[2020] UKUT 0201 (TCC)

Appeal number: UT/2019/0040

VAT – Best judgment assessments to VAT – whether FTT erred in not finding that the appellant could not have made taxable supplies in the United Kingdom because it had lost possession and control of the relevant goods in France – no – whether insufficient reasons for decision – yes – decision remade confirming FTT decision.

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

AWARDS DRINKS LIMITED
(in liquidation) **Appellant**

- and -

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

TRIBUNAL: JUDGE SWAMI RAGHAVAN
JUDGE THOMAS SCOTT

Sitting in public at The Royal Courts of Justice, Strand, London WC2 on 1 and 2 March 2020

Joseph Howard, counsel, instructed by TT Tax, for the Appellant

Brendan McGurk, counsel, instructed by the General Counsel and Solicitor to Her Majesty's Revenue & Customs, for the Respondents

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DECISION

Introduction

1. This is an appeal by Awards Drinks Limited (in liquidation) ("Award"), a wholesale alcoholic beverages distributor, against a decision of the First-tier Tribunal ("FTT") issued on 23 October 2018 published as *Award Drinks Limited (In Liquidation) v HMRC* [2018] UKFTT 632 (TC) ("the FTT Decision").

2. Award had appealed to the FTT against two "best judgment" VAT assessments which HMRC had made on it for VAT for £1,543,714 and £5,029,677 in respect of goods which HMRC considered Award had sold or traded for consideration within the United Kingdom. The consideration was based on 1,311 separate sterling deposits made into 42 different UK bank branches to an account held by Award totalling £32 million. The FTT rejected Award's case that the deposits were payments for sales of alcohol from bonded warehouses in France to cash and carry operators in France and went on to dismiss Award's appeal. The backdrop against which the assessments arose was HMRC's view, having traced the relevant supply chains, that the goods sold had entered the UK as a result of "inward diversion fraud". Such fraud entails goods held in duty suspension purportedly being released for consumption in a country where they attract a lower duty rate, for instance France, with an obfuscatory paper trail. In fact, the goods are smuggled to the UK where they are typically sold immediately for cash. HMRC had clarified in advance of the hearing that their case before the FTT involved no allegation of fraud against Award.

3. Award's case on appeal to the Upper Tribunal ("UT) is that the FTT erred in law in two respects. First, it erred by failing to conclude Award could not have made supplies of the goods in the UK. This was because of documentary evidence consisting of various transaction documents, which Award submits went unchallenged, proving that Award had divested itself of possession and/or control of the goods while they were located outside the UK, thereby depriving Award of the ability to have made the alleged supplies in the UK. Second, Award asserts that the FTT also gave insufficient reasons for rejecting this argument.

Facts and background and FTT Decision

4. Award does not, and may not, given the terms of its permission, mount any challenge to the findings of fact made by the FTT. We set out a summary of the FTT's Decision below.

5. Award, a company based in the UK, was incorporated on 11 June 2002. It registered for VAT on 1 August 2002, describing itself as a wholesaler of beers, wines and spirits with an estimated annual turnover of £10 million. ([19] [22])

6. After discussing the burden of proof, which we deal with below, the FTT outlined the documentary and oral evidence with which it was provided. The oral hearing took place over five days and further written submissions were received from both the

parties. The FTT heard evidence from Mr Judd, Award's director, six HMRC officers and one UK Border Force Officer. It received documentary evidence consisting of visit reports and correspondence. Crucially, for the purposes of Award's appeal before us, Mr Judd's witness statement exhibited copies of various transaction documents which we describe in more detail below ("the French Transaction Documents") and which we will refer to as the "FTDs". The FTT also had a witness statement of Mr Manuel Gluck, the warehouse manager of a bonded warehouse in France, with which Award was said to have an account, but Mr Gluck did not attend to give evidence.

7. The FTT explained, at [15] to [17], why it did not consider Mr Judd to be "a convincing or indeed a truthful witness" by reference to changes in his evidence in the course of cross-examination, inconsistency and lack of credibility. It did not ultimately have any issue with the evidence given by HMRC's witnesses.

8. Award's registration for VAT, and also as a "high value dealer" under Money Laundering Regulations, entailed several visits from, and meetings with HMRC officers which the FTT set out in detail at [25] to [50] and which culminated in HMRC issuing the assessments giving rise to the appeal. The assessments were based on the gross amounts of cash deposited into Award's bank account at various branches throughout the UK. The FTT gave further detail on the amounts and locations ([52] [53]) and explained ([55] – [58]) that it was not possible to trace the deposits to any of the transactions that Mr Judd and Award said that Award had entered into. No paying in books were provided, and the French customs authorities did not have any record, as required by the French customs code, of declarations, relating to cash brought in to the UK from France by the couriers Award had identified to HMRC.

9. The FTT then detailed the evidence relating to enquiries and visits pertaining to Award's purported customers ([59]-[72]). This was prefaced with some general findings relating to the "booze-cruising" market (which Award said many of its retailer customers sold to) which, having peaked in the late 1990s and the early 2000s, had declined by 2013; many outlets including Tesco had closed and the area they operated from had become run-down.

10. Regarding particular customers with whom Award was claiming to be dealing, for instance Mammouth Trading, the FTT noted the French authorities had noted no visible activity at the headquarters address and had been unable to locate the company manager despite several attempts.

11. Next, the FTT set out facts relating to a seizure, by UK Border Force, of a consignment of mixed beer on 28 August 2012 made under an ARC number that had previously been used where the haulage arranger was Scorpion of London Limited ("Scorpion") ([73]). Scorpion's letter to Border Force suggested their client had bought the goods from Award. Restoration was refused and no appeal was made against the decision ([75]).

12. Moving on to its discussion and conclusion the FTT noted there was no challenge to the bona fides or rationality of the "best of judgment" assessment, summarising at [79] that:

> "Award Drinks simply contends the assessments are wrong saying it did not make taxable supplies in the UK. It asserts that it sold goods in France and that the sums lodged in its bank account related to in-bond sales of alcohol to cash and carry outlets in and around Calais. These outlets accepted cash in pounds, sterling from UK tourists and "booze cruise" day trippers…Award Drinks asserts that it and its customers arranged for the cash to be delivered by courier and deposited at various branches of its bank".

