TC03310

Appeal number: LON/2002/08239

EXCISE – diversion of goods in bond after they left appellant's warehouse – whether diversion resulted in "losses" within the meaning of exemption for fortuitous events – no – whether Directive 92/12/EC Art 20(1) limited to detections made during the course of a movement – yes – Art 20(3) applied - appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TRAPPS CELLARS LIMITED (in liquidation) **Appellant**

- and -

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

TRIBUNAL: JUDGE BARBARA MOSEDALE
SANDI O'NEILL

Sitting in public at Bedford Square, London on 19, 20, 21, 22, 23, 26, 27, 28, 29, 30 November 2012, 4 January 2013 and 9, 10, 14 May 2013

Mr A Young, instructed by Vincent Curley LLP for the Appellant

Mr R Hill, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Background

1. The appellant ("Trapps") was approved as a general storage and distribution warehouse under s 92 of the Customs and Excise Management Act 1979 ("CEMA"). It moved excise goods in duty suspension to other approved excise warehouses.

2. HMRC raised three assessments on the appellant on 14 August 2002 relating to movements of excise goods from its warehouse in 2001. The appellant appealed and did not pay the assessments. As the assessments were not paid, HMRC withdrew its warehouse licence. That decision is under appeal but stayed behind this appeal which concerns only the assessments.

3. The appellant went into administration on 25 October 2002 and a liquidator was appointed on 14 May 2003. The liquidator authorised the former director of the company, Mr John Davis, to pursue the appeal on behalf of the company in this Tribunal.

4. The three assessments were on transactions which fell into three categories: those where the goods were to be moved from Trapps to Serio Import Export warehouse in Italy (which we shall refer to as Serio), those where the goods were to be moved from Trapps to a warehouse in Italy called Micholotti Renato SRL (which we shall refer to as "MTB") and those to be moved to a warehouse in Portugal, Garcias Comercio e Industria. Just before the start of the hearing the appellant withdrew its appeal in relation to the Garcias movements and we do not refer to these transactions again.

5. One of the two disputed assessments was for £848,071 and was in respect of eight despatches to MTB. The assessment was later reduced by £209,389 to £638,682 because two of the consignments had been originally stopped by HMRC from leaving Trapps. (They left later but under the owner's guarantee so HMRC now accept that the appellant has no liability in respect of them.) The other disputed assessment was for £962,344 and was in respect of 8 movements to Serio. It was later agreed that the assessment had been miscalculated by £123,370 and this assessment was reduced to £838,974.

6. The appeal in front of the Tribunal was therefore only concerned with the assessments arising out of the Serio and MTB movements.

Facts

7. Under s 16(6) Finance Act 1994 the burden of proof in this appeal is on the appellant. This provides:

> **S 16(6)**
>
> On an appeal under this section the burden of proof as to –
>
> (a) [not relevant]

(b) [not relevant]

(c) [not relevant]

shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.

Background

8. There was an agreed statement of facts and we make the findings of facts in §§ 9-12 based on it.

9. The appellant's premises were at Tooley Street in London. It was registered as an authorised warehousekeeper under the WOWGR regulations with effect from 1 August 1999. It was approved under CEMA as both a customs and excise warehouse.

10. Its excise warehouse approval meant that it was entitled (amongst other things) to move excise goods in duty suspension to an approved tax warehouse elsewhere in the EU. It was only entitled to move goods within the EU on payment of the duty OR if the goods were despatched to another excise approved warehouse.

11. It was a condition of its approval that it complied with all relevant provisions of the law and the conditions set out in notice 197. One of these requirements was to have in place a guarantee from a bank or similar to guarantee the payment of duty that would become payable if a duty suspended movement was subject to an irregularity. It was agreed that Trapps did have a movement guarantee in place.

12. All the goods were released under Administrative Accompanying Documents ("AADs"). The parties were agreed that the warehousekeeper was required by law to issue a 4-part AAD when the goods were despatched to another Member State. One copy is kept and the goods are accompanied by the other three copies. The receiving warehouse should endorse one of these three copies and return it to the UK warehouse keeper no later than 15th day of month after month of despatch. If the warehousekeeper does not receive the AAD, it is required to notify HMRC. In this case Trapps did receive back AADs in respect of all 14 consignments, but does not challenge HMRC's case that the AADs were not properly endorsed.

The witnesses

13. The evidence of some witnesses, and in particular those described as the shipping line witnesses, was uncontested, and we refer to this below. Evidence from the remaining witnesses was contested, and we make the following findings based on the evidence which we heard:

The veracity of the HMRC officers who gave evidence

14. Mr Young challenged the evidence of some of the HMRC officers. We consider whether any of the challenges were justified.

DCLs

15. We find from what Officer Mountford (a senior HMRC officer in policy) said that letters known as "DCLs" were used by HMRC in excise matters to circulate information to targeted HMRC officers. They were used in the 1980s and 1990s and were replaced by computer messages and online guidance in around 2000. Officer Mountford was uncertain whether DCLs were still used in 2001.

16. This evidence was consistent with what Mrs Thompson, who was also a longstanding if more junior officer in excise, said. She believed that DCLs stood for "dear collector letters" although counsel believed it stood for "dear colleague letters". Each officer whose name was on the circulation list attached to the DCL was required to read the letter and then sign to say that they had read letter before passing it on.

17. Officer Mercer did not know what a DCL was. While she was a long-standing HMRC officer, she only joined excise (from VAT) in about 2001. We had no evidence that DCLs were used on the VAT side of HMRC at that time and therefore we accept her evidence that she did not know what they were. They were phased out before or at about the time that she joined excise. Therefore we do not find that there was any reason for her to have come across a DCL.

18. Officer Davies also gave evidence that he did not know what a DCL was. Counsel put it to him that he was lying. He denied this and we accept his denial. Officer Davies was a criminal investigator who had previously been in VAT investigations prior to joining excise investigations in about 2001. Again, we do not find that there was any reason why he would have known what a DCL was.

19. The only relevance that DCLs have to this appeal was that it was part of Mr Young's case that the evidence given by HMRC officers was untruthful (especially with regards whether there was a live investigation into excise fraud involving the appellant in 2001) and he relied on what they said about DCLs to show that, in his opinion, their evidence could not be trusted.

20. We reject his case on this. For the reasons we have explained, the evidence on DCLs does not show any of the HMRC officers' evidence to be unreliable.

London City Bond

21. Another not directly relevant matter which Mr Young relied upon to demonstrate that in his opinion the officers were untruthful was the investigation involving London City Bond ("LCB") in the 1990s which led ultimately to the Butterfield report of 2003.

22. Officer Mercer's evidence was that she was unaware of the very public criticism of HMRC over the LCB investigation at the time and only became aware of it some time after becoming an intelligence officer, which was after the events in this appeal. Mr Young did not consider this truthful because, he said, the LCB "scandal" was reported in newspapers. We do not agree: Officer Mercer's evidence seems entirely credible to us. It is nothing but a groundless assumption on Mr Young's part that all

HMRC officers read everything published in newspapers and would have known about the LCB "scandal".

23. Mrs Thompson's evidence was that she was at the time unaware and remained unaware of the LCB "scandal". Mr Young suggests that this evidence was not credible. However, apart from his assumption that all HMRC officers would know about it, we were given no reason to find that Mrs Thompson would have known about it. She was a fairly junior officer in Glasgow doing a very specific job and with no connection to any criminal investigations undertaken by HMRC in London. It seems to us quite credible that she would not have known about it and we accept her evidence on this.

Location of 13 August meeting

24. A third seemingly irrelevant matter on which Mr Young pinned an allegation of dishonesty was the location of a meeting on 13 August 2002 between Officer Parsons (part of the Fulcrum Initiative, described below) and Officers Mercer and Lawler, who had responsibility within HMRC for Trapps at the time. At this meeting Officer Parsons showed the assurance officers the evidence he had collected that demonstrated in his opinion that the consignments the subject of this appeal had failed to arrive at their destination warehouse. Officers Mercer and Lawler agreed that Trapps should be assessed on the basis of this evidence and immediately raised the assessments, which were served on Trapps the following day.

25. The evidence showed that this meeting took place at Dorset House in London. Part of that evidence was Officer Mercer's witness statement which stated that the meeting was at Dorset House. Mr Young's submission was that her *oral* evidence was inconsistent with this and placed the meeting at an hotel, thus making (in his opinion) all her evidence unreliable. However, the notes of both members of the panel record her oral evidence was that the meeting was at Dorset House: the reference to a hotel came about because she mentioned that she had stayed in an hotel overnight before the meeting. So we find that there was no inconsistency in her evidence.

26. In summary, we found nothing in these allegations by Mr Young to make us doubt the veracity of the HMRC officers who gave evidence to this Tribunal. In any event, Officer Mercer's evidence was peripheral to the main issues. And while Officer Parson's evidence did concern the Fulcrum Initiative and the question of whether there was a live HMRC investigation in 2001, it was consistent with what other HMRC officers said, whose veracity was not challenged. We accept as reliable all the evidence given to us by the HMRC officers concerned.

Keeping of pocket books

27. Mr Grunwell was the UK's fiscal liaison officer ("FLO") in Italy in the second half of 2001. His evidence was that he did not keep pocket books at that time. All the notes he made would have been condensed into intelligence reports which were sent back to the UK and retained (and disclosed in this appeal), while the notes were not

kept. He said that at the time it was not a requirement for FLOs to keep pocket books although this has now changed.

28. Mr Young said Mr Grunwell's evidence on this was not credible. Mr Young relied on Officer Davies' evidence that HMRC officers did use pocket books at the time. However, we find Officer Davies was talking about HMRC officers in the field and was making no comment on whether FLOs were at the time required to keep pocket books. Therefore, we find no evidence to contradict Mr Grunwell's evidence that at the time he was not required to, and did not, keep a pocket book. We accept Mr Grunwell's evidence.

Conclusion

29. We were unable to accept as justified any of the criticisms made of HMRC's witnesses. We accepted their evidence.

Mr Davis

30. Mr John Davis was the sole director of appellant. He founded the company in 1982, after many years of working as an employee in bonded warehouses. Trapps had a turnover of about £1million per annum.

31. It had about 1,000 predominantly private clients with small holdings of fine wines and high quality cognac, who paid Trapps to store them. It had a small number of commercial clients, which accounted for a significant part of its revenue. These clients moved goods between bonded warehouses. Most movements involving Trapps prior to the deals at issue in this appeal involved imports to the UK rather than exports from the UK

32. It lost its main commercial customer in Spring 2001 and was looking for new business to replace it. It found a new client in Goldhirst Ltd, and later in Mr Coutts. Mr Davis' evidence was that he assessed that physically Trapps' warehouse could cope with the movements of bonded goods required by these businesses but he carried out no other kind of risk assessment on the new business.

