[2013] UKUT 0251 (TCC)
Appeal number FTC/64/2011

Excise duty – whether spirits delivered to declared destinations - did First-tier Tribunal wrongly consider that it could not reach a decision that implied dishonesty on part of Appellant? – held no - did First-tier Tribunal wrongly hold that HMRC had burden of proof? – held no - whether First-tier Tribunal made findings of fact that were not open to it or otherwise err in its approach to the evidence? – held that First-tier Tribunal failed to give adequate reasons for conclusion that all journeys took place as described in face of contradictory evidence – appeal allowed in part – case remitted

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE AND CUSTOMS

Appellants

- and –

SDM EUROPEAN TRANSPORT LIMITED

Respondent

Tribunal: Judge Greg Sinfield
Judge Charles Hellier

Sitting in public in London on 3 – 6 December 2012

Jessica Simor and Suzanne Lambert, counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, counsel, for the Appellants

Richard Barlow LLB MSc, representative for the Respondent, instructed by Smith & Williamson LLP

DECISION

Introduction

1. The Appellants ("HMRC") appeal against the decision of the First-tier Tribunal (Judge Theodore Wallace and John Coles) ("FTT") released on 28 March 2011, [2011] UKFTT 211 (TC) ("the Decision"). The FTT allowed an appeal by the Respondent ("SDM") against an assessment to excise duty of £6,306,137 under Regulation 7(1) of the Excise Duty Points (Duty Suspended Movements of Excise Goods) Regulations 2001 ("DSMEG Regs").

2. SDM is a haulier and was the transporter and guarantor of movements of 65 consignments of spirits between duty warehouses in the UK and duty warehouses in Belgium, Germany and Latvia in 2006. HMRC concluded that none of the consignments reached their destinations and that SDM, as guarantor, was liable for the duty in the UK on the basis that an excise duty point had arisen under regulations 3 or 4 of the DSMEG Regs because the goods had either never left the United Kingdom and/or it was impossible to ascertain where they had gone.

3. SDM appealed. SDM did not dispute that the spirits had been diverted, ie not properly entered in the countries of destination, but contended that the goods had arrived at the places of destination and, accordingly, duty was payable in the countries of destination and not in the UK. It was not disputed that the burden of proof was on SDM to show that the goods arrived at their destination. It was accepted that, if the FTT could not determine in which Member State the irregularity occurred, then excise duty was due in the UK. It followed that the only issue of fact for the FTT was whether the goods were delivered to their destinations.

4. In this appeal, HMRC contend that the FTT erred in law in its approach to the evidence and made findings of fact that were not open to it. For the reasons given below, we allow the appeal in relation to one of the grounds and direct that the case be remitted to a differently constituted First-tier Tribunal.

Evidence, facts and FTT's decision

5. As is clear from the Decision (see [9] – [13]), the FTT considered a substantial amount of evidence. The documents consisted of over 4,000 pages in more than 20 bundles. The hearing of the appeal lasted 13 days spread over two months in 2010. The FTT heard evidence from 13 witnesses for SDM and six witnesses for HMRC. The FTT also considered witness statements of two witnesses for SDM who were unable to attend, although the contents were not agreed by HMRC.

6. The FTT heard evidence from two directors of SDM, Mr Cranny and Mr Hodgkins. The FTT also heard evidence from Mr Bunce who traded as J&J International ("JJI") until August 2006 and then operated through Connie International BV ("Connie") and was himself a driver of two consignments. Four other drivers gave evidence: Mr Waters who was the driver of eight consignments for JJI and Connie; Mr Blunsden, a self-employed owner-driver, who drove eight consignments; Mr Francis who drove four consignments for Mr Woods, a sub-

contractor who also gave evidence; and Mr Parnham, a self-employed owner-driver, who was the driver of five consignments. All the drivers, including Mr Bunce, said that they delivered the consignments to their destinations. No tachograph discs were produced by any of the drivers or subcontractors covering any of the movements.

7. The FTT heard evidence from personnel of the consigning warehouses in the UK. The FTT also heard evidence from Mr Airlie, director of Doktor Czech UK Limited ("Dr Czech") which sold the spirits which were the subject of 57 of the movements under consideration. The FTT also considered witness statements of two witnesses who were not available to give live testimony, namely Mr Chahal, director of Liquid Marketing Limited ("Liquid Marketing") which sold six of the consignments of spirits, and Mr Wild, a self-employed owner driver who drove 14 consignments. Six witnesses, all officers of HMRC, gave evidence for HMRC concerning the investigation of the movements.

8. The FTT set out the facts at [2] – [7], [16] - [21] and [23] - [386] of the Decision. We summarise the facts in the following paragraphs in order to provide some background to this appeal. We discuss the evidence in more detail below in the context of the specific criticisms of the FTT's findings of fact made by Ms Jessica Simor who appeared with Ms Suzanne Lambert for HMRC.

9. Between July and November 2006, SDM was engaged by Dr Czech to transport 57 consignments of spirits to an excise duty warehouse at Vaux-sur-Sûre in Belgium operated by Aldi SA ("Aldi"). Two of the consignments were spirits that had been sold to Tele Audio Group ("TAG") based in Belgium. The other 55 consignments were spirits sold to Cyber Comp ("Cyber") based in Luxembourg.

10. Between July and October 2006, SDM was engaged by Liquid Marketing, to transport six consignments of spirits, which had been sold to TAG or to Cyber, to the Aldi warehouse at Vaux-sur-Sûre.

11. In September 2006, SDM was engaged by Tradium Limited to transport a single consignment of spirits to Unistock SA in Latvia. In December 2006, SDM was engaged by Pierhead Purchasing Limited to transport a single consignment of spirits, which had been sold to Intermediaire Europe Eurl Limited, to Dialog Logistik GmbH ("Dialog Logistik") in Germany.

12. All the movements were subcontracted by SDM. Mr Bunce said that Connie carried out approximately 28 movements to Aldi for SDM. Connie also transported goods to Latvia when Mr Bunce drove.

13. In August 2006, HMRC made enquiries of the Belgian authorities which informed HMRC on 31 October that the goods in question had not arrived at Aldi. HMRC obtained copy 3 AADs in relation to 18 movements to Aldi. They bore forged Belgian Customs stamps and forged Aldi stamps and signatures. No AAD3 was returned for the other 47 movements. All CMR International Consignment Notes to Aldi carried Aldi stamps of a type not in use at the time apart from eight which carried no Aldi stamp. Two Aldi employees made statements to the Belgian police to

the effect that Aldi did not receive the goods at the warehouse. A Belgian Customs officer, formerly responsible for the Aldi warehouse, was arrested on 30 November 2006 and later admitted forging 11 AADs in relation to consignments by Dr Czech and Liquid Marketing to the Aldi warehouse.

14. HMRC formed the view that none of the consignments reached its destination. HMRC assessed Dr Czech, Liquid Marketing and five subcontractors, Connie and four of the owner-drivers, for duty on the consignments with which they were concerned under regulation 7(2) of the DSMEG Regs as having caused the occurrence of the excise duty points. As stated above, SDM was assessed under regulation 7(1) of the DSMEG Regs on the basis that it was strictly liable for the duty as guarantor. The FTT records in [8] of the Decision that there was no allegation in HMRC's Statement of Case or skeleton argument that SDM caused any irregularity.

