Neutral Citation Number: [2023] EWCA Civ 332

Case No: CA-2019-001534

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER
Mrs Justice Falk and Judge Timothy Herrington
[2019] UKUT 296 (TCC)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2023

Before :

LADY JUSTICE ASPLIN
LORD JUSTICE ARNOLD
and
LADY JUSTICE ELISABETH LAING

- -

Between :

DAWSON'S (WALES) LTD	**Appellant**
- and -	
THE COMMISSIONERS FOR HIS MAJESTY'S REVENUE & CUSTOMS	**Respondents**

- -
- -

Michael Firth (instructed by **Morrisons Solicitors LLP**) for the **Appellant**
Kieron Beal KC and Natasha Barnes (instructed by **HMRC Solicitor's Office and Legal Services**) for the **Respondents**

Hearing date: 8 March 2023

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Approved Judgment

This judgment was handed down remotely at 11.00am on 28 March 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Asplin:

1. This appeal is concerned with the concept of "holding" for the purposes of Article 7(2)(b) of the EU Directive 2008/118 (the "Excise Directive") and regulation 6 of the Excise Goods (Holding Movement and Duty Point) Regulations 2010 SI 2010/593 (the "HMDP Regulations") and whether questions in relation to "holding" were appropriate to be dealt with as a preliminary issue.

2. The Appellant, Dawson's (Wales) Limited ("DWL") contends that whilst the Upper Tribunal (the "UT") was correct to decide that a person who is able to exercise legal or de facto control of excise goods is a "holder" of those goods, it erred in deciding that it was an additional requirement that the person "intends to assert that control against others". DWL also contends that the UT erred in over-refining the test for control by laying down factors necessary to establish that control and erred in purporting to identify an error of law in the First Tier Tribunal (Tax Chamber)'s (the "FTT's") decision to decide the meaning of "holding" as a preliminary issue.

3. It is now common ground that the Respondents, the Commissioners for His Majesty's Revenue and Customs ("HMRC"), are required, as a matter of law, to assess the first "holder" of the excise goods, within the meaning the Excise Directive and the HMDP Regulations, whose identity it can establish. DWL's case is that on a correct understanding of the law, it was not the first holder of the relevant goods known to HMRC and, therefore, should not have been the subject of an excise duty assessment.

The Excise Directive and the HMDP Regulations

4. Article 7(1) of the Excise Directive provides that excise duty becomes chargeable at the time of release for consumption. Article 7(2) states that "release for consumption" shall mean any of the circumstances described in (a) – (d) of that sub-article. We are concerned with Article 7(2)(b) which provides as follows:

> "(b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;"

5. It is not in dispute that the goods with which this appeal is concerned were held outside a duty suspension arrangement and that excise duty had not been levied. The person liable to pay the excise duty in relation to the holding of excise goods as referred to in Article 7(2)(b) is "the person holding the excise goods and any other person involved in the holding of the excise goods": Article 8(1)(b).

6. Although Article 33 is not directly relevant in this case, it is the basis of a number of authorities which have been relied upon. It is also accepted that "holding" in Article 7 must be given the same meaning as in Article 33. It is convenient to set it out here, therefore.

7. Article 33 makes provision for the charging of excise duty in a second Member State when dutiable goods have already been released for consumption in another Member State. So far as relevant, it provides:

> "1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State.
>
> For the purposes of this Article, 'holding for commercial purposes' shall mean the holding of excise goods by a person other than a private individual or by a private individual for reasons other than his own use and transported by him, in accordance with Article 32.
>
> . . .
>
> 3. The person liable to pay the excise duty which has become chargeable shall be, depending on the cases referred to in paragraph 1, the person making the delivery or holding the goods intended for delivery, or to whom the goods are delivered in the other Member State."

8. The HMDP Regulations give effect to the Excise Directive. There is no dispute that they must be construed in conformity with the Excise Directive.

