[2019] UKUT 0143 (TCC)

CUSTOMS DUTY, IMPORT VAT – appeals against post clearance demand notes – whether appeals late – whether FTT erred in giving permission to bring late appeals

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

Appeal number: UT/2018/0072

BETWEEN

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

-and-

SHARYA UK LTD **Respondent**

TRIBUNAL: JUDGE JONATHAN RICHARDS
JUDGE KEVIN POOLE

Sitting in public at The Royal Courts of Justice, Strand, London on 4 February 2019

Ben Hayhurst, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Appellants

The Respondent did not appear and was not represented at the hearing

DECISION

INTRODUCTION

1. The Appellants ("HMRC") have sent the Respondent (the "Company") some 40 "C18" demand notes (the "C18s") requiring payment of over £300,000 in aggregate of import VAT and customs duty. The Company sought to appeal to the First-tier Tribunal (Tax Chamber) (the "FTT") against these demands but HMRC argued that the Company's appeals were made later than the stipulated deadline and that the FTT should not give the Company permission to make late appeals.

2. In a decision (the "Decision") released on 12 February 2018, the FTT concluded that, in relation to 24 of the C18s, the Company had made its appeals in time. The Company's appeals against the remaining 16 demand notes were made late, but the FTT exercised its power under s16(1D)(c) of the Finance Act 1994 ("FA 1994") to permit those appeals to be made late. HMRC appeal to this Tribunal against the Decision.

PROCEDURAL MATTERS

3. The Company shows every sign of having disengaged from these proceedings. It has not complied with Tribunal directions requiring it to provide HMRC with a list of documents on which it relies and has not served a skeleton argument as required by those directions. Tribunal staff have informed us that the Company has not responded to communications requesting compliance with these directions.

4. Neither the Company nor its representative attended the hearing. Tribunal staff called the Company's representative and were informed that no-one would be attending the hearing and the relevant person was "unwell". However, no application for a postponement was made either during that telephone conversation or prior to the hearing and no medical evidence was provided to explain who was unwell or the nature of the illness. In those circumstances, we could not be satisfied that postponing the hearing would be in accordance with the overriding objective set out in Rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008. We concluded that the Company had been sent notice of the hearing, or that reasonable steps had been taken to notify the Company of the hearing, and that it was in the interests of justice to proceed in the Company's absence under Rule 38 of those Rules.

5. The unfortunate consequence of the Company's disengagement is that we have to decide some difficult questions of law without the benefit of any submissions on behalf of the Company. We are grateful to Mr Hayhurst for his submissions and we have also been assisted by the FTT's analysis of the law. However, it must be acknowledged that our task would have been more straightforward if the appeal had been fully argued on both sides, enabling some of the more complex points to be fully explored at the hearing.

THE DECISION

Relevant facts

6. HMRC have made no complaint about the FTT's findings of fact; rather their argument is that the FTT applied the law wrongly to the facts that it had found. The relevant facts are set out below (with cross-references to relevant paragraphs of the Decision).

7. The Company was incorporated in England and Wales on 4 June 2014. Its business involves the import, export and sale of clothing imported from India. Mr Ashok Sharma has, at all material times, been a director of the Company. Initially, the business address and registered office of the Company was in Cavendish Road, Leicester.

8. By 24 June 2014, the Company had obtained an Economic Operator Registration and Identification ("EORI") number that is required for any trader wishing to import goods. HMRC

have a dedicated team in Cardiff that deals with the EORI scheme that has different systems from other parts of HMRC ([57]) though the FTT made no finding as to the level of the Company's knowledge of HMRC's internal systems. In the course of applying for an EORI number, the Company gave its address as Cavendish Road ([54]).

9. A specimen of the form applicants use to apply for an EORI number was in evidence before the FTT, although the FTT did not refer in detail to it. We would observe only that Box 2 of the form asks for an applicant's address, including postcode. Moreover, the form itself makes it clear that this address had some particular importance since it would be uploaded to an EU database (and asked an applicant to tick a box indicating consent to this).

10. On 2 March 2015, the Company notified Companies House that it had changed its registered office to an address in Farringdon Street, Leicester ([18]).

11. On 24 September 2015, the Company applied to HMRC to register for VAT and, for the purposes of that application, gave Farringdon Street as its address. The application was successful and the Company was registered for VAT with effect from 4 June 2014, its date of incorporation ([58]).

12. Although the FTT concluded that it was "not relevant" whether the Company notified a change of address to the EORI team since, on 24 September 2015 the Company had notified HMRC as an entity of the Farringdon Street address when it applied for VAT registration ([59] and [60]), the FTT found that the Company did not notify the EORI team of its new address ([57]).

13. The Company imported clothing from India with a view to re-exporting that clothing to Dubai. In such cases, the Company entered the goods for inward processing ("IP") relief, a procedure which would, if applicable requirements were met, mean that no duty or VAT would be payable on importation. One requirement of IP relief is that a Bill of Discharge ("BoD") must be submitted to HMRC within 30 days of the end of the "throughput period" (which, in the circumstances relevant to this appeal, ended 6 months after the date of the import ([12])).

14. In at least 40 cases in which the Company claimed IP relief, it did not file the BoD within the requisite period. HMRC's National Import Reliefs Unit ("NIRU") issued reminder letters and "right to be heard" letters warning that the Company had made itself liable for duty and import VAT that had been suspended. Having received no explanation for the delay from the Company, HMRC moved to issuing demands for payment of duty and VAT ([14] and [15]).

15. The FTT made no findings as to the address that the Company's agent gave on import documentation relating to goods it imported. However, during the hearing before us, Mr Hayhurst showed us computer generated import declarations that the Company's agent had submitted in connection with the 40 imports in dispute that the Company put in evidence before the FTT. Those import declarations gave the Cavendish Road address even though they were given between June 2015 and November 2015, after the date on which the Company moved to Farringdon Street.

16. Between 4 March 2016 and 8 August 2016, HMRC (acting through its NIRU office) issued 40 demand notices addressed to the Company at the Cavendish Road address. ([15] and [16]). Between 14 April 2016 and 17 July 2016 at least 16 of the C18s were returned as undelivered through the Royal Mail's returned letter service ([17]).

17. By 19 April 2016, Ms Cheryl Robinson, an officer of HMRC in NIRU, discovered that the Company's address was now in Farringdon Street ([19]).

18. Between 21 April 2016 and 30 June 2016, HMRC (acting through its NIRU office) reissued 16 of the demand notes to the Farringdon Street address. A 17th demand letter that was

returned as undelivered by the Royal Mail was also reissued, but the FTT was unable to ascertain the precise date of that reissue ([20]).

19. The Company called HMRC to ask how it had become liable for the VAT and customs duty demands. Some correspondence ensued with NIRU in which the Company informed NIRU, by letter dated 16 May 2016, that its address was in Farringdon Street. HMRC made no change to the Company's recorded address in response to that letter and rather wrote to the Company on 23 June 2016 to say that they continued to hold the Cavendish Road address on file and that a change of address had to be notified to the "variations" team in Grimsby ([24]). Therefore, even after receiving the Company's letter of 16 May 2016, HMRC continued to send new C18s to Cavendish Road but (as referred to above) sent re-issued C18s to Farringdon Street.

20. HMRC were asked to reissue all of the demand notes and they did so on 2 November 2016 by sending them to the Farringdon Street address. However, HMRC did not amend the dates on those demand notes so they all bore the same date that they had when they were originally sent to the Cavendish Road address ([27] and [28]).

21. The Company's advisers, Ashok Desor & Co requested that HMRC review the decisions to make the demands on 22 November 2016, but HMRC refused the request by letter dated 25 November 2016 stating that the request for a review was made later than 30 days after the dates appearing on those demands and so the request for a review was out of time. The Company appealed to the Tribunal against all 40 demands on 16 June 2017 and by that date, HMRC had not notified the Company of the outcome of any review.

The FTT's conclusions as to applicable statute law

22. At [32] to [33] of the Decision, the FTT set out relevant extracts from statutory provisions contained in the FA 1994. We will not quote those provisions in full since their effect was largely uncontroversial. Rather, we will focus our attention on those provisions whose effect was disputed.

23. There was no dispute that the demand notices were "relevant decisions" as defined in s13A of FA 1994. In those circumstances, there was no dispute that HMRC were obliged to offer the Company a review of those decisions under s15A of FA 1994 at the same time as they were notified to it.

24. Section 15C of FA 1994 imposes a limited obligation on HMRC to perform an internal review of relevant decisions in the following terms:

> **15C Review by HMRC**
>
> (1) HMRC must review a decision if—
>
> (a) they have offered a review of the decision under section 15A, and
>
> (b) P notifies HMRC of acceptance of the offer within 30 days beginning with the date of the document containing the notification of the offer of the review.

Therefore, the time limit for a taxpayer to require HMRC to perform a review runs from "the date of the document containing the notification of the offer of the review".