13. The reasoning was brief and as there is a challenge to insufficiency of reasons it is convenient to set it out in full:

> "80. There was no positive documentary evidence adduced by Award Drinks, and nothing from the entities from which Award Drinks was said to have received payments that they were genuine retail cash and carry operators or genuine wholesalers that had made any payments to Award Drinks. There was a distinct absence of cash declarations to French Customs by couriers, customers or appellant. Moreover, cheques said to be from three different French Customers, Champion, Glass and Ducain were drawn on same UK bank account.
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> 81. There was also, in our judgment, a complete lack of commerciality in the transactions said to have occurred. No costs analysis was provided by Award Drinks comparing the costs of French banking facilities to cost of couriers despite this being requested by HMRC. It is, in our view, just not credible to contend, as Award Drinks does, that French cash and carry operators would bear costs of couriers to banks throughout the UK without any recompense from Award Drinks. Also, there was no rational explanation for cash deposits being made all around the UK but not in the branches nearest the channel ports or Eurotunnel terminus. In the absence of evidence, we cannot accept Mr Judd's assertion that this was because the Dover branch of Barclays would not accept cash payments. In addition, there was no evidence to connect any named courier with any of the deposits, nor was there any evidence of travel by any courier.
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> 82. As a result, we find that the factual case advanced by and on behalf of Award Drinks is not supported by the evidence and does not hold water. In our judgment it is not sufficient to displace the assessment which therefore remains "right". Having come to such a conclusion it is not necessary to address the legal submissions made on behalf of Award Drinks as these were advanced on the basis of facts which we have found not to have been established ie that Award Drinks sold the goods in France."

14. In summary the FTT thus rejected Award's case that it engaged in genuine and legitimate trade in France and that the purported French customers were operating legitimate cash and carry businesses. None of the sums received by Award into various bank branches in the UK could be traced back to any of those alleged customers.

Grounds of appeal

15. In the UT, Judge Richards, following an oral renewal hearing, granted permission on the following grounds:

> **Ground 1** – The FTT erred in law in failing to conclude, in the light of the Applicant's unchallenged documentary evidence of transactions within bonded warehouses in France, that the Applicant could not have had sufficient possession and/or control of the goods to make taxable supplies of those goods in the UK. In particular the FTT should have concluded, having regard to the Applicant's unchallenged documentary evidence, that since the Applicant divested itself of possession and/or control of the goods while they were located outside the UK, to the extent those goods came into the UK, taxable supplies of them were effected by persons other than the Applicant.
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> **Ground 2** – The FTT erred in law in failing to give sufficient reasons for its decision.

16. Award also sought, in a supplementary skeleton argument it filed without permission on 26 February 2020, to raise a new ground of appeal for which we refused permission on the first morning of the hearing, having considered the parties' respective submissions. The grounds concerned the application of the general rule in Article 32 of the Principal VAT Directive, that the place of supply is deemed to be the place where the goods were located at the time when dispatch or transport to the customer began, and the non-applicability of the derogation in Article 33 which applies to transport "by or on behalf of the supplier". Award argued that because HMRC had disavowed any allegation that the goods were moved by way of inward diversion to the UK by or on behalf of Award, the movement of goods could only have been carried out "on behalf of the customers". Applying the general rule in Article 32 the place of supply was therefore France. For the reasons explained at the hearing, we refused permission for the new ground to be raised. In brief, we agreed with HMRC that the ground raised a point which would have altered the approach taken to the evidence at the hearing if raised earlier. In raising the ground, Award referred to the scope of Article 32 and 33 having been considered in a recent Advocate General opinion in the case *KrakVet Marek Batko* C-276/18. We made it clear that to the extent Award wished to rely on this opinion in making submissions by way of response to HMRC's points in their Respondent's notice regarding the significance of retention of title clauses, then it was open to them to do so.

Law

Directive 2006/112/EC (the "Principal VAT Directive")

17. Article 2(1)(a) subjects "the supply of goods for consideration within the territory of a Member State by a taxable person acting as such" to VAT.

18. Article 14(1) provides that " "Supply of goods" shall mean the transfer of the right to dispose of tangible property as owner."

Value Added Tax Act 1994 ("VATA")

19. The relevant provisions of VATA which implement the VAT Directive into UK legislation are as follows.

20. Section 1(1) provides for VAT to be charged in accordance with the provisions of the Act "(a) on the supply of goods or services in the United Kingdom (including anything treated as such a supply)…"

21. Section 1(2) provides "VAT on any supply of goods or services is a liability of the person making the supply …". It is this provision which underpins Award's core argument: namely that because Award divested itself of possession and control of the goods in France, it could not then be the person who made the supply of goods in the UK.

22. Section 7 deals with place of supply of goods. In particular section 7(2) provides that "Subject to the following provisions of this section, if the supply of goods does not involve their removal from or to the United Kingdom they shall be treated as supplied in the United Kingdom if they are in the United Kingdom and otherwise shall be treated as supplied outside the United Kingdom."

23. Schedule 4 of VATA (which applies by virtue of section 5 VATA) determines "what is, or is treated as, a supply of goods…". Paragraph (1) of Schedule 4 provides:

> (1) Any transfer of the whole property in goods is a supply of goods; but, subject to sub-paragraph (2) below, the transfer-
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> (a) of any undivided share of the property, or
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> (b) of the possession of goods,
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> is a supply of services.
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> (2) If the possession of goods is transferred-
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> (a) under an agreement for the sale of goods, or
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> (b) under agreements which expressly contemplate that the property also will pass at some time in the future (determined by, or ascertainable from, the agreements, but in any case not later than when the goods are fully paid for),
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> it is then in either case a supply of the goods.

Ground 1: Discussion

24. Under section 11 of the Tribunals, Courts and Enforcement Act 2007, appeals to the UT are limited to points of law and thus to the question of whether the FTT made an error of law in its decision which needs to be corrected.

25. In relation to Ground 1, Award's case that the FTT erred in law centres on the arguments that (1) Award could not have made any of the supplies on which the assessments were based because it had lost possession and control of the goods in

France, and (2) that state of affairs was proved by the FTDs, and those FTDs were not challenged by or before the FTT.

26. The reference to "possession and control" in Award's submissions does not stem from any of the legislation we have set out above. Rather, it derives from a decision of the High Court (Griffiths J) in *Customs and Excise Commissioners v Oliver* [1980] STC 635 ("*Oliver*").

27. Mr Howard raised numerous arguments in support of this ground of appeal, including as to the burden of proof and points of pleading. Having considered those arguments, we have concluded that Award's position rests on four points, as follows:

> (1) As a matter of law, a necessary pre-requisite of a supply of goods for VAT purposes is that the putative supplier has possession and control of those goods (see *Oliver*).
>
> (2) The FTDs prove that Award divested itself of possession and control of the goods in this case in France, meaning that Award could not then have supplied the same goods in the UK.
>
> (3) The FTDs were unchallenged, by either HMRC or the FTT, and since any challenge would necessarily have implied dishonesty or fabrication on the part of Award, such challenge would have had to have met the established requirements for a pleading of dishonesty.
>
> (4) Points (1) to (3) were either not considered at all by the FTT, or the decision which the FTT reached on them was unreasonable or perverse.

28. If we do not find in favour of Award on both points (2) and (3), then their appeal fails, regardless of our conclusions on points (1) and (4). Put another way, even if we agree as a matter of principle with the description of the legal position in point (1), that does not avail Award if, on the facts, we do not find in their favour on points (2) and (3). We therefore consider first Award's detailed arguments in support of points (2) and (3).