15. The FTT concluded that, on the balance of probabilities, all the movements arrived at their destinations except for one movement, Movement 65, intended for Germany. The FTT therefore allowed the appeal in relation to all the movements except one.

Grounds of appeal

16. Ms Simor submitted that the FTT erred in law in four respects, namely:

(1) Ground 1. The FTT incorrectly considered that it was precluded from reaching any decision that by implication contemplated that the Appellant, or its employees, had acted dishonestly.

(2) Ground 2: The FTT wrongly applied the burden of proof, requiring the HMRC to prove the scenario that the FTT had imputed to it and also requiring it to show that the Appellant's 'scenario' was incredible.

(3) Ground 3: The FTT reached findings of fact that were not open to it on the evidence and that no reasonable tribunal could have reached in that the facts were such that no person acting judicially and properly instructed as to the relevant law could have come to the determination that it did.

(4) Ground 4: The FTT's approach to reaching its decision and the assessment of the witness evidence were erroneous.

First ground of appeal

17. HMRC's first ground of appeal is that the FTT erred in law in the view it took in relation to the relevance of 'dishonesty' not having been pleaded against SDM. HMRC submit that the FTT incorrectly considered that it was precluded from reaching any decision that by implication contemplated that SDM or any of its employees had acted dishonestly. Both parties agreed that because SDM had strict liability under Regulation 7(1) of the DSMEG Regs to pay the amounts under the movement guarantees, the FTT did not have to determine precisely what happened to the goods or whether SDM was honest or dishonest. The criticism is that, in precluding itself from finding that SDM or any of its employees had acted

dishonestly, the FTT failed to address the evidence properly and reached the wrong conclusion.

18. The issues that we must address are did the FTT decide that it was precluded from finding that SDM or any of its employees had acted dishonestly and, if so, was it wrong to do so?

19. The need for the issue of dishonesty to be put to a witness arose in relation to the evidence of Mr Stephen Waters, who was the driver for Movements 2, 9, 10, 15, 47 and 64 and possibly also 55 and 59. The FTT records at [150] that, after Ms Simor had finished her cross-examination of Mr Waters, the FTT pointed out that it had not been put to Mr Waters that he did not deliver any loads to Aldi and referred to *EPI Environmental Technologies Inc v Symphony Plastic Technologies plc* [2004] EWHC 2945 (Ch), [2005] 1 WLR 3456. Although the FTT did not quote the passage at [150], it is worth setting out what Peter Smith J said in *EPI Environmental Technologies* at [74(iii)]:

> "I regard it as essential that witnesses are challenged with the other side's case. This involves putting the case positively. This is important for a judge to enable him to assess that witness's response to the other case orally, by reference to his or her demeanour and in the overall context of the litigation. A failure to put a point should usually disentitle the point to be taken against a witness in a closing speech. This is especially so in an era of pre-prepared witness statements. A judge does not see live in chief evidence, thereby depriving the witness of presenting himself positively in his case."

20. This is a point which has arisen in the context of tax appeals. A recent example is *Joseph Okolo v HMRC* [2012] UKUT 416 (TCC), which was released after the Decision in this case but was referred to in the hearing before us. In *Okolo,* Arnold J said at [34]:

> "Finally, I would add that, in the absence of any challenge to Mr Okolo's evidence to the Tribunal that he had not developed, refurbished or redecorated any properties other [than] his own residence, it was not open to the Tribunal to disbelieve that evidence: see Phipson on Evidence (17th ed) at §12-12 and the authorities cited in footnote 32, in particular *Markem Corp v Zipher Ltd* [2005] EWCA Civ 267, [2005] RPC 31 at [50]-[61]. Counsel for HMRC submitted that this rule of evidence did not apply in the First-tier Tribunal. I do not accept that submission. This rule of evidence is simply an application of the principles of natural justice which apply in all courts and tribunals."

21. The FTT records at [150] that Ms Simor applied to put the point to Mr Waters but the FTT refused to allow the cross-examination to be re-opened. Rule 2 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 requires the tribunal to deal with cases fairly and justly. Rule 2(2) provides that dealing with the case fairly and justly includes "avoiding unnecessary formality and seeking flexibility in the proceedings." In our view, the objectives of flexibility and informality suggest that the FTT should have permitted the additional questions to have been put. In the

circumstances, however, it seems that the fact that the questions were not put did not have any effect on the FTT's findings because it considered (see the next paragraph) that there was an implicit formal challenge to the deliveries.

22. Ms Simor submits that [443] of the decision shows that the FTT accepted SDM's submission that where HMRC do not plead or explicitly allege dishonesty, the FTT must approach the case on the basis that SDM was honest. In [443], the FTT, having said that they accepted the evidence of Mr Cranny and Mr Hodgkins that they did not know the names of the drivers, other than their core owner-drivers, stated that "[i]t was not suggested to [Mr Cranny or Mr Hodgkins] that they were a party to the conspiracy or that they informed anyone of the identity of the owner-drivers used for any movement". In our view, the FTT was not here stating that it must treat SDM and its directors as honest in the absence of pleading or allegations of dishonesty by HMRC but simply saying that it accepted the evidence of Mr Cranny and Mr Hodgkins which was not contradicted.

23. The FTT set out at [448] and [449] the significance of the issue of dishonesty in the appeal. The FTT observed that:

> "448. Faced with two alternative scenarios both of which present substantial difficulties we turn to consider the evidence of the drivers as to the movements.
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> 449. It is clear that there was an overall conspiracy in relation to the Belgian consignments on either scenario, although different persons were no doubt involved at different times. Logically if we are satisfied that any one of the drivers did deliver the goods at Aldi, that would show that there were one or more dishonest insiders at Aldi and this would be relevant to all the Belgian movements. Equally if we conclude that any one driver was involved in the conspiracy and did not deliver to Aldi, that would show that somehow the ringmasters were able to discover in advance who that driver was and presumably who the other drivers were."

It is clear from [449] that the FTT had not ruled out the possibility that it could conclude that one or more of the drivers might be dishonestly involved in the conspiracy.

24. The FTT returned to the subject of the need to put matters in cross-examination in relation to Mr Waters's evidence at [460].

> "As recorded at paragraph 150 it was never in fact put to Mr Waters that he did not deliver any loads to Aldi, although it was pleaded at paragraph 38(c) of the Statement of Case that the goods did not reach the warehouse of intended destination. It was not pleaded or put to Mr Waters that he was part of an overall conspiracy although this was implicit in Customs' case. The requirement to put matters in cross-examination is long established. In *Browne v Dunn* (1894) 6 R 67 (cited in *Hamilton on Tax Appeals* (2010) at paragraph 17.179) Lord Halsbury said at page 76,

> "To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have disposed to."

> In the present case Mr Waters was cross-examined for some two hours and was questioned on each movement. We approach Mr Waters' evidence on the basis that there was an implicit formal challenge to the deliveries. However the fact that there was no actual challenge reflected the fact that there was no point in his cross-examination when a challenge was clearly to be expected in the light of his answers and of his demeanour."

25. It is clear from [475] that the FTT accepted the evidence of Mr Waters and the other drivers (Mr Blunsden, Mr Parnham and Mr Francis) and were satisfied on the balance of probabilities that they did not divert their loads en route to Aldi. The FTT gives no indication that it reached that conclusion on the basis that Ms Simor had not put an allegation of dishonesty to Mr Waters or the other drivers in cross examination. The last paragraph of [460] shows that the FTT considered that there had been a challenge, albeit implicit, to Mr Waters's evidence of delivery to Aldi. The FTT came to its conclusion in [475] because it accepted the evidence of the drivers and not on the basis of any failure to plead dishonesty or put it in cross examination.