9. Regulation 5 provides that :

> "Subject to regulation 7(2), there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom."

Regulation 6 defines "release for consumption". We are concerned with regulation 6(1)(b) which transposes Article 7(2)(b) in the following way:

> "(1) Excise goods are released for consumption in the United Kingdom at the time when the goods-
>
> . . .
>
> (b) are held outside a duty suspension arrangement and UK excise duty on those goods has not been paid, relieved, remitted or deferred under a duty deferment arrangement;
>
> . . ."

Regulation 7(1) prescribes the time at which excise goods leave a duty suspension arrangement.

10. The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(b) (holding of excise goods outside a duty suspension arrangement) "is the person holding the excise goods at that time": regulation 10(1). Sub-regulation 10(2) provides that "[a]ny other person involved in the holding of the excise goods is jointly and severally liable to pay the duty with the person specified in paragraph (1)."

11. The provisions of Article 33 of the Excise Directive are transposed by regulation 13. Where relevant, regulation 13 provides as follows:

> "13.—(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.
>
> (2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the
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> person—
>
> (a) making the delivery of the goods;
>
> (b) holding the goods intended for delivery; or
>
> (c) to whom the goods are delivered.
>
> (3) For the purposes of paragraph (1) excise goods are held for a commercial purpose if they
>
> are held—
>
> (a) by a person other than a private individual; or
>
> . . ."

Background

12. In summary, the background to this matter is as follows. In 2011-2012, HMRC investigated purchases of wine by Tesco and Morrisons. The supermarkets had purchased the wine from two suppliers who, in turn, had purchased them from DWL. DWL, which is a wholesaler of alcoholic drinks, had held the wine in its warehouse. HMRC traced the supply chain prior to DWL and, in respect of the supplies with which this appeal is concerned, concluded that there was insufficient evidence that excise duty had been paid. The supplies were traced back to missing, de-registered or hijacked companies. HMRC was unable to establish that any of the companies in the supply chain prior to DWL had taken physical possession of the goods and it is assumed that DWL's suppliers did not receive the goods but were responsible for arranging for them to be shipped to DWL.

13. HMRC exercised its powers of assessment under section 12(1A) Finance Act 1994 and raised a notice of assessment against DWL in the sum of £3,729,381 which was issued on 17 October 2013 for the period from 21 February 2011 to 15 May 2012.

14. The assessment was made on the basis that the goods were physically held outside a duty suspension arrangement and UK excise duty on those goods had not been paid with the consequence that a duty point had arisen under regulation 6(1)(b) of the HMDP Regulations. HMRC considered that DWL was the first known person to hold the goods in the sense of having been in physical possession of them and was liable to pay the excise duty under Regulation 10(1).

The FTT

15. DWL appealed the assessment to the FTT. It applied for three preliminary issues to be determined on the appeal on the basis of assumed facts. After initial opposition, HMRC consented to that approach but noted that it did not consider that the preliminary issues would resolve the appeal one way or the other. The FTT recorded the basis upon which the tribunal had agreed to hear the preliminary issues at [3] of its decision dated 8 February 2018, [2018] UKFTT 66 (TC), however, as follows:

> ". . . if the Tribunal were to determine the preliminary issues in favour of the appellant, the appeal would be successful without the need to determine the disputed issues of fact and other disputed matters of law and there would be real costs savings."

16. Having noted at [4] that the assumed facts were the facts which one or other of the parties would seek to prove if the matter went to a full hearing, the FTT summarised them at [5] – [8] of its decision as follows:

> "5. The appellant purchased certain alcoholic drinks from about 10 suppliers. It is assumed for the purposes of the preliminary hearing that the appellant's immediate suppliers at no point took physical possession of the goods the excise duty assessment on which was at issue in this appeal. It is, however, also assumed that the appellant's immediate supplier arranged for the goods to be shipped and delivered to the appellant's premises. More particularly, it is assumed that the appellant's immediate suppliers had the power to instruct the persons (albeit unidentified) who had physical possession of the goods to deliver them to the appellant, and that that power was exercised in favour of the appellant in respect of the goods at issue in this appeal.
>
> 6. It is assumed, as can be inferred from the above, that the goods the subject of the assessment were physically held by the Appellant. It is also assumed, and follows logically, that prior to the goods being physical [sic] held by the appellant, the goods were physically held in the UK by someone else. It is assumed that that person cannot be identified.