33. We find this new business was exporting large quantities of generic branded sprits such as Smirnoff and Famous Grouse whisky.

34. Mr Davis also said that at the time of the movements in question, by law only warehousekeepers could give movement guarantees. Later he was shown Notice 197 which states that a movement guarantee could also be provided by the owner or transporter and he agreed his earlier statement was wrong. He said that he was previously unaware of this and regretted that Trapps had not got the owner or transporter to provide guarantees in respect of the 14 consignments at issue. This shows that at the time Mr Davis was not fully aware of the contents of Notice 197, even though it was a requirement of his licence that he complied with the Notice.

35. Mr Davis accepted that there were accounting isssues at Trapps in the year to June 2001. We find that the accounts for that year were qualified by the auditors on the grounds Trapps' "system of internal controls is inadequate to provide safeguards of assets and to assure proper recording of transactions". The notes to the accounts record that staff in the accounts department were replaced.

36. A visit by Officer Lawler in March 2002 discovered problems with Trapps' systems and security. We further find that Mr Davis wrote to HMRC on 24 May 2002 in response to an error made by Trapps in April 2002 and identified by HMRC, saying "we accept that prior to 12 April 2002 our business records were in a less than satisfactory state, caused in part by over-stretched and under-confident staff. However, the staff member in charge of keeping business records has been replaced by two people…..we acknowledge and appreciate that the imperfections of our former record keeping system were of concern to HMRC…." Officer Mercer's evidence is that she wrote to Trapps in July 2002 about the poor state of their business records and in particular that her visit to them a week earlier had shown that they had two separate systems of recording goods which could not be cross referenced making it impossible to verify status, owner, or location of goods within bond. She found it was impossible to audit that what was in the warehouse was in the warehouse's records.

37. Mr Davis was adamant that the accounting/recording inadequacies in 2001 and 2002 were of very limited nature. We do not accept this assessment of the deficiencies, however understandable, as reliable. We find that at the time in question Trapps' methods of recording movements were unreliable and led to qualified accounts and concerns from HMRC.

Trapps' movement guarantee

38. All the 14 AADs at issue in this case recorded that the movement guarantee was provided by Trapps. It was agreed by Mr Davis that a condition of Trapps' licence was that it held a movement guarantee and that it did hold one during the period at issue in this appeal.

Serio

39. All 8 movements in issue which stated on their AADs that they were destined for Serio involved large quantities of popular bulk spirits, such as Smirnoff and Famous Grouse whisky.

40. In all 8 movements the owner of the spirits was Mr Frazer Coutts trading as Rocket Fuel Drinks Company ("RDF"), the buyer was stated to be Valletta Trade and Consultancy ("Valletta"), and the haulier was stated to be Graham Chadwick. All 8 AADs were (at least purportedly) signed and stamped as received by Serio and by the Italian tax authorities in Bergamo.

41. For the first three movements the AADs were all dated 8 October 2001. For the next three movements the AADs were all dated 11 October 2001. The seventh AAD was dated 17 October and the eight was dated 19 October 2001.

Serio's bonded warehouse licence

42. It was not in dispute and we find that Serio's bonded warehouse licence was revoked on 29 June 2001 which was before any of the shipments at issue in this appeal.

43. We accept the evidence from HMRC obtained from the Italian tax authorities that, bar two consignments earlier on, Serio never operated as a warehouse and its licence was revoked because it had lost possession of its purported warehouse.

Valletta Trade & Consultancy

44. HMRC's evidence, based on information from the Maltese authorities via a mutual assistance request, which we accept, is that the company was not registered in Malta and its given address (Milito Street in Malta) was false.

Mr Coutts

45. Mr Coutts traded as Rocket Fuel Drinks. He had virtually no trading history. He was assessed for unpaid duty, appealed, made bankrupt, and the appeal was withdrawn. There have been no payments to his creditors.

Did the Serio goods arrive?

46. HMRC produced evidence from the Italian Tax authorities that from an inspection of the warehouses books, none of the 14 consignments arrived. Indeed, as noted above, Serio was not even operational at the time of the consignments to it from Trapps. We find that the goods did not arrive at Serio. We find that they were diverted after they left Trapps.

47. As the goods did not arrive, it must be the case that the stamps affixed to the AADs showing the goods' arrival were false. We also accept HMRC's (hearsay) evidence from the Italian tax authorities that the stamps were forged.

MTB consignments

48. All 6 movements stated to be to MTB involved large quantities of popular bulk spirits, such as Bells and Famous Grouse whisky.

49. In all 6 movements the owner was Goldhirst Ltd ("Goldhirst"). The Director of Goldhirst was a Mr Abid Mahmood. Goldhirst's buyer was stated to be L'Alambic, a business in France. The haulier was stated to be Maybank Transporters. All 6 AADs were (at least purportedly) signed and stamped as received by MTB and the Italian tax authorities in Trento.

50. The AADs for the first four movements were dated 15, 29, 30 and 31 October 2001. The fifth and sixth were both dated 7 November 2001.

MayBank Transport

51. We accept the evidence which shows that the address given by Maybank was false. It was for "Barclay Avenue" in Reading, which does not exist. "Berkeley Avenue" does exist but we accept Mr Busson's evidence that the address at the time belonged to the business (Lok'n'store) of which he was the manager and was nothing to do with Maybank Transport. Indeed, the evidence of the officer who attempted to contact Maybank in December 2001 indicated that the person on the other end of the phone did not want to be traceable.

Did the goods arrive at MTB?

52. We accept HMRC's hearsay evidence (which was not in dispute) from mutual assistance requests to the Italian tax authorities that none of the consignments from Trapps were shown in MTB's books. We also accept the (albeit hearsay) evidence that the AADs had false stamps and signatures. There would be no point in forging the release on the AADs had the goods actually arrived. We find that none of the 6 movements consigned by Trapps to MTB arrived at their destination. The goods were diverted at some point after departure from Trapps.

53. In any event the burden of proof is on the appellant if it wishes to assert that the goods arrived and we find that it has failed to do so. There is consistent, albeit hearsay, evidence from the Italian tax authorities that none of the 14 consignments to Serio and MTB arrived and that the stamps on the AADs were false. We accept that evidence.

Did the 14 consignments leave the UK?

54. Both parties were agreed that the evidence did not establish whether the goods left the UK.

55. Of the 8 Serio despatches, the only record from the various shipping line (including Eurotunnel) witnesses, was that one vehicle left UK 6 days after it left Trapps and then it was in the tourist channel.

56. Of the 6 MTB despatches, 3 of the vehicles were recorded as leaving the UK the day after the goods were despatched by Trapps. But at least one of the vehicles was recorded as travelling empty and one returned too soon to have been to Italy and back.

57. Both parties were agreed that this evidence proved little. Of the vehicles which did cross the channel, there was no evidence that they were hauling the same trailer with which they collected the goods from Trapps, or even if they were, whether that trailer still contained the excise goods. But this was true the other way around: there was no evidence that the goods collected from Trapps with a tractor which did not cross the Channel remained in the UK. A different tractor could have taken the trailer across, or the goods could have been transferred to a different trailer and taken across.

58. This is therefore a question which turns on who has the burden of proof and we discuss this below at § 214.

SEED checks and fiscal checks

59. Under EU law the UK was required to and did maintain a database which contained EU-wide information on whether or not a warehouse within the EU was authorised to receive excise goods. HMRC was required to and did undertake checks of the information held on the database at the request of traders. The database was called the SEED database.

60. Mrs Thompson was the HMRC officer responsible for the SEED database at the time of the events at issue in this appeal. Mrs Thompson was a long-standing HMRC excise officer at the time but left HMRC in 2006. We found her to be a confident and careful witness. She was very clear about what she did know or remember and what she did not. As we have said above, we reject the appellant's criticisms of her evidence. We accept her evidence.

61. It was only Mrs Thompson's very small team which could enter information on the SEED database. Only her team had a live copy of the database on which changes could be entered. Each member State was obliged under EU law to send a monthly update of its authorised warehouses to every other member State. Mrs Thompson's team would update the information received from all other member States onto the SEED database. We accept her evidence that the updates were uploaded promptly and normally within 24 hours, although of course there was an in-built delay as updates were only monthly and in any event the database could only be as good as the information with which Mrs Thompson's team was provided.

62. In between monthly updates, her team would also add notes to the information on the database if more up to date information was obtained. For instance, if as a result of a specific, fiscal check (explained below) with a member state she discovered that a particular warehouse had lost its approval, she would not change the approval column in the databases but she would add a note that traders were to be informed that that warehouse was not approved.

63. The other responsibility for her team was to carry out checks of the database ("SEED checks") on behalf of traders and HMRC officers. Although some HMRC offices might have a "dead" copy of the database (into which they could not enter changes) they were not supposed to carry out SEED checks on behalf of traders. If a SEED check request was received, her team would check the live database and give the result to the trader. The SEED check would be negative unless the details of the warehouse (name, address and authorisation number) provided by the trader exactly matched the details on the SEED database.

64. If the trader was not happy with the result, they could and sometimes did ask her team to carry out a specific check with the relevant tax authority. This was a type of mutual assistance request and was referred to as a "fiscal check". The result of this request would be communicated to the trader, and might, if relevant, be used to update the notes in the SEED database as mentioned above.

65. It was Mrs Thompson's evidence that if the Italian tax authorities had included Serio's loss of authorisation in June 2001 in their monthly updates, this would

automatically have been uploaded onto the live SEED database held by Mrs Thompson's team. We accept this evidence. We have no reason to doubt her veracity and in any event it was consistent with evidence from the other HMRC officers that no one knew of the loss of authorisation until 26 October 2001 when it was discovered following a fiscal check.

66. We accept Mrs Thompson's evidence that she had not seen Mr Grunwell's reports and was not aware in 2001 that MTB and Serio were the subject of an Italian investigation (see §§111-126 below). We find that the first Mrs Thompson knew about Serio losing its licence was 26 October 2001 (see § 79 and 128). We accept her evidence that she had no involvement with the Fulcrum Initiative (see § below) other than to provide her witness statement on SEED checks.

The SEED spreadsheet

67. Immediately before the commencement of the hearing in 2012 the appellant's advisers asked HMRC to disclose copies of all the SEED checks undertaken by the appellant. The appellant's position was that all its records were uplifted on 14 August 2002 (see § 110) and that HMRC had only returned incomplete records and in particular had not returned the records of SEED checks.

68. Mrs Thompson's team maintained not only the SEED database, but a spreadsheet which recorded all enquiries made of the SEED database.