Proof, pleadings and dishonesty

29. Before we do so, it is helpful first to set out the relevant case law principles concerning the burden of proof, pleadings and cross-examination where issues of dishonesty arise and the principles surrounding when and how evidence is challenged, and the consequences if it is not. The parties largely agreed as to those principles but disagreed as to their application in this case.

30. The first decision relevant to this appeal is *Brady (Inspector of Taxes) v Group Lotus Car Companies plc and another* [1987] STC 635 ("*Brady*"). In that case, the taxpayer companies became involved with DeLorean and a Panamanian company, GPD. Lotus appealed against in-time estimated assessments which HMRC had made in respect of work GPD had contracted to do with DeLorean but which in fact had been done by Lotus and which the Revenue suspected had led to profits being received by Lotus. The General Commissioners discharged the assessment, holding that if there

was evidence the payments had come into Lotus' hands then its contract with GDP would have been fraudulent; in that case the burden was on the Revenue to show that and they had not done that. Upholding the decision of the High Court, the Court of Appeal (Dillon, Mustill and Balcombe LJJ) held the commissioners had misdirected themselves, and that the burden to show the assessment was wrong lay on the taxpayer companies throughout. Mustill LJ dealt head on with the argument that the burden had somehow shifted because the Revenue's arguments in response to the taxpayers' implied the taxpayers or their officers were guilty of fraud. The critical point was that the legal burden of proof and the evidentiary burden of proof were distinct. As Mustill LJ put it, at page 643:

> To express the same notion in different words, once the taxpayer companies had made out a prima facie case that the returns were soundly based, the evidentiary burden of proof passed to the Revenue.

31. He went on to explain that the concept of evidentiary burden of proof was, in essence, simply a reflection of where the balance of evidence pointed to at any given point in time in the proceedings:

> Although this term is widely used, it has often been pointed out that it simply expresses a notion of practical common sense and is not a principle of substantive or procedural law. It means no more than this, that during the trial of an issue of fact there will often arrive one or more occasions when, if the judge were to take stock of the evidence so far adduced, he would conclude that, if there were to be no more evidence, a particular party would win. It would follow that, if the other party wished to escape defeat, he would have to call sufficient evidence to turn the scale.
>
> It would follow that, if the other party wished to escape defeat, he would have to call sufficient evidence to turn the scale. The identity of the party to whom this applies may change and change again during the hearing and it is often convenient to speak of one party or the other as having the evidentiary burden at a given time. This is, however, no more than shorthand, which should not be allowed to disguise the fact that the burden of proof in the strict sense will remain on the same party throughout—which will almost always mean that the party who relies on a particular fact in support of his case must prove it. I do not see how this fact of forensic life bears on the present case. It is a commonplace that, if there is a disputed question of fact admitting of only two possible solutions, X and Y, with party A having the burden of proving X in order to establish his case, if A produces credible evidence in favour of X and B produces none in favour of Y, it is very likely that A will win. B must therefore exert himself if he wishes to avoid defeat. But this does not mean that B ever has the burden of proof. So also here. It may well be that, if the taxpayer companies' version does not correspond with the true facts, it must follow that someone was guilty of fraud. This does not mean that, by traversing the taxpayer companies' case, the Revenue have taken on the burden of proving fraud. Naturally, if they produce no cogent evidence or argument to cast doubt on the taxpayer companies' case, the taxpayer companies will have a greater prospect of success. But this has nothing to do with the burden of proof, which remains on

> the taxpayer companies because it is they who, on the law as it has stood for many years, are charged with the task of falsifying the assessment. The contention that, by traversing the taxpayer companies' version, the Revenue are implicitly setting out to prove a loss by fraud, overlooks the fact that, in order to make good their case, the Revenue need only produce a situation where the commissioners are left in doubt. In the world of fact there may be only two possibilities: innocence or fraud. In the world of proof there are three: proof of one or other possibility, and a verdict of not proven. The latter will suffice, so far as the Revenue are concerned.

32. In *Ingenious Games and others v HMRC* [2015] UKUT 0105 (TCC) ("*Ingenious*"), the parties appealed to the UT (Henderson J as he then was) against case management directions made in the course of a hearing before the FTT relating to whether it was necessary for HMRC to plead allegations of dishonesty in respect of evidence adduced by the taxpayers. The appeal before the FTT concerned appeals against various issues in a closure notice including whether certain partnerships involved in the production of films and games were carrying on a trade "with a view to profit". The taxpayers relied on an Information Memorandum prepared for investors in the venture. The allegation of dishonesty concerned whether the memorandum had been prepared so as to show an expectation of eventual profit when the application of standard assumptions would have shown an overall loss.

33. In setting out the background and pleadings (at [15]), the UT noted that *Brady* established that the burden of proof was on the taxpayer to show the assessment was incorrect and that "this was so even if the circumstances of the case are such that there either must, or may, have been some fraudulent conduct on the part of the taxpayer which is relevant to the tax liability."

34. The UT discussed at ([62] to [65]) the taxpayers' argument that it was not open to HMRC to put allegations of dishonesty (or other serious forms of misconduct) to the taxpayers' witnesses, or to invite the FTT to make adverse findings of fact, unless the relevant allegations had been pleaded with full particularity and the taxpayers had been given a proper opportunity to respond to them. Distinguishing other kinds of appeal (for instance VAT carousel fraud) where the burden of proof to establish fraud or dishonesty lay on HMRC, the UT emphasised that the burden of proof in the appeal before the FTT lay on the taxpayers throughout. At [65] it set out that HMRC were under no obligation to accept the Information Memorandum relied on by the taxpayers at face value and that they were fully entitled to cross-examine the witnesses for the taxpayers who had been involved in its preparation in order to test its reliability. Further, HMRC were:

> "…not obligated to give advance notice of the lines of questioning which they intended to pursue with the witnesses, and still less were they obliged to plead a positive case of dishonesty in preparation of the Memorandum before putting questions to witnesses which, depending on how they are answered , might in due course provide a foundation for the FTT to draw such a conclusion."

35. However, HMRC's counsel were subject to professional conduct obligations affecting when they could put questions to a witness suggesting fraud and dishonesty, and it was not open to the tribunal:

> "…to make a finding of dishonesty in relation to a witness unless (at least) the allegation has been put to him fairly and squarely in cross-examination, together with the evidence supporting the allegation, and the witness has been given a fair opportunity to respond to it. Important though these obligations are, they are quite different from, and do not entail, a prior requirement to plead the fraud or misconduct which is put to the witness."

36. Two principles emerge from *Ingenious* and *Brady*:

> (1) The burden of showing an assessment is incorrect remains on the taxpayer throughout the appeal. This is so even if the circumstances of the case are such that there either must, or may, have been some fraudulent conduct on the part of the taxpayer which is relevant to the tax liability.
>
> (2) The allegation that a witness is dishonest must be put fairly and squarely to the witness in cross-examination before the tribunal can find the witness is dishonest, but does not need to have been pleaded in advance in cases where the burden is on the taxpayer.