25. HMRC's case was that it was not obliged to perform a review of any of the decisions in dispute (because the Company's request was out of time). However, as will be noted, the FTT did not accept this broad contention with the result that it considered legislation relating to the conduct of a review to be relevant. In that context, s15F of FA 1994 provides as follows:

> **15F Nature of review etc**

(1) This section applies if HMRC are required to undertake a review under section 15C or 15E.

…

(5) The review may conclude that the decision is to be—

(a) upheld,

(b) varied, or

(c) cancelled.

(6) HMRC must give P, or the other person, notice of the conclusions of the review and their reasoning within—

(a) the period of 45 days beginning with the relevant date, or

(b) such other period as HMRC and P, or the other person, may agree.

(7) In subsection (6) "relevant date" means—

(a) the date HMRC received P's notification accepting the offer of a review (in a case falling within section 15A),

(b) the date HMRC received notification from another person requiring review (in a case falling within section 15B), or

(c) the date on which HMRC decided to undertake the review (in a case falling within section 15E).

(8) Where HMRC are required to undertake a review but do not give notice of the conclusions within the time period specified in subsection (6), the review is to be treated as having concluded that the decision is upheld.

(9) If subsection (8) applies, HMRC must notify P or the other person of the conclusion which the review is treated as having reached

26. Section 16 of FA 1994 sets out the time limit for a taxpayer to appeal to the FTT against a relevant decision in the following terms, so far as relevant:

16 Appeals to a tribunal

…

(1B) Subject to subsections (1C) to (1E), an appeal against a relevant decision (other than any relevant decision falling within subsection (1) or (1A)) may be made to an appeal tribunal within the period of 30 days beginning with—

(a) in a case where P is the appellant, the date of the document notifying P of the decision to which the appeal relates, or

…

(1C) In a case where HMRC are required to undertake a review under section 15C—

(a) an appeal may not be made until the conclusion date, and

(b) any appeal is to be made within the period of 30 days beginning with the conclusion date.

…

(1F) An appeal may be made after the end of the period specified in subsection (1), (1A), (1B), (1C)(b), (1D)(b) or (1E) if the appeal tribunal gives permission to do so.

> (1G) In this section "conclusion date" means the date of the document notifying the conclusion of the review.

Therefore, very broadly, the scheme of the legislation is that a taxpayer has 30 days from "the date of the document" notifying HMRC's decision to appeal to the FTT but, if HMRC are obliged to perform a review, the deadline is deferred to 30 days after "the date of the document" notifying the conclusions of the review.

27. The FTT has power under s16(1F) of FA 1994 to permit taxpayers to make appeals to it after the applicable deadline. In the circumstances of this appeal, the FTT had no power to require HMRC to perform a late review of the C18s since, while s15E of FA 1994 requires HMRC to perform a late review if, among other matters, HMRC are satisfied that a taxpayer has a "reasonable excuse" for requesting a review late, the statute confers no right of appeal to the FTT if HMRC do not consider the requirements for a late review are satisfied.

28. The FTT considered that the above statutory provisions had to be interpreted so as to give effect to provisions of the Community Customs Code ("CCC") contained in the Regulation of the Council of the European Communities dated 12 October 1992 (EEC) No 2913/92. In particular, Articles 243 and 245 in Title VIII of the CCC provide as follows:

> **Article 243**
>
> 1. Any person shall have the right to appeal against decisions taken by the customs authorities which relate to the application of customs legislation, and which concern him directly and individually.
>
> …
>
> The appeal must be lodged in the Member State where the decision has been taken or applied for.
>
> 2. The right of appeal may be exercised—
>
> (a) initially, before the customs authorities designated for that purpose by the Member States;
>
> (b) subsequently, before an independent body, which may be a judicial authority or an equivalent specialised body, according to the provisions in force in the Member States.
>
> …
>
> Article 245
>
> The provisions for the implementation of the appeals procedure shall be determined by the Member States.

29. The FTT also sought to identify statutory provisions specifying the address to which HMRC were obliged to send the demand notices. At [43], the FTT identified that Article 221 of the CCC required amounts of customs duty considered due to be notified to the debtor "in accordance with appropriate procedures" but that neither the CCC nor Regulation (EEC) No 2454/93 (the "Implementing Regulation") made in connection with it specified what those "appropriate procedures" were.

30. At [47] of the Decision, the FTT sought to identify other statutory provisions that prescribe where notices should be sent and concluded as follows:

> There does not appear to be in domestic customs duty legislation such as the Customs and Excise Management Act 1979 (except in relation only to notices of seizure of goods – paragraph 2(b) Schedule 3) a provision akin to that in s 98 Value Added Tax Act 1994 or section 115 Taxes Management Act 1970 permitting service to a last known address. And as we have said, s 7 of the

> Interpretation Act does not stretch to affect directly effective EU Directives or Regulations. Section 1139 Companies Act 2006 does permit service on a company at its registered office, but that must mean at the registered office as it is on record at Companies House at the time of attempted service, and that was not the case here.

The FTT's conclusion and reasoning

31. The FTT found that none of the 40 C18s sent between 4 March 2016 and 8 August 2016 to the Cavendish Road address was actually received or validly served because (i) they were sent to an address that was neither the Company's registered office nor place of business at that time and (ii) the evidence that around 16 of these demand notices were returned as undelivered through the Royal Mail demonstrated that none of the demand notices had, having been sent to the wrong address, actually been received (see [46] and [48] of the Decision). In reaching this conclusion, the FTT rejected HMRC's argument that, because the Company had failed to notify its new address (or its VAT number after it was registered) to the EORI team at HMRC, service to the old Cavendish Road address was good service on the Company; the FTT took the view that HMRC "as an entity" had been notified of the new address and therefore issue of the notices to the old address was insufficient (see [57] to [60]).

32. Next, the FTT considered the 16 (or 17)[1] demand notices referred to at [18] above that HMRC reissued between 21 April 2016 and 30 June 2016. The FTT decided that the Company received these notices (see [61]) and that HMRC offered a review of the decisions contained within them (see [64]). The FTT concluded (see [68]) that the Company did not request a review within 30 days of the date on which the notices were reissued and so necessarily did not request a review within 30 days of the date on the notices as originally sent. Therefore, since the Company did not appeal to the FTT until 16 June 2017, whether time ran from the date of the original notices, or the reissued notices, the Company was late in appealing against those 16 demand notices. The Company has served no Respondent's notice objecting to this conclusion.

33. Having concluded that the Company was late in appealing against 16 of the demand notices, the FTT considered whether it should exercise its power to permit a late appeal to be made. It considered the law set out in *BPP Holdings v HMRC* [2017] UKSC 55, *Denton v TH White Ltd (and related appeals)* [2014] EWCA Civ 906 and *Data Select v HMRC* [2012] UKUT 187 (TCC) and concluded that it would apply the three-stage approach set out in *Denton* (reasoning that the five questions that the Upper Tribunal had referred to in *Data Select* remained relevant to an application of the three-stage approach in *Denton*). Applying that three-stage approach, it concluded:

> (1) The delay of between 10 and 13 months in making these appeals was both serious and significant ([95]).
>
> (2) The Company had no reasonable excuse for its delay in appealing ([104]).
>
> (3) Considering "all the circumstances of the case" (including the five questions set out in *Data Select*), the Company would suffer prejudice if it were not able to contest decisions making it liable for VAT and import duties. It considered that the Company had at least an arguable case that an appeal could succeed but that the merits of the Company's appeal did not weigh in the balance ([114]). The FTT attached considerable significance to its decision (dealt with below) that since the Company would be entitled

[1] The FTT did not conclude definitively whether there were 16 or 17 such notices, but indicated that it would proceed on the basis that there were 16. We will do the same in this decision since HMRC are not suggesting we should do otherwise.

to appeal against 24 of the C18s in any event, there would be comparatively little prejudice to HMRC if the other 16 were the subject of an appeal as well (see [117]).

(4) The FTT's ultimate conclusion was that it would give permission for these appeals to be made late.

34. The FTT then turned its attention to the 24 C18s that were reissued on 2 November 2016 and which had not previously been reissued. HMRC argued that the deadline for the Company to request a review of these 24 decisions was 30 days from the date of the original notices arguing firstly that the notices were validly served when they were originally sent (to the Cavendish Road address) and secondly that, when they were reissued on 2 November 2016 (and sent to the Farringdon Street address), the reissued C18s bore the date that appeared on the original notices. The FTT had already rejected the first of these arguments when it concluded that the C18s were not validly served when originally sent. The FTT also rejected the second argument reasoning that it would mean that, by the time the Company received the C18s, the deadline for requesting a review had expired and such an interpretation would be contrary to Article 243(2)(a) of the CCC that gave the Company a right of appeal to HMRC in the first instance. Therefore, the FTT concluded that although s15C of FA 1994 provided for the deadline for requesting a review to run from the "date **of** the document" communicating HMRC's decision, that did not mean that time runs from the date **on** the document. Rather, in relation to these 24 C18s, time started to run from 2 November 2016, the date those reissued notices were despatched (see [85]). It followed (see [86]) that the Company had validly requested a review of HMRC's decision in its letter of 22 November 2016.