69. In November 2012 all the Tribunal had in evidence was an extract, attached to Mrs Thompson's first witness statement made in 2003, from the SEED spreadsheet showing checks on Serio by Goldhirst and one other trader (not Trapps). At the hearing, after this length of time, she did not want to commit herself to saying whether the extract showed all the enquires made in respect of Serio, or just the enquiries made by these two particular traders in respect of Serio.

70. The discovery and production of the complete spreadsheet later in the hearing showed that this extract was in fact a list of all the enquires made in respect of Serio in that period of time.

71. The reason for the discovery of the complete spreadsheet arose out of a disclosure request made by the appellant. When questioning Mr Davies, Mr Young complained that all the evidence which was kept for the potential criminal prosecution of Goldhirst and Mr Mahmood (see §110) had not been disclosed to the appellant. Mr Hill's instructions were that all this material had been thoroughly searched following disclosure orders made in the Trapps appeal and relevant material disclosed. Nevertheless, it was agreed by counsel that HMRC officers would conduct a search for the index to the material, in order to disclose the index to Mr Young. They did so and in the process discovered the SEED spreadsheet. We ordered it to be disclosed to the appellant. (An order was required as it included names of many other traders).

72. HMRC then applied for it to be admitted into the hearing. This was opposed by the appellant. We admitted it. Firstly, the appellant only put the SEED checks in issue

immediately before the start of the hearing so HMRC could not be criticised for not realising the relevance of the spreadsheet earlier. Secondly, Mrs Thompson had referred to it in her evidence. Thirdly, it had the potential to resolve the heated question of whether HMRC had failed to return the alleged SEED check results to Trapps and in particular the question of whether Trapps had made SEED checks and if so with what result.

73. Mrs Thompson was recalled to give evidence in May 2013. Her evidence was that the spreadsheet produced to the Tribunal was a complete record of all SEED checks made on and between 1 December 2000 and 17 December 2001 in Glasgow by her team.

74. The spreadsheet terminated on 17 December 2001 as on that date the old SEED database was replaced by a new SEED database which allowed enquiries to be logged directly into the database, obviating the need for a separate spreadsheet. As this post-dates the movements in this appeal, we do not mention it again.

75. Mr Young criticises Mrs Thompson' evidence. At the time of her second witness statement she was no longer an HMRC officer and could not access the SEED database. We consider this is true but irrelevant: she was entitled to rely on her memory and in any event the old SEED database no longer exists and at the time did not record checks made (the checks being recorded on the spreadsheet)

76. Mr Young suggested to Mrs Thompson that the spreadsheet was not complete – even though each check was numbered and the spreadsheet contained every number sequentially until the day it ceased. Mr Young put it to Mrs Thompson that it was odd that it showed no checks against MTB at all. However, this was a mistake by counsel. There were quite a few checks against MTB in the spreadsheet.

77. Mr Young also suggested it was not credible because it showed only one check being undertaken by Trapps in just over one year. However, it seems there is no basis to say that this is incredible. Mr Davis does not claim to have carried out any SEED checks himself (§ 90). His claim is that his employees would have done this, but they were not called to give evidence. We also note that we have found that Trapps' record keeping was unsatisfactory (§ 37) which does not inspire us with confidence that SEED checks would have been carried out. All in all, we were given no grounds on which we could assume that Trapps would have carried out regular SEED checks, so we have no reason to doubt the spreadsheet just because it shows that Trapps did not.

78. Mr Young also stated that it was obvious that the spreadsheet was not a complete record of all SEED checks in the relevant period because (he said) it did not record some of the SEED checks which were in evidence in the Tribunal. We could and do reject this criticism out of hand because he did not make it until closing and failed to put it to Mrs Thompson, thereby depriving her of the chance to give an explanation. It is a fundamental rule of justice that witnesses ought to be given the chance to answer challenges to their evidence.

79. Nevertheless, we note in passing that even without any explanation which Mrs Thompson could have given had she been given the chance, the criticisms are unfounded. For instance, the Tribunal had a SEED check carried out by Mr Coutts t/a Rocket Fuel Drinks into Serio on 26 October 2001. It was not, as Mr Young pointed out, listed in the spreadsheet for 26 October. But, as cursory inspection shows, the spreadsheet was in numerical order. The fax result contains the number of the check. Looking at the numbered check on the spreadsheet the information is that Mr Coutts first requested a SEED check into Serio on 5 October. The result was negative. Mr Coutts then asked for a fiscal check which took place on 9 October. The spreadsheet then goes on to record that the reply was not received until 26 October, and it appears that this led to the result being faxed to the trader on 26 October, and this was the document in front of the Tribunal. (We note that the spreadsheet appears to contain an error in that the answer in the fax was "no", Serio was not approved, but the spreadsheet records a "Y"). In other words the 26 October SEED check was in the spreadsheet.

80. There were other SEED checks drawn to the Tribunal's attention where they did not appear on the spreadsheet for the day shown as the date of the faxed answer to the trader. However, similarly, they could all be located in the spreadsheet by using the *number* of the SEED check which was recorded on the fax as well as the spreadsheet. All the entries relating to a particular check were logged onto the spreadshett on the day the check was originally requested by the trader. Mr Young's criticisms were misplaced.

81. Mr Young in closing drew other alleged discrepancies to our attention, such as what were in his opinion incorrectly negative results. An example is a negative check on Trapps itself on 2 July 2001 which was at a time when it did hold a warehouse licence. Again this was not put to Mrs Thompson so she was not given a chance to explain. From her earlier evidence (see § 63), we can speculate that the answer would have been that the trader who requested the check had misspelt the appellant's name as the spreadsheet records the check as being on "Trapp Cellar". There were other alleged false negatives, all of which would appear to be explainable because the check was against a wrong name and/or number. It does not matter. It was not put to the witness so we disregard the challenge.

82. Mr Young also criticised in his closing submission the spreadsheet on other grounds, such as that for some reason the first page recorded only checks made by HMRC officers. We don't know why this was so (although no doubt we could speculate it was perhaps a test of the database). In any event we disregard the criticism. It was not put to the witness. She was not given a chance by Mr Young to explain it. Natural justice means we must disregard it.

83. Mr Young relied on all these criticisms, which he had failed to put to the witness, as evidence the database was manipulated by HMRC. We reject the criticisms on grounds of natural justice. We have noted they all appear unfounded in any event. We find no evidence whatsoever that the database was manipulated by HMRC. We accept Mrs Thompson's evidence that it was not.

X99 and Dover SEED checks

84. When Mrs Thompson was recalled in May 2013 to give evidence about the complete spreadsheet, Mr Young produced to her an undated HMRC document called X99. HMRC did not object to the document coming in although the Tribunal would probably have upheld such an objection as it was wrong for counsel to seek to spring surprises on witnesses. The undesirability of surprise such attacks can be seen from the fact that it gave HMRC no time to check the date of the X99.

85. The X99 showed that out-of-hours SEED checks could be undertaken at Dover HMRC offices when Glasgow was closed. We asked for the date of the document. Counsel was unable to provide it, although he later sought in submissions to "prove" that it was in force in 2002/3 by relying on a direction given in an earlier Tribunal case (*Grapevine Storage Services Ltd* [2008] UKVAT(Excise) E01100*)* which referred to the X99 existing in 2002/3.

86. This seems to us to be very weak evidence, but in any event, it was clear that the X99 was, like so many guidance notes published by HMRC, a document which was updated over time. The question is not whether the X99 existed in 2002/3 or in 2001, but whether the version of it shown to Mrs Thompson was the current one in 2001. Even if we were inclined to rely on it, which we are not, the *Grapevine Storage* direction gives no help on the question of which version was in force in 2001.

87. We accept Mrs Thompson's evidence that Dover did not carry out SEED checks in her time and in particular did not carry out SEED checks in 2001. It follows that the version of the X99 shown to Mrs Thompson was not in force in 2001, because it indicates that out-of-hours SEED checks could be made with Dover HMRC office.

88. In any event, the only significance of all this evidence is whether Trapps carried out SEED checks. The complete spreadsheet shows that Trapps carried out no checks on MTB or Serio. Mr Young's case, as we understand it, is that the complete spreadsheet of checks which took place at Glasgow would not record out-of-hours checks being made with Dover. However, Mr Davis' evidence, given long before the X99 was produced in the hearing, was that SEED checks were made by Trapps with Glasgow. He made no mention of Dover. So while we have reservations about Mr Davis' evidence on what SEED checks were actually made with Glasgow (see below), it is clear that he did not even suggest that Trapps made checks with Dover. They did not. The X99 was a complete red herring.

89. We accept Mrs Thompson's evidence that the spreadsheet was a complete record of checks made by her team in the period 1/12/00 to 17/12/01 of the live SEED database and that no other HMRC office carried out SEED checks for traders at that time.

Did Trapps undertake SEED checks?

90. Mr Davis' evidence was that Trapps carried out SEED checks. He did not claim to do them himself: it was his evidence that this was entrusted to two employees (Mr Ozieh and Mr Spicer). Mr Davis said that they would have checked every new

destination warehouse before the first consignment and all destination warehouses on a regular, weekly basis if not before every consignment. He said he had controls in place to ensure that these SEED checks were carried out.

91. We are unable to find this evidence reliable. We find that the spreadsheet shows that Trapps carried out only one SEED check and that was on an unrelated company: it never carried out a SEED check on Serio or MTB at all. Mr Davis was mistaken in thinking that the employees carried out the checks and mistaken in thinking that his controls were sufficient.

92. He did produce copies of SEED checks carried out by his customers. In so far as it was his case that he relied on the Serio checks, we reject it. Mr Coutts carried received only two checks on Serio and they were both negative (the second was after the negative fiscal check referred to in §79; the first which was in early October 2001 says "the information you have supplied is not on SEED"). Goldhirst had received positive checks on MTB, the earliest being dated 5 October 2001.

93. We can find nothing in the appellant's allegation that HMRC failed to return uplifted documents. Copies of SEED checks were not returned to Trapps because they did not exist. We find Trapps did not carry out SEED checks on either MTB or Serio.

Early warning system

94. It was a condition of Trapps' warehouse approval, as with all other warehouses, that details of proposed movements had to be provided to HMRC 24 hours prior to their taking place. This was known as the Early Warning System ("EWS").

95. It was Mr Davis' evidence that Trapps had complied with its EWS obligations to notify all its movements to HMRC. HMRC did not challenge this evidence. Indeed, Officer Parson's evidence was that relying on the EWS information provided by Trapps, HMRC intervened to stop the two movements (that no longer form part of the assessment) referred to at § 5 above.

96. Mr Young's submission was that prior to any movement the Respondents had imposed a condition that they were to be provided with advanced notification in order to obtain their approval and that "unqualified approval was given by the respondents which was relied on by the appellant".

