[2017] UKFTT 0228 (TC)

TC05716

Appeal number: TC/2013/06299

Excise duty and VAT assessments- whether HMRC decisions " notified"- authorities considered- yes- whether decisions the subject of HMRC " review"- no- application for permission to appeal out of time- Data Select, BPP, Denton applied- permission refused- appeals struck out

FIRST-TIER TRIBUNAL
TAX CHAMBER

ABBEY FORWARDING LTD **Appellant**
(In liquidation)

- and -

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

TRIBUNAL: JUDGE THOMAS SCOTT

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 4, 5 and 6 July 2016

David Bedenham of Counsel for the Appellant

Stephen Nathan QC and Sarah Harman, both of Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. HMRC applied to strike out appeals by Abbey Forwarding Limited ("Abbey") against assessments to excise duty and VAT raised against Abbey in March 2009 when it was in liquidation.

2. Abbey resisted the application and, so far as necessary, sought the permission of the Tribunal to extend the time for filing its appeals.

3. This was a preliminary hearing to determine the strike out application and request for permission for a late appeal.

Evidence

4. I was provided with twelve lever arch files of documents and authorities. The volume of documentation reflected the long history of dealings between Abbey and HMRC.

5. I also heard evidence from, and had the opportunity to question, the following witnesses:

    (a) Guy Bailey, an HMRC officer.

    (b) Mrs Louise Brittain, a former liquidator of Abbey.

    (c) Jeremy French, who succeeded Mrs Brittain as liquidator for Abbey.

    (d) Stephen Lundy, an HGV driver.

    (e) Cecil Breadon, also an HGV driver.

6. I deal below with the relevance of the evidence from each of these witnesses, and the weight which I have attached to it.

Background events and agreed facts

7. The history of dealings between the parties has been long and fractious. It was abundantly clear both from those prior dealings and the proceedings before me that the relationships between Abbey and HMRC, and indeed between Abbey and Mrs Brittain, were, at best, highly strained.

8. In order to set the appeals in these proceedings in context, I will summarise in chronological order certain other events and legal proceedings. I will return subsequently to the relevance of those other events and proceedings. The facts set out below are agreed between the parties.

9. On 4 February 2009 HMRC made an *ex parte* application to the High Court to appoint a provisional liquidator to Abbey. HMRC provided an undertaking in damages in relation to that appointment. Mrs Brittain of Deloitte was appointed as provisional liquidator and commenced misfeasance claims against the directors of Abbey. Broadly, the misfeasance claims alleged that three of Abbey's directors had been complicit in an excise diversion fraud, with the

fourth director being negligent in allowing Abbey to become involved in that fraud. That alleged fraud had led to HMRC issuing assessments against Abbey for excise duty and VAT amounting to over £6.5 million, with the first assessment being raised in January 2008 and the last in February 2009.

10. The basis of those assessments by HMRC, and the misfeasance claim, had been the assertion by HMRC that 307 movements of duty suspended alcohol which had left Abbey's warehouse had not reached the designated bond but had been diverted onto the black market.

11. In July 2010 Lewison J in the High Court dismissed the misfeasance claim. He found that in relation to 301 of the movements the alcohol had in fact reached the recipient bond, and that insufficient evidence existed to determine the issue as regards the remaining 6 movements.

12. HMRC did not withdraw the assessments which underpinned the misfeasance claim in response to Lewison J's decision. Following an appeal process by the former directors of Abbey (not Mrs Brittain), the appeals were allowed in September 2011 and those assessments then removed.

13. The former directors then called a creditors' meeting for November 2011. Shortly before that meeting, the existence of the two assessments which are the subject of these proceedings was brought to the attention of the former directors.

14. The former directors then applied to remove Mrs Brittain as liquidator. She resigned as liquidator and was replaced by Mr French of FRP Advisory in August 2012.

15. Acting on behalf of Abbey, in November 2013 Mr French applied to court for an inquiry as to damages on the undertaking which had been given by HMRC on the appointment of Mrs Brittain as provisional liquidator. The judgment of David Richards J in the High Court, ordering an inquiry as to damages, is reported at *Abbey Forwarding Ltd (in liquidation) v Revenue and Customs Commissioners* [2015] EWHC 225 (Ch).

16. The enquiry as to damages was eventually compromised in a mediation between the parties in December 2015.

17. The only remaining dispute between Abbey and HMRC relates to the current proceedings.

Findings of Fact

18. In relation to the issues in these proceedings, I make the following findings of fact.

19. Two letters, each dated 27 March 2009, describing the assessments raised for excise duty and VAT in respect of the movements of goods in these proceedings were sent by HMRC to Mrs Brittain, the then liquidator of Abbey, at her offices at Baker Tilley. The excise duty assessment was for £374,132 and the related VAT assessment was for £81,936. I will refer to the appeals by Abbey against those assessments as the Excise Duty appeal and the VAT appeal.

20. Each of those letters was received on 30 March 2009, and marked so received by a Baker Tilly date stamp.

21. Mrs Brittain did not at any time during her appointment as liquidator appeal against or seek a HMRC review of either the excise assessment or the VAT assessment.

22. Following the appointment of Mr French as liquidator in August 2012 in place of Mrs Brittain, Mr French sought to assign to the former directors of Abbey the right to appeal against the excise duty and VAT assessments. By June 2013 it was clear that that purported assignment was legally ineffective, and the directors withdrew their attempted appeals.

23. On 25 June 2013, Mr Russell Herbert, on behalf of Mr French, sent a fax to HMRC. The fax contained the following passage:

> "Following legal advice the directors have withdrawn their appeals and Jeremy French wishes to request a late review of the assessments on the following grounds:-
>
> - No review has been requested by the former liquidator despite requesting a review of the assessments on which the provisional liquidation order was granted.
>
> - HMRC is aware that the vehicle loads on which the assessment is based travelled but was unaware whether these vehicles were loaded or empty, as they were not intercepted.
>
> - The company was not assessed jointly & severally with the owner of the goods on which the assessment was based, Kismat Ltd.
>
> - There is evidence that the vehicles were diverted from Simkiens (the designated recipient) in Antwerp to another nearby warehouse, purporting to be the 'Overspill Warehouse' when the main one was full. HMRC is, we understand, aware of this due to other movements not involving Abbey Forwarding Ltd being diverted in a similar fashion.
>
> - There are some doubts as to the timing of and Regulations under which the assessments were raised."

24. On 7 August 2013 Mr Bailey of HMRC replied to Mr French's fax. The letter began as follows:

> "Thank you for your letter dated 25 June 2013, in which you request that the Commissioners consider whether to allow an out of time review in relation to assessment EXB96/09… That assessment was raised against [Abbey] on 27 March 2009 and duly served on its then registered office at Baker Tilly on 30 March 2009.
>
> In line with published HMRC guidance (ART4300 which is published on the HMRC website), it falls to the Decision Maker to decide if a request for an out of time review should be allowed. Officer Lawler of Holding & Movements, Stratford was the original decision maker but retired some years ago. The role of Decision Maker subsequently passed to me and it falls to me to consider your request".

25. Having summarised the grounds put forward by Mr Herbert in favour of an out of time review (as set out at [23]), Mr Bailey continued as follows:

> "I have reviewed the grounds and consider that only the first ground [no review requested by former liquidator] is directly relevant to the matter of whether an out of

time review should be allowed. The other grounds are, in my view, only relevant to the validity of the assessment and the evidence that supports it.

In accordance with ARTG4300, I should agree to allow an out of time review to take place if I consider both that there is a 'reasonable excuse' as to why a request for review was not made within the statutory time limit (as set out in ARTG2250 available on the HMRC website) and that the company asked for the review without unreasonable delay after the excuse ceased.

I do not consider that you have a reasonable excuse for not requesting a review within the statutory time limit as set out in Officer Lawler's letter of 27 March 2009.

The reasons for this are:

- I am not aware of the reason why the original liquidator, standing in the shoes of the company, did not request a review.
- It is clear that, for whatever reason, a decision was made not to request a review.
- Whether or not this was the right course of action is a matter for the company and liquidators past and present. It is not a matter for the Commissioners.
- An offer of review was made to the company which was and remains the person liable to pay the tax debt and was not taken up.

Furthermore, even if your excuse for the delay were reasonable (which it is not) you have failed to ask for the review without unreasonable delay after that excuse ceased. In other words, you added to the delay unreasonably and without excuse.

You have been aware of the assessment, and the evidence behind it, since the date of your appointment on 30th August 2012 nearly 12 months ago.

It is not clear from your request why you have waited so long to seek a review out of time although I am aware that you initially and wrongly believed (presumably on advice) that the company could assign the right to appeal the assessment to the former directors. Wrong advice or delay in your lawyers taking the proper action cannot be a reasonable excuse and again is a matter between the company, you and your advisers.

I have looked at the assessment and the underlying evidence in great detail and I am wholly satisfied that the assessment is sound. Although I am under no obligation to consider the underlying merits of any challenge to the assessment, I would look at any evidence you possess as part of the reconsideration process and not as part of a statutory review. It has been suggested several times to the Commissioners that there is evidence to consider (and you make reference to it in your letter) but nothing has been provided."

26. On 5 September 2013 FRP Advisory on behalf of Abbey lodged an appeal against the excise duty and VAT assessments, which stated as follows:

> "I attach a copy of a request sent to HMRC for an out of time review of Duty and VAT assessments raised on [Abbey] whilst in liquidation, and the reply received from the reviewing officer at HMRC dated 7 August 2013 refusing that request.
>
> In the circumstances the company's liquidator Jeremy French wishes to lodge an appeal against the assessments pursuant to the section 16(1)(a) of the Finance Act 1994, on the grounds contained in the original request for an out of time review to HMRC above."

27. On 17 December 2013 HMRC applied to strike out the appeals.

The issues in these proceedings

28. The preliminary issues before me remain essentially as they were in late 2013, namely an application by HMRC to strike out the appeal, and an application by Abbey, so far as necessary, for permission to file appeals late.

29. However, the arguments raised on behalf of Abbey have changed considerably between December 2013 and these proceedings in July 2016. During that period, various previous representatives of Abbey sought to raise numerous arguments which have since been withdrawn. In my opinion, it was prudent to withdraw those arguments, since none of them would be likely to have withstood scrutiny. In addition, when the proceedings were first due to be heard by me, in January 2016, Mr Bedenham sought to raise at an extremely late stage an additional argument in relation to the first issue which I set out below. The lateness of that amendment to Abbey's case resulted in the proceedings being adjourned until July 2016.

30. I have considered three issues in these preliminary proceedings.

31. The first issue is the date when HMRC's decision to make the excise duty and VAT assessments in question was notified to Abbey. The importance of this issue lies in the significant changes, explained below, to the process by which such assessments could be challenged by the taxpayer which came into effect on 1 April 2009. In particular, was there, as HMRC contend and Abbey refutes, notification when the HMRC letters were received on 30 March 2009? If not, when was there notification? I will refer to this as the Notification Issue.

