Neutral Citation: **[2025] UKUT 00210 (TCC)**

Case Number: UT/2024/000070

UPPER TRIBUNAL
(Tax and Chancery Chamber)

Rolls Building, London

VAT – VAT Notice 725 – whether FTT erred in law in concluding trader held insufficient evidence of removal - no - appeal dismissed

Heard on: 24 and 25 March 2025
Judgment date: 27 June 2025

Before

JUDGE SWAMI RAGHAVAN
JUDGE MARK BALDWIN

Between

H RIPLEY & CO LIMITED

Appellant

and

THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE AND CUSTOMS

Respondents

Representation:

For the Appellant: David Southern KC, instructed by Plummer Parsons

For the Respondents: Aparna Rao, Counsel, instructed by the General Counsel and Solicitor to His Majesty's Revenue and Customs

DECISION

INTRODUCTION

1. This is an appeal against a decision of the First-tier Tribunal (Tax Chamber) ("FTT"), published as *H Ripley & Co Limited v HMRC* [2024] UKFTT 125 (TC) ("the FTT Decision"). The FTT Decision upheld HMRC's decision denying the Appellant's claim to zero rated output tax of £1,176,161.34 72 arising on 72 transactions in scrap metal goods in the period 15 February 2016 to 1 September 2016.

2. The Appellant had not charged output tax on the basis that the goods had been removed outside the UK to Belgium and were thus zero-rated. Although there was no suggestion of fraud or bad faith, the FTT considered the evidence the Appellant had put forward to show the goods were removed was insufficient to meet the relevant conditions and time limits set out by HMRC regarding proof of evidence of removal in VAT Notice 725.

3. With the permission of the FTT, the Appellant appeals, alleging various errors of law, principally that the FTT wrongly expected the Appellant to require conclusive proof of removal, and arguing that the only reasonable conclusion the FTT could have been reached on the evidence was that the goods had been removed.

LAW

4. At the time of the relevant transactions in 2016, the UK was still a Member State of the European Union and the relevant supplies relied on by the Appellant between the UK and Belgium where therefore intra-Community removals of goods. In relation to those Article 138(1) of the Principal VAT Directive (2006/112/EC) provided:

> 'Member States shall exempt the supply of goods dispatched or transported to a destination outside their respective territory but within the Community, by or on behalf of the vendor or the person acquiring the goods, for another taxable person, or for a non-taxable legal person acting as such in a Member State other than that in which dispatch or transport of the goods began.'

5. Regulation 134 of the VAT Regulations 1995 implemented that obligation to exempt by providing for the zero-rating of intra-Community movements of goods as follows:

> "134. Where the Commissioners are satisfied that
>
> (a) A supply of goods by a taxable person involves their removal from, the United Kingdom,
>
> (b) The supplies are to a person taxable in another member State …
>
> (c) The goods have been removed to another member State,
>
> the supply subject to such conditions as they may impose shall be zero rated"

6. HMRC imposed such conditions in VAT Notice 725, certain provisions of which were specified to have the force of law.

7. Paragraph 4.3 of the Notice which had the force of law stated:

> "A supply from the UK to a customer in another EC Member State is liable to the zero rate where:
>
> • you obtain and show on your VAT sales invoice your customer's EC VAT registration number, including the 2-letter country prefix code, and
>
> • the goods are sent or transported out of the UK to a destination in another EC Member State,
>
> and

> • you obtain and keep valid commercial evidence that the goods have been removed from the UK within the time limits set out at paragraph 4.4"

8. The time limits, in paragraph 4.4, which also had the force of law, were expressed, so far as relevant, as follows:

> "In all cases the time limits for removing the goods and obtaining valid evidence of removal will begin from the time of supply. For goods removed to another EC Member State the time limits are as follows:
>
> • 3 months…"

9. As regards evidence of removal, paragraph 5.1 (which did not have force of law) provided:

> **"5.1 Evidence of removal**
>
> A combination of these documents must be used to provide clear evidence that a supply has taken place, and the goods have been removed from the UK:
>
> • the customer's order (including customer's name, VAT number and delivery address for the goods)
>
> • inter company correspondence
>
> • copy sales invoice (including a description of the goods, an invoice number and customer's EC VAT number etc)
>
> • advice note
>
> • packing list
>
> • commercial transport document(s) from the carrier responsible for removing the goods from the UK, for example an International Consignment Note (CMR) fully completed by the consignor, the haulier and signed by receiving consignee
>
> • details of insurance or freight charges
>
> • bank statements as evidence of payment
>
> • receipted copy of the consignment note as evidence of receipt of goods abroad
>
> • any other documents relevant to the removal of the goods in question which you would normally obtain in the course of your intra-EC business
>
> Photocopy certificates of shipment or other transport documents are not normally acceptable as evidence of removal unless authenticated with an original stamp and dated by an authorised official of the issuing office."

10. Paragraph 5.2, which did have force of law, mandated what had to be shown on the documents used as proof of removal:

> "The documents you use as proof of removal must clearly identify the following:
>
> • the supplier
>
> • the consignor (where different from the supplier)
>
> • the customer
>
> • the goods
>
> • an accurate value
>
> • the mode of transport and route of movement of the goods, and

• the EC destination"

11. The guidance which followed explained that "vague descriptions of goods, quantities or values are not acceptable".

12. Paragraph 5.5 which did not have the force of law stated:

> 5.5 What if my customer collects the goods or arranges for their collection and removal from the UK?
>
> If your VAT registered EC customer is arranging removal of the goods from the UK it can be difficult for you as the supplier to obtain adequate proof of removal as the carrier is contracted to your EC customer. For this type of transaction the standard of evidence required to substantiate VAT zero-rating
>
> Before zero-rating the supply you must ascertain what evidence of removal of the goods from the UK will be provided. You should consider taking a deposit equivalent to the amount of VAT you would have to account for if you do not hold satisfactory evidence of the removal of the goods from the UK. The deposit can be refunded when you obtain evidence that proves the goods were removed within the appropriate time limits.
>
> Evidence must show that the goods you supplied have left the UK. Copies of transport documents alone will not be sufficient. The information held must identify the date and route of the movement of goods and the
>
> mode of transport involved. It should include the following:
>
> ~ • ----------
>
> 5 Registration number of the vehicle collecting the goods and the name and signature of the driver and, where the goods are to be taken out of the UK by a different haulier or vehicle, the name and address of that haulier, that vehicle registration number and a signature for the goods.
>
> 6 Route, for example, Channel Tunnel, port of exit.
>
> 7 Copy of travel tickets.
>
> 8 Name of ferry or shipping company and date of sailing or airway number and airport.
>
> 9 Trailer number (if applicable).
>
> 10 Full container number (if applicable).
>
> …."