35. Therefore, according to the FTT, it followed that HMRC were obliged to conduct a review, the provisions of s15F of FA 1994 applied to that review and the deadline for making an appeal was, by virtue of s16(1C) of FA 1994, 30 days after the "conclusion date". Since HMRC did not perform their review, they never issued a document that set out the conclusions of that review for the purposes of s16(1G) with the result that there was never any "conclusion date" and the appeal made on 16 June 2017 was in time in relation to the 24 C18s reissued to Farringdon Street for the first time on 2 November 2016.

HMRC'S GROUNDS OF APPEAL

36. HMRC appeal against the Decision on the following grounds:

(1) Ground 1 – that the FTT erred in law in not finding that guidance HMRC published in connection with the EORI scheme imposed a legal obligation on the Company to notify the correct HMRC department of its change of address.

(2) Ground 2 – that the FTT erred in law when it concluded that the original 40 C18s were not communicated to the Company.

(3) Ground 3 – that the FTT erred in law when it found that, because the Company had notified its new address to a specific team within HMRC when it applied for VAT registration, it had thereby notified that address to HMRC as an entity.

(4) Ground 4 – that the FTT erred in law when it concluded, for the purposes of s15C(1) and s16(1B) of FA 1994, that the "date of" the document was the date of despatch as opposed to the date on the document.

(5) Ground 5 – that the FTT erred in law in considering whether to give permission to the Company to make late appeals by incorrectly applying guidance in binding authorities and failing properly to consider the extent of possible prejudice to both parties.

(6) Ground 6 – that the FTT erred in taking into account, as a decisive consideration, when allowing 16 decisions to be appealed out of time, the fact that the other 24 decisions were not out of time and were going to be appealed.

(7) Ground 7 – the FTT erred, when considering whether to give permission to make late appeals, in not sufficiently exploring the merits of the appeals.

37. The grounds of appeal overlap somewhat. Grounds 1 to 3 are all concerned with the question of when the C18s and associated decision letters were "communicated" or "notified" to the Company. Ground 1 approaches this question by arguing that communication or notification by HMRC to the Cavendish Road address was effective because that was the address held by HMRC for the purpose and the only way in which that address could be changed was by the Company following HMRC's guidance as to the means of doing so (such guidance having the force of law). In Ground 2, HMRC argue that, applying relevant provisions of EU law and of domestic UK law, all 40 of the C18 demand notes were validly served by sending them by post to the Cavendish Road address even though, when they were sent to that address, the Company did not maintain business premises there. Ground 3 expands on Ground 2 by making the specific argument that, contrary to the FTT's conclusion, the Company did not validly notify the Farringdon Street address to HMRC when it made an application to be registered for VAT since a change of address could only be validly notified to the specific HMRC team that deals with EORI matters.

38. Therefore, Grounds 1 to 3 all involve HMRC arguing that the FTT should have concluded that all 40 C18 demand notes were validly served when initially sent. Accordingly, HMRC's primary position is that the Company was late in appealing against all 40 C18 demand notes (and not just 16 of those demand notes as the FTT had concluded).

39. Ground 4 involves a challenge to the FTT's reasoning that led it to conclude that the Company's appeals against the 24 demands that were reissued for the first time on 2 November 2016 were in-time. In essence, HMRC argue that the time for appealing against those demand notes, and the time for requiring an HMRC review of those decisions which is also relevant to the appeal deadline, runs from the date appearing on those documents and not the date on which they were either sent, or received. That is significant because, as noted at [20], when HMRC resent the demand notices on 2 November 2016, they left the original dates of those notices unchanged.

40. Grounds 5 to 7 deal with the way that the FTT approached its discretion to permit late appeals. No further explanation of those grounds is necessary at this point.

41. In the remainder of this decision, we will first consider the extent to which HMRC's grounds of appeal establish an error of law in the Decision. Having decided the nature of any errors of law, we will decide how we should dispose of the appeal (for example, whether we should remake the Decision or remit it back to the FTT).

Discussion - Ground 1

42. As we have noted, Ground 1 addresses the same underlying issue as Grounds 2 and 3 but seeks to establish the principle that the Company was under a legal obligation to notify its new address specifically to the department of HMRC that administers the EORI system and that in consequence of the Company's failure to do so, the sending of C18s and decision letters to the old address amounted to valid communication and/or notification of them to the Company.

43. In the period relevant to this appeal, there were two EU Regulations sequentially in force dealing with customs duty. We have already mentioned the CCC. However, for part of the relevant period, the relevant EU Regulation was Commission Regulation 952/2013 establishing the Union Customs Code (the "UCC"). Mr Hayhurst submitted that for the

purposes of this appeal, all goods placed under the inward processing procedure on or after 1 May 2016 would be dealt with under the UCC. Those placed under the procedure before 1 May 2016 would, provided that procedure had not been discharged before that date, also be dealt with under the UCC. The CCC would apply to other goods. The inward processing procedure can only be discharged without a customs debt arising by delivery of a BoD up to 7 months after the goods are imported. Therefore, it followed, in his submission, that since all imports after 1 October 2015 (of which there were 20) were not so discharged by 1 May 2016, the UCC applies to the recovery of the customs debt on those imports. The other 20 imports made before 1 October 2015 would be subject to the provisions of the CCC. The Company has not submitted to the contrary and we have, therefore, accepted Mr Hayhurst's submission in this respect.

44. Mr Hayhurst's primary submission on Ground 1 was that the requisite legal obligation could be found in the Implementing Regulation which lays down the provisions for the implementation of the CCC. He relied in particular on Articles 4k, 4m, 4o and Annex 38d of the Implementing Regulation which provide, so far as material, as follows:

> **Article 4k**
>
> 1.The EORI number shall be used for the identification of economic operators and other persons in their relations with the customs authorities
>
> The structure of the EORI number shall comply with the criteria set out in Annex 38.
>
> …
>
> **Article 4m**
>
> 1. Registration and identification data of economic operators or, where appropriate, of other persons processed in the system as referred to in Article 4o shall comprise the data listed in Annex 38d subject to specific conditions laid down in Article 4o(4) and (5).
>
> 2. When registering economic operators and other persons for an EORI number, Member States may require them to submit data other than the data listed in Annex 38d where that is necessary for purposes laid down in their national laws.
>
> …
>
> **Article 4o**
>
> 1. Member States shall cooperate with the Commission with a view to developing a central electronic information and communication system which contains the data listed in Annex 38d provided by all the Member States.
>
> 2. The customs authorities shall cooperate with the Commission to process and to exchange between customs authorities and between the Commission and customs authorities, the registration and identification data listed in Annex 38d of economic operators and other persons, by using the system referred to in paragraph 1.
>
> Data other than the data listed in Annex 38d shall not be processed in the central system.
>
> 3. Member States shall ensure that their national systems are kept up to date, and are complete and accurate.
>
> 4. Member States shall upload on a regular basis to the central system the data listed in points 1 to 4 of Annex 38d concerning economic operators and other persons whenever new EORI numbers are assigned or changes in that data occur.

> 5. Member States shall also upload on a regular basis to the central system, where available in the national systems, the data listed in points 5 to 12 of Annex 38d concerning economic operators and other persons whenever new EORI numbers are assigned or changes in that data occur.
>
> …
>
> **Annex 38d: Data processed in the central system provided for in Article 4o(1)**
>
> (referred to in Article 4o)
>
> 1. EORI number as referred to in Article 1(16).
>
> 2. Full name of the person.
>
> 3. Address of establishment/address of residence: the full address of the place where the person is established/resides, including the identifier of the country or territory (ISO alpha 2 country code, if available, as defined in Annex 38, Title II, box 2.)….
>
> 8. Contact information: contact person name, address and any of the following: telephone number, fax number, e-mail address

45. The essence of Mr Hayhurst's submissions was that the Implementing Regulation imposes obligations on the UK to gather, and keep updated, information, including address details of holders of EORI numbers. Moreover, the Implementing Regulation requires that information to be uploaded to a central database. Since the Implementing Regulation is directly applicable, he submitted that it empowered the UK to impose on holders of EORI numbers the obligation to provide the authorities with the necessary information. The UK had, he submitted, chosen to impose those obligations by issuing the guidance referred to below.

46. First, he referred to HMRC's published guidance including a document entitled "FAQs: Economic Operator Registration and Identification" which set out the answers to certain "frequently asked questions" in relation to the EORI. That guidance related to the position under the CCC and was put in evidence before the FTT in response to the FTT's request at the hearing for further written submissions.

47. Under the heading "What if my details change?", the FAQs said:

> You will need to advise the EORI Team in Cardiff by sending an email if:
>
> There are any changes to your name and/or address
>
> Your VAT number changes or you deregister.

