a local compliance officer of the Respondents visited Seabrook and asked generally about consignments from STTM Ziegler. The officer was told that none had been received and none were expected (indeed Seabrook had checked with Brank International who confirmed they had not ordered any goods from STTM Ziegler and who had in fact moved their account away from Seabrook by this time) and by 22 October 2009 the Respondents had evidence that the AAD it had received on 30 September 2009 was false.

89. Nevertheless, Officer Grimshaw's evidence was that she required further evidence as to the non-arrival of the remaining loads before being able to conclude that there had been an irregularity in respect of each of those loads, as the information from Seabrook received during the visit on 18 September 2009 that no consignments were expected from STTM Ziegler was received at most two days after the relevant AADs had been issued. Her evidence was that confirmation to that effect was not received from Seabrook until 6 May 2010, following a request by her to a colleague made on 27 April 2010 and consequently her evidence was that she was not in a position to make an assessment in relation to those loads until that date.

90. Mr Akin challenged Officer Grimshaw on this aspect of her evidence. In particular he put it to her that the omission from her witness statement of any reference to the visits to Seabrook in July, September and October 2009 and the reference to was deliberate in order to make the Respondents' evidence look stronger, notwithstanding the fact that she referred to these visits in her earlier witness statement filed in relation to the substantive hearing of the appeal. Mr Akin also challenged Officer Grimshaw as to whether she genuinely was of the view that the further evidence she sought from Seabrook as to the non-arrival of the goods was necessary in the light of the previous evidence as to the forged AAD that was already in the Respondents' possession.

91. It is unfortunate that Officer Grimshaw's witness statement failed to give the full picture with regard to the Seabrook AADs. It was very careless at the least that Officer Grimshaw did not review the relevant evidence, and in particular her earlier witness statement before preparing the statement filed in relation to the preliminary issue. Her explanation was that she was following the position advised by her senior officer, Officer Duxbury that 12 January 2010 was the starting date in relation to the AADs and she had no reason to doubt that. That is certainly the impression given in Officer Duxbury's witness statement filed in the High Court Proceedings. Nevertheless, at the very least she should have questioned that in the light of what she said in her earlier statement.

92. It would also appear that Officer Duxbury's witness statement in the High Court was misleading as it assumes 12 January 2010 was the earliest date all the AADs was received. No doubt the Respondents will consider the position in relation to those

proceedings carefully bearing in mind that a freezing order was obtained against the Appellant on the basis of evidence that was not entirely correct.

93. I do not however accept that the omissions in Officer Grimshaw's statement were deliberate. As I have mentioned, she lacks experience in relation to these types of investigation and the preparation and giving of evidence and I am prepared to accept that the omissions can be attributed to these factors and the lack of resource available to assist her. She also took steps to ensure her evidence was revised once she saw Mr Akin's skeleton argument. No doubt the Respondents will take steps to prevent such lapses happening again.

94. Officer Duxbury's evidence in the High Court Proceedings was that as well as providing the necessary information to enable the correct amount of duty to be assessed the AADs also contained evidence of false stamps, and thus by implication, an irregularity. Therefore once the Respondents had all the AADs, those in relation to Seabrook bearing the same stamp and a signature of an employee known not to exist in common with an earlier AAD they already had in respect of a load which Seabrook had confirmed had not arrived, and where Seabrook and their customer had confirmed to the Respondents that it was not expecting deliveries from STTM Ziegler, there must be a question as to whether Officer Grimshaw genuinely believed further evidence of irregularities was necessary.

95. In cross-examination Officer Grimshaw gave a confused answer to the question as to why she felt it necessary to seek further information in the light of the evidence that she held that the AADs were forgeries. She was asked how it could be doubted that the goods described on a forged AAD did not arrive at their stated destination. She gave a somewhat inconsistent answer, stating that whilst she agreed there would be no doubt nevertheless she would want to check directly with the warehouse.

96. However, for me to conclude that her opinion was not genuine I would have to conclude that the request Officer Grimshaw made for further information as detailed at [89] above was window dressing so as to buy more time before the time limit expired. I am unable so to conclude. At the time the request was made there was no evidence that Officer Grimshaw was aware that some AADs had been received earlier than 12 January 2010. I have already referred to Officer Grimshaw's relative inexperience at the time. I find that she was in effect following a tick box approach out of an abundance of caution when making the further request, having convinced herself that first hand evidence from the warehouse was necessary to confirm non-arrival notwithstanding the other evidence.