37. The fact that no authority was cited in *Ingenious* for that latter proposition reflects that it is a long-held and established principle: *Browne v Dunn* (1893) 6 R 67 explains that the principle is grounded in fairness. That principle was approved by the Court of Appeal in *Markem Corporation v Zipher Ltd* [2005] EWCA Civ 267.

38. While the above legal principles are uncontroversial, the parties disagree on how they apply to the facts of this case. We deal first with the appellant's argument that because HMRC conceded that no allegation was made that Award or agents of Award smuggled the goods into the UK, it necessarily followed that HMRC must have conceded that Award had lost possession and control of the goods outside the UK. Further, in light of this concession it was not open to the FTT to make the finding it did; such a finding could only be made if Award retained possession and control of the goods when they were in the UK.

39. HMRC rely on *Brady* as establishing that before the FTT, the burden of displacing the assessment remained on Award throughout, and steadfastly refute any allegation that by implication they were alleging fraud or dishonesty by Award.

40. Award argue that HMRC's reliance on *Brady* is misconceived. HMRC can only avoid the burden of proof shifting to them in this case, say Award, to the extent that some person was guilty of fraud. Having conceded that that person was not Award or someone acting on Award's behalf, the FTT could not uphold the assessment because that inevitably meant Award or persons acting on their behalf carried out the smuggling. Mr Howard developed his point in oral submissions as follows. He accepts that *Brady* means that where the taxpayer's version of events is rejected this does not mean a finding of fraud is made, because there is an indeterminate third category

under which, in effect, the taxpayer's version of events is simply not proved. However, he distinguishes Award's situation from this third category. Given the clear legal position that Award would have to be in possession and control of the goods for it to have made a supply for VAT purposes in the UK, the FTT decision, in upholding the assessment, is necessarily a finding that Award brought the goods back to the UK and retained possession and control. That, Award says, goes beyond the "*Brady* uncertainty" of an indeterminate third category of "not proven".

41. We reject Mr Howard's arguments. We agree with HMRC that Award's suggested analysis impermissibly reverses the burden of proof. It rests on the assumption that HMRC had to plead fraud against Award, in order to come to a conclusion that the assessment, based on Award's possession and control of the goods, should be upheld. The point falls squarely within *Brady*, which confirms the burden remains on the appellant to show the assessment was incorrect even if that conclusion may, or indeed *must*, involve fraud. Even accepting Award's submission that it could not have supplied in the UK without possession and control of the goods, fraud did not need to be pleaded in order for a conclusion to be reached which entailed Award retaining possession and control. We agree with HMRC it is a non-sequitur to say that because HMRC did not run a positive case on fraud they are taken in addition to concede that the appellant lost possession and control. The burden remained at all times on the appellant to discharge. It was for Award to show it lost possession and control of the goods.

42. Indeed, in any case where the FTT dismisses an appeal against a best judgment assessment, including a situation where HMRC allege takings or profits may have been under-declared, it is clear that the legal burden of displacing the amount of the assessment (assuming it is found that it was made to the best of the officer's judgment) does not shift from the taxpayer to HMRC merely because fraud or dishonesty may have been an explanation, even the most obvious explanation, for the deficiency of tax. We consider that the FTT was correct in its observation at [10], repeated at [77], as follows:

> Although *Brady* and *Ingenious* concerned direct tax assessments the same principles apply in the case of VAT assessments. This is clear from the comments of Carnwath LJ (as he then was) in *Khan (t/a Greyhound Dry Cleaners) v Customs and Excise Commissioners* [2006] STC 1167 ("*Khan*"), where commenting both on the burden of proof and the "best judgment" issue he said:
>
> "[69] There is no problem so far as concerns the appeal against the VAT assessment. The position on an appeal against a 'best of judgment' assessment is well-established. The burden lies on the taxpayer to establish the correct amount of tax due:
>
> 'The element of guess-work and the almost unavoidable inaccuracy in a properly made best of judgment assessment, as the cases have established, do not serve to displace the validity of the assessments, which are prima facie right and remain right until the taxpayer shows that they are wrong and also shows positively what corrections should be made in order to make the assessments right or more nearly right (See *Bi-Flex Caribbean Ltd v The Board of Inland Revenue* (1990) 63 TC 515 at 522–523 per Lord Lowry).'

That was confirmed by this court, after a detailed review of the authorities, in *Customs and Excise Comrs v Pegasus Birds Ltd* [2004] EWCA Civ 1015, [2004] STC 1509.

Were the FTDs unchallenged?

43. HMRC do not accept Award's assertion that the FTDs were unchallenged. Before dealing with how the documents were addressed before and during the FTT hearing, it is helpful to set out what the FTDs include and in what respects Award seeks to rely on them.

(a) The FTDs in more detail

44. In his first witness statement dated 23 March 2016, Mr Judd exhibited various documents said to be examples of the sales carried out by Award in France under bond and out of bond. He named eight entities for in bond sales, and one for out of bond sales by way of example. His supplemental witness statement of 30 April 2018 stated that he had noted some gaps in the files submitted and he therefore exhibited various further documents relevant to certain of the transactions. The supplemental witness statement also noted that a witness statement from a representative, Mr Manuel Gluck, of IEFW, one of the bonded warehouses at which Award held accounts, had exhibited an "activity report" for Award for a period preceding the appeal period. Mr Judd exhibited an updated activity report to his supplemental witness statement. This was a summary of transactions produced by IEFW. The section of Mr Judd's evidence exhibiting the report was prefaced ([3]) with Mr Judd's confirmation that he "neither had control nor possession of any goods not held in [his] account at one warehouse or another". Mr Gluck did not attend the hearing and no explanation for this was given. Mr McGurk highlighted to the FTT the above circumstances and argued that as the activity report was not Mr Judd's document, Mr Judd did not have direct knowledge of it and could not be questioned on it as Mr Gluck might have been had he attended.

45. The document packs provided to evidence the sales were selected on a sample basis. No point was or is taken by HMRC as to whether they are a fairly representative sample.

46. The example which both we and the FTT were taken to and which concerned an out of bond transaction is set out in the appendix to this decision.

47. As to the IEFW warehouse summary of alleged in bond transactions, which in Mr Gluck's absence was then exhibited to Mr Judd's supplemental witness statement, this was important because it purported to give details of the release date and destination of the alleged transactions in goods.

48. Award highlights that the FTDs comprise a series of documents created by a variety of people, some vendors, some warehouses, some purchasers but all are tied together.

(b) How HMRC put its case in pleadings

49. HMRC's Amended Statement of Case, dated 10 May 2017, made it clear that in HMRC's submission the transaction documents were designed to give the impression that taxable supplies were being made in France when that was not the case. The case maintained that the arrangements in their entirety were sham arrangements, the sales of alcohol were purported, many traders were missing and there was no evidence customers or missing traders received the goods even if only for diversion to the UK. It was stated that "the transactional documents as between the Appellant and those from whom it claims to receive payment in cash or cheque are arranged to give the impression of taxable supplies being made in France. To that extent they are sham transactions." Notwithstanding they purported to show a transaction for consideration in bond there was no such transaction, the French customers (if they existed) never having paid Award for the goods. Mr McGurk clarified before us that HMRC's case on sham only concerned whether i) a French taxable supply had been made and ii) a sale had been made.

