ASSESSMENT – protective assessment made pending the outcome of Primback *– Form VAT 641 completed and kept on the file without processing and consequently not shown on the ledger – whether valid assessment – yes – whether affected by subsequent events -- no*

LONDON TRIBUNAL CENTRE

COURTS PLC - Appellant
- and -
THE COMMISSIONERS OF CUSTOMS AND EXCISE - Respondents

Tribunal: DR JOHN F AVERY JONES CBE (Chairman)

MICHAEL SHARP FCA FHCIMA

Sitting in public in London on 11-13 November 2002

Roderick Cordara QC and David Scorey instructed by PricewaterhouseCoopers for the Appellant

Kenneth Parker QC and Peter Mantle instructed by the Solicitor for the Customs and Excise for the Respondents

DECISION

1. This is an appeal by Courts plc against an assessment dated 16 December 1999 originally in the sum of £5,347,275. The Appellant was represented by Mr Roderick Cordara QC and Mr David Scorey, and the Commissioners by Mr Kenneth Parker QC and Mr Peter Mantle.
2. The issue in this appeal is the validity of the assessment as a "protective assessment" made after the Court of Appeal had decided *Primback* in favour of the taxpayer on the basis that the Commissioners wanted to preserve their position with regard to time limits for assessing in the event that they won in the House of Lords, which they did following a reference to the European Court of Justice. The Appellant's case in outline is that the protective assessment is not an assessment at all because it was never processed; alternatively, if it were a valid assessment it was effectively withdrawn by subsequent assessments. There is no previous authority in the courts on protective assessments.
3. We heard evidence from Mr Ron Scott, policy manager leading the Commissioners' team with responsibility for technical aspects of VAT assessments, and Mr Peter Gurd, the officer responsible for the Appellant.
4. Section 73 of the VAT Act 1994 provides:

"(1) Where a person has failed to make any returns required under this Act (or under any provision repealed by this Act) or to keep any documents and afford the facilities necessary to verify such returns or where it appears to the Commissioners that such returns are incomplete or incorrect, they may assess the amount of VAT due from him to the best of their judgment and notify it to him.

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(9) Where an amount has been assessed and notified to any person under subsection (1)…above it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly, unless, or except to the extent that, the assessment has subsequently been withdrawn or reduced."

5. It is necessary to set out at the beginning the normal method of making an assessment. We were shown the Commissioners' internal guidance about making assessments. The process starts with a form VAT 641 which contains the trader's name and registration number and the officer's name. There are then ten lines for assessing different periods (a continuation sheet exists if more than ten periods are assessed) containing details of the period, an attribution code for the type of assessment (such as output, or input, tax error), the amount of the assessment, various other codes (type, method and reason), and two columns enabling a misdeclaration penalty and interest to be inhibited. The guidance for completing form 641 is contained in Table 34 comprising 24 bullet points. The final section of Table 34 deals with processing the VAT 641. The form is sent for batching and keying. The form is then processed by the computer which automatically calculates interest and penalties. A number of checks are carried out which can result in the VAT 641 being rejected. The computer generates the familiar Notice of Assessment on form VAT 655, which is technically notification of the assessment. The trader's file is updated with the information which then appears on the ledger containing details of the financial position between the trader and the Commissioners.
6. The guidance contains a paragraph (1.82) about making a protective assessment saying:

"The making of such an assessment will protect our position in these circumstances [subsequent appeal being decided in favour of the Commissioners]. These assessments should be made and notified in the normal manner with an explanatory letter to the trader. In correspondence with the trader, you should not refer to these assessments as 'holding', 'potential' or ' protective' assessments."

A subsequent paragraph explains that such phrases could render an assessment invalid as traders could construe that the assessment had not been made to the best of the Commissioners' judgment.

Facts found

7. We set out our findings of fact in relation to the various assessments or alleged assessments:
    1. 16 December 1999. Mr Gurd had received advice in the form of an email dated 22 October 1999 through his line manager from Richard Excell of Retail COPE to make an assessment in *Primback* cases. Mr Excell's email had been sent to a number of VAT offices