Under the heading "Can I obtain an EORI number whilst I am applying for VAT registration in the UK?" the FAQs said:

> Yes…
>
> Once you are registered for VAT you will need to submit a new EORI application … advising us at the same time of your EORI number before you were registered for VAT. We will then cancel your old EORI number and issue you with another based on your new VAT registration number…

48. Mr Hayhurst also showed us much shorter guidance that was published after the UCC came into force. That guidance contained the following relevant section:

> **If your details change**
>
> Contact the EORI team to tell them:

> About changes to your business name, address or VAT number – if you're VAT registered, first update your VAT registration details
>
> If you register for VAT

49. In short, Mr Hayhurst's submission was that the guidance imposed a legally binding obligation on the Company to inform the EORI team (in the manner stipulated in that guidance) of its address from time to time. More specifically, he also argued that the guidance imposed a legally binding obligation on the Company to reapply for an EORI number as soon as it became VAT registered.

50. We do not accept Mr Hayhurst's broad submission. The provisions of the Implementing Regulation to which he referred are doubtless directly applicable. Therefore, without the need for domestic legislation, the UK authorities became obliged to collect information and administer the EORI system in the manner set out in the Implementing Regulation. However, it does not follow that the Regulation itself imposes obligations on holders of EORI numbers to keep their address details up do date. Nor does the Implementing Regulation itself mean that any guidance that HMRC issue on areas covered by that Regulation necessarily acquires the force of law.

51. Mr Hayhurst also referred to Article 199 of the Implementing Regulation which provides as follows:

> 199. Without prejudice to the possible implementation of penal provisions, the lodging of a declaration signed by the declarant or his representative with a customs officer … shall render the declarant or his representative responsible under provisions in force for:
>
> - the accuracy of the information given in the declaration;
>
> - the authenticity of the documents presented; and
>
> - compliance with all the obligations relating to the entry of the goods in question under the procedure concerned.

52. We do not consider that this provision imposes any positive legal obligation on the Company to notify address details to HMRC in any particular way and therefore we do not regard it as relevant to Ground 1. However, it does indicate that the Company is "responsible" (though it does not say how) for the accuracy of the address details that the Company, through its agent, gave on customs declarations that it submitted.

53. We did not regard the provisions of the Customs Traders (Accounts and Records) Regulations 1995 or s174 of the Companies Act 2006 to which Mr Hayhurst also referred as shedding much light on the extent, if any, of any legal obligation of the Company to notify its address for "communication" purposes to HMRC in any particular way.

54. In short, simply because HMRC published "guidance" on matters connected with the Implementing Regulation, there is no basis for arguing that such guidance acquired the force of law, thereby necessarily rendering invalid any notification of a change of address which did not comply with the guidance. We therefore dismiss HMRC's appeal on Ground 1.

Discussion – Grounds 2 and 3

55. Article 217 to 221 of the CCC (which applies to imports on or before 1 October 2015) provides for the amount of import duty to be entered in accounts and for communication of the amount of duty to the debtor. The obligation to "communicate" the duty is expressed in Article 221 in the following terms:

> As soon as it has been entered in the accounts, the amount of duty shall be communicated to the debtor in accordance with appropriate procedures.

56. Article 102(1) of the UCC (which applies to imports after 1 October 2015) expresses the obligation in terms of "notification" rather than "communication" as follows:

> The customs debt shall be notified to the debtor in the form prescribed at the place where the customs debt is incurred or is deemed to have been incurred in accordance with Article 87.

57. Article 87 of Delegated Regulation 2015/2446 takes matters (slightly) further forward by stipulating that, in relation to the UCC:

> The notification of the debt in accordance with Article 102 of the Code may be made by means other than by electronic data processing techniques.

58. A striking feature of the UCC and CCC is that neither sets out expressly how the debt must be notified, or where HMRC must send documents relating to customs duty. In different contexts, taxing Acts make specific provision for the delivery and service of assessments. For example, for the purposes of income tax (and other direct taxes) s115 of the Taxes Management Act 1970, according to its heading, deals with the "delivery and service of documents". Section 98 of the Value Added Tax Act 1994 ("VATA 1994") deals with the "service of notices". However, Mr Hayhurst accepted, for the purposes of Grounds 2 and 3, that there are no analogous provisions that determine the precise address to which C18 demand notes are to be sent. He accepted that some statutory provisions that might seem to apply do not actually do so. For example:

> (1) Without any prompting from either the Tribunal or from the Company, Mr Hayhurst conceded in his oral submissions that s146 of the Customs and Excise Management Act 1979 does not apply since it is concerned with the service of legal process, and not mere demands for payment.
>
> (2) In answer to a question from the Tribunal, Mr Hayhurst accepted that s7 of the Interpretation Act 1978 does not apply directly[2] (since, as the Upper Tribunal (Morgan J) concluded in *HMRC v A.G. Villodre SL* [2016] UKUT 166 (TCC) it applies only where "an Act authorises or requires any document to be served by post" and neither the UCC nor the CCC are "Acts" for this purpose).
>
> (3) Even though the C18s were demanding sums in respect of both customs duty and import VAT, Mr Hayhurst did not argue that s98 of VATA 1994 was relevant, at least insofar as the C18s related to import VAT. He did not explain why he was not making such an argument. However, it may be that he considered that s16 of VATA 1994 provides for import VAT on goods arriving in the UK from outside the EU to be chargeable in accordance with EU and domestic legislation on customs duty so that the provisions of VATA 1994 were not applicable.

59. In *Villodre,* Morgan J commented that:

> It was common ground that the United Kingdom has not adopted or defined procedures for effecting a communication for the purposes of [the CCC].

Given what we have said at [58], that was Mr Hayhurst's position before this Tribunal as well. Therefore, the question is what amounts to "communication to the debtor" in accordance with "appropriate procedures" (for the purposes of the CCC) or "notification to the debtor" in the "form prescribed" for the purposes of the UCC. We accept Mr Hayhurst's submission (which the Company has not contradicted) that despite the slight difference in terminology, the effect of the CCC and UCC is, for the purposes of this appeal, the same and we will, therefore, focus

[2] Mr Hayhurst submitted however that s7 of the Interpretation Act 1978 might be of indirect relevance as noted in more detail below.

our analysis on the concept of "communication" and will apply that analysis to the concept of "notification" by analogy, without necessarily referring to it on each occasion.

60. In *Belgische Staat v Molenbergnatie NV* (Case C-2014/04), the Court of Justice of the European Union ("CJEU") said, in the context of the CCC, that laying down the "appropriate procedures" was essentially a matter for member states saying, at [53] and [54]:

> 53 Given the absence in the Community customs legislation of provisions on the meaning of 'appropriate procedures' or of any provision conferring power on entities other than the Member States and their authorities to determine those procedures, it must be held that the procedures are within the scope of the national legal systems of the Member States. Should the latter not have enacted specific procedural rules, it is the responsibility of the competent State authorities to guarantee a form of communication which allows persons liable for customs debts to have full knowledge of their rights.
>
> 54 In the light of the foregoing, the answer to the fourth question is that Member States are not required to adopt specific procedural rules on the manner in which communication of the amount of import or export duties is to be made to the debtor where national procedural rules of general application can be applied to that communication, which ensure that the debtor receives adequate information and which enable him, with full knowledge of the facts, to defend his rights.

61. In *Villodre,* Morgan J was considering whether a document that HMRC sent by post, correctly addressed, to a Spanish company in Spain was "communicated" even though it was found as a fact that it was never received. Morgan J approached this question by considering whether there was any English law provision or decided case determining what constituted "communication" to a debtor (see [37] of the judgment). Since he was referred to no such provision or authority, he then proceeded to consider the ordinary meaning of the word "communication", saying this:

> In my judgment, a document which is sent in the post to a debtor but which is lost in the post and never received by the debtor is not communicated to the debtor. The concept of communication requires the relevant message to get through to the debtor.

62. Morgan J rejected HMRC's argument that s7 of the Interpretation Act 1978 applied on two grounds. First, s7 was not applicable because the CCC was not an "Act". Second, in any event, s7 did not apply to deem as received a document that, as the Spanish company had established, was not actually received. We therefore reject Mr Hayhurst's submission that s7 of the Interpretation Act 1978 is somehow of "indirect" relevance to the question whether the C18s were "communicated". Morgan J's approach in *Villodre* demonstrates that s7 of the Interpretation Act 1978 could be relevant only if it gave some guidance as to when notices are "communicated" to a debtor. For the reasons that Morgan J gave in *Villodre,* s7 gives no such guidance and therefore is of neither direct, nor indirect, relevance.

63. We will follow Morgan J's approach, of seeking to ascertain the meaning of "communication" in UK domestic law, when deciding the extent to which the C18s were validly served on the Company. However, there are two features of this case that were not present in *Villodre* and are relevant to the question of "communication":

> (1) This appeal involves the question whether documents were "communicated" to a company incorporated in England & Wales. The Companies Act 2006 prescribes methods of serving documents on such a company which are of potential relevance to the question whether documents were "communicated" to the Company.