> 7. It is also assumed that the chain of supply which culminated in the supplies to the appellant of the goods at issue in this appeal commenced with a missing, de-registered or hijacked company. It is assumed that none [sic] the traders in this chain of supply subsequent to that missing company, but prior to the appellant, can be shown ever to have had physical possession of the goods.
>
> 8. The appellant was given by its suppliers W5 documents (certifying payment of excise duty and VAT) in respect of some of the supplies in issue: it is assumed, for the purpose of this preliminary hearing only, that those documents were forgeries and that no excise duty was paid on the goods the subject of the assessment."

17. The FTT was concerned with three preliminary issues. In summary: the first was whether regulation 6(1)(b) of the HMDP Regulations and article 7(2)(b) of the Excise Directive were incompatible with the principles of proportionality and legal certainty; the second was whether the FTT had jurisdiction to consider a challenge to a decision to assess under regulation 6(1)(b) of the HMDP Regulations; and the third, with which this appeal is concerned, was framed in the following way:

> "(3) Whether a person who has de facto and/or legal control of the goods but who does not have physical possession of the goods "holds" the goods for the purposes of r.6(1)(b)/ Art 7(2)(b) consistent with the definition of "held" under r.13."

It became known as the "Holding Issue".

18. The FTT determined the proportionality and the jurisdiction issues in favour of HMRC. Accordingly, its decision in relation to the "Holding Issue", which was in DWL's favour, was obiter dicta (for the reasons given by the FTT in [146]).

19. In relation to the Holding Issue, the FTT noted that the assumed facts were such that neither party could identify a person who was in physical possession of the goods prior to DWL, but that the person who owned the goods and supplied them to DWL could be identified. It observed that if that person was the "holder" of the goods then a duty point earlier than the one occasioned by DWL buying the goods and taking possession of them could be identified. The FTT, therefore, identified the "crucial question" as whether a person who owned the goods, and who had the power to direct them to be delivered to its customer but who did not have physical possession of the goods, was "holding" the goods within the meaning of the legislation: [145].

20. The FTT considered that the correct answer to preliminary question (3), the Holding Issue was that:

> "167. . . .
>
> (3) A person who has *de facto* and/or legal control of the goods but who does not have physical possession of the goods and who knows that the goods are duty unpaid 'holds' the

> goods for the purposes of Reg[ulation] 6(1)(b) / Ar[ticle] (7)(2)(b), consistent[ly] with the definition of 'held' under Regulation 33 [of the 2008 Regulations]."

21. The FTT granted DWL permission to appeal its decision in relation to the proportionality and jurisdiction points and in a Respondents' Notice, HMRC stated that it did not accept the FTT's obiter findings in relation to the test for "holding" excise goods.

22. DWL's appeal to the FTT had been stayed pending the decision of the UT in *B&M Retail Limited v HMRC* [2016] STC 2456. In that case, the UT decided that a person holding excise duty goods in respect of which duty had not been paid could be assessed under regulation 6(1)(b) notwithstanding that, in principle, an earlier release for consumption had occurred. The UT went on to note at [150] of its decision that if there can be more than one release for consumption in respect of the same goods, then which of the various persons who may have had some involvement with the goods should be assessed for duty, would depend upon an exercise of discretion by HMRC; and it was HMRC's policy to assess against the earliest point in time at which they were able to establish on the evidence before them, that excise duty goods were held at a static location outside a duty suspension arrangement, in circumstances where the duty had not been paid and where they do not have sufficient evidence to assess any other person who is liable for duty as a result of an earlier excise duty point which may have occurred.