50. As regards the purported French customers, HMRC's pleaded case was that the customers were mere buffers or conduits whose purpose was to give appearance of an in-bond transaction and thus to facilitate the movement of the goods to the UK to be sold by or on behalf of Award**.**

(c)The FTT Hearing and further submissions

51. Before the FTT, Mr Howard, who also represented Award below, made a brief opening emphasising that the key question was whether there was a supply of goods in the UK, and, if so, whether the supply was made by Award. He submitted the tribunal would have to compare the plausibility of whether, as Award maintained, £33 million in cash was brought back to the UK (admittedly with very little documentation to show that it was brought back to the UK at all) against the complete implausibility of the possibility that Award smuggled back 88 million cans of beer none of which was detected or linked to Award.

52. Award's position was described at [79] as follows:

> 79. The bona fides or rationality of the sum assessed by the "best of judgment" assessments in this case were not challenged. Award Drinks simply contends the assessments are wrong saying it did not make taxable supplies in the UK. It asserts that it sold goods in France and that the sums lodged in its bank account related to in-bond sales of alcohol to cash and carry outlets in and around Calais. These outlets accepted cash in pounds, sterling, from UK tourists and "booze cruise" day trippers (see eg paragraphs 33 and 39, above). Award Drinks asserts that it and its customers arranged for the cash to be delivered by courier and deposited at various branches of its bank.

53. Mr McGurk's opening explained HMRC's case that the alleged French customers were not legitimate, they did not operate as genuine cash and carry businesses, they did not have any means to and did not in fact pay anything to Award for the goods

alleged to have been sold under bond. He emphasised the need for consideration in order for there to be a taxable supply.

54. Mr Judd was called as the first witness. Following Mr Howard's initial questions to Mr Judd, the FTT expressed concern that Mr Howard's line of questioning was not properly supplemental to Mr Judd's witness statements which stood as his evidence-in-chief but sought instead to "expand" Mr Judd's evidence. Mr Howard explained, on taking instructions, that what was fundamental to Award's case was the validity and reality of appellant's business and the commerciality of the transactions which had been carried out in France. No examination in chief was requested.

55. Mr McGurk, for HMRC, highlights the following points that were put to Mr Judd: a) no declarations relating to removal of money from France were ever made to French customs because no couriers were bringing money from France to England during the relevant period b) his alleged customers were missing traders c) Mr Judd never visited the offices of the alleged French customers because the premises would have revealed they were not genuine d) the cash deposits could not have been the proceeds of French sales where sums were paid to Award in Bolton, Lancashire, Sandwell and Northfield and where none of the deposits could be traced back to identify the payor e) the alleged sources of sterling being French customers' sales to UK "booze cruise" day trippers was implausible f) the French revenue authorities' investigations showed the alleged French customers were missing traders, not engaged in any visible trading activity, were implicated in diversion fraud, had not registered or paid VAT , and could not be traced g) goods were paid for by third party UK-incorporated entities h) the reason why French customs had no record of any declarations of monies being couriered out of France was because in fact the monies were from customers buying Award's goods in the UK.

56. However, specifically as regards the FTDs, Mr Howard submits that at no stage in Mr Judd's cross-examination or at any other time were the documents challenged as inaccurate or false in so far as they demonstrated the goods passing into and out of the possession and control of Award.

57. It can be seen from the transcript of the hearing that the questioning regarding the documents was concerned principally with Mr Judd's ability properly to speak to what went on in the warehouse and the activity report. Mr Judd admitted, contrary to the impression given in his own witness statement, that there was nothing in Mr Gluck's statement about how goods were handled when under bond, and no evidence about how other bonds operated.

58. It was put to Mr Judd that regarding the IEFW summary he did not know what documents the person inputting the summary transaction line had taken into account. He was also taken to certain inconsistencies in the IEFW document.

59. Mr Howard's oral case in closing raised loss of control, the relevance of that term having been explained by Mr Howard's reliance on *Oliver*: because the appellant had lost control of the goods in France it was then not able to make a supply of the goods in the UK. The FTT and HMRC regarded that argument as new and directed that

HMRC should have the opportunity to respond to in written closing submissions and which in turn the appellant replied to in writing.

60. In its written reply, Award reiterated that its critical submission was that because it had divested itself of control in France, it could not have had the required possession and control of the goods in the UK to have made a UK taxable supply.

(d)Submissions of the parties on challenge before the UT

61. On behalf of Award, Mr Howard submits that at no stage in Mr Judd's cross-examination or at any other time were the documents challenged as inaccurate or false in so far as they demonstrated the goods passing into and out of the possession and control of the appellant. It was not open to the FTT to find that those documents were not true on their face because it was not put to Mr Judd that he was being dishonest: *Ingenious* ([65]).

62. Mr McGurk submits that HMRC's case was clear; HMRC having not accepted that there were any sales of goods or taxable supplies to third parties in France, or that Award received any consideration for its alleged sales from its alleged customers, Award could not have divested itself of control of those goods. HMRC's case did not require a finding that the FTDs had been fraudulently concocted – the other evidence, when looked at in the round, showed the sale transactions were simply not plausible and therefore that possession and control could had not have been lost in France. Further, Mr Judd was found by the FTT not to be a truthful or credible witness. Award could not show there was any sale, taxable supply or therefore divestment of control in the bond; one cannot transfer possession and control of goods to someone who neither pays for them nor has any demonstrable existence. No other evidence was offered by Award as to who else might have acquired possession and control. HMRC submits that to the extent Mr Judd was relying on documents for the truth of underlying transactions (and such transactions led to possession and control being lost) that evidence must be treated as not having been believed by the FTT with good reason. The case that the French entities were cash and carry traders was "blown apart" –it was implausible that they were anything other than buffer entities.

Discussion as to whether the FTDs were challenged

63. We deal first with Award's argument that it was not open to the FTT to find that the documents could not be taken at face value because it was not put to Mr Judd that he dishonestly concocted them.

64. We agree with HMRC that their case did not necessitate any finding that Mr Judd had dishonestly concocted the documents. As made clear in *Brady,* the burden to displace the assessments remained on Award throughout. In inviting the tribunal to prefer other evidence to show that the alleged sales to French customers did not take place in preference to the facts as indicated purely by the FTDs, HMRC did not take on the burden of showing the documents were fraudulently produced, whether by Mr Judd or others, even if that was one of the possible, or even likely, explanations for why the documents did not truly reflect the transactions.