32. The second issue is whether HMRC's letter of 7 August 2013 (described at [24] to [25]) was a "review" of HMRC's decision to charge the excise duty and/or its decision to charge the VAT, as that term is used in the relevant statutory provisions. I will refer to this as the Review Issue.

33. The third issue is whether Abbey's appeals should be permitted notwithstanding that they are out of time. This is the Late Appeal Issue.

34. The relationship between the three issues is somewhat complex and depends on various permutations. I will refer to these further below, but it may be helpful if I summarise the position, which differs as between the Excise Duty appeal and the VAT appeal.

35. Dealing first with the Excise Duty appeal, if I find for HMRC on the Notification Issue, then the appeal must be struck out for lack of jurisdiction unless I find for Abbey on the Review Issue. If I find for Abbey on the Notification Issue, then I again need to determine the Review Issue. However the Notification Issue is determined, a finding in favour of Abbey on the Review Issue would mean that the appeal (being made within 30 days of the review letter) was in time, so the Late Appeal Issue would not be in point. The Late Appeal Issue falls to be considered only if I find in favour of Abbey on the Notification Issue but in favour of HMRC on the Review Issue.

36. Turning to the VAT appeal, the difference by comparison to the Excise Duty appeal is that since the VAT appeal process at the relevant periods did not require a statutory review, the Late Appeal Issue would require consideration even if I found in favour of HMRC on both the Notification Issue and the Review Issue.

Legislation

Excise Duty

37. The assessment to excise duty was based on an irregularity in the movement of certain goods (alcohol) detected by the Commissioners. The relevant provisions of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001/3022 as then in force were as follows:

> **3. Irregularity occurring or detected in the United Kingdom**
>
> (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…
>
> **7. Payment**
>
> (1) …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.

38. The assessment was expressed to be raised under section 12 (1A) (b) of the Finance Act 1994 ("FA 1994"). The relevant provisions as then in force were as follows:

> **12. Assessments to excise duty**
>
> (1) Subject to subsection (4) below, [time limits], 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 there has been a default…
>
> , the Commissioners may assess the amount of duty due from that person to the best of their judgment and notify that amount to that person or his representative.
>
> (1A) 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 from that person and notify that amount to that person or his representative."

39. At 30 March 2009, the date of receipt of the HMRC letter notifying the excise duty charge, section 14(2) of FA 1994 gave a person assessed to excise duty the right to require HMRC to review the decision to assess. Section 14(3) stated that there was no requirement on HMRC to review the decision unless the person assessed gave written notice requiring a review within 45 days of receiving written notification of the decision. Section 15(1) FA 1994 provided that where HMRC were required to review a decision, then on that review they could confirm, withdraw or vary that decision. Where HMRC did not respond to a review request within 45 days of receiving it, section 15(2) had the effect that they were deemed to have confirmed their decision.

40. As at 30 March 2009, the statutory provisions governing appeal rights in relation to an excise duty assessment had the effect that there could be no appeal to the tribunal unless there had been an HMRC review. The only appeal rights were those contained in section 16 FA 1994, which stated as follows:

> **16. Appeals to a tribunal**
>
> (1) Subject to the following provisions of this section, an appeal shall lie to an appeal tribunal with respect to any of the following decisions, that is to say-
>
> (a) any decision by the Commissioners on a review under section 15 above (including a deemed confirmation under section (2) of that section); and
>
> (b) any decision by the Commissioners on such review of a decision to which section 14 above applies as the Commissioners have agreed to undertake in consequence of a request made after the end of the period mentioned in section 14(3) above.
>
> (2) An appeal under this section shall not be entertained unless the appellant is the person who required the review question.

41. With effect from 1 April 2009 section 16 FA 1994 was amended, with the result that an appeal could be made against an HMRC decision to assess as well as against a review decision. The review provisions became sections 15A to 15F. A review carried out at the taxpayer's request was dealt with in section 15C. The operative appeal provisions, so far as relevant, then read as follows:

> **16. Appeals to a tribunal**
>
> (1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision [defined by section 13A to include a decision by HMRC to assess to excise duty] may be made to an appeal tribunal within the period of 30 days beginning with-
>
> (a) in a case where P is the appellant, the date of the document notifying P of the decision to which the appeal relates, or
>
> (b) if later, the end of the relevant period (within the meaning of section 15D).
>
> (1C) In a case where HMRC are required to undertake a review under section 15C-
>
> (a) an appeal may not be made until the conclusion date, and
>
> (b) an appeal is to be made within the period of 30 days beginning with the conclusion date…

42. Under the Transfer of Tribunal Functions and Revenue and Customs Appeals Order 2009 (S1 2009/56) ("the Order") the VAT and Duties Tribunals were abolished as from 1 April 2009, and replaced with this tribunal. The "commencement date" of the Order is 1 April 2009. The functions of the old tribunals were transferred under the Order. Schedule 3 of the Order is titled "Transitional and Savings Provisions", and paragraph 2 of that Schedule provides, so far as relevant, as follows (emphasis added):

> ***Former VAT and duties tribunal matters (except VAT)***
>
> 2. (1) This paragraph applies in relation to the following decisions –
>
> (a) **any relevant decision which HMRC notify before the commencement date**, unless –
>
> (i) the period to require a review of the decision has expired before that date, or
>
> (ii) a review of the decision has been required before that date …
>
> (2) On and after the commencement date, the following enactments continue to apply (subject to sub-paragraphs (3) and (4)) as they applied immediately before that date –
>
> (a) the review and appeal provisions …
>
> (3) Those enactments apply subject to Tribunal Procedure Rules.
>
> (4) Any reference to an existing tribunal is to be substituted with a reference to the tribunal.
>
> (5) Any time period which has started to run before the commencement date and has not expired will continue to apply.
>
> (6) In this paragraph –
>
> **"relevant decision" means a decision to which a review and appeal provision applies (apart from a relevant review decision);**
>
> **…**
>
> **"review and appeal provisions" means –**
>
> (a) **section 14 to 16 of the Finance Act 1994 …**

VAT

43. The VAT assessment, which was parasitic on the excise duty assessment, was expressed to be made under section 73(7B) of the Value Added Tax Act 1994 ("VATA 1994"). As at 30 March 2009, that section provided as follows:

> **73. – Failure to make returns etc.**
>
> …
>
> (7B) Where it appears to the Commissioners that goods have been removed from a warehouse or fiscal warehouse without payment of the VAT payable under section 18(4) or section 18D on that removal, they may assess to the best of their judgment the amount of VAT due from the person removing the goods or other person liable and notify it to him.

44. The detailed rules regarding appeal rights in respect of the VAT assessment differ depending on the Notification Issue i.e. whether or not the decision to assess the VAT was notified by HMRC on 30 March 2009.

45. For decisions notified prior to 1 April 2009, the timing of appeals was governed by Rule 4 of the Vale Added Tax Tribunals Rules (S1 1986/1590). The basic rule, set out in Rule 4(1), was that a notice of appeal should be served on the tribunal within 30 days of the document containing the disputed HMRC decision.

46. Section 83 VATA 1994 then provided that an appeal lay to the tribunal with respect to an assessment under section 73 (7B): section 83(p) (ii). Section 83G(6) provided that the tribunal could decide to give permission for such an appeal after the normal 30 day time limit for appealing.

47. For decisions to assess VAT notified on or after 1 April 2009, while the basic appeal right continues to arise under section 83 (now section 83(1) (p) (ii)), the timing requirements are now set out in section 83G VATA.

48. Under section 83G VATA 1994, an appeal under section 83 must be made within 30 days of the date of the document notifying the decision to which the appeal relates, subject to modification where an HMRC review is requested or made. An appeal may be made beyond the specified periods if the tribunal gives permission: section 83G (6).

The Notification Issue

49. As regards the excise duty assessment, the effect of the Order (set out at [42]) is that if the HMRC letter received by Mrs Brittain on 30 March 2009 constituted a "relevant decision which HMRC notify" before 1 April 2009, then Abbey's appeal against the excise duty assessment must be struck out unless they succeed on the Review Issue. That is because, as I have explained, in respect of decisions to charge excise duty notified before 1 April 2009, an appeal was only possible against an HMRC review, and not against the decision itself.

50. Given the significance of this issue in relation to the excise duty assessment, I will deal first with whether the decision to charge excise duty was notified before 1 April 2009.

51. It was common ground that the only fact which could prevent HMRC's letter from being such a notification was that there was an inconsistency in the documents which were sent to Mrs Brittain, and copied to Abbey, by HMRC and received on 30 March 2009. In short, the issue is whether the effect of that inconsistency was such that the documents were ineffective to notify the assessment.

52. Excise duty such as the duty in these proceedings is charged by reference to movements of goods, in this case alcohol. Such movements are identified by reference to an Accompanying Administrative Document or "AAD", which must travel with the vehicle transporting the goods if they are being transported on a "duty suspended" basis. I deal with this further below.

53. HMRC's letter to Mrs Brittain dated 27 March 2009 is headed "Re: Notice of Assessment for Excise Duty". It refers to four specified movements of alcohol during the period 17 October 2007 and the period 1 November 2007. It states that "these movements have been detailed on the attached sheet." A separate sheet accompanying the letter (headed "Schedule of Excise Duty for Abbey /

Kismat / Siemkens Loads") identifies these four movements by reference to four separate AADs, with numbers, in October 2007 and November 2007.

54. However, the "Trader's Payment Copy" of the invoice which also accompanies the letter, while correctly identifying the amounts of excise duty due, states under a column headed "Period/Default dates" the period from 01/10/2008 to 31/10/2008 and 01/11/2008 to 30/11/2008 respectively.

55. So, while the letter and schedule correctly and consistently identify the movements being charged as occurring in October and November 2007, the trader's payment copy of the assessment refers wrongly to the "period/default dates" of those movements as being October and November 2008.

56. This inconsistency, referred to by Mr Bedenham as the "ambiguity" issue, was argued by Mr Bedenham to have the effect that the documents received on 30 March 2009 were ineffective to "notify" the decision to assess excise duty. As a consequence, he argued, the proper procedure to challenge the assessment was not governed by the rules requiring a prior HMRC review which were in force before 1 April 2009.

57. This argument was first raised by Mr Bedenham at an extremely late stage when the proceedings first came before me in January 2016. Ultimately, it was necessary to adjourn the proceedings to enable each party properly to prepare its arguments and evidence on the point.