(2) *Villodre* involved the question whether a document that was addressed to the "correct" address but lost in the post was nevertheless "communicated". This appeal involves the somewhat different question whether a document sent to (and received at) an address of the Company which the Company had previously provided to HMRC, was "communicated" even though, at the time the document was sent, the Company no longer maintained a presence at that address and the document was returned without any officer or employee of the Company seeing it. Therefore, *Villodre* does not itself set out a conclusive answer to the relevant issue in this appeal and it is instead necessary to apply the reasoning in *Villodre* by analogy.

64. As regards [63(1)], Section 1139 of the Companies Act 2006 provides as follows:

> **1139 Service of documents on company**
>
> (1) A document may be served on a company registered under this Act by leaving it at, or sending it by post to, the company's registered office.

Section 1139, therefore, provides that documents may be served by being left at or posted to a company's registered office.

65. The question then arises as to whether "service" amounts to "communication" or "notification" under the CCC and the UCC, particularly given the comments in *Belgische Staat v Molenbergnatie NV* to the effect that, where a member state does not enact specific procedural rules it must "guarantee a form of communication which allows persons liable for customs debts to have full knowledge of their rights". Of course, no method of communication with a company can be "guaranteed" to be successful. A document delivered to a registered office can be overlooked, for example. We consider however that "service" in accordance with s1139 of the Companies Act 2006 would constitute "communication" (and "notification") for customs duty purposes, and accordingly all C18s and associated decision letters sent by post to the Company at its registered office from time to time would thereby be communicated. Thus the 16 C18s re-issued to the Company between 21 April 2016 and 30 June 2016 (as referred to in the Decision at [20]) were clearly validly communicated at that time.

66. However, given that s1139 sets out a permissible, and not a mandatory, method of service on a company incorporated in England & Wales, we do not consider that the opposite holds true: just because a permissible method of service has not been used, it does not follow that a document sent in some other way was not "communicated".

67. To discern what else (if anything) amounts to "communication" in the circumstances of this appeal, we consider it is highly relevant that the Company is a legal person rather than a natural person. There is no legal requirement that, in order to be "communicated" to a company, a document must necessarily have been received by a particular natural person such as a director or controlling mind of the company. Section 1139 Companies Act 2006 clearly contemplates "service" taking place without any such direct personal contact, and we consider the same should logically apply to "communication". In short, we consider that delivery of a document to a certain place (which might include an email address) amounts to communication to a company of the contents of that document, whether or not any individual within the company sees the document or is aware that such delivery has taken place.

68. The crucial question still to be addressed, however, is how to ascertain the place to which the relevant document must be delivered in order for its contents to be "communicated" or "notified". In our view, the general rule is that a company may itself specify the address, or addresses, at which it can be contacted for particular purposes by particular counterparties. It may revoke a notification of an address that it has previously given to a counterparty by contacting that counterparty to specify a new address. Provisions having the force of law may

require a company to communicate its address, or change of address, in a particular way. In addition, parties may agree, by contract, that addresses, or changes of address, have to be communicated in a particular way. However, in this case, our conclusion on HMRC's Ground 1 means that we are not satisfied that HMRC's guidance imposed any obligation having the force of law requiring the Company to communicate its address, or change of address, for customs duty in any particular way. The FTT made no finding that there was a contract in place between the Company and HMRC that regulated the manner in which the Company was to notify HMRC of its address for customs duty purposes, or changes to that address and HMRC have not asked us to infer the existence of a contract in its appeal to this Tribunal. Therefore, the only sensible way to approach this issue in the context of this appeal is to consider, objectively, the effect of communications passing between the Company and HMRC and consider which involved the Company notifying HMRC of an address HMRC could use for customs duty purposes and which notified HMRC of changes to that address.

69. The FTT did not address the question in these terms and therefore made an error of law when it simply assumed (at [59] – [60]) that notification to HMRC "as an entity" of the Company's new Farringdon Street address when it applied to be registered for VAT was necessarily sufficient to require HMRC to send all future communications in relation to its customs duty affairs to that address. As is obvious to any trader, VAT and customs duty are quite distinct regimes, administered through completely different parts of HMRC. For VAT registration purposes, a trader may choose to provide a different address from that used for customs duty purposes. Therefore, provision of a particular address on an application for VAT registration does not necessarily amount to an instruction to HMRC to send future communications relating to customs duty to that address. That conclusion is only reinforced in the circumstances of this appeal by the fact that, even after the Company had provided the Farringdon Street address in its application to be registered for VAT, it continued, by its agent, to provide the Cavendish Road address on import declarations submitted for customs duty purposes. We therefore find Ground 3 of HMRC's appeal to be made out.

70. Ground 2 effectively depends upon the application to the facts of this case of the broad principle identified at [68] above. As the FTT has made reasonably detailed findings of fact about the overall circumstances during the relevant time, and further uncontentious evidence is contained in the document bundle which was before the FTT (and us) it is possible for us to apply that principle to the facts and decide whether, as a matter of law, the overall conclusion reached by the FTT (that the original 40 C18s were not communicated to the Company) is sustainable. In doing so, we will necessarily reach a view as to whether the FTT's decision on Ground 3 is still correct, despite having been reached on the wrong basis. We therefore turn to consider the application of the broad principle identified above to the facts of this case.

71. First, in a situation where the Company applied for an EORI number and, when doing so, gave an address to HMRC, viewed objectively, that amounted to a notification by the Company that HMRC should use that address for communicating with the Company for customs duty purposes until new circumstances arose.

72. The main new circumstance that is likely to arise (as it did in this case) is some communication being received from the Company giving a different address. In that situation, the question that arises is whether, read objectively, communication of a different address amounted to a clear instruction to HMRC to communicate with the Company in relation to customs duty matters at the new address.

73. HMRC argue that based on their guidance the only appropriate means of notifying a change of address to them was to "advise the EORI Team in Cardiff by sending an email" or "contact the EORI Team" (see [47] and [48] above).

74. We disagree. We acknowledge that HMRC is a complex organisation of many parts, not all of which are in close contact with each other. But that fact on its own cannot justify a complete refusal to accept any but the published means of communication of certain information. It is certainly one circumstance to be taken into account and in simple cases it may be determinative. But here the factual history is more complex and, moreover, HMRC have failed to establish that their guidance had the force of law or was reflective of the terms of a contract entered into between HMRC and the Company.

75. We have already explained that the Company's provision of its Farringdon Street address on its VAT application in September 2015 was insufficient to result in a changed address for customs duty purposes.

76. The next contact with HMRC by the Company, as recorded at [21] of the Decision, was a phone call "asking how the C18 had arisen" (presumably referring to one of the C18s that had been re-issued by HMRC to Farringdon Street after the original had been returned through the Royal Mail returned letter service). There is no indication in the FTT's decision that any mention of the change of address was made during the course of this phone call.

77. The next contact, as recorded at [24] of the Decision, was a letter dated 16 May 2019 from the Company to HMRC's NIRU department (which had been sending out the C18s), notifying HMRC of the Farringdon Street address. This letter was received by HMRC on 19 May 2016, and crossed with a letter which they had themselves issued to the Company on 16 May re-issuing 11 of the C18s. At the end of that letter, HMRC referred to the fact that they understood there had been a change of address that they were not aware of, and that any change of address should be notified to a "Variations Section" of HMRC in Wolverhampton (not Cardiff).

78. This was followed up by a further letter from the NIRU team of HMRC (at Enniskillen) dated 23 June 2016, addressed to the Company at Farringdon Street, informing it that HMRC still held Cavendish Road as its address, and that to update it the Company should contact their "Variations Section" in Grimsby (not Cardiff or Wolverhampton).

79. Mr Hayhurst referred us to *Hinchey v Secretary of State for Work and Pensions* [2005] UKHL 16, [2005] 1WLR 967, a case which addressed the situation where a claimant had failed to comply with the requirement written on her benefit payment books to notify her local social security office if certain events occurred, including the expiry of a particular benefit which was awarded from another office. She had not done so, as a result of which she had received excess benefits which were now being reclaimed from her. As part of the argument, it was submitted that there was no duty to disclose something which was already known and as the local social security office and the office which had awarded the other benefit were both arms of the Secretary of State, the relevant knowledge of the other office should be imputed to the local social security office. The House of Lords rejected this approach, but largely by reference to the terms of the relevant regulations and the specific instructions on the claimant's payment book which, every time she signed a payment order for presentation, she confirmed she understood. Given the context in *Hinchey*, we did not find it of any assistance in the present case.