97. I therefore conclude that in relation to the remaining five loads purportedly destined for Seabrook Officer Grimshaw was of the opinion that the last piece of evidence necessary to justify an assessment was the material she received in response to her request of 27 April 2010. I return later to the question as to whether that opinion was perverse or wholly unreasonable.

Aabsolute

98. As with Seabrook, Officer Grimshaw's evidence was that she relied on the material received from DNRED on 14 December 2009 as establishing the Appellant's potential liability and the AADs for the information necessary to calculate the amount of duty.

99. In relation to evidence of irregularities, as with Seabrook the starting point was the AADs. It was common ground that none of these were received before 12 January 2010. Officer Grimshaw also had evidence from an investigation carried out by the Respondents in relation to an AAD in respect of a load intercepted on 7 July 2009 suggesting that the stamp on the third copy of the AAD had been forged. She did attempt to confirm with Aabsolute whether the loads purportedly destined for them ever arrived but no information was forthcoming because the warehouse had ceased trading and it was impossible to obtain the records. Information was, however, available to the Respondents before 12 January 2010 showing that the mandatory returns made by Aabsolute to the Respondents as to goods delivered to them (known as the W1 returns) demonstrated that the volume of goods purportedly delivered to them exceeded the total amount Aabsolute returned on their W1 for the relevant periods. Officer Grimshaw's evidence was that she relied therefore on the combination of the AADs, the evidence as to the forged AAD and the information on the W1 return to satisfy herself that there was sufficient evidence of irregularities in the movements of the loads concerned. She therefore concluded that she did not have sufficient evidence to assess these loads until 12 January 2010.

100. It was put it to Officer Grimshaw that rather than wait for the AADs she could have calculated the amount of the duty from the information set out on the DNRED Schedule that was received on 14 December 2009. That schedule did disclose in relation to each load the spirit concerned and the number of bottles comprised in the loan but it did not disclose the size of the bottles or the alcoholic strength. Officer Grimshaw's evidence was that to have made an assessment based on this information alone would not be accurate as it would involve her guessing the bottle size and the alcoholic strength and whilst she might have done so to best judgment if no further information was available she was aware at the time she received the DNRD Schedule that the AADs would be forthcoming.

101. I accept Officer Grimshaw's evidence on this point. It is consistent with the cautious approach she took to the assessment in respect of the Seabrook loads and I therefore conclude that it was her opinion that she did not have sufficient evidence to assess the Aabsolute loads until 12 January 2010. I return later to the question as to whether that opinion was perverse or wholly unreasonable

Abbey

102. As with Seabrook, Officer Grimshaw's evidence was that she relied on the material received from DNRED on 14 December 2009 as establishing the Appellant's potential liability and the AADs for the information necessary to calculate the amount

of duty and in relation to the latter issue I come to the same conclusion as I did in relation to Aabsolute.

103. In relation to evidence of irregularities, as with Seabrook the starting point was the AADs. It was common ground that none of these were received before 12 January 2010. Certain irregularities were found in relation to the AADs, in particular the stated haulier had been struck off the companies register some months before the loads were purportedly despatched to Abbey. As with Seabrook, Officer Grimshaw did make enquiries as to whether the loads had arrived at Abbey, some months after the AADs had been received, and received confirmation from a representative of Abbey's liquidator on 9 November 2010 that no record could be found of the loads having reached Abbey. Officer Grimshaw's evidence was that she relied on this as the evidence that justified the assessment in respect of the Abbey loads and for the reasons given in relation to Seabrook I accept that she held this opinion.

Magazzini

104. As with Seabrook, Officer Grimshaw's evidence was that she relied on the material received from DNRED on 14 December 2009 as establishing the Appellant's potential liability and the AADs for the information necessary to calculate the amount of duty and in relation to the latter issue I come to the same conclusion as I did in relation to Aabsolute.

105. In relation to evidence of irregularities, prior to receiving the AADs Officer Grimshaw had received the DNRED Schedule detailing all the Magazzini loads and was also aware of the false paperwork and stamp found in the Appellant's briefcase, from which it might be inferred that all the Magazzini loads were likely to be connected with the Scheme and therefore would have been diverted to the UK rather than being sent to Magazzini in Italy. In addition the Respondents had on 11 July 2009 intercepted in the UK a load stated to have been sent from Magazzini and purportedly destined for a warehouse in the UK. They notified Magazzini of this seizure and on 6 August 2009 Magazzini informed the Respondents in an email that they did not issue an AAD with the number that the Respondents told Magazzini it bore.