26. Ms Simor's criticism was not limited to the FTT's approach to the evidence of Mr Waters and the drivers. She also relied on passages from the Decision at [472] and [473]:

> "472. Ms Simor correctly submitted that as a matter of law SDM's liability as guarantor is strict and does not depend on an allegation of dishonesty by or on behalf of SDM. However as a matter of fact she was unable to advance any explanation as to how diversions before arrival at Aldi could have been organised without involving the drivers and how the ringmasters could have identified the drivers without participation by SDM. Participation by Mr Bunce would not have assisted with movements by SDM's core owner-drivers.
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> 473. Having heard both Mr Cranny and Mr Hodgkins cross-examined at length, we found them both to be honest witnesses. Not only was it not put to them that they participated in a criminal conspiracy, but on the material before us we do not consider that such an allegation could properly have been put. There was no evidence or suggestion that SDM made anything more than a normal commercial profit."

27. Ms Simor submitted that [472] showed that, although it correctly stated that there was no need for HMRC to prove dishonesty, the FTT then disregarded its

observation and approached the case on the basis that, since HMRC had not made an allegation of dishonesty, they needed "as a matter of fact" to show "... how the diversions before the arrival at Aldi could have been organised without involving the drivers and how ringmasters could have identified the drivers without participation by SDM". We do not accept this criticism of the FTT. It is clear from [473] that the FTT accepted the evidence of Mr Cranny and Mr Hodgkins (see also [443]) and, further, found that there was no evidence that could have founded an allegation of involvement of SDM in a criminal conspiracy.

28. In our view, the passages from the Decision show that the FTT considered that there was a requirement to put matters in cross-examination but they do not go as far as to show that the FTT decided that it was precluded from finding that SDM or any of its employees had acted dishonestly because HMRC had not made any specific allegation of dishonesty. The FTT regarded such an allegation as implicit and simply preferred the evidence of the directors of SDM and those drivers who gave evidence.

Conclusions on first ground of appeal

29. We do not accept that FTT considered that unless HMRC proved that SDM was dishonest, the FTT had to proceed on the basis that SDM and its employees, including the owner-drivers, were honest. At [473] and [475], it is clear that the FTT took the view that HMRC had not undermined the evidence of SDM's directors or of Mr Waters and the other drivers which the FTT accepted.

30. In our view, Ms Simor has not established that the FTT misdirected itself or adopted an erroneous approach to the question of dishonesty. Accordingly, we reject this ground of appeal.

Second ground of appeal

31. HMRC's second ground of appeal is that the FTT erred in law in its approach to the burden of proof.

32. HMRC accept that the FTT correctly stated the position as to burden of proof and the issue to be decided at [440], where the FTT said that:

> "In order to succeed the Appellant must satisfy us on the balance of probabilities that the irregularities were committed in a Member State other than the UK so that the duty is due in that other Member State … rather than in the UK. … In relation to the Belgian consignments the issue is therefore whether we are satisfied on the balance of probabilities that the goods were delivered to Aldi."

The only issue is whether the FTT acted in accordance with its own precept.

33. HMRC contend that, notwithstanding that it set out the burden of proof correctly, the FTT erred in that it applied the wrong test in the Decision. HMRC say that, although the FTT purported to assess the facts on the basis that it was for SDM

to prove that the goods reached their intended destination (see [440]), this is not in fact what it did. Ms Simor submitted that, when properly analysed, it is evident that the FTT failed to assess whether SDM had discharged that burden by reference to the evidence in front of it. Ms Simor submitted that the FTT accepted SDM's submission that, once SDM had established a prima facie case that the goods had been delivered to their destination, then the evidential burden shifted to HMRC. HMRC's case is that the FTT approached the evidence on the basis that it was for HMRC to plead and prove, by reference to a 'theory' or 'scenario' precisely what happened and then the FTT's task was to assess whether HMRC's scenario was more probable than that of SDM. Ms Simor relied on [456] where the FTT said: "We get little assistance from Movement 1 in deciding whether Mr Barlow's scenario is the more probable. The delay between Mr Melvit meeting Mr Airlie and the departure of Movement 1 is consistent with either scenario."

34. Ms Simor also referred to [471] where the FTT said that it was faced with two scenarios, namely HMRC's scenario that the goods never reached Aldi and SDM's scenario that the drivers were not involved and the goods were diverted after they reached Aldi. Also, at [487] the FTT said that, in relation to the Aldi consignments for which there was no evidence of delivery by a driver and no statement, it had to decide whether it was satisfied on the balance of probabilities that the conspiracy followed the same method.

35. The difficulty with HMRC's submission is that they cannot point to any statement by the FTT in the Decision that indicates that the FTT considered that the burden of proof was borne by or shifted to HMRC. We have already referred to the passage from the Decision at [440] where the FTT correctly set out the position on burden of proof. The FTT also discussed burden of proof at [475] and [490]. At [475], the FTT said:

> "475. Faced with the difficulty of the two competing scenarios, the burden of proof which rests on SDM is important. Having heard the evidence of Mr Waters, Mr Blunsden, Mr Parnham and Mr Francis, we are satisfied on the balance of probabilities that they did deliver to Aldi; their evidence tips the balance in respect of those deliveries. Similarly we are satisfied on the balance of probabilities that Mr Bunce delivered to Latvia. "

36. At [490], the FTT, when discussing those deliveries for which there was no driver evidence, said:

> "490. The mere fact that there was no direct evidence of delivery is not decisive in spite of the burden of proof. In legal proceedings of any nature facts can be established by inference. We have to decide whether the inference of a consistent system of diversion or concealment of diversion by the ringmasters is sufficient to satisfy us that it is more probable than not that all the drivers delivered their consignments to Aldi being given receipt stamps on the CMRs and that they were not personally involved in the conspiracy."

37. Ms Simor says that in a number of passages the FTT showed that it was applying the wrong standard of proof: effectively requiring HMRC to prove its case rather than asking whether SDM proved its case. This she says is particularly evident in those passages where the FTT contrasted Mr Barlow's scenario with that of HMRC:

> "444. The last three paragraphs address the scenario implicit in the submission for Customs that the goods were not shown to have been delivered at Aldi. There are however also substantial difficulties implicit in SDM's case that the drivers were not involved in the irregularities and did deliver the goods to Aldi
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> 448. Faced with two alternative scenarios both of which present substantial difficulties we turn to consider the evidence of the drivers as to the movements.
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> 456. We get little assistance from Movement 1 in deciding whether Mr Barlow's scenario is the more probable
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> 471. Ultimately we are faced with two scenarios: (a) Customs' scenario that the goods never reached Aldi which involves active participation by the drivers wherever the diversions occurred and knowledge by the ringmasters as to the individual movements and drivers; and (b) Mr Barlow's scenario that the drivers were not involved and the diversions or irregularities took place after arrival at Aldi
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> …
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> 475. Faced with the difficulty of the two competing scenarios …"

38. We do not share Ms Simor's view of these passages. The FTT was asking the question: is SDM's contention (that the goods were taken to Aldi) more likely than not. "Not" is the contrary hypothesis - that the goods were diverted before they got to Aldi. This comparison is precisely the task the FTT was required to undertake. The FTT may describe the "not" as "Ms Simor's scenario", but that does not mean that evidence is being required to prove the "not", it simply describes logical consequence of the balancing exercise the FTT had to undertake.