58. I will first set out the respective arguments of the parties on the issue.

59. In his skeleton argument, Mr Bedenham argued as follows:

> "The issue is, then, whether the 27 March 2009 notice was sufficient to "notify" Abbey of the assessment. If it was not, then the notification of the assessment must have occurred *after* 1 April 2009 and the new review and appeals regime will apply. Under that regime, there is no requirement for a review prior to exercising a right of appeal against an excise assessment.
>
> In *House (trading as P&J Autos) v Customs & Excise Commissioners* [1994] STC 211, May J considered what would constitute "notification" of a tax liability arising from an assessment. May J stated at 226(h):
>
> > "I do not see why a notification cannot be contained in more than one document provided that it is clear which document or documents are intended to contain the notification and that that document or those documents contain in *unambiguous and reasonably clear terms the substantial minimum requirements* to which Mr. Cordara has referred." (emphasis supplied)
>
> The 'minimum requirements' that must be stated unambiguously include 'the period of time to which [the assessment] relates' (see page 223(h)). See also *Queenspice Limited v HMRC* [2010] UK UTT 111 (TCC) at paragraph 25.
>
> On the present facts it cannot be said that the period of time to which the assessment relates was, before 1 April 2009, stated unambiguously. Specifically:
>
> a. On the notice of assessment to excise duty, the 'period/default dates' are stated as being 1/10/08 to 30/11/08;

b. Whereas a letter accompanying the notice of assessment to excise duty stated that the assessment related to movements 'during the period 17 October 2007 and 1 November 2007'…"

60. For HMRC, Mr Nathan submitted that, read together, the documents received on behalf of Abbey on 30 March 2009 made it abundantly clear that the assessment related to the movements in October and November 2007 as specified in the relevant AADs. The reference in the trader's payment copy to October and November 2008 was an obvious typographical error, and nothing more.

61. Further, Mr Nathan submitted, the relevant individuals who had considered the documents received on 30 March 2009 on behalf of Abbey had not found there to be any uncertainty or lack of clarity, at least before Mr Bedenham raised the argument before the tribunal in January 2016. The relevant degree of clarity, he submitted, must be to a person in the position of the taxpayer (in this case Mrs Brittain) with knowledge of the taxpayer's affairs. He submitted that Mrs Brittain could not have been in any doubt about the precise grounds, ambit and extent of the assessment.

62. Mr Nathan argued that the operative test is whether the assessment has been effectively communicated to the taxpayer, and in that respect minor errors do not render an assessment invalid.

63. Specifically in relation to excise duty (in contrast to VAT) the assessment of duty turns critically not on a specific calendar period but on the *movement* in respect of which an irregularity has occurred. In this case, both the letter and the AADs on the schedule make the relevant movements clear.

64. In relation to *House*, cited as authority by Mr Bedenham, Mr Nathan pointed out that it was not the first instance judgment of May J which was in point, but rather the decision on appeal in that case of the Court of Appeal. The Court of Appeal's formulation of the relevant criteria differed from that of May J in several important respects. Moreover, the decision related to VAT, not excise duty.

65. Mr Nathan sought to distinguish *Queenspice* as dealing with VAT, where the assessment period was critical, and also as failing to take account of the Court of Appeal formulation in *House*.

66. Mr Nathan submitted that I should assess the validity of the notification by what he termed "an objective - subjective test". He described that as "an objective consideration of what an informed recipient would have understood, armed with common sense and having all the same information available to him as the taxpayer in the particular case." The test should take account of the factual matrix in which the assessment was notified.

67. *House* concerned a "global" assessment for undeclared VAT for the period from 1 November 1984 to 31 January 1990. The notice of assessment did not specify the prescribed accounting periods covered by the assessment. A letter which accompanied the notice of assessment attached schedules detailing how the total VAT assessed had been calculated, but without breaking that down into the VAT assessed for each accounting period. The taxpayer appealed on the basis

that the assessment was invalid because it had not been notified to him in accordance with the Value Added Tax Act 1983, as the notice of assessment did not specify the accounting periods to which it related nor the tax due for each such period.

68. May J in the High Court rejected the taxpayer's contention. Under the relevant legislation, what the commissioners were required to "notify" to the taxpayer was "the amount of tax due". There was no statutory provision which prescribed the form of assessment or notification. There was no reason why notification could not be contained in more than one document, and if it was the relevant documents should be read together.

69. Counsel for the taxpayer argued (at page 223(h)) that:

> "… the minimum requirements of a valid notification are that it should state the name of the taxpayer, the amount of tax due, the reason for the assessment and the period of time to which it relates."

70. In a passage relied on by Mr Bedenham, May J stated as follows (at page 226(h)):

> "I do not see why a notification cannot be contained in more than one document provided that it is clear which document or documents are intended to contain the notification and that that document or those documents contain in unambiguous and reasonably clear terms the substantial minimum requirements to which Mr Cordara has referred."

71. May J's decision on the issue was upheld on appeal by the Court of Appeal: *House (trading as P&B Autos) v Customs and Excise Commissioners* [1996] STC 154. Giving judgment for the Court, Sir John Balcombe set out his reasons for upholding the decision. He stated as follows (at page 161):

> "As I have already said, neither the Act nor the regulations require any specified form of notification but, as Mr Justice Woolf said in [*International Language Centres Ltd v Customs and Excise Commissioners* [1983] STC 394], and I repeat:
>
> > "The taxpayer is entitled to be informed in reasonably clear terms of the effect of the assessment.""

72. Sir John Balcombe described how it might have taken the taxpayer "half an hour at most – one suspects, with a calculator, rather less" to establish from the various documents the total VAT due, and posited the question (at page 161):

> "That being so, is there any reason why we should not let common sense apply and say that the taxpayer was here given proper and adequate notification of the basis upon which he had been assessed?"

73. Having considered and disapproved the earlier decisions in *Bell v Customs and Excise Commissioners* [1979] VATTR 115 and *SAS Fashions Ltd v Customs and Excise Commissioners* (1992) VAT Decision 9426, the judge set out his conclusion as follows (at page 161):

> "I come back to the question which was the relevant question in this case: was the notification to the taxpayer which was contained in the Form VAT 655 in the accompanying letter and Schedules, a sufficient explanation in reasonably clear terms of the effect of this? In my judgment, it was. The learned judge was right to so hold and, for those reasons, I would dismiss this appeal."

74. *Queenspice v HMRC* [2010] UKUT 111 (TCC) was a decision of the Upper Tribunal relating to an assessment for under-declared VAT. One of the arguments raised by the taxpayer was that because the notice of assessment was stated to relate to the accounting period "00/00", it was invalid because it did not relate to a prescribed accounting period.

75. Lord Pentland rejected that argument as "untenable". He referred to the passages from May J's judgment set out at [69] and [70] above. He then went on to state as follows (at page 12):

> "24. The judgment of May J was unanimously upheld by the Court of Appeal: see [1996] STC 154.
>
> 25. In my opinion, the following points may be taken from the judgment of May J in *House*.
>
> > (i) Like its predecessor, section 73(1) of [VATA 1994] lays down no particular formalities in relation to the form, or timing, of the notification of the assessment.
> >
> > (ii) A notification pursuant to section 73(1) can legitimately be given in more than one document.
> >
> > (iii) In judging the validity of notification, the test is whether the relevant documents contain between them, in unambiguous and reasonably clear terms, a notification to the taxpayer containing (a) the taxpayer's name, (b) the amount of tax due, (c) the reason for the assessment, and (d) the period of time to which it relates.
>
> 26. The position is summarised in *De Voil Indirect Tax Service*, volume 2, page 5-109, where it is said that:
>
> > "Where tax is assessed by reference to prescribed accounting periods, the notification must contain in unambiguous and reasonably clear terms the period of the assessment. This may be ascertained from letters and schedules in addition to the formal notice where they form (part of) the notification [citing *House* as authority]. Thus, an assessment is unenforceable if no period is stated on the notice unless the relevant prescribed accounting periods are identified in a letter or schedules forming (part of) the notice so that the assessment period can be readily deduced despite the absence of a clear statement setting out the beginning and end of the period [again citing *House*]."""

76. I was also referred to the decision of the Upper Tribunal in *Romasave (Property Services) Limited v HMRC* [2015] UKUT 0254 (TCC). That case also concerned VAT assessments, with one of the issues again being whether the assessment had been notified to the taxpayer.

77. In *Romasave*, the main issue in dispute was the effectiveness of the method adopted to notify the assessment rather than the content of the assessment itself. Another issue related to the effect of an inconsistency in one of the VAT assessments which, the taxpayer argued, rendered it invalid. Judges Berner and Falk distinguished the facts from those in *House*, in that it was "not simply about adding up figures in schedules to arrive at the total said to be due": [78]. It nevertheless rejected the taxpayer's argument, stating as follows (at [78]):

> "The error in Box 5, in describing the result of the deduction of a nil amount at Box 4 from the amount of £5,666.66 due as input tax in Box 1 as "Net VAT to be reclaimed" of £5,666.66, instead of that amount being described there, as it was on page 2, as net VAT

> payable, was one that could readily be understood as a simple mistake. As was made clear in *House*, in determining whether a taxpayer has been informed of the effect of the assessment in reasonably clear terms, an element of common sense must be applied. No reasonable person, knowing the circumstances under which the notice of assessment had come to be issued, and having regard to the terms of the notice as a whole, could have failed to understand that the description of Box 5 was an error, and that the true position, as evidenced by Boxes 1, 4 and 7, the simple arithmetical calculation required in arriving at an amount to be included as payable in Box 5 and the page 2 description of the amount of £5,666.66 as being payable in respect of period 12/08 was that this was notice of an assessment in that sum. In those circumstances, agreeing with the FTT in this respect, we consider that Romasave was, at the time it was properly notified of Decision 3, given proper and adequate notification of both the effect of the assessment and of the basis upon which it had been assessed for the relevant accounting period."

78. One decision which was not referred to me but which in my opinion is relevant is the decision of the FTT in *London School of Economics and Political Science v HMRC* [2015] UKFTT 291 (TC). That case again concerned the argument that a VAT assessment was a nullity because it was stated to be for period "00/00".

79. Having referred to the decision in *House*, Judge Mosedale commented as follows (at [60]):

> "Applying common sense, it seems to us that Parliament did not intend an assessment to be unenforceable for a minor technical defect in dating which has misled no one. We take the view that Parliament intended notification of an assessment to inform a taxpayer why and for what he has been assessed."

80. In relation to the respective decisions of May J and the Court of Appeal in *House*, Judge Mosedale commented as follows:

> "67. The appellant also relies on the case of *House (t/a P&J Autos)* for the proposition that to be an assessment at all, the 'assessment' must contain at least the following information:
>
> (a) the amount of the assessment;
>
> (b) the name of the taxpayer;
>
> (c) the reasons for the assessment; and
>
> (d) the period of the assessment.
>
> 68. May J at [1994] STC 357 on appeal from the VAT Tribunal in that case appeared at page 226j to agree with Counsel's submission at page 223h that to be valid an assessment must contain the above four matters. On further appeal, the Court of Appeal at [1996] STC 154 did not specifically deal with what an assessment must comprise in order to be an assessment; it just stated that the taxpayer must be given
>
> > 'proper and adequate notification of the basis upon which he had been assessed.' (page 161h).
>
> 69. Sir John Balcombe also approved Woolf J's statement in International Language Centres [1983] STC 394 at 398 that:
>
> > "… the taxpayer is entitled to be informed in reasonably clear terms of the effect of the assessment…""

81. In emphasising the need to consider the factual context surrounding the assessment, Judge Mosedale commented (at [81]):

> "However, common sense is that a taxpayer does not look at a notification of an assessment in isolation. It must know something about its own VAT affairs, and certainly about claims for repayment which it has made. We consider that, because the combination of the years stated and the amount assessed in the documents clearly indicated that HMRC were assessing the entire amount repaid for the entire period of the claim, and as the appellant knew the periods of the claim, the prescribed accounting period could be readily deduced. And that would be enough to make the assessment valid…"

82. Having considered the authorities I have referred to, I make four observations on the relevance of those authorities to the Notification Issue.