106. Officer Grimshaw acknowledged this evidence but stated that in her opinion she did not have sufficient evidence to justify an assessment until she had checked the ferry manifests to ascertain whether the vehicles concerned had travelled to the UK instead of going to Magazzini as the AADs issued by STTM Ziegler represented. She received the last set of information in relation to the ferries on 21 April 2010 and therefore stated that in her opinion that was the earliest date from which an assessment could be justified.

107. For the reasons given in relation to Seabrook I accept that she held this opinion. Mr Akin submitted that in the light of the evidence regarding the irregularities from 6 August 2009 onwards and the information on the DNRED schedule to the Magazzini loads there was no need to wait for the AADs and I consider this submission later.

Issues to be determined

108. It follows from the findings of fact that I have made that I have determined that Officer Grimshaw did hold the opinion that the last piece of evidence of sufficient weight to justify the Assessment was in respect of the various assessed loads as follows:

- In relation to the six loads purportedly destined for Seabrook referred to at [86] above the material received from DNRED on 14 December 2009 linking the Appellant to the Scheme with the result that the Respondents were out of time to assess those loads

- In relation to the remaining loads purportedly destined for Seabrook the information she received as to whether the loads arrived at Seabrook in response to her request of 27 April 2010, the material being received on 6 May 2010.

- In relation to the loads purportedly destined for Aabsolute the relevant AADs which were received on 12 January 2010

- In relation to the loads purportedly destined for Abbey the information she received as to whether Abbey's records showed the loads had arrived from a representative of Abbey's liquidator on 9 November 2010

- In relation to the loads purportedly destined for Magazzini the information she received from her check on the ferry manifests on 21 April 2010.

109. Accordingly, there are three remaining issues to determine as follows:

(1) Was the Assessment a single global assessment or a series of separate assessments in relation to each of the assessed loads?

(2) If the Assessment was a global assessment is the whole assessment out of time because of the fact that it includes assessments in respect of some loads which have been made out of time?

(3) If the Assessment was made in time in relation to any of the assessed loads was Officer Grimshaw's opinion as to the matters referred to at [10] above perverse or wholly unreasonable?

110. It is convenient to deal with Issues (1) and (2) before considering Issue (3).

Global Assessment

111. Mr Puzey submitted that the letter together with the documents enclosed with it sent to the Appellant on 17 December 2010 did not constitute a global assessment. Construing the documents together as a whole and reading them together leads to the conclusion that there were separate assessments in relation to each assessed load.

There was no prescribed form to an assessment; what was necessary was that the taxpayer was told about the irregularity, that the goods did not arrive at their destination, and what loads he was being held responsible for. In this case taken together the documents make clear the importations in respect of which duty was demanded and the reason for the demand (the non arrival of the goods). These elements fulfil the requirements of reasonableness and explain adequately the case the Appellant has to meet. In particular, the Appellant can ascertain the loads in respect of which he is alleged to be liable by reference to the AADs which were particularised on the schedule to the letter. It was not necessary that the excise duty point was specified in order that the Appellant knows the case he has to meet; the fact that it was a day or two later than the date of issue of the AAD is not relevant. In so far as *Morris Young* stated that in that particular case the assessment should have specified specific excise points it did not establish a principle and should not be followed.

112. Mr Puzey also submitted that a true global assessment was one where the individual loads were not specified at all. He distinguished *Keyes* on the facts; unlike the position in that case the schedule here was part of the Assessment and not merely for information. Unlike the position in *Keyes* the amount of duty assessed in relation to each load was set out in the schedule.

113. In my view the Assessment is clearly a global assessment and the absence of a reference to the date of any specific excise duty point in relation to each assessed load is a key element in leading me to that conclusion. Both the letter to STTM Ziegler refer in effect to there being a single excise duty point in respect of all of the loads in question, there being only a single irregularity referred to, namely that the goods (which must be taken to refer to the goods in respect of the aggregate of the loads) did not reach their stated destination.