65. However, irrespective of any requirement as to pleading that does not answer Award's argument based on *Ingenious* that, to the extent the tribunal were being asked to disbelieve the documents, Mr Judd should have been specifically cross-examined on them. This is on the basis that a finding that the transaction documents, in particular those which were produced by Award, were disbelieved, while not amounting to a specific finding of dishonesty might imply dishonesty or misconduct on the part of Award. While *Ingenious* refers to findings of dishonesty, in our opinion the principle in *Browne v Dunn* regarding the need to challenge extends to matters in which the witness's evidence is not proposed to be accepted. There appears no reason why, in terms of the principle of fairness, a witness should not have a chance to explain something which might otherwise be disbelieved even if that does not entail suggesting he or she was dishonest.

66. Having reviewed the transcript, we agree that Mr Judd was not specifically cross-examined on the transaction documents. However, it is equally clear that the main areas of conflicting evidence, which HMRC were inviting the FTT to weigh in the balance as going against Mr Judd's version of events - namely that the transactions took place as genuine sales in France to genuine customers operating in a legitimate trade – were put to Mr Judd. It was crystal clear that HMRC did not accept the essential elements of Mr Judd's story and took him through the areas which went against it.

67. It must be borne in mind that when Mr Judd was being cross-examined, his "story" (the taxpayer's alternative to HMRC's best judgment assessment) was materially broader than the proposition put before us by Mr Howard in this appeal. Mr Judd's story was not that the FTDs, if taken at face value, proved the loss of the necessary possession and control for Award to make any supply in the UK. It was that Award had made genuine sales of the goods to genuine customers in France for £32 million in cash which had then been couriered back to the UK. Two consequences for Award's submission as to challenge flow from this. First, in determining whether the FTDs were effectively challenged, the first question is "challenged as showing what?". The FTDs were not put forward in Mr Judd's evidence to show loss of possession and control by Award, but were put forward as part of the evidence supporting Award's much broader version of events as to genuine sales to genuine customers in France and real cash payments couriered to the UK. Second, challenge depends on context, and need not take the form of specific questioning on each disputed item of evidence in cross-examination where the underlying principle of fairness referred to in *Browne v Dunne* is satisfied by the opposing party's overall case and pleadings. Lord Herschell LJ's speech in that case was commented on in the Australian decision *Allied Pastoral Holdings Pty Ltd v Federal Commissioner of Taxation* 44 ALR 607 (referred to recently by the Court of Appeal in *Travel Document Service v HMRC* [2018] EWCA Civ 549 at [47]) as follows:

> "His lordship conceded that there was no obligation to raise such a matter in cross-examination in circumstances where 'it is perfectly clear that (the witness) has had full notice beforehand that there is an intention to impeach the credibility of the story which he is telling'. His speech continued…'All I am saying is that it will not do to impeach the

> credibility of a witness upon a matter on which he has not had any opportunity of giving an explanation by reason of there having been no suggestion whatever in the course of the case that his story is not accepted'."

68. In our view there was sufficient challenge in the course of the proceedings and opportunity for explanation to meet any issue with the possible implications that might be drawn from a finding that the transaction documents were not to be believed. HMRC's Amended Statement of Case of 10 May 2017, filed following Mr Judd's first witness statement in June 2016, gave sufficient notice of challenge. It made it plain the documents were sham in the sense they were designed to give the impression that taxable supplies were being made in France when that was not the case. Their challenge was not, as Award argues, limited only to the extent of any claim that the documents established a French supply for VAT purposes; HMRC's case, which was not resiled from as contended by Award, was that although the documents purported to show a transaction for consideration in bond there was in truth no such transaction. HMRC did not make a specific challenge regarding loss of possession and control falling short of a sale but they did not have to. The way in which the case had been argued at that point was that possession and control had been lost through genuine commercial sales to genuine customers for cash. HMRC's overall case was that the sales were purported sales and the customers purported customers. As mentioned above, Mr Judd filed a supplemental witness statement in April 2018 which included further transaction documents. He had the opportunity there to give any explanation of why HMRC's case was wrong.

69. Returning to Award's wider criticism, that the FTDs were not challenged on the specific proposition that they proved loss of possession and control, it is again correct that there was no specific cross-examination of Mr Judd on this narrow point. However, as we explain above, the argument as put to us in the UT had narrowed materially and significantly as compared to the argument Award presented to the FTT as an alternative to HMRC's best judgment assessment. Before the FTT, Award's case was there were genuine French customers making genuine sales in a legitimate trade for cash couriered back to the UK. Mr Howard's closing submission dealing with the control point and even the written submissions filed afterwards couch the loss of possession and control in terms of a sale contract. Nowhere did those submissions refine the point to that made before us, which is that, irrespective of any sale or any concern over the legitimacy of the trade, or whether the French customers were fronts or not, or whether consideration was delivered, all that mattered was whether possession and control was lost. Indeed, it is difficult to see how Award, before the FTT had issued its decision, could have run the point except as a case in the alternative which it did not. In other words Award would have had to have submitted that its primary case on legitimate trade with genuine French customers was not to be believed but instead all that was relevant was that possession and control had been lost through the vehicle of a transaction that was not a sale.

70. In these circumstances there can be no criticism of HMRC for failing to make a challenge in relation to a point that had not been articulated at the time Mr Judd gave evidence. That the point is misconceived is revealed by playing through how such a challenge could practically have been made. The challenge would have involved

putting questions to Mr Judd which would have required Mr Judd to assume his primary case was not correct, and that the trade was not genuine or legitimate, but that nevertheless possession and control was transferred in France. It is difficult to see on what basis such challenge could have been anticipated as necessary and, even if it had, that challenge by way of cross-examination on the narrow point of loss of possession and control, would have been sanctioned. At that point in time, it was not being suggested by Award that possession and control had been lost outside of the context of a sale. Mr Judd's evidence was that the transactions were sales. His evidence at [5] of his statement was that "No transactions were conducted by or on behalf of the Appellant other than sales or purchases which were clearly made in the Appellant's name". It is unlikely that questions simply challenging whether possession and control had been lost would have resulted in anything more than reassertions of Mr Judd's primary position that the transactions were genuine sales. The challenge would therefore unlikely have elicited anything of practical use. It must also be borne in mind that to the extent the documents were produced by someone other than Award there would be inherent limitations in what Mr Judd could usefully be cross-examined on.

71. To the extent HMRC's pleaded case was that the customers were mere buffers or conduits whose purpose was to give the appearance of an in-bond transaction and thus to facilitate their return to the UK to be sold by or on behalf of Award, it was implicit that HMRC were not accepting that any transfer of goods resulted in Award losing possession and control of goods to the French counterparties even if there was not in fact a genuine commercial sale. On that basis Mr Judd was sufficiently on notice that HMRC were challenging a loss of possession and control irrespective of whether there was a genuine commercial sale or not.