97. Mr Young's submission is that Mr Davis' evidence was that Trapps relied on HMRC's approval. But we do not agree that that was his consistent evidence. Having said Trapps relied on the EWS, Mr Davis then admitted that he did not know if HMRC sent traders an approval to state that the movement could go ahead. He then said that at the time of the deals he was unaware of excise diversion as a "foreseeable risk" and did not want to agree with Counsel that the reason for the EWS was because of the risk of diversion, repeatedly stating instead that Trapps were just complying with the regulations when providing advance notification. In conclusion, we do not accept Mr Davis' evidence that Trapps relied on the EWS as approval.

98. We accept Mr Parsons' evidence that the EWS did not involve approving movements. Movements would be stopped if HMRC considered that they had sufficient evidence of likely diversion. Otherwise no action was taken: the movement was neither approved nor stopped. We find that HMRC did not expressly authorise any movement by Trapps. We reject the appellant's case on this. There was no approval from HMRC; and the appellant did not rely on the non-existant approval.

Trapps' due diligence

99. Mr Davis had only a couple of fleeting meetings with Mr Mahmood of Goldhirst. Nevertheless he chose to conduct business with him without bank references or credit checks. Similarly he chose to do business with Mr Coutts, who had only just started his business and only just been WOWGR registered, without bank references or credit checks.

100. It was put to Mr Davis that this was an uncommercial attitude bearing in mind that he invoiced in arrears. Mr Davis' explanation was that he held other stock belonging to that customer so he felt secure against non-payment. It was pointed out that this might not be the case as all stock could have been despatched. Mr Davis said, rather unconvincingly, that he would have checked that he had sufficient stock levels.

101. We also find that Trapps undertook no due diligence on its hauliers, on the consignees nor on the destination warehouses. Mr Davis' explanation of this was that none of these people were his customer. This is true. However, what it means is that Trapps either did not understand or did not care that it was exposed to excise duty liability if the goods were diverted and that one way to reduce this risk in advance was to carry out a risk assessment on the persons involved in the movement, even if they were not its customer. In any event, as stated above, it did not even carry out due diligence on its customers in these deals.

102. It did keep records of the names passport numbers of the lorry drivers. Mr Davis said this was "completely different" but failed to explain in what way it protected Trapps against the risk of diversion.

103. It was the appellant's case that HMRC effectively authorised it *not* to carry out due diligence because it was not a requirement of its warehouse authorisation that it carry out due diligence. We reject this. While the law may require a warehouse operator to obtain a licence, and to comply with conditions in order to obtain the licence, successfully obtaining the licence did not abrogate the warehouse operator's responsibility to conduct its business properly. In particular, the fact that due diligence was not required for the licence was no explanation of why Trapps did not take sensible precautions to ensure that it would be paid and its consignments would not be diverted while it was exposed to the excise duty liability.

104. There was absolutely no suggestion that Trapps had known in advance that the 14 consignments would be diverted. However, we find simple due diligence would have shown it that:

- The haulier (Maybank) on the 6 loads to MTB gave a false address;
- The consignee (Valletta) on the 8 loads to Serio gave a false address.

105. Instead it seems Trapps' only due diligence was to check that the AADs were returned. However, as this took place about a month after shipment, it was obviously inadequate to protect Trapps against the risk of diversion. We have already noted that Trapps did not undertake SEED checks and did not rely on any approval from HMRC under the EWS system (there wasn't any). Trapps either did not understand or chose to ignore the risk it was taking. This naivety may be explained by the fact that it was operating in a market new to it (see § 31-33).

Fulcrum initiative

106. We find that in early November 2001 HMRC put in extended controls at two UK warehouses, Rangefield Import Export ("Rangefield") and Oakwood Storage Services ("Oakwood"). They did this because they suspected consignments from Westwood Vintners Ltd were intended for diversion after leaving these two warehouses. The extended controls were then put in place at three other warehouses in mid-November, in order to prevent further loss of revenue by the brokers moving their business from Rangefield and Oakwood to other London warehouses. One of those three warehouses was Trapps. The imposition of the extended control was after all 14 consignments the subject of this appeal had left the warehouse.

107. HMRC's inspection of Oakwood's records led them to commence a criminal investigation. They called this Operation Fulcrum. Arrests were made on 7 February 2002. Following this, Officer Parson's analysis of uplifted records led to identification of other targets for investigation. This further investigation was known as the Fulcrum Initiative and we accept the consistent evidence of the officers that it was launched in March/April 2002. We find it was a retrospective investigation looking at suspect movements in the previous year.

108. We reject the appellant's case that the investigation commenced in 2001. There is no evidence of this and it is contradicted by the consistent evidence of the officers, which we find reliable. We accept, in particular, the evidence of Officer Lowe that, due to failings which were the subject of the Butterfield Report, HMRC in the early years of this century would no longer carry out "live" investigations. In particular, they would not undertake live investigations which involved letting loads, likely to be diverted, run so HMRC could catch the criminals in the act. We accept that the Fulcrum Initiative was a 2002 investigation into various movements, including the 14 movements the subject of this appeal, which took place in 2001.

109. We reject the appellant's case that HMRC knew or suspected at the time in 2001 that all or any of the 14 consignments the subject of this appeal would be

diverted; we reject the appellant's allegation that HMRC chose to let them run in order to follow them. There is no evidence to support these allegations and it is inconsistent with the evidence of the HMRC officers which we accept as consistent and reliable.

110. The Fulcrum Initiative involved simultaneous civil and criminal proceedings. The targets of the investigation were 5 brokers and, by late 2002, one warehouse. One of the brokers investigated was Goldhirst. Mr Coutts was not criminally investigated. Trapps was not an object of the criminal investigation. Nevertheless, a search warrant was executed at Trapps' premises, and a number of other premises, on 14 August 2002, the day on which Trapps was assessed in respect of the 14 consignments the subject of this appeal. This was when its records were uplifted. Mr Davis later provided a witness statement to be used in a potential criminal prosecution of Mr Mahmood.

Midolo report

111. This was a report compiled by a Officer Midolo, an Italian tax official, about an Italian investigation into excise irregularities. Officer Midolo is not a witness in this case.

112. We find that the report was written by Officer Midolo in January 2004 in a response to a commission rogatoire from HMRC in November 2003 seeking information about the Italian criminal investigation referred to below. We accept Mr Parsons' evidence that HMRC had never seen the report before it was sent to them in March 2004 (and available to be read in April 2004 after it had been translated).

113. The report was disclosed by HMRC to the appellant in one of the rounds of disclosure in these very extended proceedings and the appellant relies on it. HMRC do not object to the report being relied on in the proceedings: their case is that the report does not bear the interpretation which the appellant puts on it. In other words, the report is hearsay, but neither party objects to it being in evidence on that basis. We accept the report as reliable.

114. In broad outline, it was the appellant's case that at the time of the consignments the subject of this appeal, there was a large investigation involving both the Italian and British tax authorities into movements to and from two Italian warehouses, and that as part of that investigation HMRC chose to allow the appellant to release goods to these warehouses in Italy.

115. We find (relying on the Midolo report) that at the time of the shipments at issue in this appeal the Italian tax authorities were carrying out an extensive investigation into the organisers of three tax warehouses in Italy, two of which were MTB and Serio. This investigation seemed to have started around September 2000, involved telephone taps and appears to show a substantial fraud orchestrated by an Italian organised crime syndicate. The investigation resulted in a number of successful prosecutions.

116. The report shows that in the opinion of the Italian tax authorities the fraudsters were involved in three different types of fraud. The first involved a genuine arrival of excise goods at one of the three suspect Italian warehouses (including MTB and Serio) with proper AADs. These goods then left the warehouses with proper AADs, but did not reach their destination and the AADs were discharged by forged stamps. The second method does not concern this Tribunal. The third method was for goods to leave bonded warehouses elsewhere in the EU with appropriate AADs purportedly destined for one of the three suspect warehouses, but then they would be diverted en route and fail to arrive at the suspect warehouses and their AADs would be discharged by false stamps.

117. That the first kind of fraud took place is evidenced by other reports which described an investigation into AADs issued by Serio for goods purportedly transported to Ireland and Greece. The Midolo report itself mentions an AAD issued by Michelotti on 27 March 2001 for a delivery to Trapps in UK with forged stamps (ie suggesting the goods never reached Trapps). It contained reports of other similar forgeries involving purported deliveries to other traders.

118. Mr Young said that the fraud at issue in this appeal was of the first sort. We find that he has failed to prove that. Not only has he failed to prove that the goods arrived at any of the three Italian warehouses the subject of the report, he has failed to prove that the goods even left the UK. Moreover, goods the subject of the first type of fraud would have had a genuine Italian stamps affixed to their AAD as the fraud included their genuine arrival in the Italian warehouse of purported destination: in this case we find that the AADs had false Italian stamps affixed to them because they never arrived at the Italian warehouses. The fraud in this case was of the third and not first type.

119. The Midolo report shows that on a few occasions the Italian tax authorities made mutual assistance requests to HMRC, normally about whether a particular load had actually arrived in Britain. These requests did not concern Trapps. We also find that on a few occasions HMRC had seized some consignments coming into the UK acting on information received from Italy.

120. The Midolo report records that a meeting was held on 1st December 2000 in Trento between Italian authorities and liaison officers from other member States (including the then British liaison officer which was not Mr Grunwell) in which it appears the Italians outlined their investigations into MTB. There was also a liaison meeting between EU tax authorities on 15 October 2001 which Mr Grunwell attended and it was agreed "there should be an ongoing exchange of information…in order better to co-ordinate action against the smuggling of alcoholic products."

121. We find that at the time HMRC had very limited involvement in or knowledge of the Italian investigation into MTB and Serio

122. We note that there was a very limited overlap of names, even British names, from the Italian investigation in the subsequent British investigation (Fulcrum). Trapps, for instance, is mentioned, in respect of the above mentioned telephone tap

information. It is mentioned as the source warehouse of the goods in respect of the some of the AADs to which false discharge stamps had been applied. But the subjects of the Italian investigation, which were it seems members of an Italian organised crime syndicate, were not the subjects of the Fulcrum Initiative.

123. We also note that the first and main fraud investigated by the Italian authorities were genuine despatches from the Italian warehouses which were diverted en route to their ostensible destination warehouses elsewhere in Europe; the frauds the subject of the Fulcrum Initiative were despatches from UK warehouses ostensibly to the three Italian warehouses but which were diverted en route and discharged by forged stamps.

124. We find that the British liaison officer in Italy (Mr Grunwell from April 2001) was aware of an investigation by the Italian tax authorities into Serio and MTB at the time of the consignments at issue in this appeal. This information was communicated to the UK by way of an intelligence report in May 2001. The UK were asked by the Italian tax authorities to provide documents evidencing consignments to or from Serio, but there was no evidence that HMRC ever complied with the request.