114. As a matter of law, however there cannot have been one single excise duty point that was the same for each of the assessed loads. The irregularity which triggers an excise duty point pursuant to Regulation 3(1) of the Regulations must have occurred at the point at which the goods were diverted from their intended destination and the load "slaughtered". In this case the Respondents will not have known when that precisely happened so the excise duty point would be when the irregularity, that is the diversion, first came to the Respondents' attention, as provided by Regulation 3(2) of the Regulations. In a number of cases that would have happened when the load was intercepted by the Respondents and seized; in loads that were diverted and not intercepted it would not have happened until the Respondents became aware of further information, such as evidence to show that the load travelled under a false AAD.

115. The Respondents made no attempt to deal with this issue in the documents sent to STTM Ziegler and the Appellant notifying them of the Assessment. Therefore in my view the situation is entirely analogous to the situation where a global assessment for VAT is issued covering a number of prescribed accounting periods, expressed to cover a single period, possibly because it was not known within which accounting period a particular liability fell. Likewise, in this case the Assessment was in respect of a stated period which although was expressed to be in respect of a single excise

point did in fact make an assessment covering a number of separate excise duty points. As the Assessment was structured in this way it was inevitably a global assessment. In that context, the schedule can then be seen as providing information as to how the duty has been assessed in relation to each load covered by the global non-statutory excise duty point (equivalent to the global non-statutory accounting period stated in a VAT global assessment) and, in relation to the Appellant, the particular loads in respect of which he is alleged to bear responsibility.

116. Contrary to Mr Puzey's submissions, the excise duty point is important even if there is no statutory duty to include it. As Mr Akin observed, the statutory limitation period prescribed by s 12(4) (a) FA 1994 starts to run from it and it is highly relevant to the question as to whether the Respondents have jurisdiction to make an assessment, that is whether the irregularity that they contend triggers the excise duty point has occurred or is detected in the United Kingdom. Neither it an answer that details of the AAD is an adequate substitute for details of the excise duty point; the date of the AAD may be some time in advance of the occurrence of the irregularity and the person assessed is entitled to know what irregularity is alleged to have triggered his liability so that he has all the relevant information he needs to challenge it. This is implicit from the passage from *Arena* quoted at [39] above. I observe that the assessment in issue in that case did give details as to how the excise duty point had been determined: see the extract quoted at [22] of the judgment.

117. My conclusion on this point is reinforced by the other features of the documents sent to the Appellant. In particular, the letter refers repeatedly to "an assessment" and refers to an assessment of a single sum. As mentioned at [64] above a single period to which the Assessment is stated to relate, extending beyond the date of the last AAD specified in the schedule, is entered on one line on the form EX601 and a single figure of the amount assessed appears alongside that period, strongly indicating again that the Assessment was for an indivisible single event, namely a global assessment made in respect of the period during which the Scheme was believed to be carried on.

118. I therefore conclude that the Assessment was a global assessment and did not comprise a series of separate assessments in relation to each assessed load.

Whether the whole of the Assessment is out of time

119. Mr Puzey submits that the VAT cases which establish that if any element of a global assessment is out of time then the whole assessment is invalid were all dealing with the time limit that is now in s73(6)(a) VATA and which has its equivalent in s12(4)(a) FA 1994, rather than s 73(6)(b) VATA which has its equivalent in s 12 (4) (b) FA 1994, the provision in issue in this case.

120. He submits that the principle established in the VAT cases is designed to prevent the Respondents from bundling in a single assessment an out of time prescribed accounting period with an in time period and should therefore be confined in the excise duty context to assessments made under s 12(4) (a) FA 1994; the principle would therefore apply so as to bundle in a single assessment a liability to duty arising more than 3 years ago with one arising less than three years ago.

121. However in relation to the question as to whether an assessment is made outside the time limit in s 12(4) (b) Mr Puzey submits that if, as in this case, the assessment is of a single sum the question is answered by establishing when the Respondents received the last piece of evidence sufficient to justify the making of an assessment for that sum. By applying that test Mr Puzey submits that the relevant time limit expired one year after the Respondents received the confirmation from Abbey's liquidator on 9 November 2009 and consequently the whole assessment was in time. He submits that the "evidence of facts sufficient" test must be applied to the whole of the sum assessed and not to any part of it. This approach is consistent with the reasoning of Dyson J in *Pegasus Birds* where in his second principle he stated that the evidence in question must be sufficient to justify the making of *the* assessment in question: see [17] above. The judge was not referring to any different assessment that *might* have been made.