72. While Award submit it is significant that the release notes were not challenged as sham HMRC did not need to; Award was on notice that in HMRC's submission the transactions did not happen as they purported to happen with genuine French customers. That cast a shadow over whether the release notes were genuine. Mr Howard also sought to persuade us the FTT erred in ignoring the FTDs as documentary evidence because when discussing Mr Judd's evidence it maintained (at [18]) that when there was a conflict it preferred the documentary evidence to that of Mr Judd. That argument was not at all apposite: there was no conflict between Mr Judd's evidence and the FTDs as they pointed in the same direction.

73. Looking at the entire context of the proceedings the FTDs were, in our view, subjected to sufficient challenge and Mr Judd had sufficient opportunity in the course of those proceedings to address HMRC's case. The FTT was not therefore *required* to accept that those documents accurately reflected the transactions which they listed. However, that is not necessarily the end of the matter. The mere fact the documents were challenged does not mean a tribunal could not, when all the evidence was viewed in the round, nevertheless have preferred the version of events consistent with the documents. Articulating that point as an error of law for the purposes of dealing with the appellant's ground, was it reasonably open to a tribunal, on the evidence that was before the FTT, to conclude that possession and control of the goods was not divested in France? In addressing this question, it must be acknowledged that the loss of possession and control was framed in the context of a sale transaction.

74. No challenge is made, or permitted, by the terms of its permission to appeal, by Award to the FTT's other findings or their assessment of Mr Judd as a witness. In our view, while the FTT's findings on Mr Judd's credibility, which were based on inconsistencies in his oral evidence, are something to be taken into account in the FTT's overall evaluation of his evidence, we do not understand HMRC to suggest that the FTDs could be dismissed as evidence solely on that basis.

75. Taking the FTDs at face value in isolation, as Award urge us to do, even taking into account the much broader context in which those documents were put as evidence, the state of affairs suggested by those documents would, we consider, have operated to move the evidentiary burden of proof (but not the legal burden) towards HMRC. So, if the only evidence presented to the FTT had been those FTDs (as Mustill LJ put it in *Brady*, if the judge had taken stock at that stage of the evidence so far adduced), perhaps it might have been unreasonable for the FTT to have preferred HMRC's alternative version of events. However, if a document is put forward which on its face indicates that a trader has disposed of goods in France for £32 million in cash, the task of the FTT is to consider all available evidence to determine whether that indication is true. For instance, who were the trader's customers, were they in a position to pay it that amount of money, did they pay it and did the goods move? For the purpose of seeing which version of events is true we must take into account the FTT's findings on other countervailing areas, not as final findings but as preliminary ones which fall to be tested in view of the evidence as a whole.

76. In our view the relevant findings of the FTT which weighed against simply taking the FTDs at face value, (those documents having been advanced by Award by way of support for a genuine sale to genuine commercial counterparties) were these:

> *(1) the lack of payment link to the purported French customers*
>
> (a) An absence of evidence that any couriers were bringing money from France to the UK during relevant period, or that any of the customers made the required customs declarations that monies were being taken out of France: [55], [57] [80]
>
> (b) the location of cash deposits in geographical locations all around the UK rather than near the Channel ports: [52-53] and [81]
>
> (c) the lack of commerciality in using couriers to transfer cash cross-channel: [81]
>
> *(2) the circumstances concerning purported French customers*
>
> (a) The FTT dealt with the relevant evidence at [59] to [72] concerning what was observed at the addresses of the majority of Award's alleged customers when HMRC officers visited there on 30 July and 1 August 2013 shortly after the end of the principal relevant period (September 2012 – June 2013), and reports from the French tax authorities regarding their attempts to contact those customers. The common theme from the evidence was the lack of any sign that the customers were trading from the premises. The French Tax authorities were unable to contact directors or authorised

representatives of the customers. For instance, regarding Eurl Clockwork Distribution and Sarl Vins Moins Cher, that there was "not a trace", beyond a sign marked Vins Moins Cher, of the customer's business being carried out shortly after the relevant period. Eurl Clockwork stopped filing declarations having previously done so regularly in June 2011.

(b) For some purported customers the premises were unsuitable for a cash and carry business. The premises address of Atout Commerce, Romtrad, H.A.M. Distrinord and Mammouth Trading was a serviced office which lacked storage space for goods. Even if these customers transacted bond to bond no trace of these customers was seen by HMRC at their purported premises. The French tax authorities were unable to establish contact with anyone at Atout Commerce and Mammouth or observe activity by them at their addresses; they reported on 4 July that Atout Commerce and Mammouth Trading no longer existed. They could not establish contact with anyone at Romtrade or H.A.M Distrinord and similar difficulties were encountered with Glass, Champion Drinks and Oversea.

(c) No findings were made suggesting that the French tax authorities dealt with the purported customers Forever Drinks, and Premier Cash & Carry or UB Negociant or Vins Mons Cher, save that UB Negociant was struck off on 27 March 2014.

(3) the implausibility of cash and carry market servicing "booze-cruise" still existing in volume: [59]

77. Taking a step back, none of the above evidence, whether looked at individually or in totality, supports the proposition that the sales recorded by the FTDs took place: no payments were made and the customers lacked an obvious means of making payments. The purported customers were not trading, and in some cases lacked suitable premises.

78. There were also numerous additional factors identified by HMRC for treating the FTDs with caution and attributing little if any weight to them:

(1) The absence of additional release and/or consignment and haulage documents

(2) There was no purchase order from Mammouth

(3) Regarding the purported ex bond transactions, there was no release note or anything that showed that Award had authority from Mammouth and Novaid to release the goods

(4) Mr Judd accepted that the IEFW summary did not indicate what actually happened to the goods

(5) The corroborative value of the IEFW document could not be tested

(6) Some documents showed Award was dictating what happened in practice to the goods even after their purported sale.

79. There was also no evidence from other bonded warehouses, or from suppliers, hauliers or the alleged cash couriers. The only evidence on those topics was from Mr Judd who the FTT in no uncertain terms found to be an untruthful witness.

80. We are left in no doubt that it would be open to an FTT in such circumstances to reach the conclusion that possession and control in the goods was *not* lost in France through the sales transactions which purportedly took place on the face of the FTDs. While in reply Mr Howard argued that the vast majority of the transactions were in bond so did not require consignment documents and that the fact the French VAT authorities assessed them showed they must at least have existed neither of these points outweighs the many other factors, and the fact an entity has been set up, and attracts interventions from a tax authority, says nothing about the nature of the transactions, if any, the entity has entered into.

81. Further, even if we were to consider the issue in the way it has been narrowed before us – that there was a bare transfer of possession and control, irrespective of whether there was a sale - we do not accept the FTDs would demonstrate that. We agree with HMRC that they demonstrate purported dealings with missing traders whose role was to operate as mere conduits.

82. The above is sufficient to dispose of Ground 1. The initial premise of the ground, that the FTDs were not challenged, is not made out. In circumstances where the FTDs were challenged, those documents did not mean it was unreasonable of an FTT to find possession and control had not been divested; it was at least open to them not to be so satisfied. That means there was no error of law, as asserted by Ground 1, in the FTT failing to be satisfied on the balance of probabilities, on the basis of all the evidence, that possession and control of the goods had been lost by Award while the goods were in France.