13. Paragraph 4.6 provided that "if the goods are not removed or you do not have the evidence of removal within the time limits you must account for VAT as described in paragraph 16.10. That paragraph explained that "if the goods have not been removed or you do not have satisfactory evidence of removal within 3 month…" VAT must be accounted for.

14. Paragraph 16.12 addressed the adjustment traders needed to make to their VAT account if goods were not removed or the trader had not received evidence of removal with the relevant time limit. The Notice provided that VAT records should be amended and VAT accounted for on the invoiced amount of consideration received. Paragraph 16.13 then provided that "If the goods are subsequently removed from the UK and/or you later obtain evidence showing that the goods were removed, you may zero rate the supply and adjust your VAT account for the period in which you get the evidence."

BACKGROUND AND FTT DECISION

15. In addition to receiving a large volume of documentary evidence, the FTT heard evidence from Mr Obed Ripley, a shareholder of the Appellant, and Mr Simon Ripley, a director of the Appellant. It also heard evidence from: Matthew Browning, from the Appellant's accountant (he had analysed the various transaction documents to produce a spreadsheet linking the documents to the relevant loads and from HMRC's officer, Raffaela Lahi regarding the exchanges between the Appellant and HMRC's investigating officer (Julie Yeomans – who had since retired). There is no challenge to the findings the FTT made on the basis of this evidence (in contrast to the inferences that were drawn or lack thereof which the Appellant does take issue with). In this section we briefly outline those findings and the FTT's reasoning in order to put the Appellant's grounds in context. We will elaborate on these as appropriate under the relevant ground.

16. The FTT set out how, the scrap metal business of the Appellant, had been a family-run for successive generations since 1928 and explained how the basis had evolved over the years ([28] to [31]).

17. Various findings were made regarding the nature of scrap metal business for instance that it was a high-volume trade with low margins, that the metal was expensive to transport and that because of the wear and tear cause to transport vehicles only a limited number of haulage firms were prepared to transfer it. Payments had to be made by bank transfer ([32] to [40]). The FTT went on (at [41]) to describe the steps and background to typical export transaction which may be summarised as follows.

> (1) Sales are agreed and recorded via email and WhatsApp, often daily. Due to price volatility, transactions are completed quickly.
>
> (2) Prices follow London Metal Exchange scrap metal rates. Goods are usually held until payment is received, though this rarely causes issues as most customers are regulars.
>
> (3) Each load is 20–25 tonnes, the capacity of one lorry. Customers typically arrange their own transport and notify HR of arrival times to manage yard flow. Most hauliers are familiar due to frequent business. Loads are prepared in advance.
>
> (4) Lorries are weighed empty on arrival and again after loading. The net weight (metal sold) is calculated and recorded via a fully electronic and automated system. Once payment is received, the Appellant issues an invoice based on the weighbridge ticket.
>
> (5) After collection, hauliers book the next available ferry slot. P&O issues a boarding card with load details. Since P&O cannot reweigh, they assume an 18-tonne tare weight for safety and load balancing.

18. At [42] the FTT described the suite of documents which could be matched to each transaction: (1) sale invoice (2) bank statement (3) weighbridge ticket recording net weight of load. (4) CMR (*International Consignment Note*) produced by haulier. (5) Annex VII documents (The FTT explained this was information required to accompany shipments of waste and is completed by the Appellant using information given in advance by the customer and from the haulier).

19. The 72 transactions which the Appellant relies on were each with Gregory Callewaert t/a Recyclink International ("Recyclink"). The FTT set out that the Appellant had dealt with Recyclink since 2000, that it did not make a specific payment for a load but had a running account and topped up its balance. The Appellant was always paid in full before the transfer. It was Recyclink who arranged the transport and mainly used a Belgian haulier. All the goods were dispatched from the Appellant's yard at either Ashford or Hailsham and the ferry port used was Dover ([43][44]) .

20. By reference to Mr Browning's statement, which had attached example of the documents he had used to identify a particular transaction (#9), the FTT described in comprehensive detail the precise contents of these various documents (comprising a sales invoice, weighbridge ticket, CMR, Annex VII documents, P&O Boarding cards, the e-mail conversations that Mr Browning had sought to match to the transactions). It also set out the conversations Mr Browing had with a P&O employee to explain the basis and time point reference of the process around provisions of boarding cards and the significance of the information on those ([52] – [66]). (HMRC's submissions included that the P&O boarding cards could not be used to support the Appellant's case as they had not been obtained and retained within the three-month time limit in Vat Notice 725 ([115])).

21. The FTT then recorded the chronology of exchanges between HMRC and the appellant and details of various pieces of additional information provided to HMRC Officer Lahi, including WhatsApp messages and her observations that none indicated whether the goods were removed from the UK ([67] to [81]).

22. After setting out the relevant law and summarising the parties' respective submissions ([82] to [116]), the FTT (at [118]) rejected the Appellant's argument that the burden of proof had passed to HMRC, referring to the Court of Appeal's reasoning in *Peter Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 144. The FTT also rejected the Appellant's argument that there was scope for HMRC to look at evidence obtained outside the three-month time limit specified in VAT Notice 725 ([119-125]). As regards the question of whether the evidence of removal was sufficient, the FTT analysed in turn the sale invoices, bank statements, weighbridge tickets, CMRs, Annex VII documents, P&O boarding cards, e-mails, and WhatsApp messages. In respect of each category of documents the FTT considered (for reasons which we summarise when dealing with Ground 2 below, and Ground 3 in relation to the P&O boarding cards) that none of them were sufficient to show removal ([127][147]).

23. The FTT accordingly concluded (at [148]) that "none of the documents (individually or taken as a whole) relied upon by [the Appellant] evidence export of the loads of scrap metal per the requirements of VN 725" and dismissed the appeal.

GROUNDS OF APPEAL

24. With permission of the FTT, the Appellant appeals on the following six grounds of appeal:

(1) The FTT's 14-month delay in producing its decision was unacceptable and impaired its function.

(2) No person acting judicially and properly instructed on relevant law could have come to the determination under appeal.

(3) The FTT adopted an erroneous approach to evidential standard in reliance on the Court of Appeal judgment in *Tui* which had been overturned by the Supreme Court before release of the FTT's decision.

(4) The FTT wrongly relied on terms of VAT Notice 725 to exclude the P&O boarding cards and other supplementary evidence.

(5) The FTT failed to apply EU law (the effectiveness principle).

(6) The FTT failed to find evidence of a commercial system (in order words that there was a common pattern to the transactions which if the FTT ought to have to taken account so that despite the absence of evidence in relation to certain transactions the Appellant had still shown them to be removals).

25. Mr Southern KC who appeared for the Appellant highlighted Ground 2 as the Appellant's main focus, with the errors under Grounds 1 and 3 to 6 being said to compound the Ground 2 error. He also helpfully clarified that Ground 1 was not put as a freestanding ground of appeal but was argued to have impaired the ability of the FTT to perform its statutory function and to have "contributed to the other grounds of appeal". In the light of both these points we shall address Ground 2 first and consider Ground 1 once we have considered and reached a preliminary view on Grounds 2-5.