23. After the FTT had heard the preliminary issues in this case, the UT decided the case of *Davison & Robinson Limited v HMRC* [2019] STC 694. In that case, the UT held, amongst other things, that as Mr Beal on behalf of HMRC had accepted in argument, as a matter of law, HMRC was obliged to assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise goods have been held outside a duty suspension arrangement. It was not a matter of discretion. See *Davison & Robinson* at [79] and [80]. By the time the UT heard the appeal in this matter, therefore, the only issue which fell to be considered substantively was the Holding Issue.

The UT

24. The UT's decision was released on 4 October 2019, [2019] UKUT 296 (TCC). In addition to the appeal from the FTT, the UT also heard DWL's judicial review proceedings which the High Court had directed should be transferred to it to be heard at the same time as the substantive appeal. Those proceedings were dismissed on the basis that in the light of the decision in the *Davison & Robinson* case, DWL was able to pursue its challenge to the assessment through the statutory appeal route and, therefore, there was an effective alternative remedy [61].

25. In relation to the Holding Issue itself, the UT began by emphasising that the term "holding" as used in the Excise Directive must be given an autonomous EU law meaning and by noting that it is a well-established principle that when interpreting a provision of EU law it is necessary to consider not only the wording of the provision but its context and its aims [93] and [94]. The UT noted therefore, that: " . . interpreting the term by reference to common law concepts such as bailment and

constructive possession or purely by reference to its ordinary and natural meaning in the English language is of limited assistance".

26. Having reviewed both CJEU and domestic authorities and having noted that the Court of Appeal had referred various matters in *HMRC v Perfect* [2019] STC 705 to the CJEU, the UT stated that pending the CJEU delivering judgment, it would proceed on the basis of the authorities which it had reviewed and set out four principles at [131]. The first principle is the one with which we are concerned. It is that a person who is able to exercise legal or *de facto* control of excise goods in respect of which duty remains unpaid, "and intends to assert that control against others" is to be regarded as "holding" those goods for the purposes of the Excise Directive: [131(1)].

27. The UT went on to reject DWL's submissions on the basis that its case failed to take proper account of the aims of the Excise Directive and the manner in which those aims are pursued by strict controls over the movement of excise goods. It was held that:

    i) those controls focus on where the goods are physically located at any particular time prior to their release for consumption and as a result, in the absence of any evidence that established an earlier excise duty point, the person holding the goods at a time that it is established that they are being held at a specific location but are no longer subject to a duty suspension arrangement must be chargeable to the unpaid duty [139];

    ii) it follows from the fact that the focus of the scheme established by the Excise Directive is on the goods themselves, that the starting point in determining who is "holding" the goods at the relevant time is the person with physical possession of them and then to consider whether the circumstances of that possession are such that it is inappropriate for that person to be considered to be "holding" the goods: [142] and [143];

    iii) the case law demonstrates that once goods leave a duty suspension arrangement duty must be paid and the focus is on the goods at any particular time and the question of who is responsible for the payment of duty is a subsequent step [141];

    iv) the reasoning in *R v Bajwa* [2012] 1 WLR 601, *R v Taylor & Wood* [2013] EWCA Crim 1151 and *R v Philip Tatham* [2014] EWCA Crim 226 is based on a domestic law analysis which recognises that under English law a person can be in possession of goods without physically holding them. The term "holding" must, however, be given an independent EU law meaning and in that context the focus of the Excise Directive and the EU authorities was on the question of physical possession [145];

    v) therefore:

> "146. … the question of whether a person who has de facto or legal control over excise goods in respect of which duty has not been paid and which are established to be in the physical possession of another person is, in the circumstances of a particular case, "holding" those goods, and conversely whether