80. In summary, therefore, the Company had, on 16 May 2019, written a short and clear letter to the unit at HMRC which was actually sending the C18 forms and decision letters to it at its new address, notifying them of a change of address for customs duty purposes. Its letter crossed with a letter from the same HMRC unit, sent to it at its new address, telling it that it needed to notify the change of address to an address in Wolverhampton. A further letter was then sent by the same HMRC unit a month later, again to the Company at its new address, stating the HMRC still held the old address on file, and the Company should contact an entirely different

office of HMRC in Grimsby to update it. In the meantime, the Company had been receiving a steady stream of re-issued C18s at its new address from the same unit of HMRC. If the Company had actually looked at HMRC's guidance at the time, it would have seen that the guidance asked taxpayers to notify changes of address for customs duty purposes to yet another office in Cardiff. Against that factual background, and in the absence of any contractual or other legal obligation on the Company to notify HMRC of changes of address for customs duty purposes to either Wolverhampton, Grimsby or Cardiff, we consider that the clear effect of the Company's letter of 16 May 2016 was to notify HMRC of Farringdon Street as its new address for communication of documents for customs duty purposes specifically. That letter was received by HMRC on 19 May 2016. In our view, from that time, HMRC were not entitled to treat Cavendish Road as the Company's address for communication for customs duty purposes.

81. Accordingly, any C18s and associated decision letters sent to the Company at its Cavendish Road address on or after 19 May 2016 were not "communicated" (or "notified") to the Company. By reference to the material before us and as stated by the FTT in the Decision at [26], this applies to 25 of the 40 C18s, namely those issued from 2 June to 8 August 2016. We therefore find that whilst the first 15 C18s (i.e. those issued prior to 19 May 2016) were communicated to the Company when delivered to the Cavendish Road address, the remaining 25 were not so communicated when first issued. To that extent, we find Ground 2 made out.

Discussion - Ground 4

82. Ground 4 of HMRC's appeal is that:

> The FTT erred when it concluded that, for the purposes of s15C(1) and 16(1B) of the Finance Act 1994, the statutory term 'date of' the document was the date of dispatch as opposed to the date on the document (see FTT decision 84-94).

83. As we have noted at [35] above, the key conclusion that the FTT expressed related to s15C(1) of FA 1994 as it decided that, in relation to the 24 C18s that were only successfully reissued on 2 November 2016, the Company had requested a review within 30 days of the "date of" those C18s[3]. The FTT concluded that the other 16 C18s were validly served on the Company when reissued between April and June 2016 and that the Company neither requested a review of those 16 C18s, nor appealed to the FTT against them, within 30 days of receiving them. The FTT clearly considered (see [68] and [94] of the Decision) that the time for making an appeal (under s16 of FA 1994) or requesting a review (under s15C) in relation to those 16 C18s ran from the date of reissue (and not, as HMRC had argued, the original date appearing on the C18s as originally sent to the Cavendish Road address) but that did not affect the FTT's decision on those 16 C18s.

84. Therefore, the Decision only makes a determination as to the "date of" a document that actually affects the outcome of the appeal in relation to s15C(1) of FA 1994. However, HMRC's arguments in the appeal to this Tribunal make s16(1B) of FA 1994 relevant as well because, in Grounds 1 to 3, HMRC seek to argue that all 40 C18s were "communicated" or "notified" to the Company (by sending them to the Cavendish Road address) even though the FTT found as a fact that none was received by the Company when initially sent. Therefore, HMRC are arguing that the date for requesting a review (under s15C(1) of FA 1994) or appealing (under s16(1B) of FA 1994) was, in all cases, 30 days after the date appearing on the C18s when they were initially sent. It follows that we will consider both s15C(1) and s16(1B).

[3] In fact, the C18s themselves were not dated; however the evidence before the FTT was that each C18 was issued under cover of a decision letter, which was itself dated. References to the dates of C18s should be read accordingly.

85. Mr Hayhurst referred us to several decisions of the FTT which had considered statutory wording providing for time limits to run "from the date of a document notifying" the appeal. He considered that the FTT in *Data Select Ltd v HMRC* [2011] UK FTT correctly stated the law to be as follows:

> Under s.83G(1)(a)(i)VATA the time limit for appealing is 30 days from "the date of the document notifying the decision to which the appeal relates", not 30 days from date of receipt by the appellant of the document notifying the decision. That means that in this case, where the Appellant is seeking to appeal against the Decision dated 28 April 2009, the time limit is 30 days from 28 April 2009, regardless of when the Decision was received by the Appellant. In cases where the decision appealed against is not received by the appellant until after the expiry of this deadline, or even until shortly before expiry of the deadline, this may be a circumstance justifying an extension of the deadline under s.83G(6). However, an extension of the deadline will not necessarily be for 30 days after the date of receipt of the decision in question. Any extension would be for whatever period is reasonably appropriate in all of the circumstances.

86. The FTT's decision is, of course, not binding on us or any other Tribunal[4]. We have not found this point straightforward to determine since the logical corollary of Mr Hayhurst's submission is that, even if HMRC deliberately backdate a decision (or deliberately delay in sending it out), a taxpayer could be forced to seek (discretionary) permission to appeal late against that decision rather than being entitled, as of right, to appeal against it by sending a notice of appeal within 30 days of the date of the document. Moreover, Parliament has expressed time to run from the date 30 days after "the date of the document notifying the decision…". If HMRC send a decision to the wrong address, so that it is never received, there is a conceptual difficulty in an argument that the they have sent a "document notifying the decision".

87. The part of s16(1B) of FA 1994 that is relevant to this appeal is s16(1B)(a) which deals with the situation of a person (P) who is the direct addressee of an HMRC decision and not merely a third party who is affected by an HMRC decision addressed to another. In s16(1B)(a) of FA 1994, Parliament has focused attention on the "date of the document notifying the decision". Its apparent purpose in doing so is to ensure that, in a s16(1B)(a) situation, there can be no doubt about the deadline for making an appeal whereas there would be doubt if s16(1B)(a) focused on the date on which the decision is despatched or generated (which HMRC would have the means of knowing but the addressee of the decision would not) or the date of actual receipt (which the addressee would know but HMRC could not).[5]

88. At [85] of the Decision, the FTT decided that the "date of" the document is not necessarily the same as the date <u>on</u> the document. We respectfully disagree since applying the FTT's approach the parties could only know the deadline for making an appeal under s16(1B)(a) by knowing when HMRC's decision letter was actually sent. HMRC will generate large numbers of letters each day and we do not consider that Parliament can have intended there to be such an enquiry as it is inconsistent with Parliament's evident purpose in setting a

---

[4] The FTT's decision was the subject of an appeal to the Upper Tribunal, reported as *Data Select v HMRC [2012]* UKUT 187 (TCC), but the appeal did not relate to the FTT's interpretation of s83G(1)(a)(i) of VATA and so this passage was neither approved, nor disapproved, by the Upper Tribunal.

[5] There is no such certainty in the situation set out in s16(1B)(b) of FA 1994. However, that is unavoidable because s16(1B)(b) is concerned with the position of third parties who are affected by an HMRC decision addressed to P. Parliament evidently considered that fairness requires that the time limit applicable to the third party should only start to run once that third party becomes aware of the decision (which will be in the third party's knowledge, but not HMRC's).

clear date, known to all sides, for an addressee of an HMRC decision to appeal against it. In our view, for the purposes of s16(1B)(a), provided a document operates to notify a decision, attention should be focused on the date appearing on that document.

89. There may be cases where what is put forward as a "document notifying the decision" does not answer to that description at all. To give an extreme example, if HMRC sent the C18s to the Company "c/o Santa's Grotto, North Pole" and unsurprisingly they were never received, the "original" C18s would not notify any decision to the taxpayer. The date appearing on such a document could not, therefore, be conclusive for the purposes of s16(1B)(a) of FA 1994, not because s16(1B)(a) directs attention at the date of despatch, but rather because the document in question would not be "a document notifying the decision".

90. In the circumstances of this appeal, there is no doubt that the Company received "documents notifying the decision". On HMRC's case, all 40 C18s were properly notified to the Company by sending them initially to the Cavendish Road address. But even if that is not correct, on or around 2 November 2016, the Company received all 40 C18s which HMRC reissued to the Farringdon Street address, albeit that they all bore dates earlier than 2 November 2016. While we are alive to the difficulties that could arise if HMRC "backdated" documents, given the clear words used in s16(1B) of FA 1994, we see no alternative but to reckon time from the dates appearing on those documents. Parliament has chosen to address the possible risk of injustice in such a case by giving the Tribunal power, in s16(1C) of FA 1994, to permit late appeals to be made. That, it seems to us, is sufficient to give the Company the right, referred to in Article 243 of the CCC, to bring an appeal to the FTT against the C18s.

91. We now turn to the position in relation to s15C of FA 1994. The FTT concluded at [77] that Article 243 of the CCC gives taxpayers an unqualified right to appeal first to HMRC and, subsequently, to the FTT with the HMRC review being integral to the right of appeal to HMRC. Moreover, while the FTT has power to permit the Company to make a late appeal, it has no power to direct HMRC to perform a late review. It follows, therefore, that to the extent that the C18s were not notified to the Company prior to 2 November 2016, the effect of reckoning time from the date appearing on those reissued documents (which was the date on which they were originally sent) could be to deprive the Company of a right to a review of HMRC's decision. The FTT clearly regarded this as pointing in favour of an interpretation that, for the purposes of s15C(1) of FA 1994, time runs from the date HMRC despatched the C18s, and not the date appearing on those documents (see [79] and [85] of the Decision).