Ground 2 – failure to draw the only reasonable conclusion from the evidence

26. Before turning to the substantive issue under this ground, we need to resolve a preliminary dispute between the parties as to the proper nature of the issue the FTT needed to decide in order to dispose of the appeal before it.

27. The Appellant submitted that the true question was whether it had shown, on the balance of probabilities, that the goods had been removed from the UK. HMRC, by contrast, argued that the key issue was whether, as the FTT had correctly identified, the Appellant held, sufficient evidence falling within the conditions of VAT Notice 725 (including that such evidence had been obtained within 3 months of the sale) of the removal of the goods from the UK.

28. This dispute, over the framing of the issue, permeates a number of the Appellant's argument before us. As to whether the test is mere factual removal or the existence of sufficient evidence at a given point of time of removal, Ms Rao, who represented HMRC before us, relied on the Upper Tribunal's decision in *HMRC v Arkeley* [2013] UKUT 393 (TCC).

29. That concerned zero-rating in the context of exports from a Member State. HMRC challenged the FTT's conclusion in favour of the taxpayer that, as regards certain of the transactions, there was sufficient evidence of export. HMRC's argument on appeal was that the FTT had mistakenly assumed that HMRC had agreed the goods had been exported when (so HMRC argued) that would have been illogical given HMRC were at the same time arguing that the conditions for zero-rating were not met (because the evidence of the alleged export had not clearly identified the relevant goods).

30. Although the case concerned exports outside the EU rather intra-Community removals there is no reason to suppose that the principles articulated in that case would not apply equally here. That is especially clear from the fact that the Upper Tribunal in *Arkeley* itself relied on the CJEU's decision in *R(on the application of Teleos plc*) *v HMRC* (Case C-409/04), which had concerned removals rather than exports.

31. In *Teleos*, the CJEU considered a situation in which a UK trader was not denied zero-rating even though the document (a CMR) on which it had relied was later found to contain false information. The CEJU held that it was sufficient that the trader had provided adequate evidence at the time; it did not matter that the goods had not, in fact, been exported.

32. The Upper Tribunal in *Arkeley* summarised what that meant in terms of the proper issue to be decided as follows (at [21]):

> "There is no allegation that the taxable person was acting otherwise than in good faith or that the taxable person failed to take reasonable steps to ensure that he was not participating in tax evasion, the focus must be on the evidence required to establish the right to zero-rating. The taxable person cannot be required to prove the fact of export in any other way."

33. The Upper Tribunal went on to explain at [34]:

> "It is clear from *Teleos* that proof of export depends on there being sufficient evidence of export in the hands of the taxable person at the relevant time.

> Absent fraud or bad faith, such evidence will result in the application of zero-rating even if it is later established that the goods were not exported. No question of bad faith or fraud on the part of Arkeley, or knowledge or means of knowledge of fraud, was alleged in this case. Accordingly, the question for the FTT was not whether it was satisfied that the goods were exported, but whether it was satisfied that there was sufficient evidence of export in the hands of Arkeley within the prescribed time limit."

34. In the Appellant's oral submissions in reply, Mr Southern emphasised that the key point in *Teleos* and *Arkeley* was that, even where there was cogent evidence that the goods had not left the UK, zero-rating was still permitted because the taxpayer should not be penalised for, as he put it, "dirty work at the cross-roads" (in other words the wrongdoing of others further down the supply chain).

35. In our view, and in agreement with Ms Rao, the decisions in *Arkeley* and *Teleos* support the position that the correct issue to consider is the sufficiency of the evidence held by the taxpayer. In the absence of fraud or bad faith, a taxpayer who obtains the required information in time will be protected from "dirty work at the cross roads" (something going wrong with the removal), but these cases do not support the view advanced by Mr Southern that there are no consequences for a taxpayer who fails to obtain such evidence (whether or not the removal takes place or not and whether any failure is their fault or not).

36. The reason why the sufficiency (or insufficiency) of evidence is what matters, rather than whether there was a removal was explained by CJEU at [51] in *Teleos* (referred to by the Upper Tribunal at [19] of *Arkeley*)*:*

> "To oblige taxable persons to provide conclusive proof that the goods had physically left the member state did not ensure the correct and straightforward application of the exemptions."

37. The CJEU's concern was that it would be contrary to legal certainty if, despite there being a prescribed list of documents which evidenced entitlement to exemption from accounting for VAT, the supplier could later be required to account for VAT. The focus, therefore, is on enabling the operation of a straightforward system where compliance with evidential requirements becomes the decisive factor.

38. We therefore agree with HMRC and the FTT in their formulation of the issue. The correct question is whether the Appellant held sufficient evidence of removal, not whether the goods were in fact removed.

39. Mr Southern also sought to argue that HMRCs' and the FTT's depiction of the issue was inconsistent with the way the issue had been put in HMRC's Statement of Case. We reject that argument. HMRC's case correctly identified sufficiency of evidence as key. That is clear from [6] of HMRC Statement of Case which stated:

> "It is common ground that the issue before the Tribunal is whether the conditions for zero rating have been satisfied, and in particular whether sufficient evidence has been provided by the Appellant that the goods in question were removed from the United Kingdom."

40. The remainder of the Statement of Case is also consistent with this focus on evidence. For example, at [51] it states:

> "HMRC's position is that alternative evidence may be relied upon, but that the evidence provided does not meet the conditions as to the content of the evidence specified in paragraph 5.2 or 5.5 of Notice 725."

41. We therefore find nothing in HMRC's Statement of Case that is inconsistent with the conclusion that the central issue is the sufficiency of the evidence. The correct issue in this appeal is whether the Appellant held sufficient evidence falling within the requirements of VAT Notice 725 including its time limits to support zero-rating, not whether the goods were in fact removed from the UK. With that in mind we now turn to the Appellant's arguments under Ground 2.

Appellant's Ground of Appeal

42. The Appellant's core ground of appeal is that the FTT's overall conclusion was not one that was reasonably open to it. The Appellant further argues that the FTT erred by examining categories of evidence in isolation rather than considering them cumulatively. Although the FTT referred in its conclusion at [148] to "none of the documents (individually or taken as a whole) relied upon by [the Company] evidence the export…" the Appellant argues that that was a mere "verbal formula" and that the FTT did not in fact carry out the holistic assessment it claimed to.

43. HMRC submits that the FTT was entitled to reach the conclusion it did. As discussed, the key issue, as framed by HMRC, is whether the Appellant held valid commercial evidence within three months of the supplies being removed from the UK, not whether later-produced evidence shows that removal occurred. HMRC notes that the FTT did consider the totality of the evidence and concluded that none of the documents, individually or collectively, satisfied the evidential requirements of VAT Notice 725.