83. First, and most importantly, the decisions relate to notification for VAT purposes, and to the necessary form of such notification under the relevant VAT legislation. In relation to notification of the excise duty assessment, the issue which I must determine is notification for excise duty purposes, under the relevant excise duty legislation. Decisions relating to VAT are, in that context, of relevance, but are not determinative. For that reason, caution must be exercised in reading across too slavishly the language used in those cases to a different tax contained in different legislation.

84. Secondly, there appears to remain some confusion as to the guidance which can properly be drawn from *House*. In particular, the status of the "minimum requirements" for the relevant VAT notification suggested by Counsel for the taxpayer in the High Court and apparently approved by May J is unclear.

85. In my opinion, the Court of Appeal in *House*, while clearly approving May J's conclusion, stopped short of endorsing his detailed exposition. I agree with Judge Mosedale's reading of the Court of Appeal's judgment in *House* in *London School of Economics*, set out at [80]. A careful reading of the Court of Appeal's decision shows that they did not set out in any detail the "minimum requirements" for notification in the manner apparently endorsed by May J. If they had intended to so do, it would have been entirely straightforward for them to have so stated. Rather, the Court of Appeal formulated and applied a more general test, to which I return below.

86. The decision in *Queenspice*, as a decision of the Upper Tribunal, is, of course, binding on me. Its facts, however, bear few similarities to those in these proceedings. The Upper Tribunal's decision in *Queenspice* accurately describes the observations of May J in *House*, including as to the minimum requirements for notification of a VAT assessment, citing as support a passage in *De Voil*. In my respectful opinion, however, the better approach is that of the Upper Tribunal in *Romasave*. As set out at [77], Judges Berner and Falk did not approach the notification question by a forensic analysis of any supposed minimum requirements, but by applying the Court of Appeal approach in *House* of determining "whether a taxpayer has been informed of the effect of the assessment in reasonably clear terms."

87. Thirdly, in my opinion the decisions relating to notification for VAT purposes support the proposition that the appropriate approach is that set out in the Court of Appeal's decision in *House*. That test, effectively building on the

formulation in *International Language Centres*, is whether or not the taxpayer has been given a sufficiently clear explanation, in reasonably clear terms, of the effect of the assessment.

88. Fourthly, the context in which that test is to be considered should take due account of the factual matrix as regards the taxpayer and his tax position, and common sense should be applied in the evaluation. In my opinion, this is a more readily understandable formulation than the "objective/subjective" test suggested by Mr Nathan.

89. I turn now to the relevant issue in these proceedings, which is the statutory provisions under which the excise duty was assessed, in order to evaluate the significance in that context of the error regarding "the period/default dates."

90. The assessment to excise duty was based, and expressed to be based, on a detected irregularity in the movement of certain specified products, namely alcohol. The irregularity was detected by the Commissioners under the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 (the "2001 Regulations").

91. The HMRC letter dated 27 March 2009 referred to section 3 (a) (i) of the 2001 Regulations. That provision applies where excise goods are subject to a duty suspected movement that started in the United Kingdom. Officer Bailey in his evidence stated that on the facts it might have been more appropriate in his opinion to refer to section 4 of the 2001 Regulations. The latter applies where the relevant excise goods fail to arrive at their destination. In either event, the choice of section in the Regulations does not go to whether or not the excise duty assessment was duly notified, and Mr Bedenham did not seek to argue that it did. If the Excise Duty appeal proceeds, then the issue might at that stage be relevant.

92. The effect of the detected irregularity in the movements of the goods was that an "excise point" arose which could be assessed on Abbey in accordance with section 7 of the 2001 Regulations. The assessment was raised under section 12 (1A) (b) FA 1994. This provided as follows:

> 12. – **Assessments to excise duty**
>
> (1A) Subject to subsection (4) below [time limits] 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.

93. There is a clear distinction in the legislation between the *power* of HMRC to assess (contained in the 2001 Regulations and section 12(1A) (6)), the *decision* by HMRC to assess, and the *notification* of that decision.

94. In this case, HMRC made a decision to assess Abbey to excise duty. That was the decision which they sought to notify by the letter and accompanying documents received on behalf of Abbey on 30 March 2009. That was a "relevant decision" within the meaning of the 2001 Regulations because it was a decision to which the review and appeal provisions contained in sections 14 to 16 FA 1994 applied: paragraph 2(6) of the 2001 Regulations.

95. In determining whether that decision was "notified" to Abbey on 30 March 2009, the question is therefore whether the documents received on 30 March 2009, when read together, informed Abbey of HMRC's decision to assess Abbey to excise duty on the specified movements of goods, because of detected irregularities in those movements.

96. It is abundantly clear, and is not disputed by Abbey, that this question would be answered in the affirmative but for the discrepancy as to the "period/default dates" in the Trader's Payment Copy of the excise duty invoice contained in those documents.

97. In my judgment, the effect of this discrepancy on whether or not the HMRC decision was notified should not be approached by considering a formulaic set of "minimum requirements". Rather, following the approach of the Court of Appeal in *House*, I consider the question to be whether or not the documents received on 30 March 2009 gave Abbey a sufficiently clear explanation, in reasonably clear terms, of the effect and basis of HMRC's decision to assess the excise duty.

98. In weighing the significance of the "period/default dates" discrepancy, it is relevant to understand the mechanics of the excise duty assessment process, and the relative importance of those dates in that process. It is also relevant to understand the purpose and significance of the trader's payment copy document.

99. The first point to note is that, as with VAT, there is no prescribed form of assessment for excise duty. If authority is needed for that proposition, it can be found in *John Cozens v HMRC* [2015] UKFTT 482 (TC), at [38].

100. In relation to a decision to assess excise duty, such as that arising in this case, in my judgment the critical elements are the identification of an excise duty point, and of the person or persons liable for any resulting excise duty. The excise duty point generally arises and is fixed by reference to a particular movement of goods.

101. In addressing whether or not a decision to assess excise duty has been adequately notified, the taxpayer must therefore be informed, in reasonably clear terms, of the relevant excise duty points, and the movements of goods which gave rise to those duty points.

102. The significance of this information is emphasised by Judge Herrington in *John Cozens*, where he draws an analogy between prescribed accounting periods for VAT purposes and excise duty points. See, in particular, the following statement (at [127]):

> "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."

103. Officer Bailey gave written and oral evidence, which was not challenged and which I accept as accurate, regarding the typical process for raising an assessment to excise duty. In relation to an irregularity in relation to duty suspended goods, as in this case, he described the normal process as follows. Once an irregularity has been detected, a letter would be prepared to the person liable, together with a schedule of the movements of goods and accompanying AADs. The duty due would be calculated, and an accounting document (called an SC01) created to reflect that liability. At the time in question in this case, that process would have typically been carried out by the assessing officer via a standard form Word template. The resulting documents would then be checked by another HMRC officer, counter-signed, and posted to the taxpayer. At the relevant time, the excise was paper-based for excise duty.

104. Officer Bailey explained that the purpose of the "trader's payment copy" of the excise duty invoice was as a record of the physical bill (the trader's remittance copy) which the taxpayer could send to the relevant HMRC accounting centre with the payment due. Its purpose in his opinion was not to describe the effect or basis of the assessment – that was done in the letter and accompanying Schedule.

105. In response to a question from Mr Bedenham as to the importance of the "period/default dates", Officer Bailey expressed the view that in relation to excise duty (as opposed to VAT), generally they were in his view not particularly important; it was the movements of goods and accompanying AAD references which comprised the critical information.

106. I turn now to the documents received on 30 March 2009. Did they give Mrs Brittain, on behalf of Abbey, a sufficiently clear explanation, in reasonably clear terms, of the *effect* and *basis* of the excise duty assessment?

107. The letter began as follows:

> "Re: Notice of Assessment for Excise Duty
>
> Following enquiries made with the Belgian authorities and the owners of Siemkens Warehouse in that country, HMRC have been advised that this warehouse has never received or traded in the products Glen Vodka and/or Teachers whisky.
>
> During the period 17th October 2007 and 1st November 2007, Abbey Forwarding Ltd guaranteed four movements to Siemkens Warehouse that were made up entirely or partly of the above products. These movements have been detailed on the attached sheet.
>
> The Commissioners have therefore detected an irregularity in the movement of these goods in accordance with the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 s3 (a) (i).
>
> The Commissioners have raised an assessment for £374,132 excise duty (see attached sheet for calculations) in accordance with Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001, s(1) and the Finance Act 1994 s12 (1A)(b).

> Please see separate letter accounting for the VAT on this consignment. The total amount of Excise duty and VAT due is £456,068."

108. Accompanying the letter was a schedule headed "Schedule of Excise Duty for Abbey/ Kismat/ Siemkens Loads". This contained information in 12 columns. For each movement of goods, the first column contained the relevant AAD number, being OCT114/7, OCT134/7, OCT181/7 and NOV006/7. The subsequent columns detailed the goods; number of cases; bottles per case; bottle size; litres; duty rate; % alcohol; duty payable; value of goods; VAT payable, and total duty plus VAT.

109. The next document, headed "Officer's Assessment/ Civil Penalty Excise Trader's payment copy" referred to the assessment of excise duty and detailed the net amount of excise duty due, namely £374,132. The document identified the duty due for each of the periods October 2007 and November 2007 in amounts which reconciled precisely with those referred to in aggregate in the letter and in detail in the Schedule. However, under the column headed "Period/ Default dates", the periods were stated as running from 01/10/2008 to 31/10/2008 and from 01/11/2008 to 30/11/2008 respectively.

110. The final document was headed "Officer's Assessment/ Civil Penalty Excise Trader's remittance copy". This explained that Abbey was required to forward the total net amount of £374,132 to HMRC, together with the remittance copy, retaining the trader's payment copy for its own records.

111. In my judgment, it is clear that these documents adequately notified Abbey of the HMRC decision to assess the relevant excise duty.

112. The letter and Schedule read together contain all the information necessary for Abbey to understand both the effect and basis of HMRC's decision to assess. The basis of that decision is clearly described in the letter, both as to the relevant statutory powers and as to the movements of goods giving rise to the liability. The detailed effect of the decision in terms of duty and VAT due could scarcely be clearer from the Schedule. The overall effect of the decisions, in terms of the net excise duty of £374,132, is clear from all four documents, including the trader's payment copy of the invoice. While the documents do not specifically detail the resultant excise duty points, they provide all the information necessary for the taxpayer to understand the excise duty points.

113. The trader's payment copy of the invoice correctly breaks down the total excise duty due between the two periods in question. However, the column headed "period/default dates" incorrectly refers to the periods October and November 2008 rather than October and November 2007.

114. In my judgment, it is clear that this single error in the four documents received on 30 March 2009 did not have the effect that the HMRC decision to assess was not then notified. I reach that conclusion for the following reasons.