125. A letter from Mr Grunwell in September 2001 to the Italian authorities states that HMRC knew that the Italian authorities were continuing to investigate MTB, but HMRC just wanted MTB closed down and the fraud disrupted to stop the flow of goods.

126. However, we find at the time (in October and November 2001) the existence of this investigation was not known to Mrs Thompson or any of the other officers who gave evidence in this appeal. And while the liaison officer (Mr Grunwell) knew of the investigation, he did not know of any planned movements from the UK to those warehouses and in particular no knowledge of any planned movements by Trapps. We find it was not a joint British–Italian investigation. It was an Italian investigation.

When did HMRC know that Serio was not authorised?

127. Mr Young's case is that HMRC knew that Serio had lost its authorisation but chose to let loads destined for Serio run in order to carry out its own live investigation (or presumably assist the Italians with theirs). However, we find that there is no evidence that HMRC knew before 26 October 2001 that Serio's licence had been revoked.

128. As mentioned above in §66 and 79, Mrs Thompson requested a fiscal check on Serio in early October 2001 and the faxed reply from the Italian authorities on 26 October 2001 was that Serio was not authorised. Mrs Thompson faxed on this information to Officer Stone, who relayed this to Officer Parsons. Officer Parsons then told his team to contact all London warehouses with this information. It was not clear whether Trapps was told, but the answer is irrelevant in so far as this appeal is concerned as the date of this information was after the date of the last of the 8 consignments. These actions demonstrate that the information that Serio's licence was withdrawn was news to the officers.

129. There is no evidence that prior to 26 October any HMRC officer knew that Serio's licence had been revoked and we find that they did not.

Law

130. By closing the Appellant no longer maintained its argument that its liability was limited by the amount of its movement guarantee. Its movement guarantee was only for £10,000. We agree with HMRC that for the reasons given in Mr Hill's closing and in particular following *Anglo Overseas Limited* E01090 (2008) and *Garrett Trading* E01126 (2008) (No 2), that the appellant's liability is not limited by the amount of its movement guarantee.

131. In its closing the appellant's three contentions were as follows:

(1) The appellant was not liable to duty because there was a fortuitous event;

(2) The assessments were not to best judgment because they failed to take account of the matters which the appellant asserts amount to a fortuitous event (whether or not they do amount to a fortuitous event); and

(3) And if wrong on the above, and Article 20 applies, Article 20(2) deems the offence and irregularity to have taken place in Italy so there is no liability to UK duty.

Fortuitious event?

132. It is the appellant's case that it was inadvertently caught up in an (alleged) British-Italian investigation and that amounted to a fortuitous event; and/or that at the time (it alleged) HMRC suspected that the goods would be diverted but chose to let the consignments run in any event either through negligence or because they thought it would assist their (alleged) live investigation and that that amounted to a fortuitious event; it was also its case that Serio had its warehouse licence revoked before the shipment and this was a fortuitous event; and/or the (alleged) deliberate or unwitting failure by HMRC or the Italians to update the SEED database in June 2001 to show that Serio's licence was revoked was a fortuitous event.

133. Article 14(1) of Directive 92/12/EEC allows for relief from duty in cases where losses are attributable to fortuitous event. There was discussion in the hearing of an error in the Official Journal which contained the Directive as it referred to "fortuitous events…established by the authorised of the Member States concerned."(our emphasis). This was an obvious error and it is clear from the CJEU decision in *Société Pipeline Méditerranée et Rhône* Case C-314/06 [2007] ECR I-12273 that properly Article 14(1) should be read as follows:

> **Article 14(1)**
>
> "Authorised warehousekeepers shall be exempt from duty in respect of losses occurring under suspension arrangements which are attributable to fortuitous events or force majeure and established by the [authorities] of the Member State concerned. They shall also be exempt, under suspension arrangements, in respect of losses inherent in

> the nature of the products during production and processing, storage and transport. Each Member State shall lay down the conditions under which these exemptions are granted. These exemptions shall apply equally to the traders referred to in Article 16 during the transport of products under excise duty suspension arrangements."

The remainder of Article 14 reads as follows:

> **Article 14(2)**
>
> "Losses referred to in paragraph 1 occurring during the intra-community transport of products under excise duty suspension arrangements must be established according to the rules of the Member State of destination."
>
> **Article 14(3)**
>
> "Without prejudice to Article 20, the duty on shortages other than the losses referred to in paragraph 1 and losses for which the exemptions referred to in paragraph 1 are not granted shall be levied on the basis of the rates applicable in the Member States concerned at the time the losses, duly established by the competent authorities, occurred, or if necessary at the time the shortage was recorded."

134. The appellant accepts that the goods were diverted at some point between departure from Trapps and arrival at the destination warehouse. Its case is that such diversion was, from Trapps' point of view, a fortuitous event.

135. It is clear from Article 14 that "fortuitous events" does not refer events which result in losses inherent in the nature of the goods, such as evaporation or breakage in transit, because these are separately mentioned in the next sentence of Article 14. "Fortuitous events" are also to be distinguished from events resulting from force majeure. Is the diversion of goods a loss within Article 14(1)?

Is the Tribunal bound to accept the appellant's claim that there were losses?

136. We do, of course, accept (and HMRC did not suggest otherwise) that Article 14 is of direct effect. It has not been enacted into UK domestic legislation but this is irrelevant. If it is applicable, the appellant can rely on Article 14.

137. Article 14 applies where there are "losses… which are attributable to fortuitous events". So the appellant must not only show that there was a fortuitous event but that there were losses within the meaning of Art 14.

138. In his closing Mr Young raised an argument that "losses" in Article 14 cannot be determined in this Tribunal because Article 14(2) says that:

> "losses referred to in paragraph 1…must be established according to the rules of the Member State of destination"

Mr Young's case is that this Tribunal cannot say what is or is not a loss but must simply accept the appellant's claim that it suffered a loss because:

(a) the UK had failed to implement Article 14 and therefore had failed to establish any rules as required by 14(2); and/or

(b) HMRC had failed to establish what if anything were the rules on 'losses' in Italy, which was the Member State of destination, and therefore the State's whose rules apply under Article 14(2).

139. We do not agree. Article 14(2) does not empower Member States to determine the meaning of "losses". 'Losses' has an EU-wide meaning. Its meaning is the same anywhere in the EU. Article 14(2) is merely empowering Member States to have national rules on *quantification* of 'losses' within the meaning of Article 14(1). Quantification of the loss is not an issue in this case and therefore Article 14(2) is irrelevant. What is relevant is whether a diversion could be within the meaning of "losses" at all. So what does the Directive include within "losses"?

What are losses?

140. It is HMRC's position that Article 14 as a whole deals only with goods which have become unusable or not consumable, as opposed to remaining useable (and presumably sold on for use) but diverted and "lost" so far only as excise duty is concerned. HMRC's reason for this interpretation is that under Article 14(2), "losses" during carriage "must be established according to the rules of the member State of destination". But under Art 20 an irregularity (as discussed below) may lead to the member State of departure's rules applying. Therefore, reasons HMRC, Article 20 and Article 14 are dealing with different types of situations. They do not overlap, so that an irregularity under Art 20 cannot be a fortuitous event under Art 14.

141. HMRC also rely on Article 14(3), which provides for the levying of duty on shortages and losses not falling within Article 14(1) and is prefaced by the words "without prejudice to Article 20". HMRC's view is that Article 14(1) and (2) are not prefaced with the same words, because they do not deal with the same sort of situation and therefore the drafters did not need to determine whether Article 14(1) or Article 20 took priority. They are mutually exclusive.

142. We agree with this reasoning and find that the "losses" to which Article 14(1) and (2) apply are not diversions to which Article 20 applies. The goods are not *lost*, even if the tax authorities are unable to ascertain where they are or collect the excise duty owing. The tax is lost; not the goods.

143. We agree with HMRC that this analysis is also supported by the leading case on Article 14, which is *Société Pipeline Méditerranée et Rhône*. That case concerned the leakage of fuel from a pipeline and the Court of Justice said that:

> [30] "excise duties are, as a rule, also chargeable on shortages and losses in respect of which exemptions have not been granted by the competent authorities. The exemption provided by the first sentence of Article 14(1) of Directive 92/12 for losses attributable to force majeure constitutes a derogation from that general rule, which must therefore, as the Advocate General pointed out at point 43 of her Opinion, be interpreted strictly".

144. While the CJEU did not expressly refer to it we note that in her Opinion, in that case, Advocate General Kokott stated at paragraph 18 that there was:

> "… no doubt that a 'loss' of fuel within the meaning of Directive 92/12 has taken place. That obtains, as the Commission rightly points out, even if the concept is interpreted in accordance with the similar concept referred to in Article 4 of Directive 79/623/EEC. The Court has decided with regard to that provision that there is no loss where there is a risk that the missing product would be put into circulation within the Community, which is in particular possible in the case of theft. In the present case, however, the fuel has seeped irretrievably into the ground, with the result that the mixture must be disposed of as waste. It is therefore impossible for it to be put into circulation within the Community".

145. The Advocate General relied on the case of *Esercizio Magazzini Generali* [1983] ECR 2951 C-186/82 and 187/82. In that case, the issue was whether the manager of a customs warehouse was liable for customs duty (and VAT) on imported whisky and tobacco which had been stolen from the warehouse. The relevant Directive on the harmonisation of the customs debt (Directive 79/623/EEC) had similar exempting provision to Art 14(1) which applied where there was:

> total destruction [or] irretrievable loss of the said goods by reason of the nature of the goods themselves or because of unforeseeable circumstances or force majeure".

146. The Court of Justice held in paragraph 14 of its judgment that:

> "… the reasons for the extinction must be based on the fact that the goods have not been used for the economic purpose which justified the application of import duties. In the case of theft, it may be assumed that the goods pass into the Community commercial circuit. It follows that "loss" of the goods for the purposes of the directive does not embrace the concept of theft, regardless of the circumstances in which it has been committed".

147. This line of reasoning was applied to diversion of excise goods by the First-tier Tribunal in *Butlers Ship Stores* [2012] UKFTT 371 (TC). That case was an excise duty case in which dispatches of duty suspended spirits failed to reach their destination. The Appellant relied on the doctrine of fortuitous event/force majeure. However, the FTT found at §§ 91-97 that the warehousekeeper could not claim an exemption from excise duty for the relevant consignments under Article 14(1) of Directive 92/12, since the diversion of the relevant consignments "did not constitute losses within the meaning of Art 14.1 of the 1992 Directive", expressly applying the analysis of the Court of Justice in *Esercizio Magazzini Generali.*

148. We agree with the Advocate General, and the FTT in *Butlers Ship Stores,* that Article 14(1) and (2) were intended to apply to *losses* of the product in order to relieve persons from excise duty in the events the goods were lost and could not be sold within the EU. Art 14(1) was not intended to relieve from excise duty persons liable to pay it where the goods remained available to be sold within the EU. Indeed, it

would make Article 20 virtually obsolete whereas the intention behind Article 20 was to ensure that excise duty was chargeable when goods were diverted. To interpret "fortuituous event" in Article 14 as including diversions would be to undermine the Directive.