122. Mr Puzey submits that when applying the "evidence of facts sufficient" test it may not be possible to ascertain the Respondents' knowledge relevant to any particular point of time covered in the assessment rather than any other point. He accepts that the passages from *International Language Centres* and *Spillane* quoted at [35] and [36] above *are* against him but submits that the passages were *obiter* and in neither case was the point specifically argued. He also observes that the example given by Woolf J in *International Language Centres* quoted at [35] above in fact illustrates the position under what is now s 73(6) (a) and not s 73 (6) (b) VATA.

123. I reject Mr Puzey's submissions on this issue. The principle that if part of a global assessment is out of time then the whole assessment fails was clearly established to protect the taxpayer against the prejudice that could by caused to him by the Respondents choosing to use a global assessment rather than a series of separate assessment and thereby bundling together demands that would be out of time if made separately with those that were in time. As the Court of Appeal in *Pegasus Birds* observed in the passage quoted at [20] above, the time limit provisions are there to protect the taxpayer from tardy assessment; permitting the Respondents to use a global assessment in the way envisaged by Mr Puzey to defeat assessments in respect of particular excise duty points that would otherwise be out of time is inconsistent with that principle.

124. In my view the VAT authorities demonstrate that when a global assessment is made, so as to create an accounting period which covers a number of prescribed accounting periods, then for the assessment to be valid it must be in time for all of the prescribed accounting periods that it covers. This is readily apparent from the way the Court of Appeal formulated the principle in *Grange*: see the passage from Templeman LJ's judgment quoted at [31] above where the statutory wording was interpreted so as to read in words permitting an assessment to be expressed to cover a period including a number of prescribed accounting periods.

125. There is nothing to suggest that this reasoning is confined to assessments falling within what is now s 73 (6) (a) ; the introductory words in s 73(6) which covers both (a) and (b) makes it clear that whether VAT is due is calculated by reference to prescribed accounting periods. I therefore find the reasoning of Woolf J in

International Language Centres and Simon Brown J in *Spillane*, which clearly assumes the reasoning in *Grange* covers both provisions, *highly* persuasive.

126. Neither is there anything in the passage in *Pegasus Birds* that Mr Puzey relies on which casts doubt on this analysis; as Ms Lemos submitted this statement was made in the context of considering the question as to whether the assessing officer's opinion was to be tested on a subjective or objective basis and has no application to the limitation issue.

127. Nor is there anything in the specific wording of s 12(4) FA 1994 which suggests that a different approach should be taken to excise duty assessments. Instead of prescribed accounting periods as reference points for calculating liability for tax and the determination of limitation periods the excise legislation uses excise duty points. Section 12 (4) refers in its introductory words to "an assessment of the amount of excise due from a person" and obviously it will be the case that an amount is due from a person if he has a liability to pay it. Section 12(6) makes it clear that a liability to pay arises by reference to the excise duty point in question. It follows that where an assessment is made covering a number of excise duty points arising during the period the assessment is stated to cover, as is the case here, then in order for the assessment to be valid in must be in time with respect to all of the excise duty points to which it relates.

128. I therefore conclude that the whole Assessment (which I have found to be a global assessment) is out of time and is therefore invalid because it includes assessments for excise duty points in respect of which evidence of facts sufficient to justify such assessments had come to the knowledge of the Respondents more than one year before the Assessment was made.

Whether Officer Grimshaw's decision to assess any of the loads was perverse or wholly unreasonable

129. My conclusion on the global assessment issues is sufficient to dispose of the limitation issue entirely, and indeed the appeal as a whole. I do not therefore need to consider the remaining issue but I will do so briefly in case this matter goes further.

130. Mr Akin submits that it was perverse and wholly unreasonable for Officer Grimshaw to have held the opinion that she did not have sufficient evidence to make the Assessment until she had received the following evidence:

- In relation to the loads purportedly destined for Seabrook (other than those which the Respondents now accept were assessed out of time) the information she received as to whether the loads arrived at Seabrook in response to her request of 27 April 2010, the material being received on 6 May 2010.

- In relation to the loads purportedly destined for Aabsolute the relevant AADs which were received on 12 January 2010

- In relation to the loads purportedly destined for Abbey the information she received as to whether Abbey's records showed the loads had arrived from a representative of Abbey's liquidator on 9 November 2010

- In relation to the loads purportedly destined for Magazzini the information she received from her check on the ferry manifests on 21 April 2010.