39. In its decision the FTT had in mind the logical consequences of diversion before the goods reached Aldi. They were right to do so. If those consequences were inconsistent with the evidence then that inconsistency would support the proposition that the diversion took place at Aldi; if they were consistent with the evidence that would lend no support to SDM's case. Thus:

> "442. If the irregularities were committed without the goods being delivered at Aldi, the drivers must have been involved. The ringmasters could only involve the drivers if they knew who the driver would be for the particular movements. ...

> 443 ... No explanation or even theory was advanced by Ms Simor as to how the ringmasters could have known the identity of the drivers of each movement if the goods were never delivered at Aldi. We observe that if the driver had become involved in one diversion, he could have told the ringmasters about further movements by him. That would not explain how such driver could have become involved initially if his identity was not known
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> …
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> 449.... Logically if we are satisfied that any one of the drivers did deliver the goods at Aldi, that would show that there were one or more dishonest insiders at Aldi and this would be relevant to all Belgian movements. Equally if we conclude that any one driver was involved in the conspiracy and did not deliver to Aldi, that would show that somehow the ringmasters were able to discover in advance who that driver was and presumably who the other drivers were."

40. Following on from its description of the competing scenarios, the FTT further stated at [472]:

> "472 ... However as a matter of fact [Ms Simor] was unable to advance any explanation as to how diversions before arrival at Aldi could have been organised without involving the drivers and how the ringmasters could have identified the drivers without participation by SDM."

We do not regard the reference to Ms Simor in [472] as requiring HMRC to prove its case rather than asking whether SDM had proved its case. We consider that the FTT meant simply "we could not think of an explanation, and even Ms Simor could not help us". The FTT did not require there to be a story but were saying that, in the absence of any other explanation, the only choice was between a diversion involving the active participation of the drivers and one in which the drivers played no part.

41. Ms Simor criticised the FTT for approaching the evidence as if the only choice that it was required to make was between SDM's case that the goods had been delivered to their destinations and an alternative scenario in which the goods were diverted before they reached their destinations rather than leaving open the third possibility that delivery at Aldi had not been proved. Ms Simor referred to the decision of the House of Lords in *Rhesa Shipping Co SA v Edmunds* [1985] 1 WLR 948. The case concerned a claim under marine insurance for loss occasioned when a ship sunk in deep water in calm weather. The claimants needed to establish that the loss of the ship was caused by "perils of the seas" and put forward a theory that the ship had been struck by an unidentified, moving, submerged submarine which was never seen. The insurers resisted the claim and put forward an alternative theory of loss due to wear and tear. At first instance, Bingham J, as he then was, made no finding as to the seaworthiness of the vessel and although he regarded the claimants' case as being inherently improbable held that the submarine hypothesis had to be accepted, on the balance of probabilities, as the explanation for the ship sinking. The Court of Appeal refused an appeal by the insurers but their appeal was allowed by the

House of Lords. Lord Brandon of Oakbrook, who gave the only speech, pointed out (at 955H - 956A) that

> "… the judge is not bound, always, to make a finding one way or the other with regard to facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take".

42. Lord Brandon went on to conclude that:

> "In my opinion Bingham J. adopted an erroneous approach to this case by regarding himself as compelled to choose between two theories, both of which he regarded as extremely improbable, or one of which he regarded as extremely improbable and the other of which he regarded as virtually impossible. He should have borne in mind, and considered carefully in his judgment, the third alternative which was open to him, namely, that the evidence left him in doubt as to the cause of the aperture in the ship's hull, and that, in these circumstances, the ship owners had failed to discharge the burden of proof which was on them."

43. Ms Simor submitted that the FTT fell into the same trap as Bingham J in *Rhesa*. Ms Simor contended that the FTT improperly limited itself to considering two alternatives and gave no consideration to the third possibility ie that the position was unclear and SDM had failed to prove its case on balance of probabilities. We do not agree. Not only do we regard the FTT as simply evaluating SDM's submission against the evidence relating to the logical consequences of its antithesis[1], but *Rhesa* concerned an inference that the ship was lost by perils of the sea (see 951B) which was necessarily the case because there was no direct evidence of the cause of the loss. That is not the situation in this case.

44. In relation to the movements for which there was driver evidence, the FTT was entitled (subject to the *Edwards v Bairstow* points in Ground 3) to accept such evidence. The FTT did so in [475] where it held that the evidence of the drivers "tips the balance" in respect of those journeys for which the drivers gave evidence. In such cases, no question of deciding purely on the burden of proof arises. In *Rhesa*, both explanations advanced for the loss of the ship were equally improbable and there was no direct evidence on which the Court could decide what caused the loss. The House of Lords held that, in such cases, the cause of the loss of the ship could not be established on the balance of probabilities and so remained unknown. It followed that

[1] We note that at 953D Lord Brandon accepts that if a seaworthy ship sinks in good weather and calm seas there was a rebuttable presumption that she was lost by perils of the sea. In other words, the consequences of the antithesis of perils of the sea was (rebuttably) such as to make perils of the sea more likely than not.

the party that bore the burden of proof must be held to have failed to discharge it. In this case, the evidence of the drivers that the goods were delivered to their destinations was not inherently improbable and, if the FTT was right to accept it (as to which see below), it tipped the balance so there was no uncertainty. In such a case, no question of a third possibility of determining the issue solely by reference to the burden of proof arises.

45. In relation to the journeys for which there was no driver or other direct evidence of delivery, the situation is much closer to that in *Rhesa* but there was some evidence, namely the fact found by the FTT that the drivers who had given evidence had delivered the goods to their destinations. The FTT concluded that there was a consistent system of diversion, ie it was unlikely that the goods that had been delivered by the drivers who gave evidence had been diverted at the Aldi warehouse whereas the goods where there was no driver evidence had been diverted elsewhere. This conclusion was an inference based on findings of fact in respect of which the FTT had heard evidence. The FTT was entitled to draw an inference from the evidence of the drivers. In our view, the FTT's conclusion in relation to the movements for which there was no driver evidence cannot be challenged by reference to *Rhesa*.

Conclusions on second ground of appeal

46. In our view, the FTT at [440], [475] and [490] clearly and correctly set out the position on burden of proof. There is nothing in the Decision that indicates that the FTT disregarded its own statements on burden of proof. We do not accept that the FTT approached the evidence as if the burden of proof was on HMRC or required them to show that SDM's 'scenario' was improbable. The FTT correctly applied the burden of proof to the evidence before it. Accordingly, we reject this ground of appeal.

Third ground of appeal

47. HMRC's third ground of appeal is that the FTT was not entitled, on the evidence, to find that all the loads, save for Movement 65 consigned for Germany, had been delivered to their intended destinations

48. HMRC submit that the FTT's conclusion on this point is contradicted by the evidence and is one that no reasonable tribunal properly instructed as to the relevant law could have come to on the evidence (*Edwards v Bairstow* [1956] AC 14 per Lord Radcliffe at 36).