Discussion

44. It is common ground that no single document incontrovertibly proves that the goods were removed from the UK. The Appellant argues, however, that the FTT failed to consider whether the documents, taken together, established its case.

45. At the outset it should not be overlooked that the issue of whether the evidence which complied with VAT Notice 725 was sufficient to show removal, is a matter of evaluative fact. While under other grounds the Appellant argues the FTT erred in matters of legal principle, under this ground Mr Southern rightly accepted the legal principles that findings (involving evaluation) of fact are matters which an appellate court or tribunal will be slow to interfere with. The Appellant is thus correct to puts its challenge to the FTT's conclusion in terms of the high threshold of having to show that it was one that the FTT was not entitled to reach. Although the appellant has framed this challenge by reference to the fact of removal, we shall consider it in relation to sufficiency of evidence.

46. To address the arguments that the FTT failed to consider the evidence as a whole, and that it could only have concluded the goods were removed (or that there was sufficient evidence to prove this) it is helpful first to outline the Appellant's arguments about the individual categories of evidence, and how the FTT then assessed those.

47. In respect of the various categories the Appellant makes the following points: (1) The fact the payments to the Appellant were from a Belgian bank account. That is a "very strong indication" of export, as a buyer would not continue to pay for goods not received. In particular, the Appellant's written submissions contend that the FTT gave no reasons for not accepting that the Appellant's Barclays bank statements evidenced the export of the scrap metal. It is said that the inference from payments, especially in a sequence of transactions, is that the goods were received, and that this strongly indicates removal from the UK. The Appellant questions why this does not confirm who received the goods or where they were received, noting that there was no contrary evidence. (2) The fact Sales invoices were issued to a Belgian-registered company, with an undisputed Belgian VAT registration. (3) The Weighbridge tickets were consistent with the other documents, show the consignments left the Ashford yard and show

the customer as a business based in Belgium. (4) The CMRs, which the Appellant submits were issued in triplicate, show an intention for cross-border movement. (5) The Annex VII documents are only used in cross-border waste shipments. (6) The P&O boarding cards, which were excluded due to timing support export. (7) Emails and WhatsApp messages link to consignments showing a Belgian address. (8) There is consistency in load weights across documents, indicating they relate to the same consignment.

48. The FTT addressed all of these items as follows,: (1) On payments, at [130]–[131], it found that the bank statements only evidenced receipt of payment. Although it was accepted on the back of those statements that payments were received by the Appellant from Recyclink's Belgian bank account it did not follow the loads were received by it in Belgium; payment did not confirm "who received the goods nor where the goods were delivered". (2) On sales invoices, at [130], it stated: "Despite the sales invoice confirming the sale to a purchaser who is a Belgian registered company it does not automatically follow nor can it be inferred that the address of the purchaser is the same address as the destination that the goods were sent to." (3) On weighbridge tickets, at [133], it explained those were issued whether the load was being exported or sold a UK buyer and that they merely confirmed what was apparent – a consignment to a Belgian based and VAT registered company that was collected by a UK registered vehicle (and where the UK registration did not appear in any subsequent documents provided as evidence) (4) On CMRs, at [136], it noted that none of the CMRs were fully completed by the haulier and receiving consignee. The fact the load was sold to Belgian registered company did not mean the loads were exported. (5) On Annex VII documents, at [138], the FTT did not accept that they evidenced export: none of the them had the box for "Signature upon receipt of the waste by the consignee" completed and the fact they stated the UK as the export destination and other dates meant they could not be relied on. (6) On P&O boarding cards, at [140], it found that even if the timing issue were set aside, they did not evidence export; they did not have any identifying features such that they could be matched with any of the disputed consignments. (7) On emails and WhatsApp messages ([142] and [147]) the FTT noted the e-mails were obtained outside the three-month time limit and at their highest showed a request for the carrier to collect and deliver to a Belgian carrier abroad. The WhatsApp messages showed Mr Callewaert "acting as a middleman and buying on behalf of unidentified third parties". They did not identify the clients or the destination for the loads (8) As regards the load weights, the FTT did not find these persuasive as evidence of export noting at [141] that load weight of in the region of 43.00 tonnes would invariably be arrived at from the standard 25.00 tonnes for a fully laden lorry when added to the standard are of 18.00 tonnes.

49. Accordingly, as regards each of these individual categories of evidence, the FTT considered, for the reasons it explained, that they did not evidence the loads were removed outside the UK.

50. Before us Mr Southern sought to undermine the FTT's evaluation of some of these categories of document through a series of specific points. For the reasons below none persuade us that the FTT was not entitled to reach the view it did.

> (1) The fact that WhatsApp messages to a Belgian mobile showed exchanges regarding a complaint about the quality about a particular load (a message dated 18 September 2016 complained about a rejected load) might suggest Mr Callewaert was based in Belgium said nothing about where the ultimate customer who received the goods was located.
>
> (2) Mr Southern also highlighted that a CMR was filled out in triplicate at different stages with copies retained respectively by the consignor, carrier and consignee. The copy the Appellant as consignor retained would inevitably not be complete so its full completion was not within the Appellant's control. There were also commercial reasons

explained in the evidence as to why Recylink would not want to disclose its customer for fear of being by-passed. However, whatever the reasons for the evidence not being complete, they could not detract from the fact that the evidence that *was* ultimately advanced was viewed as insufficient. It was the sufficiency of evidence showing removal that the FTT had to assess not the Appellant's reasons for not providing sufficient evidence. The guidance in VAT Notice 725 makes a point of mentioning that the CMR referred to is one that has been "fully completed by the consignor, the haulier, and signed by the receiving consignee" Paragraph 5.5 envisages that, where the customer collects or arranges to collect goods it might be difficult for the supplier to obtain adequate proof, but that it will be for the supplier to obtain the documents within the relevant time limits.

51. It was therefore open to the FTT to take the view that the evidence was insufficient in its evaluation of the individual categories of documents.

52. Moving on the question of whether the FTT then considered the evidence in combination we should first acknowledge what the FTT itself recorded as regards the need to do this.

(1) The FTT recorded HMRC's submission that paragraph 5.1 of Notice 725 allows for a combination of documents to prove removal ([101]).

(2) It recorded the Appellant's submission that the evidence, "both regarded separately and in combination," established that all 72 consignments were removed shortly after leaving the yard ([105]).

(3) It referred to paragraph [47] from *Arkeley* (at [121]) which referred to the FTT there being entitled to consider the evidence that was produced and evaluated in the light of the circumstances.

53. From this it is clear the FTT was aware of the need to look at the documents in combination.

54. For the reasons below we are satisfied the FTT delivered on the task that had been identified and that did it consider the evidence in its totality accordingly.