92. If the Company had not disengaged from this appeal, we might well have invited further submissions on this issue. However, given that the Company has disengaged, and the point was not argued either before the FTT or us, we have concluded that it would not be proportionate or in accordance with the overriding objective to do so. To the extent the Company had an absolute entitlement to appeal first to HMRC which it considered HMRC had unlawfully frustrated (by not communicating the Company's liability to it validly in time for it to take up its right to a "first stage" appeal to HMRC), it would be open to the Company to seek judicial review of HMRC's decision to refuse to consider its appeal; that remedy would in our view suffice to satisfy such requirement as might exist for the Company to be afforded a "two stage" appeal.

93. In our judgment, Article 243 requires only that persons be given a "two-stage" right of appeal against customs duty decisions and the UK has complied with that requirement by enacting domestic legislation that confers both a right to a review and a right of appeal to the FTT. Article 243 says nothing about time limits that member states can impose for making the "first stage" appeal to HMRC and indeed Article 245 leaves provisions relating to the implementation of the appeals procedure to be determined by Member States. Like s16(1B)(a),

s15C is concerned with the situation of addressees of HMRC decisions, and not third parties. For comprehensible and proportionate reasons, Parliament has decided that the time limit for requesting an HMRC review in that situation should run from the date of the document containing notification of offer of the review. We accept that, in the particular circumstances of this appeal, the Company may not in practice have been able to exercise its right to require a review (since, to the extent it received C18s for the first time following their reissue to the Farringdon Street address on 2 November 2016, the deadline for requesting a review (30 days from the date appearing on the original C18s) expired before those C18s were received). However, we do not agree with the FTT's conclusion that this justifies an interpretation of s15C(1) of FA 1994 that differs from its ordinary and natural meaning.

94. Therefore, HMRC succeed in their appeal under Ground 4. The relevant time limits in both s15C(1) of FA 1994 and s16(1B)(a) of FA 1994 run from the date appearing on the C18s and not, contrary to the FTT's conclusion, from the date those C18s were despatched.

Discussion - Grounds 5 and 6

95. Grounds 5 and 6 both involve challenges to the way the FTT evaluated the prejudice that the parties would suffer if it did, or did not, grant permission to make late appeals and we deal with them together.

96. Ground 5 involves the following criticisms of the FTT's approach:

(1) The FTT over-estimated the prejudice that the Company would suffer if, having been denied permission to make late appeals, HMRC sought to enforce the customs debts and the Company was forced into liquidation.

(2) The FTT should have concluded that the Company would suffer little prejudice if it were denied permission to make late appeals as, by the time of the hearing before the FTT, it had ceased trading.

(3) The FTT did not consider the requirements of CPR 3.9. Moreover, it approached the question of prejudice by focusing on prejudice that the Company would suffer. It gave no, or no adequate, weight to the prejudice that HMRC would suffer.

97. Ground 6 challenges the FTT's conclusion, set out at [116] and [117] of the Decision that, since appeals against 24 of the C18s would be going ahead, it was "in the interests" of justice for the other 16 to go ahead as well.

98. We remind ourselves that, as Lawrence Collins LJ said in *Walbrook Trustee (Jersey) Limited v Fattal* [2008] EWCA Civ 427 at [33]:

> an appellate court should not interfere with case management decisions by a judge who has applied the correct principles and who has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion entrusted to the judge.

99. In *Martland v HMRC* [2018] UKUT 178 (TCC), the Upper Tribunal (Judge Berner and Judge Poole) concluded that, while a decision whether to permit a taxpayer to make a late appeal is not in form a "case management decision", it nonetheless involves the exercise of a judicial discretion with the result that the principle in *Walbrook Trustee (Jersey) Limited* applies by analogy (see [56] of *Martland*).

100. There is little force in the point summarised at [96(1)] above. The FTT had seen evidence (in the form of the Company's successful "hardship" application) that indicated it would suffer hardship if required to pay the amount HMRC were demanding before the appeal had been

determined. The sum that HMRC were claiming was over £300,000, a significant sum and the FTT was entitled to infer that, if HMRC sought to collect such a debt, the Company might be forced into liquidation. Mr Hayhurst submitted that companies in liquidation can still pursue appeals. Of course that is true, but if the FTT refused to allow the Company permission to make a late appeal both the Company and any liquidator of the Company would have lost the ability to challenge HMRC's decisions. The FTT was not "plainly wrong" to consider that if the Company went into liquidation it would suffer prejudice.

101. Nor do we agree that the FTT erred by ignoring HMRC's submission that, since it appeared to have ceased trading, it would suffer reduced prejudice in not being given permission to make late appeals against the C18s (see [96(2)] above). First, there was little force in that submission. Even if the Company ceased trading, it would suffer obvious prejudice if it could not challenge the C18s as it would become obliged to pay amounts it did not consider due. Moreover, HMRC's reliance on this point came in post-hearing submissions in circumstances where it was not clear to us that the FTT had requested additional submissions on the question of prejudice.

102. There is, however, force in the point summarised at [96(3)] above. We are not satisfied that the FTT was in error in not considering Rule 3.9 of CPR expressly (since CPR sets out rules of procedure that apply in the courts and the FTT has its own rules of procedure). However, in *Martland,* the Upper Tribunal said:

> [The] balancing exercise should take into account the particular importance of the need for litigation to be conducted efficiently and at proportionate cost, and for statutory time limits to be respected.

The FTT's evaluation of relevant circumstances and competing prejudice to the parties (in the third stage of its evaluation) makes no mention at all of this factor. Therefore, the FTT was in error, not by failing to refer to Rule 3.9 expressly, but by failing to consider a factor of "particular importance".

103. Mr Hayhurst submitted that the FTT did not consider at all the question of whether HMRC would suffer prejudice. He noted that the FTT approached this issue by considering that the only prejudice that HMRC would suffer would consist of having to defend decisions that it thought were final (see [107] and that no other prejudice was either considered or analysed. However, HMRC had made submissions to the FTT that officers of HMRC had retired and HMRC offices closed which would make it difficult for them to defend the decisions if permission to make late appeals was granted. Mr Hayhurst therefore invited us to conclude that HMRC's submissions were ignored.

104. We do not agree that the FTT "ignored" HMRC's submissions on prejudice. Rather, we consider that they were considered (and dismissed) in a somewhat oblique way at [107] where the FTT said:

> For HMRC [the consequence of granting the Company permission to make a late appeal] is that it will need to defend these decisions as well as the November decisions. Obviously in its skeleton HMRC evaluated the prejudice to it on the basis that it would succeed on all or none of the demand notices which is not the situation we have found to exist.

105. As we understand it, in this passage, the FTT is concluding that, since appeals against 24 of the C18s were in-time, HMRC would always have to deal with the difficulties identified in Mr Hayhurst's skeleton argument with the result that there was no incremental prejudice in facing the same consequences with the other 16 C18s. Therefore, we do not accept that the

FTT ignored submissions on prejudice. Rather, HMRC's true complaint involves the way that the FTT evaluated that prejudice and that complaint overlaps with Ground 6 set out below.

106. HMRC's Ground 6 of appeal has been considered by this Tribunal, in a slightly different context, in *Romasave (Property Services) Ltd v HMRC* [2015] UKUT 254 (TCC). We respectfully agree with what Judge Berner and Judge Falk (as she then was) said in that case as follows:

> 100. We have considered whether the fact that Romasave will, according to our decision on the other issues in this appeal, be able to pursue its appeals against Decisions 2 – 6 and 8, is a material factor in determining whether an appeal should be permitted in relation to Decision 9. Whilst to add such an appeal to those otherwise able to proceed would not involve much, if any, additional time and expense in conducting the proceedings, the time and expense of such proceedings was not a factor to which we consider any particular weight should be given in the circumstances of this case. In principle, it seems to us that the question whether permission should be granted should be determined independently of the position on other appeals and that they are of limited, if any, relevance. If a clear conclusion is reached that it is not appropriate to grant permission to bring a particular appeal on its own merits, taking account of all the circumstances relating to that appeal, we do not think it right that the result should change solely because, as a result of our decision on the other appeals, it could conveniently be heard with them. The existence or otherwise of related appeals ought not to be a material factor. If it were, then the question whether an appeal that would otherwise not be permitted to proceed could be allowed to do so could turn on the happenstance that, at the time the application is considered, there are appeals to which it might be joined. That would be capable of operating unfairly as between taxpayers in otherwise identical situations, some of whom have concurrent appeals and others of whom do not.
>
> 101. The position can also be tested this way: if we were wrong on this point then, even if the FTT judge had applied the correct test and reached an otherwise unassailable decision on this point to refuse permission, that decision could be overturned on appeal simply by virtue of the outcome of appeals in relation to the other Decisions, since the FTT judge would have made an error of law in failing to recognise that the other appeals could proceed. The same process could continue if our own decision was appealed, and the outcome would logically also change if Romasave withdrew its appeals in relation to the other Decisions (which it could choose to do at any time). Effectively, the parties' own actions on other appeals, well after the time when the delay in appealing occurred, could continue to affect the decision whether to grant permission.