49. As Evans LJ stated in *Georgiou and another (trading as Mario's Chippery) v Customs and Excise Commissioners* [1996] STC 463

> "...the nature of the factual inquiry which an appellate court can and does undertake in a proper case is essentially different from the decision-making process which is undertaken by the tribunal of fact. The question is not, has the party upon whom rests the burden of proof established on the balance of

probabilities the facts upon which he relies, but, was there evidence before the tribunal which was sufficient to support the finding which it made? In other words, was the finding one which the tribunal was entitled to make? Clearly, if there was no evidence, or the evidence was to the contrary effect, the tribunal was not so entitled.

It follows, in my judgment, that for a question of law to arise in the circumstances, the appellant must first identify the finding which is challenged; secondly, show that it is significant in relation to the conclusion; thirdly, identify the evidence, if any, which was relevant to that finding; and, fourthly, show that that finding, on the basis of that evidence, was one which the tribunal was not entitled to make. What is not permitted, in my view, is a roving selection of evidence coupled with a general assertion that the tribunal's conclusion was against the weight of the evidence and was therefore wrong."

50. The FTT's conclusions on the facts divide as follows:

(1) at [441] - [475], the FTT considers principally the evidence relating to the movements for which the drivers gave evidence and concludes that the evidence of the drivers "tips the balance" in respect of those deliveries and that they were therefore delivered to Aldi;

(2) at [476] - [477], the FTT accepts the evidence of delivery to Aldi by Mr Wild; and

(3) at [479] - [491], the FTT considers the 22 movements (all by JJI/Connie) for which there was no driver evidence.

51. In [441] to [475], the FTT first considers the alternative scenarios and their logical consequences; then, at [450] to [467], the evidence of the drivers; and, between [468] and [474], the effects of the evidence from SDM personnel. At [475], the FTT concluded that it was satisfied, on the balance of probabilities, that the drivers who gave evidence (Mr Waters, Mr Blunsden, Mr Parnham and Mr Francis) had delivered the goods to Aldi. The evidence of those drivers covered 26 or 28 of the 65 disputed movements (Mr Waters was not sure whether he was the driver on two of the movements). The FTT stated that the drivers' evidence tipped the balance in favour of delivery to Aldi in respect of those movements.

52. The reasoning in [475] is important. It shows that the FTT recognised that the analysis of the alternative scenarios, even in the light of the SDM evidence, does not show on balance that the deliveries were made to Aldi. That conclusion can only be reached with the drivers' evidence. As a result, if the FTT's acceptance of the drivers' evidence was unreasonable then the conclusion in [475] cannot stand.

53. If the FTT should not have accepted the drivers' evidence, then, first, at least some of the movements would not have been proved to have been delivered to Aldi; second, the corroborative value each driver's evidence for that of the others would be diminished; and third, it would not be possible for the FTT to conclude that there was a consistent system of diversion (as to which see section (3) below). The acceptance of the drivers' evidence is the linchpin on which the FTT's decision rests.

54. The FTT saw the drivers giving their evidence. The witnesses were in the stand for many hours. Mr Waters was cross-examined for some two hours and Mr Blunsden for three and a half hours. The FTT saw them cross examined and being tested on material said to be inconsistent with their testimony. The FTT weighed the criticism of their evidence against what they had said. In our view, the FTT's acceptance of the drivers' evidence could only be unreasonable either:

> (a) on the narrower ground that there were one or more material facts which are so inconsistent with the evidence as to make a conclusion that a material part of it was true impossible. In this regard Ms Simor advanced an argument that some of the journeys which the drivers said, and the FTT had accepted, they had undertaken were impossible; or
>
> (b) on the broader ground that the sheer weight of the concerns with the drivers' evidence makes it impossible to believe it (or to accept the balancing exercise the FTT conducted).

We deal with Ms Simor's broader attack after considering the issues arising in relation to the "impossible journeys".

The narrower ground: "impossible journeys"

55. In relation to the narrower ground, Ms Simor relied on evidence in relation to the timing of the journeys which she submitted showed that some of the journeys which the drivers claimed to have made were impossible within the time taken according to other evidence.

(1) Deliveries by drivers who gave evidence.

56. At the hearing before the FTT, Ms Simor provided a schedule that identified ten journeys on the continent (movements 17, 19, 22, 24, 29, 37, 38, 43, 44 and 57) that HMRC alleged were impossible. The allegedly impossible journeys were all by Mr Blunsden (movements 17, 19, 22, 29, 38. 43 and 57) except for single journeys by Mr Wild (movement 24), Mr Parnham (movement 37) and Mr Francis (movement 44) respectively.

57. The evidence of Mr Cranny, Mr Waters and Mr Wild was that the journey between Coquelles and Vaux-sur-Sûre took between 4 and 4½ hours. Mr Blunsden initially said that the journey to Vaux-sur-Sûre would take 4 or 4½ hours but then said that he could do it in 3½ hours in the best conditions and exceeding the speed limits as he sometimes did. Mr Parnham seemed less sure of the length of time required and accepted a time of between 3½ and 4½ hours. At [453], the FTT calculated the time required for the round trip from Coquelles to Vaux-sur-Sûre and back to Coquelles as follows:

> "… if a driver took a 9 hour break before boarding a train at Folkestone, he could legally drive 4½ hours from Coquelles to Vaux without a break, spend 15 minutes waiting and half an hour being unloaded and drive straight back to

> Coquelles giving a return time Coquelles to Coquelles of under 10 hours, however he would then need another long break."

58. Thus the FTT appears to have accepted that the minimum time for a round trip was 9 hours 45 minutes. That calculation, however, ignored the fact that on many journeys, including all the ones alleged by HMRC to be impossible, the drivers were required to pick up a return load on the way back to Coquelles. That would add a minimum of 15 minutes waiting and 30 minutes being loaded to the journey time. Thus, adopting the findings of the FTT, with the addition of 45 minutes for the return load, the minimum time required for the round trip would be 10½ hours.

59. HMRC allege that seven out of Mr Blunsden's ten journeys were impossible but the FTT accepted that all but one (movement 29) were possible and had taken place.

60. We think that the evidence does not show that movements 22 and 43 were impossible. The timings of movement 22, as found by the FTT at [169], show that it was not impossible at all. It is also clear that movement 43 was not impossible on the timings of the journey but HMRC did not believe Mr Blunsden's story as to why he took 24 hours between despatch from EDM and check-in at Dover (see [171]). In relation to movement 29, the FTT said at [463]:

> "We do find the times shown on the paperwork for Movement 29 to be impossible involving covering 780 kilometres in six hours, however none of his other 10 timings was impossible. At this distance of time it was no surprise that Mr Blunsden did not have an explanation for Movement 29."

61. We could not determine the timing of Mr Blunsden's journeys in movements 38, 43 and 57 on the information made available to us and the timings were not given by the FTT in its decision. This still leaves Mr Blunsden's journeys in movements 17, 19 and 29 which appear to have taken him respectively only 6 ¾ hrs, 7 ¼ hrs and 5 ½ hrs on the continent which appear to us to make the journeys he claimed to have made impossible on the documentary evidence.

62. As to Mr Wild, we note that only one (movement 24) out of 14 movements was alleged to be impossible and appeared to be so on the evidence available but the difficulty is that the evidence could not be tested either way. Mr Parnham's journey (movement 37), at 9 hours for the round trip, was also apparently impossible. It was not possible for us to review the evidence of the timing of Mr Francis's journey in movement 44 and the FTT did not make any specific finding as to the timings of the journey.