83. However, we would go further and conclude that the strength of the countervailing evidence was such that an FTT which relied only on the documentary evidence, so as to find possession and control had been lost, would have erred in law by reaching a decision which no reasonable tribunal, properly directed, could have reached.

84. In view of our conclusion, it is not necessary for us to decide whether Award is correct that, on the basis of *Oliver*, as a matter of law a taxpayer can never make a supply of goods for VAT purposes if it has divested itself of possession and control of those goods. We are by no means persuaded that Award is correct in this respect, but we consider it appropriate for the issue to be determined where it is dispositive of the relevant appeal. In view of our conclusion we do not need to deal with the further arguments raised in the Respondents' notice as to why in HMRC's submission the FTT's decision was correct.

Ground 2: insufficiency of reasons

85. It is well established that a failure to give reasons or sufficient reasons for a conclusion which is essential to the decision may constitute a free-standing ground of appeal. In *Flannery v Halifax Estate Agencies Limited* [1999] EWCA Civ 811 [2000]

1 All ER 373 at 377 j onwards, the Court of Appeal explained the duty to give reasons was a function of due process and that its rationale of fairness "required that the parties – especially the losing party – should be left in no doubt why they have won or lost." Lack of reasons was explained to be a self-standing ground as follows:

> "Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or on the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself."

86. The FTT Decision (at [82], set out at paragraph 13 above) explained it was not necessary to address Award's legal submissions "…as these were advanced on the basis of facts which we have found not to have been established i.e. that Award Drinks sold the goods in France."

87. Award raised a separate argument that the FTT failed to give reasons regarding the need to reconcile the implication that no possession and control was lost with HMRC's disavowal that it was alleging Award had smuggled the goods. For the reasons explained in relation to Ground 1 above, Award is wrong in its view of the relevant law. The FTT dealt with the relevant point sufficiently in our view (at [7] onwards) in the section of its decision dealing with burden of proof when it recognised that HMRC were not making an allegation of fraud against Award and that therefore the position was as described in the passages it cited from *Brady*.

88. In relation to Ground 2, HMRC submit the FTT gave more than sufficient reasons to enable Award to understand why it had lost. As we have explained, the hearing before the FTT proceeded on a much wider basis than that before us, and we can understand why the FTT addressed that broader basis in reaching its decision. However, we consider there is some merit in Award's specific complaint that the FTT did not give reasons why it did not consider that the FTDs called for a reasoned analysis of whether Award had divested itself of the possession and control of the goods while located in France, so that it could not then have been the person making supplies of those goods in the UK. While for the reasons explained under Ground 1, we do not consider Award are correct to describe the FTDs as unchallenged, they were documents which, if taken at face value, pointed towards sale transactions, and therefore loss of possession and control, of the goods in France. As such, an explanation was called for, even briefly, of the reasons why, in effect, the FTT decided not to accept those documents at face value.

89. To that limited extent we consider there was an error of law in the FTT Decision. Section 12 of the Tribunals, Courts and Enforcement Act 2007 provides that in these circumstances the UT may (but need not) set aside the FTT decision, and, if it does so, may either (i) remit the case back to the FTT with directions for its reconsideration, or (ii) remake the FTT decision.

90. There does not appear to any reason why a decision which is found to be lacking in sufficient reasons should not be set aside and we therefore exercise our discretion to do so. That then raises the question of whether we should remake the FTT Decision or remit to the FTT. When we canvassed with the parties the potential options, Mr

Howard suggested that if Award was successful on Ground 2 but not Ground 1, but if we considered that on the evidence before the UT there was an insufficient basis to find in Award's favour on Ground 1, then the decision should be remitted to the FTT. We disagree.

91. As we explained in dealing with Ground 1, the FTT was fully entitled on the basis of the evidence before it to reach the view implicit in its conclusion that possession and control of the goods was not divested in France. There is therefore no concern over whether the FTT's findings were made with an incorrect legal test. No challenge is made against the FTT's assessment of the witness' credibility or to the other findings the FTT made. We have considered, and set out the reasons above, why it would not reasonably be open to a tribunal to conclude that the FTDs led to a conclusion that the requisite possession and control had been divested by Award, so that Award's appeal must succeed. We have therefore set out relevant reasons why the FTDs do not have the result contended by Award.

92. We accordingly remake the FTT Decision. The new decision adopts in its entirety the decision the FTT made but incorporates by way of addition the reasons we have set out above at [76] to [79] as to why the FTDs could not be taken at face value and did not therefore mean possession and control of the goods had been divested by Award. The remade decision accordingly concludes that Award's appeal against the assessment is dismissed.

Decision

93. Award's appeal is unsuccessful on Ground 1 and partially successful on Ground 2. We set aside the FTT Decision in order to remake it setting out the reasons in relation to the FTDs which were insufficient. However, the result of that decision remains the same and Award's appeal against the assessment is accordingly dismissed.

JUDGE SWAMI RAGHAVAN

JUDGE THOMAS SCOTT

RELEASE DATE: 22 June 2020

Appendix

Details of documents from FTDs put forward by Award to show example out of bond transaction

(1) Purchase Order from Award to Jar Water Ltd t/a Aqua Blue STC, Ireland. Order number 15853. Quantity ordered 1,980, product description "Heineken 24 x 500ml – IEFW Goods transferred under bond 18.03.2011 Rot no: B11110995.

(2) Purchase Order from Award to Jar Water for 1980 Order No. 15764 "Carling 24 x 500ML – IEFW – Goods transferred underbond 08.03.11 Rot: B11100345

(3) Invoice from Jar Water Ltd to Awards Drinks dated 09.03.2011, referring 1980 Carling.

(4) IEFW bond receipt note (client Award Drinks) referring to B11110995 Heineken (note same as B number in (1) above).

(5) IEFW bond receipt note (client Awards drinks) dated 08.03.11 referring to B11100345 (see (2) number above) Carling

(6) Awards Drinks Ltd Release note number 2393 dated 4 April 2011 stating "Could you please arrange for the following goods to be released UNDERBOND for delivery to Les Vin du Tunnel for the account of Nomadis. They will arrange collection of these goods." The note refers to the 24 Heineken, rotation numbers B11110995 and 24 Carling rotation number B11100345. Award's purchase order numbers 15764 and 15853 for the Carling and Heineken are written in manuscript.

(7) Award Drinks' invoice number 20239 to Nomadis dated 4 April 2011 showing the Heineken with rotation number B111110995 and Carling with rotation number B11100345, Release no: 2393 "Goods delivered under bond to your acc at VDT 04.04.2011

(8) IEFW bonded warehouse's invoice dated 4 April 2011 for the delivery of the goods released on notes 2393 and 2395

(9) IEFW summary showing entries for the goods in question. The date 4/4/11 matches that above – and the lot numbers (omitting B numbers) and volumes match.