149. In conclusion, a diversion in transit, even one of which the person liable to the duty was unaware, does not result in a loss to which Art 14(1) applies.

150. Therefore, there is no need to consider the remainder of the appellant's case on fortuitous event because there was no "loss" within Article 14(1) even if the various matters which the appellant allege amount to fortuitous events (as to which see § 132) are in law fortuitous events. Nevertheless, we deal with the matter as it was argued in front of us in case it goes further.

Pre-conditions for a fortuitous event?

151. A fortuitous event is not easily established. The CJEU in *Société Pipeline Méditerranée et Rhône* said at §31 that an authorised warehousekeeper could only claim the benefit of the exemption

> "if he is able to demonstrate that there are abnormal and unforeseeable circumstances, extraneous to him, the consequences of which, in spite of the exercise of all due care, could not have been avoided".

In paragraph 33, the ECJ explained that the reference to "extraneous" circumstances referred to "circumstances which are objectively outside the authorised warehousekeeper's control or situated outside his sphere of responsibility".

152. When the Court turned to the facts of the case before it, which related to the leakage of mineral oils from a pipeline, it concentrated on whether "the occurrence was in no way foreseeable" and whether "the authorised warehousekeeper had no way of checking it" (see paragraph 35). It then mentioned that "the authorised warehousekeeper must show necessary diligence" (see §36). The Court then went on to say in §37 that:

> "Although compliance with the technical requirements concerning the quality, construction, maintenance and operation of a pipeline may be considered to be a necessary condition for a finding of diligence, that compliance is not, in itself, decisive. Sufficient diligence requires, in addition, continuous action aimed at identifying and assessing potential risks and the ability to take appropriate and effective steps in order to avoid them"

153. Finally, the Court indicated in §38 that the fact that the opening and authorisation of tax warehouses is subject to authorisation and monitoring by the national tax authorities is not a relevant factor in determining whether the conditions for force majeure are fulfilled. Those provisions:

> "merely seek to ensure that [the warehousekeeper] is sufficiently reliable for the purposes of the tax suspension procedure" – they do not

> exonerate the warehousekeeper from itself displaying "sufficient diligence".

154. It is therefore clear from that judgment that it is not enough for an excise warehousekeeper to establish that it acted in good faith. The absence of fault is insufficient: the fortuitous event must be unforeseeable and the warehousekeeper must have undertaken appropriate measures to limit risk.

155. We agree with HMRC that in this case, the risk of consignments going missing was not unforeseeable. As Officer Mountford explained in his witness statement and his oral evidence there was a significant problem with excise duty fraud after the abolition of routine fiscal controls in 1993. Indeed, the risk of diversion of duty suspended excise goods being transported between Member States was recognised in Directive 92/12/EEC itself – Article 15(3) refers in terms to the "risk inherent in intra-Community movement". It was also noted by the High Court at paragraphs 2 and 4 of its judgment in *In re Arena Corporation* [2003] EWHC 3032.

156. We find that the Appellant did not take due care to prevent the consignments going missing: see §§99-105. Had it undertaken this due diligence it ought to have discovered that in one case the consignee and in the other the transporter were using false addresses. This would have put it on notice that diversion was likely.

157. Therefore, even if the various matters relied on by the appellant as amounting to fortuitous events, could be fortuitous events in law, the appellant would be unable to rely on Article 14 because it had failed to undertake basic precautions which it should have undertaken and which, if it had undertaken, ought to have put it on notice that diversion was a likely outcome.

Can "fortuitous event" include actions by taxing authorities?

158. We have set out above the various matters which the appellant consider amount to a fortuitous event at § 132.

159. We do not need to consider most of these as a matter of law because as a matter of fact the appellant has failed to establish either (a) that the British customs' authorities failed to inform Trapps of an active investigation at the time of the consignments (because we have found there was no such investigation – see § 108) or (b) that the British customs authorities failed to update the SEED system. We have found no such failure by the British (see § 65) and in any event it is irrelevant as we have found that the appellant failed to carry out any SEED checks in respect of any of the 14 consignments (§ 91).

160. We do accept that as a matter of fact that at the time of these consignments (a) some HMRC *intelligence* officers ought to have had suspicions of MTB and Serio, even though they would not have known of any intended consignments to those warehouses (see § 124); and (b) there was an active Italian investigation into the persons operating the Serio and MTB warehouses at the time of the appellant's consignments (see §§ 115) and the appellant was not warned of this. The failure of the SEED database to reflect the withdrawal of Serio's approved status is irrelevant as

the appellant failed to carry out any SEED checks in respect of any of the 14 consignments (§ 91).

161. We understand the appellant's case is that if it had known that there were suspicions about Serio and MTB at the time, it would not have released the consignments to those warehouses.

As a matter of law, could the Italian investigation be a fortuitous event?

162. The Appellant relies on the judgment of the CJEU in the customs duty case of *De Haan* [1999] ECR I-5003 C-61/98 as support for a wider interpretation of the concept of fortuitous events/force majeure in Article 14. In *De Haan*, the ECJ had to consider whether a customs agent was liable for customs duty on the diversion of several consignments of cigarettes which were diverted onto the Dutch market before they could be exported. The issue was whether customs authorities were under any duty to inform a customs agent that they suspect or are investigating a possible fraud, thus enabling the agent to take action to avoid incurring a customs debt in respect of goods fraudulently removed from customs supervision.

163. The Court held at paragraph 36 that EU law did

> "not impose on customs authorities which have been informed of a possible fraud in connection with external transit arrangements any obligation to warn a principal that he could incur liability for customs duty as a result of the fraud, even where he has acted in good faith".

164. However, the Court went on to hold in paragraph 53 that:

> "the demands of an investigation conducted by the customs authorities or the police constitute, in the absence of any deception or negligence on the part of the person liable, and where that person has not been informed that the investigation is being carried out, a special situation within the meaning of Article 13(1) of Regulation 1430/79. Although it may be legitimate for the national authorities, in order better to dismantle a network, identify perpetrators of fraud and obtain or consolidate evidence, deliberately to allow offences or irregularities to be committed, to place on the person liable the burden of the customs debt arising from the choices made in connection with the prosecution of offences is inimical to the objective of fairness which underlies Article 905(1) of Regulation No 2454/93 in that it puts that person in an exceptional situation in comparison with other operators engaged in the same business".

165. We find that the exemption from customs duties provided for "special situations" under Article 13(1) of Regulation 1430/79 is based on the existence of the "general fairness clause" provided for in Article 905 of Regulation 2454/93. Article 905(1) of Regulation 2454/93 states that where a trader seeks remission of customs duties on grounds other than those expressly set out in Articles 900 to 903 of the Regulation "but the application is supported by evidence which might constitute a special situation resulting from circumstances in which no deception or obvious negligence may be attributed to the person concerned, the Member State to which this

authority belongs shall transmit the case to the Commission", which alone has the power to decide to remit the relevant customs duties.

166. Unlike this provision, Directive 92/12/EC does not reserve to the Commission a general power to remit duties on grounds of fairness. Instead, it is for Member States' tax authorities to apply the grounds of exemption set out in Article 14 of the Directive. Those grounds have to be interpreted strictly (see § 143 above) and they focus on whether the trader took action aimed at identifying and assessing potential risks and also took appropriate and effective steps in order to avoid them (see § 151-2). We have already said why (§ 156) we do not consider that the appellant took reasonable care to avoid the risk. We note that further, even if we are wrong, and "fortuitous event" should be given the wide *De Haan* meaning, we would not find that the appellant had acted without obvious negligence for the reasons given at §§ 99-105.

167. Putting that aside, even accepting that "fortuitous event" could cover the events in *Da Hann, Da Haan* is limited to cases where the taxing authorities "deliberately …allow offences or irregularities to be committed". There is absolutely no evidence that the Italian authorities deliberately allowed offences in relation to these 14 consignments to occur. There is no evidence that they even knew about them before HMRC asked them, many months after they took place and via mutual assistance requests, to confirm whether or not the goods had arrived.

168. It seems that it is part of the appellant's case (although mentioned only in closing) that the Italian authorities permitted Serio and MTB to continue to trade while under investigation. This is true, but it is (under UK law) entirely lawful. Merely suspecting someone of committing criminal offences is not sufficient ground to put them out of business or close them down. The appellant's allegation has to be understood as an allegation that the Italian authorities failed to close down MTB and Serio as soon as it had sufficient *evidence* to bring the criminal conspiracy to an end. We find that there is nothing in the evidence presented on which the appellant could even begin to make out a case on this, irrespective of whether such behaviour would be within *Da Haan* in any event.

169. It is clear that the Italian authorities were very suspicious of Serio and MTB at the time of the consignments. They warned HMRC FLO of this, but did not generally publicise it. Even under *Da Haan* 'special situations' there is no requirement to remit duty just because the tax authorities have suspicions. See § 163 above. *Da Haan* only applies where the taxing authorities "deliberately… allow offences or irregularities to be committed". A taxing authority is not obliged to warn any taxpayer of its suspicions. It would be unable to operate effectively if this was the case. A failure to warn of suspicions is not a *Da Haan* special situation and certainly not an excise duty 'fortuitous event'.

170. And it therefore follows that even though some HMRC intelligence officers knew of these suspicions, their failure to communicate them within HMRC or to traders at large including Trapps is neither a special circumstance nor a fortuitous event. A taxing authority has no obligation to tell anyone of its suspicions: indeed to

publically communicate mere suspicions might well lay it open to legal action. A failure to do so therefore cannot be a fortuitous event.

171. The appellant cannot therefore rely on *De Haan* on the facts or the law. In any event, as we have said there was no "loss" within the meaning of Article 14 so the discussion at §§ 151-170 was obiter in any event.

172. The effect is that the appellant cannot rely on exemption from excise duty. But its next claim is that it was assessed to UK excise duty whereas it could only be assessed to Italian tax. So the UK assessments, it says, should be discharged.

Is the liability to British or Italian excise duty?

173. The parties were agreed that there was an "irregularity" in the movements of the 14 consignments, in that they had not arrived at their destination warehouses. They were agreed that for the appellant to be liable to UK excise duty resulting from that irregularity, the duty point had to arise in the UK.