55. First and foremost it should not be overlooked that the FTT expressly put its conclusion at [148] in these terms. That specifically referred to having assessed "all documentation … taken as a whole." Mr Southern argued that was a mere "verbal formula" but it is difficult to see how the FTT could be criticised for saying it was doing, and in as straightforward terms as possible, what both parties had urged it to.

56. It must also be recognised that the exercise of looking at documentation as a whole involves some measure of overall evaluative impression and judgment which by its nature is not necessarily straightforward to describe in a discrete piece of detailed reasoning. In the circumstances here, where the FTT had carefully dealt with each of the categories of information separately, it is not clear to us what the FTT might usefully have added, beyond stating that it had looked at the documents together as a whole (which is in effect what it did at [148]) in order to demonstrate that it had stood back looked at the documents together.

57. Moreover, to the extent analysis of how the documents interacted with each other was called for, we can see the FTT did that when evaluating some of the individual categories of documents. At [141] for instance, it considered whether boarding cards could be matched to specific consignments, thus indicating that it was thinking about how the evidence linked together.

58. In advancing the Appellant's case that, if the documents were looked at in their totality that would have made a conclusion in the Appellants' favour inescapable, Mr Southern made

a variety of general points and observations. None of them in our view alter the analysis that the FTT was entitled to reject the Appellant's case.

59. Mr Southern argued, for instance, that people often make mistakes, fail to fill out standard documentation fully and that, while the fact documentation is incomplete might reduce its evidential value, that did not invalidate it. However, the FTT was not rejecting the documents as invalid but simply came to the view that because of certain significant gaps (e.g. consignee signatures in the case of CMRs) it did not evidence export.

60. Mr Southern also argued that the Appellant's business set up of choosing to use experienced staff rather than casual labour lent support to the reliability of the documentation. We do not see that follows. At best it might provide explain why, if such employees were trusted more, information that would otherwise be required for the Appellant's internal monitoring was not considered as necessary, but it would not help one way or the other on the question of the sufficiency of evidence as regards removal.

61. Mr Southern also referred to Mr Simon Ripley's oral evidence that the Ashford yard was chosen for it is proximity to Dover, but such a general point would not address the requirement to show evidence in relation to removal of specific consignments and is not inconsistent with loads being collected from there yet not being removed.

62. Thus, while the Appellant's case is that a cumulative assessment would necessarily lead to a finding in its favour, we do not accept that this follows. The Appellant does not persuade us how the various documents, found to be insufficient individually, could when combined provide the necessary evidence in relation to removal as regards the specific identified consignments.

63. In our judgment nothing in the combination of documents, given the shortcomings identified in them, meant the FTT was compelled to find the evidence was sufficient evidence of removal for the purposes of VAT Notice 725. The evidence was consistent with transactions which, despite involving a sale to Belgian VAT registered company, involved the goods remaining in the UK.

64. If the framing of the issue by the FTT and by us (as one concerning sufficiency of evidence) were incorrect, so that the question turned on the fact (or not) of export, we would not have accepted that the evidence before the Tribunal compelled a conclusion that the goods had been removed from the UK. Even it could be said the evidence was not inconsistent with removal, it was also the case that it was not inconsistent with the goods remaining in the UK.

65. We therefore reject this ground of appeal.

Ground 3 – erroneous evidential standard – reliance on *Griffiths v TUI* in Court of Appeal – which was overturned in Supreme Court

66. Under this ground the Appellant argues that the FTT was misled by the Court of Appeal's decision in *TUI* (which was subsequently overruled by the Supreme Court), leading it to believe that HMRC was not required to produce evidence to meet the Appellant's case. The Appellant does not appear to dispute that HMRC was entitled not to call evidence, but contends that where the Appellant had produced unchallenged evidence, HMRC was required to respond with something substantive.

67. *Tui* concerned a claim by a package holiday-maker, who argued he had become ill from food at an all-inclusive resort. The expert witness on his side had concluded the gastric illnesses were acquired through contaminated food or drink from the resort. The issue raised on appeal was the fairness of the trial judge's acceptance of the holiday's company closing submissions that the claimant had failed to prove his case because of deficiencies in the claimant's expert's report. The expert evidence was uncontroverted, in that the holiday company neither led

evidence of its own nor challenged the claimant's expert in cross-examination. The Court of Appeal (Asplin and Nugee LJJ in the majority, with Bean LJ dissenting) considered this was not unfair.

68. In advancing this ground the Appellant referred in particular to [118] of the FTT decision where the FTT agreed with HMRC that:

> '…even when the Tribunal does not regard evidence as challenged that does not mean that HMRC are unable to undermine HR's case, see *Peter Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442 at [69] (Asplin LJ) and [81] (Nugee LJ).'

69. The FTT included that paragraph from Nugee LJ's judgment which read as follows:

> "81. As a matter of basic principle it is the function of trial judges to evaluate all the evidence before them in reaching their conclusions on the factual issues. That includes deciding what weight should be given to the evidence. I see nothing in the authorities that suggests that that obligation to assess the evidence falls away if it is uncontroverted; uncontroverted evidence still has to be assessed to see what assistance can be derived from it, viewed in the context of the circumstances of the case as a whole. Uncontroverted evidence may be compelling, but it may not be: it may be inherently weak or unhelpful or of little weight for other reasons."

70. Subsequent to the FTT issuing its decision, the Supreme Court issued its decision *Griffiths v TUI UK Ltd* [2023] UKSC 48, which overturned the Court of Appeal's decision. At [34], the Supreme Court, having previously referred (at [32]) to Nugee LJ's comments at [81]) framed the issues as follows:

> "(i) what is the scope of the rule, based on fairness, that a party should challenge by cross-examination evidence that it wishes to impugn in its submissions at the end of the trial? (ii) in particular, does the rule extend to attacks in submissions on the reliability of a witness's recollection and on the reasoning of an expert witness? and (iii) if the rule does so extend, was there unfairness in the way in which the trial judge conducted the trial in this case?"

71. The Supreme Court accepted that a principle long-stated in *Phipson on Evidence* was correct: a party is required to cross-examine a witness if it wishes to argue that their evidence should not be accepted. The principle was summarised at [70] of the Supreme Court's judgment:

> "The general rule in civil cases, as stated in *Phipson, 20th ed*, para 12-12, is that a party is required to challenge by cross-examination the evidence of any witness of the opposing party on a material point which he or she wishes to submit to the court should not be accepted. That rule extends to both witnesses as to fact and expert witnesses."

72. The Supreme Court found that the Court of Appeal had erred in limiting the rule to challenges concerning the honesty of a witness.