throughout the country. The advice was to make an assessment, leaving it on the file without processing it and send only a covering letter in a form contained in draft guidance TA [temporary amendment] 2/99. He regarded this as advice rather than instruction but he followed it. It was unusual advice and he would not have acted in this way, or at all, but for the advice. On 16 December 1999 he completed a form VAT 641 for the eight periods 12/97 to 09/99 (the Eight Periods) in the total amount of £5,347,275. The attribute code showed that it was an output tax error, and the type code showed it was an underdeclaration of tax. Misdeclaration penalty was not inhibited, which suggests that Mr Gurd did not consider it as the Appellant then had a Court of Appeal decision in its favour and would be bound to have a reasonable excuse for the underdeclaration. The form was signed and dated by Mr Gurd on 16 December 1999. It was checked by another officer who wrote his name in capitals and dated it the same date. It was stamped with the office date stamp the same date. No counter signatory was obtained, and none was necessary in the circumstances. The form 641 was not sent for processing and all copies remained on the Appellant's file. On the same date, Mr Gurd wrote to the Appellants saying that assessments had been made under section 73 of the VAT Act 1994, giving details of the periods and amounts. The letter went on to say:

"The Commissioners are appealing the Court of Appeal decision in the case of Primback Ltd to the House of Lords and the above assessments will be enforced if the Court of Appeal's decision is not upheld. Default interest will also be charged from the date the amounts were credited to your VAT accounts until the date of repayment."

The letter mentioned the right of appeal and said that if the Appellant appealed the Commissioners would apply to have the case stood over until the House of Lords decision was known. The Appellant appealed on 7 January 2000.

2. 25 May 2000. An assessment was made for the Eight Periods plus two periods before and two after. The figures assessed for the Eight Periods were lower than those assessed on 16 December 1999. The normal assessing procedure was followed with a form VAT 641 being processed to generate a form VAT 655 in the total sum of £1,591,483. The reason for the assessment was that Mr Gurd discovered an error in the Appellant's method of apportioning a credit charge to exempt sales. This resulted in output tax underdeclared for period 6/99 which he exrapolated to other periods. This sum does not depend on the result of *Primback* and is due whatever the final result in that case.
3. 29 June 2000 (amendment of assessment). The Appellant discussed the actual figures for each period rather than the extrapolated figures with Mr Gurd who agreed revised figures for the 25 May 2000 assessment. This resulted in lower figures being assessed for the two periods before and after the Eight Periods and the seventh and eighth of the Eight Periods. This was done by the normal amendment procedure involving Form VAT 643 rather than 641 and resulting in a Form VAT 656 rather than 655 showing the amended figures.

4. 29 June 2000 (new assessment). In relation to the first six of the Eight Periods the revised figures were higher than those assessed on 25 May 2000 which accordingly required the making of a new assessment for the additional amounts. This was done in the normal way with a Form VAT 641 resulting in a Form 655.
5. 6 July 2000 (amendment). Mr Gurd sent a letter headed amendment to notice of assessment showing revised figures for the Eight Periods, being the originally assessed figures less the figures assessed on 25 May 2000 as increased by the 29 June 2000 new assessment in respect of the first six periods, and as reduced by the 29 June 2000 amendment in respect of the last two. The letter is in the same terms as the 16 December 1999 letter. No form VAT 643 was produced to us and nothing was processed. Since this was not processed one would expect to find the form on the file if it existed.
6. 6 July 2000 (new assessment). The same letter notified *Primback* assessments for the two subsequent periods (12/99 and 3/00). No form VAT 641 was produced to us and nothing was processed. Since this was not processed one would expect to find the form on the file if it existed. Mr Gurd thought he would have completed one but could not explain its absence. No appeal against this assessment is before us and we do not need to decide about its validity.
7. 25 March 2001. Mr Gurd sent a further letter stating that the Commissioners had assessed three further periods (6/00, 9/00 and 12/00) and containing the same information about not enforcing the assessments pending the House of Lords decision in *Primback* as had been contained in the 16 December 1999 letter. No form VAT 641 was produced and nothing was processed. Since this was not processed one would expect to find the form on the file if it existed. As before Mr Gurd thought he would have completed one but could not explain its absence. No appeal against this assessment is before us and we do not need to decide about its validity.
8. 15 May 2001. The European Court of Justice decided *Primback* in favour of the Commissioners.
9. 22 November 2001. A recovery assessment was made for periods 12/95 and 3/96 under section 80(4A) for which a form VAT 641 was completed. We do not think that this has any bearing on the case.
10. 27 November 2001. Mr Gurd wrote to the Appellants referring to the assessments of 16 December 1999, 6 July 2000 and 23 March 2001 stating the European Court of Justice had decided *Primback* in the Commissioners' favour and asking for payment of the sum assessed of £5,426,396. The letter also said that they could have the matter reconsidered or could appeal within 30 days. An internal document contained a specimen letter on which this is based, although the paragraph about reconsideration and appeals is not contained in the specimen. It also stated that the Form VAT 641 should now be processed: "This is an accounting mechanism only to update the trader's accounting file."
11. 19 December 2001. On 23 November 2001 Mr Gurd completed a form VAT 641 for the figures for the Eight Periods as in the 6 July 2000 letter, the subsequent two periods as in the same letter, and the further three periods as in the 25 March 2001 letter. The total is £5,426,396. The form is signed by a check officer on 27 November 2001 and countersigned by a third officer on 27