115. First, as I have explained earlier, in my opinion the Court of Appeal in *House*, rather than May J's judgment, sets out the correct overall approach to establishing notification. That is not rigidly to apply a checklist of four inviolable criteria, but to ask whether in fact the taxpayer has been given a

sufficiently clear explanation, in reasonably clear terms, of the effect and basis of the HMRC decision which is being notified.

116. I find clear support for that approach in *Romasave* and *London School of Economics*. If, however, I am wrong on that point, then I would regard May J's "minimum requirements" as not properly applicable to excise duty. In relation to excise duty, as I have explained above, the closest analogue to a VAT prescribed accounting period is an excise duty point, and the excise duty points in this case can be clearly established from the documents received on 30 March 2009. The "period/default dates" are of considerably less significance in relation to a decision to assess excise duty of this type than are the movements of goods and resultant duty points, based on the proper legislative powers to assess.

117. Secondly, the authorities clearly support the proposition that in addressing the question of notification, the taxpayer should be taken to have knowledge of his overall business and tax affairs. Here, given the specified movements of alcohol, with their accompanying AAD numbers, and the information supplied in the HMRC letter, it is simply not credible that Abbey would have understood those movements to give rise to excise duty not when it would have known the movements to have occurred in November and October 2007, but a year later, because of a single error in the trader's payment copy of the invoice.

118. Thirdly, the authorities also indicate that common sense should be applied in considering whether notification has been made. Given that the movements of goods and consequential duty points were detailed so clearly in the letter and Schedule, in my judgment common sense would have indicated to Abbey that the "period/ default dates" reference in the trader's payment copy invoice was likely to be a simple error. As stated in *Romasave* (at[78]):

> "The error… was one that could readily be understood as a simple mistake. As was made clear in *House*, in determining whether a taxpayer has been informed of the effect of the assessment in reasonably clear terms, an element of common sense must be applied. No reasonable person, knowing the circumstances under which the notice of assessment had come to be issued, and having regard to the terms of the notice as a whole, could have failed to understand that the description of Box 5 was an error…"

119. Mr Bedenham referred to evidence which suggested that at least some individuals who had seen the documents received on 30 March 2009 had been confused by the discrepancy in the trader's payment copy of the invoice. Given the number of individuals likely to have seen those documents since 2009 that is perhaps unsurprising. There was, however, no evidence in my judgment that any person had been misled as to the basis or effect of the HMRC decision in question. Indeed, certain of those individuals appear to have identified the discrepancy not as misleading them as to the basis or effect of the assessment, but as giving rise to a possible technical argument on which to challenge the validity of the assessment.

120. Mr Bedenham also submitted that since the assessment was received in March 2009, it would have been reasonable and natural to assume that it related to movements in 2008, and not 2007. In my judgment, the contrary is at least equally arguable. Such an assessment received in March 2009 would, in the

normal course of events, be relatively unlikely to relate to irregularities in movements of goods occurring only a few months earlier.

121. For the reasons given, I find that in all the circumstances the HMRC decision was notified to Abbey on 30 March 2009. As a consequence, on the Notification Issue as regards the excise duty assessment I find in favour of HMRC.

122. It is not necessary for me to consider the arguments as to when adequate notification of the excise duty liability did occur if it had not occurred on 30 March 2009.

123. I turn now to whether the VAT liability was notified to Abbey on 30 March 2009. As explained above, this is of less significance in relation to VAT than to excise duty, but remains relevant to the length of delay in relation to the Late Appeal Issue.

124. As at the relevant date, the VAT assessment, which was entirely parasitic on the excise duty liability, was made under section 73 (7B) VATA 1994 as it then was. This permitted the Commissioners to "assess to the best of their judgment the amount of VAT due from the person removing the goods or other person liable and notify it to him": see [43] above.

125. The letter sent on 30 March 2009 and described above stated:

> "Please see separate letter accounting for the VAT on the consignment."

126. That separate letter was headed "Re: Notice of VAT Assessment in relation to goods removed from warehouse." It began as follows:

> "In pursuance of their powers under the VAT Act 1994 section 73 (7B), which allows the Commissioners to assess for the VAT due on goods which have been removed from warehouse. An assessment has been made for the sum of £81,936 (see attached schedule for the calculation)
>
> … You should forward the total amount of the assessment to [HMRC]. Please enclose the duplicate copy of this letter with your remittance…"

127. Critically in relation to the question of the VAT liability, the relevant documents did not refer to the document containing the discrepancy, namely the trader's payment copy of the excise duty invoice. The VAT assessed is described in the letters and the schedule, all of which are consistent.

128. The "VAT Payable" column in the schedule clearly shows the VAT as due by reference to the movements of goods with the four 2007 AAD numbers, and the total VAT figure is precisely the same in the letters and the schedule.

129. Mr Bedenham sought to argue that since the VAT charge was parasitic on the excise duty, any failure to notify the excise duty would "feed through" to the VAT assessment. That argument is fallacious. The two assessments must be considered separately for this purpose.

130. It is therefore clear that the decision to assess VAT, parasitically on the excise liability, was notified to Abbey on 30 March 2009.

The Review Issue

131. Since HMRC's decision to assess the excise duty was notified on 30 March 2009, it fell within paragraph 2 of Schedule 3 of the Order, as a "relevant decision which HMRC notify before the commencement date": see [42] above. As a consequence, Abbey could appeal in respect of that decision only by appealing against an HMRC review of the decision. If there was not HMRC review, then HMRC would necessarily succeed in its application to strike out Abbey's appeal against the excise duty assessment because this tribunal would have no jurisdiction to hear such an appeal.

132. Abbey submit that there was an HMRC review, by virtue of the HMRC letter of 7 August 2013 ("the 7 August Letter"). As a result, Abbey argues, an appeal to the tribunal lies under section 16(1) (b) FA 1994 as it was then in force, because the Commissioners agreed to undertake a late review and reached a decision on that review.

133. A finding in favour of Abbey on the Review Issue would mean that the Late Appeal Issue would no longer be relevant, since Abbey's appeal was filed within 30 days of the 7 August Letter. Although a finding in favour of HMRC on the Review Issue would mean that Abbey's excuse duty appeal would be struck out for lack of jurisdiction, the VAT appeal could still proceed if I found for Abbey on the Late Appeal Issue.

134. Mr Bedenham submits that in the 7 August Letter HMRC reached a review decision as regards its decision to charge excise duty. His argument is based solely on the final paragraph of that letter, which stated as follows:

> "I have looked at the assessment and the underlying evidence in great detail and I am wholly satisfied that the assessment is sound. Although I am under no obligation to consider the underlying merits of any challenge to the assessment, I would look at any evidence you possess as part of the reconsideration process and not as part of a statutory review. It has been suggested several times to the Commissioners that there is evidence to consider (and you make reference to it in your letter) but nothing has been provided."

135. Mr Bedenham's skeleton argument sets out Abbey's case as follows:

> "The issue in dispute is, then, whether by looking at the underlying evidence and satisfying himself of the soundness of the assessments and notifying the same to Abbey by the 7 August 2013 letter, Officer Bailey conducted a review.
>
> It is Abbey's case that in confirming that he was 'wholly satisfied that the assessment is sound', Officer Bailey may have had reference back to the review of the evidence that he undertook in 2012 and 2013. Nonetheless, the act of confirming the assessments are 'sound' (even if based on a review of evidence undertaken sometime earlier) constitutes a review for Finance Act and VATA purposes. HMRC dispute this and say that a statutory review has to be undertaken by a 'review team' and, further, HMRC did not intend to conduct a review that would give rise to a right of appeal. Dealing with those matters in turn:
>
> (a) Nowhere in the Finance Act, VATA or the Commissioners for Revenue and Customs Act 2005 is provision or requirement made for a separate 'review' team. Officer Bailey is empowered to act on behalf of the Commissioners. In conducting his review to see whether the assessment ought to be upheld, he was conducting a review (whether he intended it or not) within the meaning of the Finance Act 1994 and VATA.

(b) Whether or not a statutory review has been conducted is a matter for objective determination (see by analogy *Portland Gas Storage v HMRC* [2014] UKUT 0270 (TCC)). If HMRC has already conducted a review it cannot deprive the taxpayer of the benefit of that review merely by saying 'but we did not intend to conduct a review'."

136. For HMRC, Mr Nathan submitted that it was quite clear that the 7 August Letter was a refusal of a request for a late review, and nothing more. Since Abbey's right to request a review of the decision notified on 30 March 2009 had expired long ago, it needed to undertake a two-stage process by 2013 – first to obtain a time extension from HMRC, and second to seek a review if that time extension was granted.

137. Further, Mr Nathan submitted, a HMRC review is a process which involves the review being undertaken by an HMRC officer who is independent from the maker of the decision being reviewed. That is a necessary safeguard in order to protect the integrity of the process for the protection of the taxpayer. Officer Bailey, who wrote and signed the 7 August Letter, stood in the shoes of the original decision maker, and as a result did not have authority to conduct such a review. His authority and his task were confined to considering whether or not a time extension should be granted.

138. Officer Bailey's written and oral evidence, which I accept as reliable, showed that from his perspective he was concerned solely with making the decision regarding an extension of time. Indeed, Officer Bailey completed comprehensive internal documentation for HMRC at the time of the 7 August Letter, which explained each stage of that decision-making process.

139. Mr Nathan also pointed out that the conclusion that the 7 August Letter dealt solely with refusal of a late review was clearly understood in correspondence between FRP and HMRC subsequent to the letter, and in the notice of appeal sent to the tribunal. Further, in applying for hardship relief, to enable the appeal to proceed without payment of the disputed tax, Abbey's application proceeded on the basis that the 7 August Letter was a refusal of a late review. Abbey was therefore estopped from arguing now that in fact it constituted a review.

140. The concept of offering the taxpayer the option of an internal review as an alternative to, or in advance of, an appeal to the tribunal was introduced in its current form by the Tribunals, Courts and Enforcement Act 2007. The relevant provisions largely came into force in April 2009. When the Order was published in draft form, HMRC and the Ministry of Justice published a joint Explanatory Memorandum in relation to the Order. Paragraph 7.2.5 of that Memorandum explained the intention of the review process, as follows:

> "The adoption of a common policy on review across HMRC's tax business is intended to provide clearer safeguards for taxpayers who dispute HMRC decisions and to help ensure the tribunal is not burdened by cases which could have been resolved by review. Important benefits include:
>
> - Making HMRC action in reviewing decisions more transparent for taxpayers;
>
> - Helping ensure quality and consistency in HMRC decision making;

- Helping ensure that as many disputes as possible are resolved informally, without the expense or anxiety of a hearing;

- Helping achieve the HMRC aspiration to improve communication and to be more open in its dealings with taxpayers."

141. HMRC has established internal processes and protocols for the review process. Officer Bailey gave evidence as to those processes and protocols, which was consistent with the public guidance available in HMRC's "Appeals reviews and tribunals guidance" manual. The "decision maker" is the HMRC individual who makes the decision which is subject to review and appeal. The review is to be performed not by the decision maker but by a "review team", in which a "review officer" conducts a review of the relevant decision.