73. In the present case, where, for the reasons discussed under Ground 2, the focus was rightly on the documentary evidence that had been obtained by a given point of time, there was no evidence that HMRC were inviting the FTT not to accept. The documentary evidence was accepted for what it was. The issue was whether that evidence was sufficient, within the relevant timeframe, to demonstrate removal. The FTT found that it was not. The evidence was not therefore rejected; rather, its sufficiency was evaluated and found wanting. We do not therefore accept that the FTT was misled in the way suggested. We agree with Ms Rao's submission that, properly analysed, the issue did not concern non-acceptance of the evidence

but the interpretation and evaluation of the evidence. There were limitations in the Appellant's evidence, which meant that even if taken at face value, it did not establish the necessary facts to meet the burden of proof. That is different from the situation in *Tui,* where the trial judge had not accepted the expert witness' conclusion on causation of the illness.

74. The FTT correctly found that HMRC was not required to produce evidence. That was not because it was rejecting the Appellant's evidence, but because the evidence, though accepted, did not meet the burden of proof. There is nothing in the Supreme Court's decision in *TUI* that undermines the proposition that it is for the party asserting a claim to make out its case.

75. The Appellant also challenges the FTT's treatment of the burden of proof. At [117], the FTT stated:

> "Mr Southern submitted that once HR has provided substantial and reliable evidence the burden of proof shifts to HMRC. We do not accept that submission and agree with HMRC that there is no 'reverse burden' of proof on HMRC to conduct independent investigations to verify or provide evidence which challenges or undermines evidence which HR asserts meets the requirements of VN 725. The burden of proof is on HR to show that they have satisfied the conditions set out in VN 725 to zero-rate their supplies and provided documentation to show that the goods were removed from the UK. We agree with the Tribunal in *Angela McCamley v HMRC* [2016] UKFTT 0701 (TC) where it stated at [44]:
>
> '… The requirements for zero-rating supplies of exported goods are set out in legislation; it is not the role of HMRC to make up for the shortcomings of taxable persons in complying with those requirements, as is clear from the *Twoh International BV v Staatssecretaris van Financien* case, which is binding upon this Tribunal.'"

76. Mr Southern clarified that he was not arguing before the FTT or before us that there was a "reverse burden of proof". He rightly acknowledged that the burden of proof remained at all time on the Appellant but that the evidential burden at any given point in the case might shift.

77. The Appellant's case before us amounts in essence to a submission that the FTT failed to recognise that in the particular circumstances of the case the evidential burden had shifted to HMRC. However, as we have already found under Ground 2, the FTT was not bound to find that the Appellant had produced sufficient evidence, or that the goods had been removed. There was accordingly no need for HMRC to produce evidence when the evidential burden had not shifted. All the FTT was saying in the passage above was that in the particular circumstances of this case the evidential burden had *not* shifted to HMRC. It was not purporting to lay down any wider (and incorrect) principle that the evidential burden could never shift to HMRC.

78. The Appellant also argues the FTT erred in failing to recognise that the HMRC officer (Office Julie Yeomans) who had taken the decision to hold that zero-rating was incorrect was an essential witness who needed to be called to show the decision-making process which had led to the decision to impose the tax. We disagree. There was no requirement for her to be called to give evidence about the decision-making process. The focus of the appeal, as discussed, was on the sufficiency of the evidence. That was ultimately an issue for the FTT in relation to which an HMRC officer's opinions, or their explanation of the decision-making process would be of no evidential relevance.

79. We therefore reject Ground 3.

Ground 4 – FTT wrongly relied on terms of VAT Notice 725 to exclude P&O boarding cards and other supplementary evidence

80. Under this ground it is argued the FTT were wrong to exclude the P&O boarding cards in its evaluation of the evidence (which it said were available in the case of 48 out of the 72 sales).

81. The FTT did so by reason of paras 4.5 and 4.4 of VAT Notice 725 explaining at [127]:

> 'the onus is on [the Appellant] (as the company claiming zero-rating) to gather sufficient evidence of removal within three months of the date of supply. If [the Appellant] do[es] not do so, [it is] not entitled to zero-rate their supplies.'

82. The FTT found at [139] that this requirement had not been met. The boarding cards were provided to HMRC shortly after they were provided by Mr Callewaerts "some 18 to 30 months after the disputed consignments took place". The Appellant does not take issue with that factual finding but argues that, while paragraph 4.4 says that a trader must have sufficient commercial evidence within paras 5.1 and 5.2 obtained within three months of sale to justify zero-rating, it does not say that supplementary evidence may not be obtained after that date. That possibility, it argues, is consistent with the Court of Appeal's position in *Musashi Autoparts Europe Ltd v C & E Comrs* [2003] EWCA Civ 1738.

Discussion on Ground 4

83. As noted below under Ground 5, Mr Southern argued in oral submissions that he was not challenging the EU law conformity of VAT Notice 725. If that is correct, then given that Notice 725, as the FTT correctly observed, contains a clear bar on accepting information produced after three months, it is difficult to reconcile the lack of challenge to the terms of VAT Notice 725 with the Appellant's argument that evidence obtained outside of the time limit should nevertheless have been admitted. It is inconsistent for the Appellant to maintain, on the one hand, that there is no challenge to Notice 725, and on the other, that evidence falling outside the three-month period should have been accepted.

84. We have no hesitation in rejecting the Appellant's argument that evidence which is obtained more than 3 months after the time of supply may be considered. Paragraph 4.3 specifies, with the force of law, that the trader must "obtain and keep valid commercial evidence that the goods have been removed from the UK with the time limits set out at paragraph 4.4". Paragraph which 4.4 also has the force of law specifies the relevant time limit as three months.

85. To the extent that the Appellant maintains, despite Mr Southern's oral submissions, that there is an inconsistency between Notice 725 and EU law, we will address that argument separately below under Ground 5.

86. If the Appellant's position is that there is a distinction between the sufficiency of evidence (subject to a time limit) and the fact of removal (which is not), then that is ultimately an argument about how the issue should be framed. We have already explained above why we disagree with the Appellant's characterisation of the issue under Ground 2.

87. Subsequent paragraphs of VAT Notice 725 (16.12-16.13 – set out at [14] above) make clear that, if the trader does not have the necessary evidence within that period, VAT must be accounted for, and any adjustment must be made later, with interest payable for the intervening period. This approach is consistent with the reasoning in *HMCE v Musashi Autoparts Europe Ltd* [2003] EWCA Civ 1738. The issue in that case concerned whether the taxpayer remained liable to interest on an amount of VAT assessed by HMCE. That assessment arose because the taxpayer had not been entitled to zero rate their supplies, HMCE having considered the taxpayer did not hold sufficient evidence goods had been removed. The taxpayer had then

provided evidence outside the time limit specified in the VAT Notice which HMCE did accept. The trader adjusted its VAT account in the period when the further evidence was received such that the amount of VAT due under the assessment ceased to be due. However, HMCE maintained their assessment in respect of interest which the taxpayer then challenged, succeeding at first instance but losing on the issue before the High Court and then the Court of Appeal.