107. Far from treating it as being of "limited, if any, relevance", paragraphs [116] and [117] of the Decision demonstrate that the FTT considered that its conclusion that 24 appeals would be proceeding to a hearing was virtually determinative of the way it would exercise its discretion in the other 16 appeals. That was an error of law.

108. Overall, therefore, under Grounds 5 and 6, HMRC established the following errors of law:

> (1) The FTT was wrong not to give particular importance, in the third stage of its three-stage evaluation, to the need for litigation to be conducted efficiently and at proportionate cost and for time limits to be respected.

(2) The FTT was wrong to attach significant weight, when exercising its discretion in connection with the 16 appeals it found to be late, to its conclusion that appeals against the other 24 C18s could go ahead as they were not made late.

Discussion – Ground 7

109. Under Ground 7, HMRC argue that the FTT erred in not sufficiently exploring the merits of the appeal.

110. The Decision makes it clear that the hearing before the FTT was listed to deal with the Company's application for permission to make late appeals; in its objection to that application, HMRC had included "half a paragraph" (amounting to 5 lines at the end of a 6 page document headed "Notice of Objection to Appeal Out of Time Application") by way of an "alternative" application for the appeal to be struck out on the ground that it had no reasonable prospect of success. The argument in support of this application was then developed in HMRC's skeleton argument delivered shortly before the hearing. As recorded at [4] of the Decision, the FTT decided to hear the main application and ultimately ran out of time without considering HMRC's strike out application. In the context of considering only the late appeal application, it is clear from *Martland* (at [46]) that the FTT should, as part of its balancing exercise, have regard to any obvious strength or weakness in the underlying case; it should not, however, carry out a "detailed evaluation of the case", it should simply "form a general impression of its strength or weakness to weigh in the balance". The FTT, therefore, considered the merits of the Company's appeals only briefly (see [114] of the Decision) but concluded that there was at least an "arguable, rather than fanciful" case that the Company could make. The FTT therefore treated the merits as broadly neutral.

111. We can discern no error of law in this approach. The FTT approached this aspect of the question before it correctly and it is not appropriate for us, as HMRC request, to embark on a far more detailed assessment of the merits of the appeal than was carried out by the FTT or is called for by the criteria set out in *Martland*. Nor is it appropriate for us to criticise the FTT's case management decision not to consider HMRC's strike out application at the original hearing (a decision which clearly fell well within the generous ambit afforded to the FTT in such matters). HMRC's real complaint is that their strike out application was not dealt with at the hearing, but given the volume of material that needed to be considered by the FTT in relation to the main application, this is hardly surprising. As HMRC's strike out application had not been considered, it would have been open for them to make an application for a new hearing to address it specifically. They did not do so.

112. We therefore dismiss HMRC's appeal on Ground 7.

DISPOSITION

113. Having established that the Decision contains errors of law, under s12 of the Tribunals, Courts and Enforcement Act 2007, we have the power (but not the obligation) to set aside the Decision. If we choose to set aside the Decision, we must either (i) remit the appeal back to the FTT with directions for reconsideration or (ii) re-make the Decision.

114. Given that we have identified errors of law that are material to the Decision, we will set the Decision aside. We have also decided to remake the Decision as set out below.

The extent to which the Company's appeals were late (Grounds 1 to 4)

115. We have dismissed HMRC's appeal on Ground 1, but found that its appeals on Grounds 2, 3 and 4 are, in large part, well founded (see [54], [75], [81] and [94] above).

116. On the basis of our reasoning when considering the validity of Grounds 2 and 3, we have decided (see [81] above) that the 15 C18s issued prior to 19 May 2016 to Cavendish Road were validly communicated when first issued.

117. There were 7 C18s (numbered 218582, 218589, 218565, 218557, 218627, 218635 and 218618) which were issued on or after 19 May 2016 to Cavendish Road but returned through the Royal Mail returned letter service. These were re-issued to Farringdon Street, along with the 9 earlier C18s which had been similarly returned, by 30 June 2016 (see the Decision at [20]). These 7 C18s were accordingly validly communicated no later than 30 June 2016.

118. The remaining 18 C18s were issued on or after 19 May 2016 to Cavendish Road but were not returned through the returned letter service to HMRC. They were however re-issued to Farringdon Street on 2 November 2016, where the Company received them. They were therefore communicated to the Company upon receipt at that time.

119. In each case, the time limit for requesting a review by HMRC or for appealing to the FTT ran for 30 days from the date of the C18s themselves, even where the original date of issue was retained on re-issue (see [94] above). The Company's request to HMRC (made on its behalf on 22 November 2016) to review their decisions to issue the C18s was accordingly made out of time.

120. HMRC were accordingly entitled, as they did on 25 November 2016, to reject the request made on behalf of the Company for a review of all the decisions to issue the C18s. Neither the FTT nor this Tribunal has jurisdiction to overrule that decision.

121. The Company's notice of appeal was received at the FTT on 16 June 2017. At that date, the time limits for appealing against HMRC's original decisions to issue all 40 C18s had expired between approximately 6½ months and 14½ months earlier.

Whether permission should be granted for late appeals (Grounds 5 to 7)

122. As set out above, the Company's appeals to the FTT against all 40 C18s were between 6½ and 14½ months late.

123. It is quite clear that by the time the Company received HMRC's letter dated 25 November 2016 refusing to undertake a review of its decisions, any explanation for the length of the delay attributable either to its non-receipt of the original decisions or the awaiting of a reply from HMRC to its request for a review of them would have come to an end.

124. Quite irrespective of the previous delays, therefore, there was a further delay from around the end of November 2016 until 16 June 2017 before the appeal was notified to the FTT. That delay was "serious and significant".

125. The FTT, when carrying out the balancing exercise required in order to decide whether to permit the late appeal, was only concerning itself with the 16 late appeals against the decisions which it found to have been validly notified to the Company before 2 November 2016 (see [95] of the Decision). It had already decided (at [93]) that the appeals against the other 24 decisions were not late and should therefore proceed in any event.

126. In considering the 16 late appeals in isolation, it reached the view that they should also be permitted to proceed "in part because of our holding that appeals against the 25 November decisions were not out of time and so will go to appeal. We are clear that but for this factor we would in all probability have found against the appellants." (see [116] of the Decision).

127. As we have found at [108(2)] above, the FTT's decision on this issue contained an error of law. If that error had not been made, it also made it clear that its decision on admitting the 16 appeals would "in all probability" have been different. It is clear that in saying this, the FTT had in mind a delay of a little under six months (see [94] of the Decision).

128. When one bears in mind also the error of law identified at [108(1)] above, by reason of the FTT failing in the course of carrying out the balancing exercise to attach "particular importance to the need for litigation to be conducted efficiently and at proportionate cost and

for time limits to be respected", it seems to us inevitable that the FTT, if it had properly directed itself in the law, would have refused permission to proceed for the 16 appeals which it had identified as late.

129. In the light of the undisputed facts and the principles set out in *Martland* as discussed above, we have concluded (as it is clear the FTT would have done, if it had not made the errors of law identified above) that permission to notify all the appeals before us, extending to all 40 C18s, should be refused, and we re-make the Decision accordingly.

130. The overall result, therefore, is that the Company's appeals against all 40 C18s were late and we remake the FTT's decision so as to refuse the Company's application for permission to make late appeals. HMRC's appeal is therefore allowed.

JUDGE JONATHAN RICHARDS
JUDGE KEVIN POOLE
Release date: 8 May 2019

APPENDIX – SUMMARY OF THE C18s AND OUR CONCLUSIONS ON THEM

Category of C18	HMRC reference	Conclusion
Issued prior to 19 May 2016 to Cavendish Road	210139, 210147, 211336, 211322, 211330, 211306, 211771, 212015, 213302, 213415, 213782, 216359, 214993, 215020, 215134	Validly communicated to Company at Cavendish Road when sent. No in-time request for a review. Appeal on 16 June 2017 over one year late. Permission to make a late appeal refused.
Issued on or after 19 May 2016 to Cavendish Road, returned undelivered and re-issued to Farringdon Street prior to 30 June 2016	218582, 218589, 218565 218557, 218627, 218635, 218618	Validly communicated to Company at Farringdon Street prior to 30 June 2016. No in-time request for a review. Appeal on 16 June 2017 at or around one year late. Permission to make a late appeal refused.
Other C18s (i.e. those issued after 19 May 2016 and not reissued to Farringdon Street prior to 30 June 2016)	216770, 216809, 218118, 218092, 218095, 219127 221067, 221610, 221618 221644, 221740, 221727, 223018, 223032, 223682 223630, 223629, 223628	Communicated for the first time to Farringdon Street on 2 November 2016. Review requested on 22 November 2016 was out of time because the deadline had expired before the Company received these C18s). Appeal made on 16 June 2017 was around six months late. Permission to make late appeal refused.