63. If evidence established that it was impossible for a driver to make a particular journey which the driver testified he had made then it would be impossible to accept that driver's evidence in relation to that journey. Further, the existence of evidence that showed that a particular journey was impossible would call into question the truthfulness of that driver's evidence in relation to other journeys. If one driver's evidence could be shown to be unreliable then that would also cast doubt on the evidence of the other drivers that they had made similar journeys.

64. It seems to us therefore that the resolution of the issue of the "impossible" journeys was critical to the FTT's conclusion. If they were indeed impossible, the FTT could not properly have come to the conclusion on the evidence before it that those deliveries had been made to Aldi and without further reasons it would not be possible to accept the evidence of the drivers involved in relation to other movements.

65. The FTT concluded at [463] that movement 29 was impossible in the time shown. The FTT did not find the impossibility of movement 29 cast any doubt on Mr Blunsden's evidence about his other journeys because it observed that, after four years, it was no surprise that Mr Blunsden did not have an explanation for movement 29. That does not seem to us to explain why the FTT felt able to ignore movement 29, which was clearly impossible on the documentary evidence of timings, without any explanation. The significance of the evidence later recorded at [467] that the movement was originally intended to be part of a three vehicle delivery is unclear to us and does not explain why the impossible journey should be ignored. The FTT found without further explanation at [463] that Mr Blunsden's other journeys were not impossible.

66. The FTT discussed HMRC's schedule of allegedly impossible journeys in more general terms at [467]:

> "Miss Simor contended that many movements were impossible within the timescales indicated by the documents. We heard evidence from the drivers that they variously timed their arrivals on the continent for the early part of the day when the roads were quiet, chose routes which were known to have few traffic police and did not strictly observe legal speed limitations. Under these circumstances they were able to cruise at speeds of up to 80mph. The Tribunal analysed the timings of all the movements identified by Ms Simor in the light of the drivers' evidence, and concluded that only one movement, Movement 29, was impossible. However, the evidence indicates that this movement was originally intended to be part of a three vehicle delivery, subsequently amended to two vehicles, and which included collection of a backload from a customer in France. It was not clear which vehicle or vehicles carried out which part or parts of the journey, and it may well be that the actual journeys performed by the individual vehicles were different from those originally planned. Overall, we conclude that the journey timings offer no support to Customs' case that the goods could not have reached Aldi."

67. Given the apparent inconsistency between the drivers' evidence and the evidence of journey timings, the task of the FTT was to weigh the competing evidence and decide which it preferred. In effect, it seems to us that this is what the FTT did in this paragraph. . It is clear from reading the whole of [467] that the FTT (which had the benefit of the experience of Mr Coles in the European logistics industry) analysed the timings of the allegedly impossible movements in the light of the evidence of some of the drivers that they travelled when the roads were quiet and at speeds above the legal limits and concluded that the claimed journeys were not impossible. (And it is implicit that this analysis was extended to movement 24 driven by Mr Wild.)

68. But this paragraph does not explain *why* the FTT concluded that the timings of the journeys shown on the schedule, apart from movement 29, were possible.

69. The FTT's conclusion is that the timings offer "no support to Customs' case"; whether or not that is a relevant conclusion, the issue the timings raise is that of a challenge to the veracity of the drivers' evidence. That challenge cannot simply be put aside by relying on the drivers' evidence; that would be circular. The two must be resolved.

70. The simple recitation in that paragraph of the factors of traffic density and speed, does not seem to us to explain the significant gap between the minimum time (10½ hours) apparently required to complete the round trip when unloading and loading are taken into consideration and the actual times recorded in relation to some of the movements. Nor is it clear how these factors permitted the conclusion in Mr Wild's case. The times shown for the return trip from Coquelles to Vaux-sur-Sûre in movements 17, 19, 24, 29 and 37 are all materially less than the 10½ hours apparently required. The FTT does not expressly indicate whether or not it accepted that the drivers were travelling at a time of day when the roads were quiet and were exceeding the speed limits (and there was some apparently contradictory evidence on this score); but even if it was implicitly accepted (without resolution of those conflicts), we cannot understand how the FTT concluded that those journeys could have been made in the times shown for those movements.

71. Mr Barlow says that there was evidence that dates on documents were sometimes inaccurate, that Channel tunnel records were occasionally incorrect and that one driver might take another booking. If the FTT accepted this evidence and if it considered it relevant it might have formed part of the FTT's explanation. But the fact is that there was no explanation of the resolution of very material conflicting evidence.

72. Thus it seems to us that either the FTT's conclusion could not have been reached on the evidence, or that the FTT has not adequately explained why it felt able to ignore the disparity between the evidence of how long the round trip would take and the evidence of the actual, much shorter, times taken in at least some of the movements identified by HMRC, or how it reconciled any disparity with the drivers' evidence.

73. Rule 35 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009 requires the FTT to give full written findings and reasons in any decision upon which an application for permission to appeal may be based. The failure to give such reasons may therefore be an error of law. The failure to give reasons may thus be an error on a point of law which was involved in the making of the decision. Indeed failure to give reasons or adequate reasons for findings on material matters was one of the items noted in paragraph 9 of the judgement of Brooke LJ in *R(Iran) v Home Secretary* [2005] EWCA Civ 982 in relation to similar rights of appeal from the Immigration Tribunal, as an error of law.

74. It seems to us that the absence of any explanation for accepting the evidence of the drivers that the journeys in movements 17, 19, 24, 29 and 37 took place as described in the face of other evidence that, on the FTT's own calculation of the time required, showed that the journey times were impossible was a failure to give reasons on a material matter - a matter vital to the conclusion reached by the FTT that all the journeys (apart from those to Germany and Latvia) resulted in delivery to Aldi. The failure to give reasons for accepting the evidence of the drivers was, in our view, an error of law.

75. Section 12(1) and (2) of the Tribunals, Courts and Enforcement Act 2007 provide:

> "(1) Subsection (2) applies if the Upper Tribunal, in deciding an appeal under section 11, finds that the making of the decision concerned involved the making of an error on a point of law.
>
> (2) The Upper Tribunal–
>
> (a) may (but need not) set aside the decision of the First-tier Tribunal, and
>
> (b) if it does, must either -
>
> (i) remit the case to the First-tier Tribunal with directions for its reconsideration, or
>
> (ii) re-make the decision."

76. There was an error of law by the FTT which was material to the factual conclusions in the decision. Accordingly we should set aside the decision. The question is then whether we should remake the decision on the material before us or remit the case to the FTT.

77. Not having heard the witnesses and consequently being unable to attach relevant weight to material parts of their evidence we are unable on the material before us fairly to reach any conclusion as to whether or not any of the nine allegedly impossible journeys, apart from movement 29, were in fact possible and, if any were impossible, what effect that would have on the evaluation of the evidence in relation to the other journeys: and without being able to address the FTT's reasoning we cannot fairly conclude whether the FTT's conclusion was one it could or could not have reached on the evidence. We are thus not equipped to remake the decision.

78. Therefore the case should be remitted to the FTT. Our preference would have been to remit it to the panel which heard the original appeal with a direction to give reasons in relation to the conclusions on the "impossible journeys". That is unfortunately no longer possible because of the retirement of Judge Wallace.