> it is appropriate for a person who has physical possession of those goods to be assessed as the holder of the goods, must be established in all the circumstances by reference to the available evidence."

and

vi) it was accepted that HMRC's policy to the effect that the concept of "holding" primarily means the physical possession of the goods was consistent with the Excise Directive and therefore:

> "147. . . in order for a person other than the person found to be in physical possession of the goods to be assessed a factual enquiry will need to be undertaken as to who was in physical possession of the goods in question at the time that it is alleged that another person had de facto or legal control over the goods. It will then be necessary to determine whether in all the circumstances it is appropriate to assess that other person for the unpaid duty, rather than the person in physical possession of the goods."

28. As I have already mentioned, as a result of the UT decision in the *Davison & Robinson* case, the question of who should be assessed is no longer considered to be a matter of discretion for the HMRC. The reference to whether it is "appropriate" to assess another person is now, therefore, inapposite.

29. The UT summarised what it considered to be the position at [149] as follows:

> "149. In summary, in circumstances where HMRC seek to assess the person found to be holding excise duty goods in respect of which duty has not been paid pursuant to Regulation 10(1) of the Regulations and that person challenges the assessment on the basis that an earlier excise duty point can be established against which the assessment should be made, for that challenge to be successful it will be necessary to establish:
>
> (1) Who had physical possession at the time that the alleged earlier excise duty point occurred. For example, the earlier excise duty point might be established immediately before the goods concerned were delivered to the premises of the subsequent holder, by reference to the physical possession of the courier delivering those goods.
>
> (2) Who is the person alleged to have de facto or legal control over the goods who it is said should be assessed rather than the subsequent holder (if it is the case that the courier was an innocent agent and it is not appropriate to assess the courier), and how that person is said to have such control and the basis on which it was being exercised. For example, the terms of supply to the person alleged to have *de facto* or legal control might mean that in fact that person never had control of the

> goods and did not direct their delivery. Control might have been exercised by another entity earlier in the chain of supply in compliance with a request by the person in question to deliver them to the subsequent holder. Alternatively, for example, the terms of supply to the subsequent holder, including where relevant the operation of the Sale of Goods Act or the Convention (see [124] above) might mean that the goods were already under the control of the subsequent holder while in transit to him.
>
> (3) The time at which the excise duty point arose. Whilst precise temporal exactitude is not essential (see, for example, *HMRC v Jacobson* [2018] UKUT 20 18 (TCC) at [46]), in our view the date of an invoice is not sufficient in itself without establishing who was in possession of the goods at some identified point or points in time. In that context, and as already indicated, the terms of the relevant sale may be relevant, in particular as to when delivery is deemed to have occurred. Copies of CMRs, if they can be obtained, may be relevant.
>
> (4) Where the goods were being held at the relevant time. In the case of goods being transported, that could be by reference to the means of transport or the location of that means of transport at some point in time, possibly immediately prior to the delivery of the goods at a particular location. We do not consider that the goods need necessarily to be shown to have been static at a particular place at a single fixed point in time (again, see *Jacobson*). For example, in the case of means of transport the transport used, the start and/or end points of the journey and a defined period of time within which it must have occurred might be identified."

30. The UT concluded that it followed from its analysis that it could not determine the Holding Point in favour of DWL on the basis of the assumed facts because they contained no detail as to the matters set out at [149]. In particular, the UT noted that there was nothing in the assumed facts which identifies the person who physically held the goods before they were delivered to DWL and the FTT had assumed that that person could not be identified [150]. As the appeal was against the FTT determination of the preliminary issues which was made on the basis of the assumed facts, the UT stated that it must determine the Holding Point in favour of HMRC.

31. The UT held, accordingly, that the FTT had erred in law in agreeing to decide the Holding Point as a preliminary issue because it could not be properly determined without extensive fact-finding and was, therefore, a mixed question of fact and law [155]. The matter was remitted to the FTT in order that the Holding Point and any other outstanding issues could be determined at a substantive hearing in the light of the UT's decision and the full facts [156].