November 2001 because this form, unlike the 16 December 1999 form in respect of the Eight Periods, inhibited the misdeclaration penalty which means that a countersignature is required. It will be seen that Mr Gurd's letter to the Appellant at (10) above was sent on the same date as the additional signatures to the Form VAT 641 were obtained. This form was processed and resulted in a Form VAT 655 appearing to be a new assessment for these periods. By letter of 11 June 2002 the Commissioners' Solicitor's Office stated that the Form 655 had been sent in error and was withdrawn.

12. 14 January 2002. Assessments were made on *Primback* grounds for two further periods (3/01 and 6/01). We do not think that this has any bearing on the case.

Do the 16 December 1999 documents constitute an assessment?

Contentions of the parties

8. We shall start by considering the 16 December 1999 documents in isolation. Mr Cordara QC for the Appellant contends that the 16 December 1999 documents do not constitute an assessment because first, Mr Gurd did not make any decision to assess; he merely followed the guidance in Mr Excell's email of 22 October 1999. Secondly, the form VAT 641 was not processed and did not therefore result in any change on the Appellant's ledger showing a debt due to the Commissioners. He points to section 73(1): "[the Commissioners] may assess the amount of VAT due from him to the best of their judgment and notify it to him" and section 73(9) "Where an amount had been assessed and notified to any person under subsection (1)….above, it shall, subject to the provisions of this Act as to appeals, be deemed to be an amount of VAT due from him and may be recovered accordingly…." By not recording the assessment on the Appellant's ledger the Commissioners did not act in such a way as to show that tax was due. His case is also that what was done does not comply with the guidance, in particular paragraph 1.82 quoted above. He says that this was a speculative assessment conditional on future events and did not give rise to an enforceable debt due to the Commissioners. An assessment implies that the tax must actually be due. He relied on two Australian authorities, *Federal Comr of Taxation v S Hoffnung & Co Ltd* [1928] 42 CLR 39, in which an assessment described as "tentative" was held not to be an assessment; and *Bagatol v Federal Corm of Taxation* [1963] 109 CLR 243, in which an assessment was described as a process producing a legal effect. He also contends that the later events, particularly the assessment of 16 December 2001 show that the Commissioners do not regard the 19 December 1999 document as an assessment as they went through the full procedure for assessment of the same Eight Periods.
9. Mr Parker QC for the Commissioners contends that there is a completed form VAT 641 relating to the Eight Periods which is the evidence of the assessment coupled with notification of it to the Appellant stating that there was an assessment but that it would not be enforced. The effect was to create an immediate debt due to the Commissioners which they made clear that they would only enforce in the won *Primback* in the House of Lords. The words "may be recovered" in section 73(9) showed that the Commissioners had a discretion whether to enforce the assessment, which they use, for example, in agreeing to accept payment of an assessment by instalments. It was a valid assessment notwithstanding that it had not been processed and nothing appeared on the Appellant's ledger in respect

of it. The ledger was not conclusive as to the amount due. It was convenient to keep protective assessments off the ledger to stop enforcement of them by mistake. He said that the Australian authorities did not assist the Appellant: there was nothing tentative about the assessment, and it was intended to make a definite sum due.

Reasons for our decision

10. Surprisingly it is unclear what constitutes an assessment. Lawrence Collins J considered the question in *Cheesman v Customs and Excise Comrs* [2000] STC 1119 and concluded:

"Assessment of VAT is an important step, and it is unsatisfactory that the process is not transparent, and not defined by legislation or even by clear administrative practice. But I do not, on the unusual facts of this case, have to decide on the mechanism by which an assessment becomes complete, as it might be necessary to decide in a case where a time limit falls in the course of completion of the Form 641 process and the generation of the notice of assessment."