174. The Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 SI 2001/3022 ("DSMEG") provide for duty points in two situations as follows:

> **Irregularity occurring or detected in the United Kingdom**
>
> **3.** (1) This regulation applies where:
>
> (a) excise goods are:
>
> (i) subject to a duty suspended movement that started in the United Kingdom; …and
>
> (b) in relation to those goods and that movement, there is an irregularity which occurs or is detected in the United Kingdom.
>
> (2) Where the Commissioners are satisfied that the irregularity occurred in the United Kingdom, the excise duty point shall be the time of the occurrence of the irregularity or, where it is not possible to establish when the irregularity occurred, the time when the irregularity first comes to the attention of the Commissioners.
>
> (3) Where it is not possible to establish in which member State the irregularity occurred, the excise duty point shall be the time of the detection of the irregularity or, where it is not possible to establish when the irregularity was detected, the time when the irregularity first comes to the attention of the Commissioners.
>
> (4) For the purposes of this regulation, detection has the same meaning as in Article 20(2) of the Directive.
>
> **Failure of excise goods to arrive at their destination**
>
> **4.** (1) This regulation applies where:
>
> (a) there is a duty suspended movement that started in the United Kingdom; and

(b) within four months of the date of removal, the duty suspended movement is not discharged by the arrival of the excise goods at their destination; and

(c) there is no excise duty point as prescribed by regulation 3 above; and

(d) there has been an irregularity.

(2) Where this regulation applies…. the excise duty point shall be the time when the goods were removed from the tax warehouse in the United Kingdom.

175. We find these regulations were intended to and do implement Article 20 of Council Directive 92/12/EC 'on the general arrangements for products subject to excise duty and on the holding, movement and monitoring of such products' which provides:

"**Article 20**

1. Where an irregularity or offence has been committed in the course of a movement involving the chargeability of excise duty, the excise duty shall be due in the Member State where the offence or irregularity was committed…..

2. When, in the course of movement, an offence or irregularity has been detected without it being possible to determine where it was committed, it shall be deemed to have been committed in the Member State where it was detected.

3. …when products subject to excise duty do not arrive at their destination and it is not possible to determine where the offence or irregularity was committed, that offence or irregularity shall be deemed to have been committed in the Member State of departure….

176. There was no dispute that if the duty point arose in the UK then Trapps was liable. This is provided by reg 7(1) DSMEG which imposed (in accordance with the Dirctive) liability on the person who provided the movement guarantee as shown in box 10 of the AAD. In the case of all 14 consignments we find that that was Trapps. Regulation 7(2) imposed joint and several liability on other persons and this was why Mr Coutts and Goldhirst were also assessed (but those assessments have not been paid).

177. The issue was whether a duty point arose in the UK.

Complete provision

178. It was HMRC's case, which we accept, that the purpose of Article 20 of Council Directive 92/12/EC was to make provision for the division of jurisdiction between the Member States in relation to excise offences or irregularities. In particular, its purpose was to avoid conflicts between Member States by ensuring that only one Member State would have jurisdiction in relation to any specific offence or irregularity and, secondly, to ensure that one Member State did clearly have jurisdiction so as to ensure that the relevant excise duty was collected.

179. As HMRC pointed out, this was explained by the CJEU in *Case C-395/00 Cipriani [2002] ECR I-1187*:

> [46]"the purpose of Article 20 of the Directive is in particular to determine the Member State entitled to collect the excise duty on the products where, in the course of a movement, an offence or infringement has been committed".

180. The purpose of Article 20 is to avoid both double taxation and non-taxation, ensuring in each possible circumstance that only one Member State has jurisdiction to assess and that the relevant excise duty is in fact collected.

181. In this case Trapps has not been assessed by the Italian tax authorities who have in any case stated, we find, that they consider the UK to have the responsibility to assess for the lost excise duty in this case. HMRC point out that if this Tribunal decides that the UK taxing authorities did not have jurisdiction to assess for the duty then the duty would go uncollected anywhere in the EU. While it appears that this is true, it cannot affect the interpretation of the Directive.

182. The question is not whether the Italian authorities have chosen to leave the assessments to the UK, but whether the UK tax authority is the authority with the right to tax under Article 20.

Which provisions determine the duty point?

183. The Commissioners' case is that jurisdiction in the present case is determined by Article 20(3) of Directive 92/12/EC, which was implemented into UK law by Regulation 4 of DSMEG. In other words they see this as a case where the goods did not arrive at their destination, and not a case where an irregularity was detected in the course of a movement.

184. They cited the CJEU in *Cipriani:*

> "Where products subject to excise duty do not arrive at their destination and it is impossible to determine where the offence or irregularity was committed, Article 20(3) of the Directive provides, in particular, that the offence or irregularity is deemed to have been committed in the Member State of departure, which is therefore entitled to collect the excise duty".

185. They also rely on what Advocate General Mischo stated in paragraphs 75 to 80 of his Opinion in *Cipriani*, that Article 20(3) is alone applicable where it is not possible to determine where the irregularity or offence was committed and the relevant goods do not arrive at their destination.

186. They also cite Lawrence Collins J in paragraph 12 of his judgment in *Arena* [2003] EWHC 3032 (Ch):

> "The rationale of these provisions is that in cases of diversion it is often very difficult, or impossible, to determine the moment or place of the diversion (and thus the moment of "release for consumption" of the

> goods under Article 6). Accordingly Article 20(3) provides that where it is not possible to determine where the offence or irregularity was committed, the offence or irregularity is deemed to be committed in the Member State of departure".

In other words, where as in this case, it is not possible to determine where the irregularity occurred, the authorities are that Article 20(3) determines the duty point.

187. The appellant does not agree. It considers that (2) applies in preference to (3) and that the duty point is the member State in which the offence was detected. The appellant's case is that that was Italy.

188. There is merit in the appellant's position in that because article 20(2) precedes Article 20(3) it should be considered first. Only if it does not apply should article 20(3) be considered.

189. However, we agree with HMRC that Art 20(2) is restricted to irregularities detected *in the course of a movement.* This was the opinion of Advocate General Mischo in *Cipriani:*

> "Paragraphs 1 and 2 of Article 20 both address the situation in which an offence or irregularity has been committed in the course of a movement. Within this context, paragraph 1 concerns the situation in which the place of the said offence or irregularity is known and paragraph 2 the situation in which it is not."

190. We also agree with the Tribunal's reasoning in *SDM European Transport Ltd* [2011] UKFTT 211 (TC):

> "[429] The words 'in the course of the movement' show that the time of detection was limited to the movement. While they may cover a shortage or irregularity being discovered on arrival at the destination, the words did not in our judgment cover a situation where an irregularity was discovered as a result of later enquiries…"

191. If Art 20(2) was to be interpreted as including a situation where the irregularity detected was the failure of the goods to arrive at the destination warehouse, this would deprive 20(3) of any meaning. Article 20(2) should be applied first, but it has a restricted application. It applies only to *detections made during the course of a movement* and does not refer to a detection made after the end of the movement even though almost inevitably that detection is of an irregularity which must have occurred during the movement.

Postcript – where was the irregularity detected?

192. In any event, if we had agreed with the appellant that Art 20(2) applied even where the detection took place after the termination of the movement, we do not agree that the offence was first detected in Italy.

193. Although there is a great deal of evidence that the Italian tax authorities were investigating the use of MTB and Serio by organised crime to commit excise fraud,

there is no evidence that the Italian tax authorities knew anything about the particular 14 consignments from Trapps as they never arrived at MTB and Serio.

194. In so far as it is the appellant's case that "detected" refers to detection of related crimes and irregularities (such as the forgery of the AADs), rather the particular diversion which gave rise to the excise duty liability in question, we reject it. It is obvious that Art 20(2) is referring to the particular offence or irregularity which gave rise to the duty point. Any other interpretation is not logical and would create an uncertainty which would make it very difficult for tax authorities to decide where a duty point arose, when the purpose of Art 20 was to avoid such difficulties.

195. In so far as it is the appellant's case that it was the Italian tax authorities rather than the British which first detected that the particular 14 consignments the subject of this appeal were diverted, we reject this on the evidence.

196. It is clear from the above evidence (§ 116 & 123) that the frauds which the Italians were principally investigating were excise goods leaving the three suspect warehouses but not arriving at their purported destination, and the affixing of false stamps to assist with inward bound frauds where goods were purportedly despatched to the three suspect warehouses but never arrived. They were not actually investigating the diversion of goods purportedly en route for Italy beyond their interest in the forging of the stamps on the AADs.

197. It was also Mr Young's case that the fraud was detected in Italy specifically because of the telephone tap evidence. This shows that telephone tap information on 25 October 2001 led the Italian tax authorities to discover a number of envelopes sometime after 7 November 2001. These envelopes contained AADs with false stamps attached and related to movements including three from Trapps supposedly to Serio. However, the Italian authorities did not ask HMRC to confirm that Trapps had indeed released the relevant consignments.

198. We agree with the Tribunal in *SDM* at §432 that the words "where it was detected" in Article 20(2) "must involve at least a provisional judgment that there has been an irregularity".

199. We consider that a provisional view that the 6 MTB consignments had not reached their destination was reached by Officer Parsons, sometime after the movements in question, arising out of the investigations into Goldhirst he was undertaking as part of the Fulcrum Initiative. It led him to make enquiries of the Italian authorities who confirmed in July 2002 that MTB had not received the consignments.

200. Similarly we find Officer Parsons had a provisional view, arising out of his investigations and the knowledge that Serio was not authorised, that the Serio consignments had not reached Serio. An Italian officer confirmed in January 2002 that the AADs had false stamps. The Italian tax authorities later confirmed, in response to an enquiry, that Serio had not received the consignments.

201. In other words we find, were we called to do so, that it was HMRC and not the Italian authorities which detected that the 14 consignments had not arrived. However, for reasons we have already stated, the Tribunal is not called upon to make determinations like this unless the detection is during the course of the movement. Apart from detections in the course of a movement, Article 20 deems the excise duty point to arise, if the goods do not arrive, at the point of departure. It does this in order to provide rules that are simple to apply to carve up jurisdiction between the member states; it should not be interpreted in such a way that the question of jurisdiction can only be decided by determining difficult questions of which member State 'detected' a diversion when, inevitably, the fact of that diversion can only be proved by reliance on mutual assistance requests made between member States. The Directive was not intended to give rise to such fine distinctions about whether a 'detection' took place before or after the destination member State answers a mutual assistance request about whether the goods actually arrived.

202. In any event this discussion in §§ 192-201 is besides the point as the irregularity was not detected in the course of the movement of the goods so Article 20(2) does not apply. Article 20(3) applies.