79. Accordingly, we set aside the decision of the FTT and remit the case to a differently constituted First-tier Tribunal to reconsider the evidence and determine whether the goods were delivered to Aldi. We invite the parties to make written

submissions on the terms of the directions to be given to the First-tier Tribunal for reconsideration of the issue.

(2) The journeys of Mr Wild

80. Mr Wild provided a witness statement but did not give evidence because he had emigrated to Canada. HMRC did not accept the truth of the contents of the witness statement but it was considered by the FTT. At [476], the FTT noted that Mr Wild's statement "did not indicate any qualitative difference between Mr Wild's movements and the movements of the drivers whose evidence we accept". Mr Wild's evidence dealt with 14 movements. The FTT found that documentary evidence for all his movements, other than movement 62, did not support a different conclusion. On this basis, leaving aside movement 62, it was not unreasonable for the FTT to conclude that the pattern of Mr Wild's deliveries followed that of the other drivers. At [477], the FTT found on the balance of probabilities that Mr Wild had delivered all fourteen consignments to Aldi. This conclusion, however, depends on the reliability of the evidence of the other drivers and the FTT's conclusions in relation to the documentary evidence.

81. For movement 62, the FTT stated, in [477], that there was only a Eurotunnel invoice and no stamped CMR:

> "… Whilst we accept that [it is possible that he was persuaded by the ringmaster to divert the last load en route] there is no evidence to support such a contention. We therefore find on the balance of probabilities that Mr Wild delivered all fourteen consignments to Aldi."

82. As we understand this paragraph the FTT is saying that, given there was no evidence that the circumstances of movement 62 were different from the other 13 movements, it inferred that it took place in the same way as the others. In our view that is a permissible inference.

83. But the FTT does not address the apparent timing discrepancy in relation to movement 24. It provides no explanation as to why it regarded this movement as unexceptional. This failure has the same consequences as that referred to at [71] above. Further if the evidence of the drivers could not reasonably have been accepted because of the "impossible journeys", the FTT's acceptance of Mr Wild's evidence, which relies on the similarity with the other movements, cannot stand.

(3) The 22 movements for which there was no driver evidence

84. In [479ff], the FTT deals with the 22 movements for which there was no driver evidence.

85. On the assumption that there was a single consistent scheme, the evidence of the drivers, if properly accepted, is enough to conclude on the balance of probabilities that the other 22 loads for which there was no driver evidence were not diverted but were delivered to Aldi. But the acceptance of the drivers' evidence is however subject to the comments made above in relation to impossible journeys.

86. The FTT addressed the probability of a number of different modes of operation of the scheme at [480]. It listed the difficulties which arose if there was an inconsistent scheme:

(1) no one knew which load would be placed with which driver;

(2) particularly in relation to multi vehicle delivery, there was no evidence of some vehicles to going to Aldi and some elsewhere;

(3) because all the loads had forged CMRs, it would not be unreasonable to conclude that they were all provided at Aldi.

87. At [481] - [491] the FTT considered the evidence in relation to the movements for which there was no identified driver. Apart from movement 65, the FTT concluded, broadly, that there were no circumstances which differentiated them from the other movements.

88. At [487], the FTT stated:

> "…We have already referred to the difficulties which this alternative scenario would have involved. We would add that the combination of different methods of diversion would have increased the risk of detection from the beginning since seven of the first eight consignments were collected by drivers who were not witnesses, whereas we have concluded that Mr Waters did deliver Movement 2 to Aldi."

We note the reliance on the evidence of Mr Waters in this particular conclusion.

89. The FTT concluded at [489] – [491]:

> "489. We have had considerable difficulty in reaching a conclusion in relation to the Aldi consignments for which there was no driver evidence.
>
> 490. The mere fact that there was no direct evidence of delivery is not decisive in spite of the burden of proof. In legal proceedings of any nature facts can be established by inference. We have to decide whether the inference of a consistent system of diversion or concealment of diversion by the ringmasters is sufficient to satisfy us that it is more probable than not that all the drivers delivered their consignments to Aldi being given receipt stamps on the CMRs and that they were not personally involved in the conspiracy.
>
> 491. We have concluded that on the balance of probabilities all of the Aldi consignments were delivered by the drivers to Aldi and that the irregularities occurred thereafter….."

90. It seems to us that the conclusion by inference that there was a consistent scheme is one that the FTT was entitled to reach on the evidence, given that it had accepted the evidence of the drivers and of Mr Airlie, Mr Hodgkins and Mr Cranny The conclusion that all the consignments (apart from the ones destined for Germany and Latvia) were delivered to Aldi's premises crucially depended on the evidence of the drivers that they delivered their consignments to Aldi. If the drivers' evidence was shown to be untruthful or unreliable then the conclusion cannot be sustained.

The Broader Ground

91. HMRC's broader attack on the conclusions of the FTT rests upon highlighting the many aspects of the evidence which cast doubt on the veracity or accuracy of the drivers' evidence (and by extension on the evidence of Mr Wild and the FTT's conclusions in relation to the 22 movements for which there was no driver evidence). These were:

(1) The lack of documentary evidence of delivery. The FTT regarded those CMRs which were in evidence as capable of supporting the drivers' evidence; it was plainly aware of the absence and forging of AADs.

(2) The Belgian authorities' reports. The FTT considered this in its discussion at [468];

(3) The motive of the drivers to lie. The FTT noted this in relation to Mr Wild but not in relation to the other drivers (although we cannot believe that the FTT did not have it in mind when reaching their conclusion on the other drivers).

(4) The "loss" of the tachographs. That was considered by the FTT in relation to their assessment of the drivers' evidence.

(5) The evidence in relation to delays in the journeys after picking up the load. The FTT considered this in its evaluation of the drivers' evidence.

(6) The lack of due diligence or concern by SDM's personnel. This relates to the FTT's conclusion in relation to Mr Cranny and Mr Hodgkins.

(7) In relation to movement 65, the movement to Dialog Logistik in Germany in December 2006, the FTT held that SDM had not established that the goods had been delivered to their destination. The FTT stated its findings/conclusions in relation to Germany at [485] as follows:

> "Movement 65 raises different problems. The guarantee covered a movement to Dialog Logistik. The correct procedure for a change of consignee was not followed. There was no evidence that the goods arrived at Dialog Logistik although there was second-hand evidence that the load was diverted to Halle. There was no evidence from the driver and there was no receipted CMR quite apart from the lack of an AAD3. Even if we accepted that the goods did reach Halle, we are not satisfied on the balance of probabilities that the irregularity occurred in Germany."

HMRC submit that Mr Hodgkins's evidence was not accepted in relation to Germany and so there was no reason for the FTT to accept his evidence in relation to the other movements.

92. It seems to us that Ms Simor's criticisms are exactly the sort of roving selection of evidence coupled with a general assertion that the FTT's conclusion was wrong that was considered to be impermissible by Evans LJ in *Georgiou*. It is not clear to us that an overall assessment of all these factors would lead ineluctably to a conclusion that the drivers' evidence should not be accepted. It is plain that the FTT had these issues in mind. It worried over the detail of the drivers' evidence and concluded that it

should be accepted. We do not consider that the individual criticisms, even if taken together, show that the FTT was not entitled to reach that conclusion.