88. We consider the Appellant's reliance on *Musashi* (to support its position that the VAT Notice do does not prohibit the submission of supplementary evidence after three months to justify zero-rating) is misplaced. While it is true that the Court of Appeal in *Musashi*, when considering the timing of interest, contemplated that evidence might be produced outside the three-month period, it then went on to explain the effect of that as follows at [47]:

> "The scheme of the Act and the regulations, read with Notice 703 [*this contained similar conditions regarding the 3 month time limit and subsequent adjustment upon receipt of evidence outside of that time limit*], is that the obligation to account in one VAT accounting period (when the conditions are not met) on the basis that VAT was payable in respect of the supply is matched by a reduction in the amount of VAT payable in a subsequent accounting period (when the conditions are met)."

89. Accordingly, if the trader does not have sufficient evidence within three months, they must report the supply as standard-rated. If evidence is later obtained, it may justify an adjustment, but only in the later period. The trader cannot use that evidence to revisit the earlier period. That is reflected in the guidance given at paragraphs 16.12-16.13 of the VAT Notice 725.

90. Mr Southern suggested that *Musashi* was distinguishable because, in that case, it was common ground that the time limits had not been met, whereas here that was not accepted. We do not see how that undermines the relevance of the reasoning on which the Court's conclusion was based. The point remains that, to the extent evidence obtained outside the three-month period could be taken account of, its effect was only the later period, and not the period in which the transaction occurred (as would have been the case if the evidence had been obtained within 3 months).

91. We therefore find that the FTT was correct to exclude the evidence, given it was obtained outside the three-month time limit, in accordance with the requirements of VAT Notice 725.

92. In any event, even if we are wrong on that point, the FTT *did* consider the evidence but concluded that it would not have made a difference. At [140], the FTT found that the boarding cards could not be matched to the consignments in question and pointed out a number of issues with Mr Browning's attempts to marry up the cards to the loads. None of the reference numbers, nor lead names matched with the other documents, the number which had been assumed to be a vehicle registration did not contain the required digits and format for a UK registration and did not in any case match to the vehicle registrations on the weighbridge tickets. Nor did the format match to Belgian vehicle or trailer registration numbers. The evidence was that the date and month and time (no year was given) referred to the time of booking and not to any particular ferry departure. At [141] the FTT also explained how Mr Browning's matching assumptions based on weight could not have been determinative given the standard weight load and the standard tare P&O assumed.

93. There was thus ample support for the FTT to conclude that the boarding cards did not constitute sufficient evidence, whether themselves or in combination with the other evidence.

94. The Appellant also argues, referring to [121] and [122], that the FTT was wrong to treat paragraph 4.4 of VAT Notice 725 as a strict rule of law while also suggesting that HMRC could, if it chose, dispense with that requirement.

95. HMRC maintains that VAT Notice 725 applied and was correctly relied upon. It explains that the FTT's reasoning in those paragraphs was directed at the Appellant's proportionality argument and not at any power to waive the requirements of paragraph 4.4.

96. We agree with HMRC that there is no merit in this point. The Appellant has misinterpreted the FTT's reasoning.

97. It is helpful in our view to separate out the three distinct questions of timing to see this: (1) When did the evidence come into existence? (2) When did the trader obtain the evidence? and (3) When did the trader provide that evidence to HMRC?

98. Before the FTT, the Appellant sought to argue that question (2), the date of obtaining the evidence, could fall outside the three-month period. The FTT rejected that argument. At [121] and [122], the FTT was not suggesting that HMRC could choose to accept evidence obtained outside the three-month period. Rather, it was addressing the Appellant's argument that HMRC's refusal to accept evidence obtained within the three months but provided much later (18 to 30 months) was disproportionate. The FTT found that it was not.

99. We therefore reject this ground of appeal.

Ground 5 - failure to apply EU law

100. In its written case the Appellant argues that the exclusion of boarding cards and other evidence obtained after the three-month period specified in paragraph 4.4 of VAT Notice 725 was contrary to EU law. It is submitted that procedural conditions imposed by a Member State could not be relied upon to deny the effect of EU law. The FTT erred in seeking conclusive proof of export, contrary to the approach adopted by the CJEU in *Teleos* (see [36] above) .

101. HMRC argue that VAT Notice 725 is consistent with EU law and points out that no argument to the contrary was advanced before the FTT. They accept that while failure to satisfy formal requirements under domestic law does not automatically lead to the loss of exemption the three-month time limit in paragraph 4.4 is not a mere formality but a substantive requirement.

102. In his oral submissions on behalf of the Appellant Mr Southern maintained that he had no quarrel with the content of VAT Notice 725 from an EU compliance perspective. He accepted that the compulsory provisions were compatible with EU law. Nonetheless, his submissions, which were put in terms of the FTT adopting a "disproportionate interpretation" of the Notice, appeared to us to challenge the EU law conformity of the three-month rule. We had difficulty understanding this position. It appeared to be dependent on the Appellant's view under Ground 4 that HMRC are permitted to take account of evidence outside the three month time limit. We have already seen that there are circumstances where evidence obtained after the three-month period can be considered by HMRC, but the really important point to keep in mind here is that, while such evidence can be used by a taxpayer (and considered by HMRC), it will not have the effect of zero-rating the original removal ab initio; it may allow a taxpayer to make an entry in its VAT account which effectively balances the original standard rated transaction, but that later entry is only effective when made and it does not eliminate the original standard rated transaction, so that there will always be an interest (as in *Musashi*) or similar funding cost in not having obtained the required information in time. The requirement to obtain information within three months in order to zero-rate the original transaction is very clear and there was no suggestion that this requirement was being inconsistently applied.

103. As to whether the VAT Notice 725 requirements conform, there is no dispute that EU law permits Member States to impose procedural rules and evidential requirements by way of conditions for the application of the exemption provided they comply with general legal principles including proportionality (as set out at [25] of *Twoh International BV* (Case C-184/05). It is also established that making the right of exemption "subject to compliance with formal obligations without any account being taken of the substantive requirements and, in particular, without any consideration being given as to whether those requirements have been satisfied, goes further than is necessary to ensure the correct collection of the tax…" (*Vogtländische Straßen-, Tief- und Rohrleitungsbau GmbH v Finanzamt Plauen* (Case C-587/10) at [45]). Mr Southern's point here appeared to be that the Appellant's directly effective EU law right is to zero rate goods if they keep adequate evidence of removal, domestic law should not impose formal requirements in a prescriptive way which prevents a person who has effectively complied with that requirement being able to benefit from it.

104. To the extent the Appellant's arguments under this ground seek to impugn the proportionality of VAT Notice 725 then we would reject that. Various features in the requirements and guidance set out in VAT Notice 725 indicate to us that it is consistent with EU principles of proportionality and does not go further than is necessary to ensure the correct collection of tax.

(1) The evidence sought enables a coherent picture to be built up of whether the transactions involved removal.