It becomes material to decide what is a complete assessment in this case. It is common ground that there is a distinction between the decision of the Commissioners to make an assessment, the making of the assessment and the notification of the assessment. The taxpayer sees only the notification. As Lawrence Collins J said in *Cheesman* at paragraph 21 "The conclusion that there is a distinction between assessment and notification does not answer the question of what an assessment is and when it is made." He considered direct tax cases on assessment and concluded in paragraph 26 that they recognise that the practice of the tax authority as to when the process is complete is relevant. So far as notification of an assessment is concerned the minimum requirements are that it should state in unambiguous and reasonably clear terms (a) the name of the taxpayer, (b) the amount of tax due, (c) the reason for the assessment, and (d) the period of time to which it relates, see *House v Customs and Excise Comrs* [1994] STC 211 at 223h-j and 226j-277a, *per* May J.

11. Protective assessments, which are not a different type of assessment but a normal assessment made in particular circumstances, are required to keep time limits open where decisions in other cases are under appeal where eventually the court will declare what has always been the law. This is particularly necessary now that there is a three-year time limit for assessing. The Tribunal has also held in *DFS Furniture Company plc v Customs and Excise Comrs* (2002) VAT Decision No.17,818 that the European Court of Justice decision in *Primback* was not "evidence of facts" enabling time limits to be extended. The only way in which the Commissioners can keep time limits open is accordingly to made a protective assessment.
12. We do not think that there was any substantial disagreement about the legal principles; the disagreement is on the application of them to the facts of this case. On Mr Cordara QC’s first point, that there was no decision to assess, Mr Gurd followed the guidance in the email and completed and signed the form VAT 641. Without the advice he would never have taken any action, and, even if he had, it would not have been to act in the way he did without having the Form VAT 641 processed. We see no reason for saying that this did not constitute a decision by the

Commissioners, although split between two persons, to make an assessment.

13. On Mr Cordara QC's second point it is common ground that an assessment must create a debt to the Commissioners, but that the debt need not be immediately enforceable. Indeed, formerly income tax assessments needed to be made before the due date in order to obtain payment on the due date. Even the requirement that the debt should be definite must be subject to qualification if assessments are made on alternate bases, which have been accepted as valid in many direct tax cases, such as *IRC v Wilkinson* [1992] STC 454 at 547e *per* Scott LJ: "It is established, therefore, that there is nothing objectionable in principle about alternative assessments." Although less common they have been accepted in relation to VAT by the Tribunal in *University Court of the University of Glasgow v Customs and Excise Comrs.* (2001) VAT Decision No.17,444. In the case of alternative assessments, the tax authority intends that at least one of them creates an immediate debt but it does not know which.
14. Essentially Mr Cordara QC says that the 16 December 1999 documents did not create a debt because they depended on the outcome of the *Primback* litigation, while Mr Parker QC says that there is a debt but that it was not then enforceable. The existence of the assessment on the Appellant's ledger would obviously be good evidence of the assessment creating a debt but it was not there because the form VAT 641 was not processed, which Mr Cordara QC points out is part of the guidance contained in Table 34 for the making of an assessment. Mr Parker QC points out that Table 34 starts with a statement that "Tax assessments are processed by the input of the Form VAT 641…" implying that an assessment could be made by the officer recording his decision to assess with all the necessary information on a piece of paper; processing was a step coming after making the assessment. The Form 641 is therefore only evidence of the assessment not the assessment itself, which could be made without the form being completed.
15. The question for the Tribunal is: does the absence of processing of the Form VAT 641, with the consequence that the assessment does not appear on the ledger, mean that there is no debt due to the Commissioners? Processing would normally have resulted in a form 655 which was not required because of the notification by letter and the form would therefore have needed to be intercepted. It may have been possible to put the figure assessed on the ledger and then inhibit the enforcement, just as happens when an assessment was under appeal, but the Commissioners decided not do this. The ledger is the best evidence that the Commissioners think that there is a debt. In all normal cases the result of making an assessment is that it is recorded in the ledger. The absence of any figure in the ledger does suggest, as Mr Cordara QC contends, that there is no debt. The issue for us is whether the absence of the figure in the ledger is conclusive that there is no debt. Mr Scott was asked, as a person within policy, what was the correct inference to draw from the administrative procedure, and he replied that it was the intention to create an immediate liability but to take no steps to enforce it. But we do not think that the intention of the Commissioners should be conclusive. In favour of there being a debt is that the Commissioners have done everything, except processing the Form VAT 641, normally required for making an assessment and they have notified the Appellant that they had made an assessment. The notification is the only document seen by the Appellant and this made it clear that there was an assessment but that the Commissioners would not enforce it. The Appellant can be in no doubt that this is what the Commissioners intended. The absence of a figure in the Appellant's ledger does not mean that there is no debt; rather it is bad

accounting in not showing the debt in the place one would expect to find it. We do not think that it is conclusive that there is no debt. An entry in a ledger does not create a debt; it merely records the existence of a debt. Accordingly we find that the documents did result in there being a debt due to the Commissioners.