142. Although the broad intention of the legislation dealing with reviews is reasonably clear, and although HMRC has well-established internal processes governing such reviews, the relevant legislation contains no definition of "review" or "statutory review".

143. Although Section 49A onwards of the Taxes Management Act 1970 does set out certain procedural requirements in relation to a review process, it falls short of defining when a review has or has not taken place. Nor does there appear to be any direct case law authority on these issues, other than the numerous decisions on whether an HRMC review could reasonably have been arrived at, where the statute provides that that question is within the remit of the tribunal.

144. Given the absence of any statutory or common law definitions, or specific guidance, in my judgment the Review Issue falls to be determined by looking at all the facts and circumstances, with the greatest weight being given to the 7 August Letter, as the basis of Abbey's submission, and the letter of 25 June 2013 from FRP to which it responded.

145. The starting point is the FRP letter of 25 June 2013, since that sets out what it was that Abbey was seeking from HMRC, and why it was seeking it. The relevant passages from that letter are set out at [23] above. The letter begins by describing the background to the excise duty and VAT assessments, and sets out FRP's understanding of the statutory procedure to appeal as follows:

> "On the date that the assessment was raised, the regulations governing any challenge to the same were contained in the Finance Act 1994 and I understand that before any appeal against the assessments could be lodged, the company through its liquidator (since Abbey Forwarding Limited was in compulsory liquidation some 8 days before the assessment was issued) had to request a formal departmental Review of the decision to raise the assessments pursuant to the Regulation 14(2) of the Finance Act 1994".

146. The letter then continues by explaining why such a review has not been sought within the normal time limits, and seeks a late review, as follows:

> "Ms Brittain did not, I understand, request a Departmental Review of the assessment, indeed it was not mentioned as a debt owed by the company in any communications to creditors until November 2011. The right to appeal the assessments was then erroneously assigned to the directors by the current liquidator following his appointment in the belief that the assessment could be appealed by them.

> Following legal advice the directors have withdrawn their appeals and Jeremy French wishes to request a late review of the assessments on the following grounds…"

147. It is absolutely clear that the FRP letter is seeking permission from HMRC for a late review. It is not requesting a review itself, and at no stage does it indicate that it is doing anything other than explaining why a review was not made in time or earlier, and arguing the case for a review out of time.

148. Turning to the 7 August Letter, Abbey's submission that this constituted a review of the decision to assess excise duty and VAT rests entirely on the final paragraph of the letter, set out at [134] above. But before I consider that final paragraph, it is necessary to look at the remainder of the letter, and the other ten paragraphs contained in it, so that the letter is considered as a whole, and the final paragraph can be viewed in context.

149. The 7 August Letter is set out at [24] and [25] above. Save for the final paragraph, it could scarcely be clearer that it is dealing solely with whether or not a review will be permitted out of time. The opening sentence refers to "your letter dated 25th June 2013, in which you request that the Commissioners consider whether to allow an out of time review…" It refers twice to published HMRC guidance ARTG4300. This guidance deals solely with taxpayer requests for a review after the statutory time limit for such a request, which as at 30 March 2009 was 45 days from the date of the decision letter. It states that in line with the published guidance "it falls to the Decision Maker to decide if a request for an out of time review should be allowed". Officer Bailey explains that the role of decision maker has passed to him, "and it falls to me to consider your request". It refers to the grounds suggested by FRP "as to why the request for an out of time review should be allowed." It draws a sharp distinction between allowing an out of time review and a substantive review when it states that:

> "I have reviewed the grounds and consider that only the first ground is directly relevant to the matter of whether an out of time review should be allowed. The other grounds are, in my view, only relevant to the validity of the assessment and the evidence that supports it."

150. The letter continues by setting out the criteria for allowing an out of time review, and states that "I do not consider that you have a reasonable excuse for not requesting a review within the statutory time limit…" It deals with the reasons for continuing delay in seeking a review, and refers again to seeking a review out of time.

151. The conclusion of the 7 August Letter is that an out of time review will not be allowed, because in Officer Bailey's view, Abbey had not shown a "reasonable excuse" for failing to request a review in time, and in any event had added to the delay unreasonably and without excuse.

152. This is the context in which I must decide whether the final paragraph of that letter nevertheless constitutes a review of the HMRC decisions to assess excise duty and VAT. Given that context, and the explicit refusal to grant an out of time review, it would require the clearest possible statement in that final paragraph of a review nonetheless being undertaken, and a decision on that review given, to counter the overwhelming weight of the language and

conclusions of the letter to the contrary. Indeed, a decision by HMRC nonetheless to review those decisions to assess would render the preceding two pages of close analysis and reasoning entirely redundant. What would be the point in considering and refusing a request for an out of time review if one immediately proceeded to carry out a review regardless? Further, the explanation by Officer Bailey of his restricted role as "decision maker" would become meaningless. Indeed, none of the points set out at [149] to [151] above would serve any purpose if notwithstanding the refusal of a late review the letter then proceeded to carry out a review.

153. Turning to the final paragraph of the 7 August Letter, it is in my judgment beyond doubt that it does not bear the meaning submitted by Mr Bedenham. The first sentence of the paragraph does state that Officer Bailey has looked at the assessment and underlying evidence in great detail and is wholly satisfied that the evidence is sound. But the second sentence makes it perfectly clear that this not a "review", in stating as follows:

> "Although I am under no obligation to consider the underlying merits of any challenge to the assessment, I would look at any evidence you possess as part of the reconsideration process and not as part of a statutory review".

154. Looked at in the context of the letter as a whole, and indeed in the context of the final paragraph as a whole, in my judgment it is clear that the first sentence of the final paragraph did not amount to a "review" decision by HMRC. I accept in principle Mr Bedenham's arguments that the existence of a "review" is a matter for objective determination, and does not necessarily require HMRC to sate explicitly that they are performing a review. It is also the case, as I have explained, that there is no statutory definition of a "review" for this purpose. But it does not follow that any reference to consideration by HMRC of the soundness of an assessment means that a review must thereby have taken place, particularly where there is no discussion or explanation of the supposed review decision and the person making the statement has made it plain that they are not permitting a late review.

155. Officer Bailey explained in his evidence, and I accept, that "reconsideration" describes the informal process by which the original decision-maker may revisit his decision if presented with material fresh information from the taxpayer which shows that the decision was wrong. That is quite separate from any statutory review process, which is to be carried out by someone other than the decision-maker, and the distinction is made clear in the second sentence of the final paragraph of the 7 August Letter.

156. The distinction was clarified by Officer Bailey in an exchange of emails immediately following the 7 August Letter. Mr Herbert of FRP emailed Officer Bailey on 7 August as follows:

> "I am in receipt of your [letter] and note the refusal of a late review request and the reasons cited for the same.
>
> I would be grateful if you could let me know:-
>
> 1. why the review request was dealt with by you, given your previous involvement in this matter and not dealt with by the independent appeals review team at

Portcullis House as the letter that accompanies pre 01 April 2009 assessments suggests?

2. whether the "reconsideration process" you refer to in your letter is the accepted/ normal next stage in this process, or whether an appeal to the tribunal against the refusal to review should be sought by the liquidator?"

157. Officer Bailey replied as follows:

> "The request was considered by me as required by HMRC guidance having taken over the Decision Maker role from Officer Lawler. The offer made in Officer Lawler's letter [received on 30 March 2009] is that of a review. Such a review could be conducted by the Appeals & Review Team. The request made by the Liquidator was for the Commissioners to consider a request for an out of time review. The decision to allow a review out of time to be conducted falls to the Decision Maker and not the Appeals & Review Team.
>
> There is a mechanism where the Decision Maker can re-consider their decision if there is evidence which was not put before them when the decision was made. The Commissioners have been advised on a number of occasions that there is evidence that they should consider. Indeed, you refer to it in your letter. Despite this, that evidence has not been provided to the Commissioners. I am inviting you to provide the evidence you say you have so that I might consider it.
>
> Under the rules in force prior to 1st April 2009, the Liquidator has no further recourse to the Tribunal in relation to this matter."

158. Both the appeal filed by FRP on behalf of Abbey and their application for hardship relief referred, and only referred, to the refusal of an out of time review. They contain no suggestion that, as Mr Bedenham contends, a review has in fact taken place. The relevant email to the Tribunal from FRP of 5 September 2013 read as follows:

> "I attach a copy of a request sent to HMRC for an out of time review of Duty and VAT assessments raised on the above company whilst in liquidation, and the reply received from the reviewing officer at HMRC dated 07 August 2013 refusing that request.
>
> In the circumstances the company's liquidator Jeremy French wishes to lodge an appeal against the assessments pursuant to section 16(1)(a) of the Finance Act 1994, on the grounds contained in the original request for an out of time review to HMRC above.
>
> The company, as previously stated, was the subject of a compulsory liquidation order prior to the date of the assessments and was/ is not therefore able to provide security for the amounts assessed and would therefore seek an appeal to be heard via a hardship application, since the estate is without funds."

159. I have no doubt in concluding that the 7 August Letter was nothing more than a refusal of a late review, with the final paragraph containing a reminder to Abbey that it had at that date failed to produce the alleged evidence that the assessments were wrongly made. The initial request from FRP, the subsequent correspondence, the appeal and the hardship application are all consistent with this.

160. This conclusion applies both as regards excise duty and VAT. There is no principled basis on which the two can be distinguished for this purpose.

161. I therefore find for HMRC on the Review Issue. The excise duty appeal is therefore to be struck out since this tribunal has no jurisdiction to hear it.

The Late Appeal Issue

162. For the reasons already given, the VAT appeal could in principle proceed if I gave permission for a late appeal even though I have found in favour of HMRC on both the Notification Issue and the Review Issue. For that reason, and in case this decision is the subject of an appeal as regards the Notification Issue, I will now consider the Late Appeal Issue.

163. For VAT decisions notified prior to 1 April 2009, such as the VAT assessment in this case, section 83G(6) of VATA 1994 as it then was provided that an appeal could be made after the normal 30 day time period "if the tribunal gives permission to do so."

164. While the legislation does not give any guidance as to the exercise by the tribunal of this power, the law in relation to late appeals is well understood. My decision is a balancing exercise. In reaching a conclusion I am guided by the overriding objective of the Tribunal Rules to deal with cases "fairly and justly", including "avoiding delay".

165. My starting point is the approach set out by Morgan J in *Data Select Ltd v HMRC* [2012] UKUT 187 (TCC), at [34]:

> "Applications for extensions of time limits of various kinds are commonplace and the approach to be adopted is well established. As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions: (1) what is the purpose of the time limit? (2) how long was the delay? (3) is there a good explanation for the delay? (4) what will be consequences for the parties of an extension of time? and (5) what will be the consequences for the parties of a refusal to extend time? The court or tribunal then makes its decision in the light of the answers to those questions."