(2) The nature of the documents are also consistent with what would be produced commercially and there is some flexibility built in. Paragraph 5.1, which does not have the force of law, provides examples of acceptable documents, including "any other documents relevant to the removal of the goods in question which you would normally obtain in the course of your intra-EC business."

(3) The three-month period allows time to collect documents that would ordinarily be generated in the course of business. It is consistent with some records, e.g. the completed CMRs, not being in the trader's possession and gives time to obtain them.

(4) Although the conditions rule out exemption in respect of the sale if the evidence time is breached that is tempered by the fact that, as discussed, later evidence may potentially be used to make an adjustment in a later period.

105. We consider the requirements, which also include the 3-month time limit, to be proportionate.

106. Mr Southern also referred to *Vogtländische Straßen* where it was held that, although a Member State might require information, such as a VAT identification number, provided the requirement is proportionate, not providing that information could not be the sole reason for denying exemption. We do not consider this case assists. The CJEU's reasoning for its view was that, although the VAT identification number was "closely connected with capacity as taxable person", that status did not depend exclusively on such person having that number but simply covered a person who carried out any economic activity as specified in the Directive ([48] and [49]). The requirement in that case for a VAT identification number is far removed from the present case, where the UK requirement for commercial documents sufficient to evidence removal was non-exhaustive.

107. As regards the Appellant's written submissions suggesting a breach of the principle of effectiveness, nothing in VAT Notice 725 or the way the FTT applied that could in our view be said to meet the threshold of having rendered the exercise of the Appellant's rights virtually impossible. The Notice contemplated for instance that a CMR with the consignee's details and

signature acknowledging receipt of goods might be completed and allowed for a reasonable period of time for that to be obtained. That would be a document which might reasonably be expected to be filled out for commercial reasons, e.g. a haulier would want to be able to prove the consignee had received the goods in case of any dispute.

108. We also reject the submission that the FTT was seeking conclusive proof of export, thus contravening what was said *Teleos*. It was simply looking for sufficient evidence but for the reasons it explained it was not satisfied that this had been produced.

109. The FTT correctly interpreted and applied VAT Notice 725 whose conditions were proportionate. There was nothing in the FTT's interpretation or application of those conditions which the Appellant has persuaded us breached the principles of EU law and we therefore reject this ground of appeal.

Ground 6 – Failure to find evidence of commercial system

110. The Appellant submits that the FTT failed to consider its argument that, given the common pattern across the transactions, there was no material difference between the consignments for which it maintains a loading card was obtained (describing these as "fully-matched" transactions and the remaining 24 supplies out of the total of 72 (which it described as not "not fully-matched". It is argued that the consistency in the transactional pattern should have led the FTT to conclude that all the consignments were genuine.

111. The Appellant's position is, in essence, that if some transactions were removals, then all must be. However, we find no error of law in the FTT's approach. As Ms Rao submitted, this argument amounts to saying that the FTT was *required*, on the evidence before it, to find that the goods had been removed.

112. First, for the reasons already discussed, that line of argument misstates the issue. The correct question was not whether the goods had been removed, but whether the Appellant had provided sufficient evidence of removal in respect of each specific transaction.

113. Second, even if the issue were framed as one of actual removal, or as we have found, sufficiency of evidence, the existence of a pattern or similarity across transactions would, at best, be a relevant factor. It would not compel a tribunal to conclude either that the goods had been removed or that there was sufficient evidence of removal. In either case, it would remain open to the tribunal to find that there was no removal or insufficient evidence in relation to each individual transaction.

114. Third, it is not clear that there was any evidential basis before the FTT to support the proposition that there were any transactions for which sufficient evidence of removal had been provided or that there were 48 transactions in respect of which the documentation could be described as "fully-matched". The FTT had not made any finding that P&O boarding cards meant there was sufficient evidence of removal in respect of any of the transactions let alone the 48 the Appellant made reference to on the basis of the provision of 48 boarding cards. As already discussed under Ground 4 there were numerous difficulties with the Appellant's case that the boarding cards matched up to the relevant loads. The cycle of transactions and the evidence relied upon, particularly the boarding cards, suffered from the flaws already discussed. None of the documents (alone or in combination) required the FTT to conclude that removal had occurred in any case. An ongoing relationship adds nothing to the analysis; an ongoing relationship with a Belgian VAT-registered company does not, in itself, demonstrate removal, as that company could have been purchasing goods for delivery within the UK.

115. Thus, even if the FTT had accepted that there was an ongoing commercial relationship, that would not have meant that the FTT would be compelled to accept that the evidence provided (with all the concerns regarding the limitations of what that evidence showed) was

sufficient to establish that the evidential requirements were met in respect of any of the 72 consignments. Sufficient information still had to be provided for each transaction, and the existence of 72 sets of inadequate evidence does not cure that deficiency.

116. We therefore reject this ground of appeal.

Ground 1 – unacceptable delay

117. Under this ground the Appellant argues the significant delay impaired the fact-finding function of the tribunal and represented an addition supporting the errors made under the other grounds.

118. The hearing was held from 28 November to 1 December 2022 yet the decision was not released until 1 year and 2 months later on 7 February 2024. Although HMRC point out there was a period or so when directions (further to the Appellant's request) for the parties submissions were made and the submissions awaited (13 February 2023 to 10 April 2023) that still leaves a significant period of delay between the hearing and the issue of the decision dismissing the appellant's appeal.

119. The Upper Tribunal in *HMRC v Marlborough DP Ltd* [2024] UKUT 98 (TCC) explained at [45] that it was:

> "…quite clear from the authorities that delay alone will be insufficient to afford a ground for setting a judgment aside. However, the delay will be an important factor to be taken into account when an appellate court is considering the trial judge's findings and treatment of the evidence."

120. As to whether the delay impaired the findings and treatment of the evidence, we note this is a case where the Appellant's challenge has focussed not on the primary facts found but on the inferences to be drawn from them. As has been explored under Ground 3 and as Ms Rao pointed out, it involved examination of the documents advanced and reaching a view on the sufficiency of that material at a particular time. It was not a case which turned on FTT taking a view on the oral evidence of a witness, resolving conflicting accounts where witness reliability or credibility was in issue.

121. Although the delay in issuing the decision was regrettable, it did not manifest in any error of law in that it did not lead to any impairment in the treatment by the FTT of the evidence and arguments before it. The FTT made findings from the documentary evidence, and it drew inferences taking account of its views on the competing submissions. It dealt carefully and in appropriate detail with the findings it needed to make.

122. We therefore reject this ground. In the particular circumstances of this case there was no error of law arising out of the delay, whether independently or as a reason which supported the other errors (which for the reasons discussed above are not made out).

CONCLUSION

123. The appeal is dismissed.

JUDGE SWAMI RAGHAVAN
JUDGE MARK BALDWIN

Release date: 30 June 2025