16. Does it matter that the normal rules for making an assessment were not complied with? Mr Cordara QC said that this was a case where the Tribunal has learned more than any other Tribunal about the inside requirements of the whole process, and we have certainly seen a lot of the Commissioners' internal guidance. The normal rules contained in Table 34 requiring the processing of the Form VAT 641 were not complied with. Instead, Mr Excell sent an email stating that *Primback* protective assessments were to be held on the file and not processed. Mr Gurd complied with this guidance. Mr Cordara QC argues that this is contrary to the official guidance contained in Table 34, and there is no evidence that Mr Excell was authorised to change the guidance. The draft revised guidance in TA 2/99, attached to Mr Excell's email, which would have authorised not immediately processing the form 641 and was never issued, and therefore Mr Cordara QC contends that the email was based on the false premise that the guidance would be altered. We consider that his contentions pay too much regard to the official guidance in Table 34. We accept that, as in the income tax cases, the tax authority's practice is relevant to the question when an assessment is made. We have no evidence about Mr Excell's ability, so far as the Commissioners are concerned, to vary Table 34 but the fact is that his email gave guidance to do that. Mr Parker QC invited us to assume that those giving advice to Mr Gurd had authority to do so, while Mr Cordara QC said that this was not an occasion to do so since the advice was on the basis that TA 2/99 would become effective. In our view we should accept that Mr Excell had authority to act as he did. We do not therefore think it relevant that TA 2/99 was never issued. Mr Excell gave specific guidance to act in a certain way in making *Primback* protective assessments. Mr Gurd acted on this guidance from within the department and he has done what the department regarded as necessary for the making of an assessment. In one case the Tribunal has relied on official guidance in deciding where there was a valid assessment. In *The Royal Bank of Scotland Group plc v Customs and Excise Comrs* (1999) VAT Decision No.16,418 the Tribunal decided that where a countersignature to the form VAT 641 is required there is no assessment until that is obtained. Mr Parker QC pointed out that in that case the assessment had not been notified either and he did not accept that where a countersignature was required it was essential to a valid assessment. Mr Cordara QC replied that the lack of notification did not affect the question whether there had been an assessment. It is not necessary for us to decide whether a countersignature, when required, is essential to the validity of an assessment. Here Mr Gurd did comply with the specific guidance that he was given and we are prepared to approach the case on the basis that the guidance he was given was authorised by the Commissioners. Taxpayers have no access to such information and the validity of assessments should not depend on matters internal to the department.

17. Accordingly we find that the documents, consisting of a fully completed Form VAT 641 in the Appellant's file and a letter notifying the Appellant that the Commissioners had made assessments under section 73 but that the assessments would not be enforced, do create a debt due to the Commissioners. Subject to our consideration of the subsequent events we consider that this constitutes a valid assessment on the basis that Mr Gurd complied with the instructions he was given, whether or not those instructions were the normal method of making an assessment. The

Appellant was therefore fully informed about what the Commissioners have done. They know nothing about the Commissioners' internal procedures.

Do subsequent events throw any light on whether the 16 December 1999 documents constituted a valid assessment?

Contentions of the parties

18. Mr Cordara QC also contends that if there was a valid assessment on 16 December 1999 it has been withdrawn by subsequent events, or those events demonstrate that it was not a valid assessment.
19. Mr Cordara QC contends that the 25 May 2000 assessment (as reduced on 29 June 2000 and the additional sums assessed on 29 June 2000) is a cumulative assessment for the Eight Periods which had already been assessed with the consequence that it replaced the 16 December 2001 assessment. He says that if the 16 December 1999 documents are an assessment all that needed to be done was to process part of the tax on the 16 December 1999 Form VAT 641, not make another assessment for the same periods. The 6 July 2000 letter was not an assessment (for the same reasons as the 16 December 1999 document). The 6 July 2001 and 23 March 2001 documents were not assessments because of the absence of Forms VAT 641 or 643. The 19 December 2001 document was a valid assessment because the Form VAT 641 was processed but by then it was out of time for most of the Eight Periods.
20. Mr Parker QC contends that 25 May 2000 assessment as reduced on 29 June 2000 and the new assessment for additional amounts of 29 June 2000 are valid assessments made on an alternative basis, namely that they apply regardless of the outcome of *Primback*. In relation to the Eight Periods the subsequent document of 6 July 2000 is merely an arithmetic adjustment to the 16 December 1999 assessment resulting from the other assessments, which figures are merely repeated in the 19 December 2001 document which was made in order to process the revised figures.