Preconditions for Article 20(3)

203. As we have said, neither the Italian nor UK tax authorities detected the irregularity during the course of any of the 14 movements. The Italians were not aware of the movements at the time they took place, and while HMRC would have known about the movements under the EWS, they did not detect any irregularity in respect of them until much later. Article 20(3) applies where:

> *(a)* The dutiable goods did not arrive at their destination and
>
> *(b)* it is not possible to determine where the offence or irregularity was committed.

204. All parties are agreed that the consignments did not arrive at their destination warehouses. The appellant's case was that the goods arrived in Italy and that was sufficient to prevent the application of Article 20(3)(a). However, it is clear that by "destination" in Art 20(3) the Directive is intended to refer to the destination warehouse and not the country in which that warehouse was located. The goods would not have reached their "destination" if they merely crossed the border to Italy. They would not have reached their destination until they arrived at the warehouse. And it was accepted and we find that the goods did not arrive at their destination warehouses (see § 53) and therefore condition (a) above is satisfied.

205. The appellant's case is that Article 20(3)(b) is not satisfied because, it says, it *is* possible to determine where the offence or irregularity was committed: it was, says the appellant, committed in Italy. If it if was known that goods were diverted in Italy then under Article 6 of the Directive the duty would be chargeable in Italy.

206. As the evidence is evenly balanced on whether or not the goods left the UK (see § 54-57), we find out that the appellant has not made out its case that it is possible to

determine where the offence or irregularity was committed. It has certainly not proved its case that the diversion took place in Italy.

207. The appellant's case that the goods arrived in Italy appears to be based on the Midolo report that MTB and Serio were engaged in different kinds of fraud. We have set this out at § 116-123 above. The appellant's case was that the fraud in this case was the first type when goods would arrive at MTB and Serio and then be diverted on departure from those warehouses. We have already said that that clearly was not the fraud at issue in this case: the goods never arrived at MTB or Serio. Had that been the kind of fraud at issue, MTB and Serio's records would have recorded the arrival and departure of the goods. There would have been no need to affix false stamps to Trapps' AADs (see § 118).

208. In conclusion Art 20(3) applies.

Which irregularity?

209. The appellant also argued that HMRC could not say that the location of the offence or irregularity could not be determined because it was obvious that the affixing of false stamps to AADs was an offence and an irregularity that had occurred in Italy. The Midolo report and logic support the appellant's case that the affixing of the false stamps took place in Italy and HMRC do not suggest otherwise.

210. But it is irrelevant. Article 20(3) is concerned with a particular offence or irregularity as it refers to "the offence or irregularity". And it is clear that the offence or irregularity to which it refers, is the offence or irregularity with which the article is dealing, which is that the excise goods did "not arrive at their destination". This is obvious because it is that irregularity on which the excise duty liability which is the subject of Article 20(3) depends.

211. The excise duty is chargeable because the excise goods have been released for consumption: Article 6(1) gives liability to duty on any release for consumption including an irregular release from excise suspension arrangements.

212. There is in any event no other sensible interpretation of Art 20. Diversions of excise goods may involve a number of different excise offences taking place in a number of different places and at a number of different times. Unless Art 20 is read as referring to the offence of the actual diversion of the goods, rather than the application of false stamps to AADs or any other act undertaken to facilitate the offence, it would be impossible to sensibly apply the law, which would obviously be contrary to the purpose of Art 20.

Conclusion

213. As we have said Articles 20(1) & (2) deal with the situation of an irregularity committed during the course of a movement and, where it is not possible to determine *where* it was committed, deems it to be in the member State of detection. Article 20(3) deals with the situation of an irregularity detected after a movement, and where

it is not possible to determine *where* it was committed, deems it to be in the member State of departure. There is no need for Article 20 to deal with the situation where it is known where the irregularity was committed because Article 6 provides the answer to this. An irregular departure from duty suspension triggers excise duty liability (article 6(1)(a)). If it was known that the goods were diverted, say, in the UK, UK excise duty would be chargeable as Article 6(2) provides that liability arises in the member State where the release for consumption takes place.

214. There is perhaps a conceptual difficulty with Article 20 in that it is dealing with a situation where it is not known where the diversion took place. Yet under common law the courts habitually determine questions where the evidence is evenly balanced both ways: it depends on who has the burden of proof. In practice this Tribunal does not know whether the goods ever left the UK. As a matter of law, because the burden of proof is on the appellant and it is the appellant's case that the goods left the UK, we would determine that the goods never left the UK.

215. However, it seems to us that the European Council would not have in mind the various member States' rules on how to determine evenly balanced evidence. When article 20 uses the phrase "without it being possible to determine where [the irregularity] was committed" it means without it being possible *in practice* to determine where the irregularity was committed.

216. So it is Article 20 which determines where the liability falls in this case. We find that Article 20(3) applies and that as the UK was the member State of departure then it is for UK to assess the duty. The appellant was the consignor and guarantor and it is therefore liable to that duty under regulation 7(1) of DSMEG.

217. But if we were wrong on this interpretation of that phrase, we would find that it is possible to determine where the irregularity was committed, because the rules on the burden of proof means that the irregularity was committed in the UK. And Article 6(1) would similarly place liability for the excise duty on the appellant.

Asssessments not to best judgment

218. This was a new matter raised by the appellant in closing. The allegation appears to be that the assessment did not take into account all the matters which the appellant allege amounts to a fortuitous event. We do not find that the assessments were not to best judgment. We find that they were right and therefore it follows they were to best judgment. There was no need to consider the matters which the appellant allege were fortuitous events: they were not. And as they were not fortuitous events, they were not relevant.

HMRC failed to ask the consignee for a guarantee

219. Another new matter raised in closing by Mr Young was that he said, as at least some UK intelligence officers knew of the Italian investigation, they should have asked Serio or MTB to provide a guarantee for any consignment to them. Article 15(3) does permit a member State to require the consignee to provide a guarantee.

220. However, a failure by HMRC to exercise a discretion which it has in law is not justiciable in this Tribunal. See *J H Corbitt (Numismatists) Ltd* [1980] STC 231, *Aspin v Estill [1987] STC 72, HMRC v Hok Limited* [2012] UKUT 363 (TCC) and *National Westminster Bank plc* [2003] STC 1072. If the appellant considers it can make a case out on this its only remedy is judicial review. Our view, for what it is worth, is that HMRC cannot be required to act on mere suspicions.

Lawful removal

221. Another ground on which the appellant relied was that under s 94(3)(b) CEMA 79 it considers that it cannot be assessed to duty as there was no unlawful removal of the goods from a warehouse and therefore there was no liability to duty. This makes little sense: the appellant is assessed under DSMEG on the grounds that the goods failed to arrive at their destination and *not* under CEMA for an unlawful removal from a warehouse.

222. The appellant's case on this has to be understood as a case under DSMEG that there was no irregular departure from suspension arrangements because (alleges the appellant) HMRC authorised it to release the goods. It authorised this, says the appellant, by the EWS and/or a positive SEED check.

223. This fails on the facts as we have found that HMRC did not under the EWS authorise any release of the goods (see § 97-98) and as we have said repeatedly, the appellant did not carry out SEED checks. In any event, as a matter of law, even had HMRC either or both given an approval or a positive SEED check, that would not alter the position. The position is that the goods did not arrive at the destination warehouse and that therefore there was an irregular departure from duty suspension arrangements and liability follows under DSMEG and Article 20.

224. Lastly, Mr Young's case on this might be understood as saying that even if under Article 20 the appellant is liable to the duty, its assessments should be waived because HMRC authorised the release and/or gave a positive SEED check. As above, this fails on the facts as HMRC did neither of these things. And as a matter of law, such a question is beyond the jurisdiction of this Tribunal (see 220). It could only form the subject of a claim for judicial review and on the facts of this case such a claim would appear bound to fail.

Conclusion

225. All the grounds of appeals raised by the appellant have failed. The appeal is dismissed.

Footnote - Disclosure application

226. On 9 May 2013 counsel for the appellant asked the Tribunal in chambers for a disclosure order for details of the criminal investigation into an ex- HMRC officer Mr "X". We redact the name because we understand this officer is currently bailed and

may face criminal prosecution and we do not wish to prejudice the possible criminal trial. This is the reason also why Mr Young made the application in private.

227. Mr X had been an HMRC officer who appeared to have some involvement with the appellant's excise affairs in 2001: the extent to which Mr X had day to day responsibility within HMRC for the appellant's affairs was not agreed. He was not a witness in the hearing, and is not mentioned elsewhere in this decision as what little information we had on him appeared irrelevant to the appeal. At the start of the hearing in November, the appellant had asked, unopposed, for a witness summons against him, which we granted, but Mr X failed to appear.

228. It seems that the appellant's advisers received information at lunchtime on 9 May 2013 that Mr X had been (some time before) dismissed by HMRC for dishonesty. They conveyed this information to HMRC's solicitors, who made further enquiries and discovered that Mr X was being criminally investigated by HMRC's Internal Governance, which has power to prosecute. We were informed by Mr Hill that his information was that Mr X had been bailed pending investigation of allegations that in 2011 in return for bribes he tipped off traders about HMRC enquiries into excise matters.

229. Mr Young told us that he wished to know if there was more to Mr X's alleged criminal activities than this and postulated that it was possible that in 2001 (ten years earlier) Mr X was in conspiracy with the Italian fraudsters indicated in this appeal, and that if this was the case it might have a bearing on the outcome of this appeal.

230. He suggested that while he did not want to stop the Tribunal proceedings pending discovery, he did want something in writing from HMRC Internal Governance or HMRC's Solicitors Office so that, if it transpired there was more to Mr X's alleged criminal conduct than tipping off in 2011, he would be able to introduce this new evidence (if relevant) on appeal to the Upper Tribunal if the First-tier Tribunal decided the appeal against his client.

231. Our decision was that there was no need for HMRC Internal Governance or HMRC Solicitors' Office to put anything in writing. The appellant had the assurance from Mr Hill, counsel for HMRC. And I would not order HMRC to give any further assurance: that would be enough of an explanation for the Upper Tribunal (should the appellant require it) of why Mr Young was unable to take the matter any further in this Tribunal.

232. And in so far as it was a request for disclosure for the sake of seeking information, we would not allow it in any event as it amounted to no more than a fishing expedition: there was no evidence in the appeal to suggest that Mr X conspired with the Italian mafia in 2001 or was otherwise criminally involved in the 14 diversions the subject of this appeal. There was therefore nothing to suggest that disclosure of the investigation against Mr X would reveal anything relevant to these proceedings and we refused it.

233. 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.

BARBARA MOSEDALE
TRIBUNAL JUDGE

RELEASE DATE: 11 November 2013