131. In relation to all of these loads Mr Akin submits that the amount of the duty to be assessed in respect of each load could have been calculated by reference to the information contained on the DNRED Schedule, notwithstanding the fact that it did not indicate what the size of each bottle was that was comprised in each load nor did it indicate the alcoholic strength of the spirit concerned. Mr Akin submitted that the Assessment could have been made on an assumed bottle size and alcoholic strength, based on information obtained in respect of those loads which had already been seized or in respect of which the AADs obtained. If that submission were accepted it would mean that the Assessment was out of time in respect of all of the loads, subject to the question as to whether Officer Grimshaw's opinion in relation to the extra material she said was necessary in relation to Seabrook, Abbey and Magazzini was perverse or wholly unreasonable.

132. In relation to Seabrook, Mr Akin submits that the decision to seek confirmation that the loads had not arrived was wholly unreasonable and perverse in the light of the fact that it was already known that neither Seabrook nor its customer was expecting any consignments from STTM Ziegler and that false stamps had been used on the AADs. Despite Officer Grimshaw not doubting that those loads had not arrived she still maintained that it was necessary to check the position with Seabrook. As it was common ground that the relevant AADS were received before 14 December 2009 if Mr Akin's submission was accepted it would mean that the Assessment was out of time in relation to all the Seabrook loads.

133. In relation to Abbey, having received the AADs there was already sufficient evidence of irregularities and it was perverse and wholly unreasonable to believe that the short exchange with the liquidator many months later was of any significance.

134. In relation to Magazzini, the way the fraud operated was already known to the Respondents following the information received from Magazzini on 6 August 2009. The discovery of the blank AADs and the false Magazzini stamp in the Appellant's briefcase was sufficient to lead to the conclusion that none of the Magazzini loads were intended to go to Italy so the further search of the ferry manifests in April 2010 was overkill.

135. I reject Mr Akin's submission in respect of the DNRED Schedule. It is undoubtedly the case, as Officer Grimshaw indicated in her evidence, that if that had been the only information available to the Respondents they would have estimated the duty payable by reference to an assumed bottle size and alcoholic strength. However, as she stated in her evidence, at that stage she knew that the AADs, which gave definitive information as to bottle size and alcoholic strength, would be forthcoming and they were received within a month of the Respondents having received the

DNRED Schedule. As Officer Grimshaw stated in her evidence, in the light of that knowledge she would have known that any assessment based on the DNRED Schedule would have been inaccurate and it was therefore not perverse or wholly unreasonable for her to have awaited the receipt of the AADs. Consequently, had I not found against the Respondents on the global assessment issues, I would have concluded that the assessment in relation to the Aabsolute loads was in time.

136. In relation to Abbey and Magazzini, the finding against the Appellant on the DNRED Schedule point means that even if Officer Grimshaw's decision to seek further information after receipt of the AADs on 12 January 2010 was perverse and wholly unreasonable, the Assessment in respect of those loads would still be in time, the date at which sufficient evidence justifying the Assessment became known to the Respondents therefore being 12 January 2010. Consequently, had I not found against the Respondents on the global assessment issues, I would have concluded that the assessment in relation to the Abbey and Magazzini loads was in time.

137. I accept Mr Akin's submissions in respect of the Seabrook loads. Officer Grimshaw gave no rational explanation as to why it was necessary to carry out further checks as to whether the loads had arrived. By September 2009, following DNRED's surveillance activities and the increasing number of interceptions in the UK based on the intelligence from DNRED, the way the Scheme operated was well established. The information the Respondents received from Seabrook as to whether loads were expected together with copies of AADs which they clearly believed to be false meant that once the evidence of the Appellant's alleged part in the Scheme was obtained the Respondents had all the evidence they needed to make an assessment. It was perverse in those circumstances to believe that further confirmation as to the non arrival of the goods was necessary. It could clearly be inferred and seeking to obtain it was, as Mr Akin put it, overkill. I therefore conclude that on any view all the Seabrook loads were assessed out of time.

Conclusion

138. I have concluded at [128] above that the whole of the Assessment is out of time and invalid. The preliminary issue of limitation is therefore determined in favour of the Appellant and consequently his appeal against the Assessment must be allowed.

139. 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.

TIMOTHY HERRINGTON
TRIBUNAL JUDGE
RELEASE DATE: 21 September 2015