Reasons for our decision

21. The 25 May 2000 assessment was not intended to supersede the 16 December 1999 one. The reason for it was quite different; it was to correct the figures regardless of the outcome of the *Primback* case. We think it was correct for the Commissioners to make a new assessment. The whole of the 16 December 1999 assessment would have fallen if *Primback* had been decided in the taxpayer's favour. The 25 May 2000 assessment needed to stand in this event. It was therefore an alternative assessment, the effect of which was to reduce the amount that had been assessed on 16 December 1999. The 6 July 2000 letter merely notifies a reduction in figures caused by the other assessments. While one would expect there to be a form VAT 643 we do not consider that the lack of an internal document recording the reduction affects its validity. The amount of the reduction was arithmetic and was notified to the Appellants. We do not consider that this has any bearing on the validity of the 16 December 1999 assessment.
22. In relation to the repeat of the figures for the Eight Periods in the 19 December 2001 document Mr Cordara QC contends that this is a new assessment made out of time. He says it would be extraordinary for an officer to go through all the steps for making an assessment without intending to do so. Mr Parker QC contends that the VAT 641 was made in

order to create a document for processing by the computer in order to save processing all of the 16 December 1999 assessment as reduced by the 25 May 2000 assessment (as amended on 29 June 2000 for the additional sums assessed for six periods and as reduced for two of the periods). The resulting Form 655 should have been intercepted and was sent out in error.

23. Mr Gurd wrote on 27 November 2001, the same date as he finalised the Form VAT 641, asking for payment of the sums previously assessed. The letter begins:

    "I refer to the Notice of Assessment sent to you on 16 December 1999 and the amended Notice of assessment sent to you on 6 July 2000 in the amount of £4,268,214; the Notice of Assessment sent to you on 6 July 2000 in the amount of £449,045 and the Notice of Assessment sent to you on 23 March 2001 in the amount of £709,137."

    The letter explains that *Primback* had been decided in the Commissioners' favour and continued: "We now request immediate payment of the VAT amounts previously assessed…." The letter also states that the total amount assessed of £5,426,396 has been posted to the Appellant's VAT account. The last paragraph, that the Appellant could request reconsideration of the amount or appeal within 30 days, was not in the specimen letter and seems to have been included from a different specimen letter. It makes no sense in the context of the rest of the letter. Mr Gurd cannot therefore have intended, and an observer of all the documents cannot have concluded that he intended, on 27 November 2001, both to ask for payment of sums previously assessed and to make a new assessment for the same total sum by completing and processing the Form VAT 641. He intended, and it is objectively clear that what he was doing was, to prepare a document for inputting on the computer that would result in the debt being shown on the ledger. No doubt it is much simpler to have one document processed than the previous four documents. The computer automatically generated a form 655 of 19 December 2001 which Mr Gurd accepts he should have intercepted, and which was later withdrawn. But the Appellant, having been asked to pay the earlier listed assessments by Mr Gurd's letter of 27 November 2001, must have realised that the form VAT 655 sent to them on 16 December 2001 for the same total figure was an error and was not a new assessment. Accordingly we decide that, although Mr Gurd went through all the procedures for making and processing an assessment culminating in the Form VAT 655 of 19 December 2001, in the light of all the circumstances he did not make another assessment on that date. His actions do not suggest that the 16 December 1999 document was not an assessment.

24. Accordingly we find (1) that there was a valid assessment made on 16 December 1999 and (2) nothing that happened subsequently affected its validity except that the figures were reduced as set out in the 6 July 2000 letter by reason of the subsequent assessment made on an alternative basis. We understand that the application of *Primback* to this case is still in dispute and accordingly our decision is restricted to the validity of the assessment in principle. In case it is necessary we give both parties liberty to apply.
25. The Commissioners are in principle entitled to their costs but Mr Parker had no instructions whether this case was an exception to the normal rule that the Commissioners do not ask for costs. If the Commissioners wish to

ask for costs it is directed that they should make a request for an award of costs to the Tribunal Centre within 21 days of the date of release of this Decision. If the Appellant wishes to make any representations on costs this should be done within the same period.

J F AVERY JONES

CHAIRMAN

LON/00/048