166. In *Romasave* Judges Berner and Falk approved this approach and also referred to helpful guidance from the Court of Appeal in *Denton v T H White Ltd* [2014] EWCA Civ 906 at [24]:

> "We consider that the guidance given at paras 40 and 41 of [*Mitchell v News Group Newspapers Limited* [2014] 1 WLR 795] remains substantially sound. However, in view of the way in which it has been interpreted, we propose to restate the approach that should be applied in a little more detail. A Judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the "failure to comply with any rule, practice, direction or Court Order" which engages Rule 3.9(1) [of the Civil Procedure Rules]. If the breach is neither serious nor significant, the Court if unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate "all the circumstances of the case so as to enable [the Court] to deal justly with the application…" "

167. In relation to Morgan J's approach in *Data Select*, I also take into account the comments of the Senior President of Tribunals in *BPP Holdings v HMRC* [2016] EWCA Civ 121. He stated (at [37] and [38]):

> "There is nothing in the wording of the relevant rules that justifies either a different or particular approach in the tax tribunals of FtT and the UT to compliance or the efficient conduct of litigation at a proportionate cost. To put it plainly, there is nothing in the wording of the overriding objective of the tax tribunal rules that is inconsistent with the general legal policy described in *Mitchell* and *Denton*. As to that policy, I can detect no justification for a more relaxed approach to compliance with rules and directions in the

> tribunals and while I might commend the Civil Procedure Rules Committee for setting out the policy in such clear terms, it need hardly be said that the terms of the overriding objective in the tribunal rules likewise incorporate proportionality, cost and timeliness. It should not need to be said that a tribunal's orders, rules and practice directions are to be complied with in like manner to a court's. If it needs to be said, I have now said it.
>
> A more relaxed approach to compliance in tribunals would run the risk that non-compliance with all orders including final orders would have to be tolerated on some rational basis. That is the wrong starting point. The correct starting point is compliance unless there is a good reason to the contrary which should, where possible, be put in advance to the tribunal. The interests of justice are not just in terms of the effect on the parties in a particular case but also the impact of the non-compliance on the wider system including the time expended by the tribunal in getting HMRC to comply with a procedural obligation. Flexibility of process does not mean a shoddy attitude to delay or compliance by any party".

168. Whilst *BPP*, *Mitchell* and *Denton* all concerned court or tribunal rules rather than statutory time limits for an appeal, in my judgment the stricter approach to compliance approved in *BPP* applies in a similar fashion to statutory time limits when conducting the necessary balancing exercise.

169. In terms of the approach to this balancing exercise, I could either ask the five questions set out in *Data Select* (more accurately the four questions since (4) and (5) are really the same question) or take the three-stage approach in *Denton*. Ultimately, either should support the same approach and analysis, and either should take account of the guidance in *BPP*. In this case, particularly given the extensive submissions by Mr Bedenham regarding the relevance of the background to the proceedings, I should clearly take into account "all the circumstances of the case". I have also considered what weight should be given to the merits of Abbey's appeal. I have therefore concurrently applied the *Data Select* and *Denton* approaches, taking due account of *BPP*.

Purpose of the time limit

170. The relevant time limits in this case were 45 days to seek a statutory review and 30 days to seek a VAT appeal. The general purpose of such statutory time limits was described by Judge Bishopp in *Leeds City Council v HMRC* [2014] UKUT 350. He stated (at [24]) that the purpose of the time limit:

> "… is to require a party asserting a right to do so promptly and to afford his opponent the assurance that, after the time limit has expired, no claim will be made."

171. I respectfully agree with the fuller comments made by this Tribunal on the purpose of the time limits in *Olusegun Odunlami v HMRC* [2015] UKFTT 668, at [41] to [42], as follows:

> **"What is the purpose of the time limit?**
>
> 41. It seems to us that the time limit of 30 days for a taxpayer to make an appeal is to provide taxpayers, as those liable to tax, and HMRC, as the enforcer of the payment of taxes, with certainty as to the "cut-off" point when the amount of tax or penalties asserted by HMRC to be due as regards a particular matter or period becomes certain and final. In specifying a period of 30 days Parliament has set down what it regards as sufficient time for a taxpayer to consider whether he wishes to dispute a tax assessment or penalty determination and if so to make an appeal. The taxpayer is required to act

> promptly if he wishes to make an appeal thereby providing efficiency in the conduct of the dispute (should there be an appeal) or finality (should there be no appeal).
>
> 42. On that basis we would not regard it as a matter of routine for a tribunal to allow an appeal to be made outside of the normal time limits. The starting point must be that the 30 day limit should usually be adhered to. Otherwise the purpose of the provision of the time limit would be undermined. There would be little incentive for taxpayers to comply with the time limit and the lack of certainty and finality would potentially cause difficulties with the conduct of resulting disputes and burdensome administrative and enforcement issues for HMRC. Therefore, the tribunal can permit a late appeal only, as set out in *Data Select*, if it is satisfied that on balancing all relevant factors (the length of the delay, the reason for the delay and the effects on the parties of granting or not granting the application for the late appeal), it would be unjust and unfair not to do so."

172. Particularly following *BPP*, the purpose of the time limit must be weighed carefully, not only as between the parties, but also in the wider context of the efficient running of the tribunal system.

How long was the delay?

173. The appeal in this case was lodged on 5 September 2013. The delay following notification on 30 March 2009 was therefore around 4 years and 6 months.

174. In considering the length of delay, I have weighed up what the Court of Appeal in *Denton* described as the seriousness and significance of the failure to comply.

175. In *Romasave*, Judges Berner and Falk stated (at [96]) as follows:

> "In the context of an appeal right which must be exercised within thirty days from the date of the document notifying the decision, a delay of more than three months cannot be described as anything but serious and significant. We note, although judgment was given only after we heard this appeal, that in *Secretary of State for the Home Department v SS (Congo)* and others [2015] EWCA Civ 387 the Court of Appeal, at [105], has similarly described exceeding a time limit of twenty eight days for applying to that Court for permission to appeal by twenty four days as significant, and a delay of more than three months as serious."

176. It is therefore in my judgment the case that the delay in this case is highly significant and very serious indeed.

Reasons for the delay

177. In considering the reasons for the delay, the context is that during the entire period of the delay Abbey was in liquidation.

178. On 4 February 2009 HMRC made an *ex parte* application to the High Court to appoint a provisional liquidator to Abbey. Mrs Brittain of Deloitte was appointed and commenced misfeasance claims against the Abbey directors. Those claims and the consequential £6.5 million of excise duty and VAT assessments related to duty suspended alcohol: see further [9] to [14] above.

179. The excise duty and VAT assessments in this case also relate to duty suspended alcohol, but to different movements to those which were the subject of the £6.5 million assessments.

180. Mrs Brittain was replaced as liquidator by Mr French of FRP in August 2012.

181. In relation to the delay in appealing, it is therefore the case that approximately three and a half years of the delay occurred during Mrs Brittain's appointment, and a year during that of Mr French.

182. The reasons submitted by Mr Bedenham for the delay are wholly different as regards the delays during the respective appointments. I will therefore begin by considering those periods separately.

183. Dealing first with the delay during Mrs Brittain's appointment, it is Abbey's position that Mrs Brittain was in effect looking after the interests of HMRC in priority to those of Abbey, making it unlikely and unsurprising that she did not appeal the assessments in this case. Mr Bedenham's skeleton argument put the position as follows:

> " Louise Brittain's reasons for not appealing will be explored with her during her evidence. Of particular interest will be the extent to which her relationship with HMRC or representations made by HMRC influenced matters.
>
> In any event (whether or not Ms Brittain's relationship with HMRC or representations made by HMRC influenced her), Ms Brittain was a liquidator appointed on the application of HMRC and who, on the basis of fatally flawed evidence provided by HMRC, believed Abbey to be at the heart of a major excise diversion. It is small wonder then that she did not appeal; such an appeal would have been directly contrary to the case that she, with the assistance of HMRC, was advancing in the High Court (i.e. that Abbey, through its directors, has knowingly engaged in excise diversion fraud)."

184. In response HMRC submit that Abbey's argument regarding Mrs Brittain's decision not to appeal the assessments was fundamentally misconceived. Mr Nathan's skeleton argument summarised HMRC's submission as follows:

> " As set out [in] HMRC's strike-out application, it is important for the Tribunal to keep well in mind that the Appellant in this case is Abbey, not Abbey's liquidator. When a company is functioning normally, decisions as to its actions are taken by (usually) the board of directors. But a decision made by the board is that company's decision: even if there is a change of the board, and the new board take a different view, the company's decision has been made. If there are consequences which follow, the company cannot escape them by relying on the change of personnel.
>
> In the same way, the liquidator of a company in compulsory liquidation is the "organ" of the company which makes decisions for it: those decisions are the company's decisions. So, when Mrs Brittain positively decided not to appeal these assessments, that was the company's decision. She states in her witness statement opposing the directors' application to remove her as liquidator… that she initially overlooked the assessments. She states that after Lewison J's judgment, **she decided not to pursue appeals against these assessments**. At an interview with Mr French (the present liquidator) in February 2014, she further stated and confirmed that she had decided not to apply for a review of these assessments. These decisions were Abbey's decisions, not those of a third party.
>
> Abbey appears to be seeking to say that the "relationship" between Mrs Brittain and HMRC will be material. However, in that same witness statement, Mrs Brittain makes it very clear that she had no relationship of a kind which would compromise her position as an officer of the court and liquidator of the company. Mr Makonnen (then with his previous employers, Bark & Co, who acted for the former directors) and the former directors themselves subjected Mrs Brittain to strong criticism along these lines, all of which she denies, and deals with in her witness statement. The proposition that HMRC "appointed" her is simply wrong; she was appointed Provisional Liquidator by the court, and Liquidator by the Secretary of State, in place of the Official Receiver (a common course where there has been a provisional liquidation). While HMRC was the largest

> creditor in the liquidation, it was entirely conventional for Mrs Brittain to work with it, but there is nothing unusual about the provision of documents or witness evidence, or indeed funding, by a creditor.
>
> There is no adequate or justifiable explanation for the delay during the 3 and a half years that Mrs Brittain remained in office because it was in fact the result of a decision by Abbey."

185. Mrs Brittain gave evidence before me, appearing pursuant to a witness summons. I found her to be a reliable and co-operative witness. She was asked in cross-examination why she had not appealed the assessments in this appeal. Mrs Brittain's response was that initially the assessments were simply overlooked, with the focus of the liquidator's work relating to the £6.5 million claims. She stated that by late March 2009 her team were trying to get to grips with "hundreds of boxes" of files and records.

186. Mrs Brittain recalled that the correspondence of 30 March 2009 was filed, with a copy to the liquidator's solicitors (Moon Beever) as an "other creditor" claim. No consideration was given at that stage to whether or not to appeal the assessments, particularly, said Mrs Brittain, since the amounts were small relative to the £6.5 million.

187. The assessments continued to be overlooked, or largely overlooked, Mrs Brittain recalled, until they were identified as relevant to the creditors' meeting called by the former directors for November 2011. They were not the subject of a review request or appeal thereafter for three reasons in her view. First, and most importantly, there were liquidator's fees outstanding, and no funds to pursue any review or appeal. Second, it was Mrs Brittain's understanding that the former directors of Abbey wished to conduct the appeal themselves. Finally, once the former directors brought proceedings seeking her removal as liquidator, she regarded it as part of the job of the replacement liquidator to decide how to respond to the assessments.