Conclusions on third ground of appeal

93. In our view, the FTT failed to give any or any adequate reasons for its conclusion that each of the ten allegedly impossible journeys resulted in delivery of the consignments of spirits to Aldi. We allow the appeal on this ground and direct that the FTT's decision be set aside and the case be remitted to a differently constituted First-tier Tribunal to determine the issue afresh in relation to the allegedly impossible journeys and to consider what effect its conclusion has on the evidence in relation to the other deliveries.

Fourth ground of appeal

94. At the hearing before us, Ms Simor was content to refer us to the fourth ground of appeal as set out in the written grounds of appeal. The fourth ground of appeal is that the FTT erred in its approach to reaching its decision and in its assessment of the evidence of the witnesses, in that:

(1) it failed to take into account the motives of the witnesses, including the fact that the drivers had been individually assessed as 'causative' of the diversions and therefore had an interest in not telling the truth, as well as a likely financial interest in the operation itself;

(2) it ignored the contradictions between the witnesses' oral evidence and their earlier evidence given in interviews to HMRC that were closer in time to the events and in written statements in support of the appeal;

(3) it ignored the contradictions between the witnesses' oral evidence and the contemporaneous documentary evidence;

(4) it ignored the contradictions between the witnesses' evidence and the evidence from State officials and Aldi staff, none of whom had any motive to lie; and

(5) it placed undue weight on what it referred to as the 'demeanour' of witnesses.

Again, it seems to us that Ms Simor's criticisms of the FTT's approach fall foul of Evans LJ's guidance in *Georgiou*. We deal with each briefly below.

95. In relation to the first point, HMRC submit that the evidence of the core drivers had to be treated with a high degree of caution because they had been assessed as jointly and severally liable for substantial sums of duty under Regulation 7(2) of the DSMEG Regs. HMRC contended that the FTT did not appear to have taken these assessments into account at all or made mention of their relevance. We entirely reject this submission. The grounds of appeal acknowledge that the FTT referred to Mr Wild's assessment at [476] although not that the FTT stated that it was for £1.3 million and gives the precise figure when it refers to Mr Wild's assessment again at [297]. HMRC fail to acknowledge, however, that the FTT set out at [6] of the

Decision that five subcontractors, which included four owner-drivers, had been assessed under regulation 7(2). Those assessed were the witnesses Mr Bunce, Mr Blunsden, Mr Parnham, Mr Woods and Mr Wild. It does not appear that Mr Waters and Mr Francis, who also gave evidence, were assessed. Further, the grounds of appeal do not mention that the FTT also refers specifically to Mr Blunsden's assessment for £1,022,515 at [163] and, again, at [295] and to Mr Parnham's assessment for £484,206 at [296]. The complaint appears to be that the FTT did not regard the assessments as a reason to disbelieve the testimony of those who were subject to them. In our view, it is abundantly clear from the Decision that the FTT was well aware of the assessments and had them in mind in writing the Decision.

96. The second criticism is that the FTT ignored the contradictions between the witnesses' oral evidence and their earlier evidence given in interviews to HMRC that were closer in time to the events and in written statements in support of the appeal. The grounds of appeal state that the FTT did not test the evidence against the documentary materials, including interviews and witness statements given closer to the events in question, or other contemporaneous evidence. HMRC give no specific examples of the alleged failings in relation to interviews and witness statements in the grounds of appeal. Our view is that HMRC have not made out this criticism. The FTT reviewed the evidence at length and we do not find any sign that the FTT failed to take into account any material part of the evidence of interviews and written statements.

97. The third point of the fourth ground of appeal is that the FTT ignored contradictions between the witnesses' oral evidence and the contemporaneous documentary evidence. The only example of this alleged failing given in the grounds of appeal relates to movement 2 where the documentary evidence as to time of departure appears to contradict the oral evidence of Mr Waters. The FTT accepted the evidence of Mr Waters that he checked in with Eurotunnel at Folkestone on Sunday 30 July 2006 rather than the Eurotunnel SDM account document that showed check in on Monday 31 July. HMRC's grounds of appeal refer to the documentary evidence as "irrefutable". We do not accept that a statement of account is irrefutable. We consider that the FTT was entitled to prefer the evidence of Mr Waters, whom it had seen being cross-examined, over a document which was simply presented in evidence and could not be tested. Accordingly we reject this criticism.

98. The fourth criticism is that the FTT did not give sufficient weight to the evidence of Belgian Customs officials and Aldi staff which contradicted the evidence of SDM and the drivers. HMRC's complaint, again, appears to be that the FTT preferred one part of the evidence (the oral testimony of the witnesses) to another part (the hearsay evidence from Belgium). There was no opportunity for SDM to cross-examine the Belgian Customs officials and Aldi staff. HMRC do not argue that the FTT failed to take the evidence from Belgium into account but that the FTT did not give it enough weight. Although the tribunal can and does accept hearsay evidence, the fact that it is hearsay inevitably reduces the weight that is given to it. In our view, HMRC have not established that the FTT made any error of law in preferring the direct evidence adduced by SDM over the hearsay evidence presented by HMRC. We reject this criticism also.

99. The final criticism is that the FTT placed undue weight on the demeanour of witnesses. HMRC contend that this is an error. In support, HMRC cite the comments of Dunn LJ in *In re F. (A Minor) (Wardship: Appeal)* [1976] Fam. 238 at 259 that demeanour is not always a helpful indicator of whether or not a witness is telling the truth. We consider that it is a truism that demeanour is not always helpful but we note the words of Peter Smith J in *EPI Environmental Technologies*, referred to at [19] above that it is important for a judge to assess a witness's response to the other case orally, by reference to his or her demeanour and in the overall context of the litigation. We consider that demeanour is a matter that a tribunal may properly take into account when assessing the credibility of a witness but it will not necessarily be relevant or helpful in all cases. Whether or not to consider the demeanour of a witness and what weight to give it is a matter for the tribunal that has seen and heard the witness and an appellate tribunal or court which has not seen the witness should be slow to reach a contrary view.

100. We note that the reference by the FTT to the demeanour of a witness is at [457] where Mr Waters was recorded as having said "somewhere along the line there is a date wrong". The FTT then said:

> "His demeanour when asked about his did not give us the impression at the time that he was being untruthful or evasive."

This was a very experienced tribunal. It is highly unlikely that by "demeanour" it meant for example whether the witness stood up straight and looked them in the eye. They would have seen how the witness approached answers to questions - whether he was careful and guarded or impulsive; how he dealt with issues which might reflect badly on him; how he dealt with matters which appeared to cast doubt on his evidence; how consistent his evidence was of things that had happened in the past. All these things go to help evaluate the nature and meaning of the evidence given by a witness. All may be said to be part of the demeanour of witness. It does not seem to us that the FTT's reference to demeanour in [457] can be criticised.

Decision

101. For the reasons set out above, we conclude that three of HMRC's four grounds of appeal put forward at the hearing before us have not been made out. Our decision is that the appeal is allowed in relation to the third ground of appeal. We direct that the Decision be set aside and the case be remitted to a differently constituted First-tier Tribunal to determine whether the allegedly impossible journeys took place and consider what effect its conclusion has on the evidence in relation to the other deliveries.

102. We invite the parties to make written submissions on the terms of the directions to be given to the First-tier Tribunal for reconsideration of the issue within 28 days of the release of this decision.

Greg Sinfield
Upper Tribunal Judge

Charles Hellier
Upper Tribunal Judge

Release date: 20 May 2013