188. Mrs Brittain firmly denied that her actions as liquidator in failing to appeal were in any way influenced by HMRC or any "relationship" with HMRC, other than as the largest creditor.

189. The relevant issue in these proceedings is solely to understand and evaluate Mrs Brittain's reasons for failing to appeal the assessments in this appeal.

190. In relation to the delay in making any such appeal which took place during Mrs Brittain's period of office as liquidator, I find as a fact that her substantive reasons for failing to appeal were as set out at [185] to [187].

191. None of those reasons is a valid or good reason for failing to apply within the statutory time limit for the purposes of the approaches in *Data Select* and *Denton*. A timely appeal was not, for example, prevented by some event or occurrence outside Abbey's control. Rather, Abbey, through its liquidator, failed to appeal for an initial lengthy period because the assessments were either overlooked or afforded a low priority, and for a further lengthy period because of the absence of funds, the desire of the former directors to conduct the appeal, and the attempt to remove Mrs Brittain as liquidator.

192. To state the obvious, the fact that there were reasons for the delay is not the same as there being a good explanation or reasonable excuse for the purposes of a breach of the statutory time limit, particularly a breach as serious as this one.

193. Mrs Brittain was not a third party, such as an adviser, for the purpose of considering the reasons for the delay. She was the liquidator of Abbey. As such, she took over the (vast majority of) the powers of the directors, and became the organ of the company. In the tax context, section 108(3)(a) of the Taxes Management Act 1970 makes it clear that a liquidator is the "proper officer" of the company, with (broadly) power to do anything to be done by the company under the Taxes Acts (section 108(1)). This means that Mrs Brittain's failure to appeal the assessments for some three and a half years was Abbey's failure.

194. I turn now to the delay during Mr French's period of office as liquidator.

195. Here, Abbey's argument was essentially that the delay on the part of Mr French was reasonable because he did not receive all the relevant documentation promptly and in any event needed time to evaluate what he did receive. Mr Bedenham's skeleton argument states as follows:

> "As to the period following Mr French's appointment: Mr French did not receive *any* papers from Ms Brittain until October 2012. He was then "drip fed" material by the former liquidator. The material provided was voluminous. Mr French was entitled, indeed duty bound, to consider the company's affairs in the round before making decisions as to whether to commence tribunal appeals. Mr French asked for a review in June 2013. It was perfectly reasonable for him to take 7 months to review Abbey's position not least because of the complicated and rather unusual background. Further, Mr French had understood that the assessments could be and were being appealed by the former directors."

196. For HMRC, Mr Nathan's skeleton argument submitted as follows:

> "After Mr French's appointment, there was a further extensive period of delay. These assessments were known about before Mr French's appointment, and the relevant documents… were all in the court papers on the removal application in 2012 and were documents to which Mr French would have had immediate access. There has been no suggestion in any of Abbey's evidence that anything more was required and this appeal has been mounted on the footing of the self-same material as was available to Mr French at the end of August 2012, when he was appointed.
>
> Moreover, he must have been aware of these assessments from the start, not just because of the fact that they were drawn to his attention in the evidence on the removal proceedings which resulted in his appointment, but also because (as he states in his Amended Witness Statement even though it lacks proper detail), he was approached shortly after his appointment by the former directors of Abbey with specific regard to appealing these assessments.
>
> The delays by Mrs Brittain in providing other documents to Mr French are completely irrelevant to any explanation of Mr French's delay, since Mr French (along with the former directors of Abbey) had a full set of the documents which might be needed to make a decision about an application to HMRC for an out-of-time review, or to the Tribunal for permission to appeal out of time…
>
> During this lengthy period of almost a year, Mr French in fact wasted a substantial period of time trying to arrange to assign the right to bring these appeals to the former directors of the company, who then sought to appeal the assessments themselves… Such attempted assignment was completely ineffective (as HMRC pointed out) and the purported notices of appeal had to be withdrawn… This time-consuming and ultimately

> wholly abortive process is in no sense the responsibility of HMRC and neither is it any justification or excuse for the delay."

197. Mr French appeared as a witness and was cross-examined, and I also had the opportunity to question him. I found him to be a reliable witness, but somewhat evasive in relation to his own conduct regarding the delay issue. When asked which directors had raised and when taking over conduct of the appeals, he stated that he did not know. When asked whether he took steps to find out why Mrs Brittain has not appealed or sought a review of the assessments in this appeal, his response was that "the job I was taking on was the misfeasance". When asked whether the absence of any appeal or review was evident when he took over as liquidator he replied "I suppose so."

198. Mr French acknowledged that during the initial 6 to 8 weeks of his appointment he "did not focus" on the assessments in this appeal. He did not directly ask Mrs Brittain why she had not appealed them "until about February 2014". He described the procedure of assigning the appeals to the former directors as a " holding procedure" while the situation was reviewed by FRP, but accepted that the purported assignment was "a total cul de sac."

199. Considered separately from the delay during Mrs Brittain's appointment, none of the reasons put forward for Mr French's continuing delay were good explanations or reasonable excuses for that further delay of almost a year.

200. While I find that it did indeed take some considerable time for FRP to receive many of the papers relevant to the liquidation, that is not the issue. Mr Nathan is in my judgment correct in his assertion that there was sufficient information available to FRP from the papers filed with the court in the attempt to remove Mrs Brittain as liquidator to form a reasoned decision whether or not to appeal the assessments. Further, any delay attributable to the failed attempt to assign the appeals to the former directors is not a good explanation for the further delay.

201. The submission that the delay was somehow reasonable because it took Mr French several months to evaluate the documents and possible course of action is again a reason for delay but not a good explanation or reasonable excuse. The statutory time limit, as discussed earlier, is set at 30 or 45 days to encourage prompt action.

Consequences for the parties of an extension of time or a refusal to extend time

202. I turn now to the consequences for the parties of a decision to permit or refuse a late appeal. In this context, I will consider the extent to which the merits of the appeal fall to be taken into account.

203. An extension of time would permit Abbey to pursue its appeal against the VAT assessment (and against the excise duty assessment if there were to be a successful appeal by Abbey in respect of the Notification Issue). Such an appeal would of course require funding, and Abbey is in liquidation, but the amount is not trivial, and it is not possible to predict with accuracy the impact of a successful appeal on remaining creditors.

204. For HMRC, an extension of time to permit the appeal would, in Mr Nathan's submission, "raise real difficulties for HMRC through retirements and the staleness of the evidence". I am persuaded that this is likely to be a real concern, particularly since several of the arguments raised by Abbey in relation to the validity of the assessments relate to facts and events which took place in 2007.

205. Indeed, in relation to the merits of the appeal, Mr Bedenham stated as follows in his skeleton argument:

> "If the appeals are allowed to proceed then Abbey will seek disclosure from HMRC (and potentially Belgian customs) of all relevant material… Abbey will also conduct its own detailed investigations overseas (both in Belgium and with the hauliers). It was such disclosure requests and investigations that led to HMRC's evidence in the misfeasance claims being revealed as fatally flawed."

206. I have carefully considered the extent to which the merits of the appeal should be taken into account. I heard a considerable amount of evidence in relation to the disputed facts surrounding the movements of alcohol which formed the basis of the assessments, including from Mr Lundy and Mr Breadon, who drove vehicles involved in those movements.

207. Mr Bedenham raised several points in support of the merits of the appeal. These included technical and factual arguments such as whether the UK or Belgium was the proper jurisdiction to collect the tax.

208. In carrying out the balancing exercise, I do not regard it as appropriate to carry out what has been termed a "mini-trial" of the merits. I am guided by the comments of More-Blick LJ in the Court of Appeal decision in *R (Dinjan Hysaj) v Secretary of State for the Home Department* [2014] EWCA Civ 1633, at [46]:

> "If applications for extensions of time are allowed to develop into disputes about the merits of the substantive appeal, they will occupy a great deal of time and lead to the parties incurring substantial costs. In most cases the merits of the appeal will have little to do with whether it is appropriate to grant an extension of time. Only in those cases where the court can see without much investigation that the grounds of appeal are either very strong or very weak will the merits have a significant part to play when it comes to balancing the various factors that have to be considered…"

209. On the basis of the evidence which I heard and considered, including that of Officer Bailey, Mr Lundy and Mr Breadon regarding the disputed facts, I cannot say without further investigation that the grounds of appeal are either very strong or very weak, and so, in accordance with *Dinjan Hysaj*, I have given those merits less weight in the balancing exercise.

Other circumstances

210. In line with *Denton*, I have considered "all the circumstances of the case".

211. Mr Bedenham submitted that the background relationship between Abbey and HMRC should be considered by the tribunal in deciding whether to allow a late appeal. That background is largely summarised at [9] to [16] above. Mr Bedenham argued in his skeleton argument as follows:

> " The background is relevant because it shows how, in relation to this Appellant, HMRC has been willing to make very serious allegations of knowing involvement in diversion fraud on the basis of evidence which on a cursory review… appeared to stack up but which, when properly tested (as before Lewison J) was found to be fatally flawed."

212. Mr Nathan pointed out that the assessments which are the subject of this appeal were raised by a separate HMRC team to those in the misfeasance claim; were not part of the material before the court on the application to appoint a provisional liquidator in 2009; did not form part of the misfeasance claims considered by Lewison J, and did not form part of the "petition" proceedings in relation to the £6.5 million of assessments. Thus, in Mr Nathan's submission, " there is no parallel to be drawn."

213. In my judgment, the relevance of this background information to the decision whether to permit a late appeal is very limited, essentially for the reasons given by Mr Nathan in distinguishing the assessments in this appeal.

214. There is one other factor which in my judgment militates against allowing a late appeal only for the VAT assessment (no late appeal being permissible for the excise duty assessment in light of my conclusions on the Notification Issue and the Review Issue). That is the illogicality of an appeal against a VAT charge which is entirely parasitic on the excise duty assessment where no appeal is possible against that excise duty assessment.

Conclusion

215. The time limit has an important purpose, and the starting point is compliance with that time limit. The length of delay was very serious, both separately during the respective periods of office of the two liquidators and certainly in aggregate. The reasons for that delay fall well short of being good explanations or reasonable excuses for the delay, and such reasons as there were were not promptly addressed. An extension of time would run a real risk of prejudice both to HMRC and to the overriding objective of dealing with the issues fairly, as a result of the very long period since the facts in dispute took place. The merits of the appeal cannot in my judgment be assessed as very strong or very weak without considerable further evidence and legal argument.

216. I do not regard the "background" as carrying the weight of these other factors given in particular the distinguishing factors summarised at [212]. Therefore, the only material factor which weighs against a refusal of permission is that a refusal, like most refusals, deprives the taxpayer of its right to appeal.

217. Weighing up all the factors, and in view of the overriding objective, permission for a late appeal is refused.

218. The Excise Duty appeal is therefore struck out, and permission to make the VAT appeal out of time is refused.

219. 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.

THOMAS SCOTT
TRIBUNAL JUDGE

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