The Perfect case

32. The UT granted DWL permission to appeal on 12 November 2019. On 7 February 2020, however, Patten LJ ordered that this appeal be stayed pending the decision of the CJEU in relation to the Court of Appeal's reference of *HMRC v Perfect* [2019] EWCA Civ 465. The CJEU handed down judgment in Case C-279/19 *HMRC v WR* [2021] EU:C:2021:473 on 10 June 2021. This court also gave a ruling in *HMRC v Perfect No 2* [2022] EWCA Civ 330, [2022] 1 WLR 3180 (CA).

33. On 26 July 2021, Newey LJ ordered that the parties serve amended skeleton arguments addressing the impact of that decision and that this appeal be heard consecutively with the appeal in the *Davison & Robinson* case. That appeal has now been withdrawn.

34. I will consider the impact of the CJEU decision in *HMRC v WR* (the CJEU *Perfect* case) below.

Grounds of appeal

35. As I have already mentioned, DWL now contends that: whilst the UT was correct to decide that a person who is able to exercise legal or de facto control over excise goods is a holder, it erred in deciding that it was an additional requirement that the person "intends to assert that control against others" at [131(1)]; the UT erred in over-refining the legal test of control by laying down factors necessary to establish that control at [149]; and erred in purporting to identify an error of law in the FTT's decision to decide the meaning of "holding" as a preliminary issue at [155].

(1) Intention to assert control against others

36. Mr Firth, on behalf of DWL, accepts that the only reference by the UT to the need to intend to assert legal or de facto control over excise goods is in [131(1)] and that there is no focus on that alleged requirement in the remainder of the UT decision.

37. In fact, the UT gave no further consideration to the question of whether the additional criterion of intention was necessary. All other references in its decision omit the additional feature. Furthermore, its decision did not turn on whether DWL's suppliers intended to assert control against others. On the contrary, the decision turned upon the UT's conclusion that both the EU and the domestic case law revealed the need to start with the person in physical possession of the excise goods and to move from there to whether it would be appropriate on the facts to hold another person liable for the unpaid duty. See for example, [142] – [147]. As I have already mentioned, it is now accepted that it is not a question of appropriateness.

38. Mr Firth says, however, that the inclusion of the additional element of an intention to assert control is wrong and he is concerned that when this matter is heard by the FTT, emphasis may be placed on that aspect of the UT's decision.

39. Mr Beal KC, on behalf of HMRC, submits that when referring to the need to intend to assert control over the goods against others, the UT was merely reciting the guiding principles which it had distilled from the domestic case law which it had cited and did not purport to set out an exhaustive test. In oral submissions Mr Beal also stated that subjective intent would not be a point which HMRC would seek to take before the FTT.

40. This came late in the day and I have to say that I understand Mr Firth's concern. Although one may analyse the entirety of the UT decision as being obiter dicta, in the light of the fact that it was held that the question of holding could not be determined without the full facts, the UT did state at [156] that the FTT should determine the Holding Point at a substantive hearing in the light of both the full facts and "the findings in this decision". It seems to me, therefore, that it is appropriate to address this ground of appeal in order to avoid further confusion.

41. Mr Firth referred us to *HMRC v WR* (supra) (the *Perfect* case) and to the Opinion of Advocate General Tanchev (Case C-279/19 *HMRC v WR* [2021] Opinion). That was a case in which a delivery driver had been assessed to excise duty in relation to goods in his possession. One of the questions for the CJEU was whether a person who is in physical possession of excise goods at the point when the goods become chargeable to excise duty in a second Member State is liable for that excise duty pursuant to Article 33(3) of the Excise Directive, where he knew that the goods in his possession were excise goods but did not know and did not have reason to suspect that they had become chargeable at or prior to the time at which they became chargeable.

42. In his preliminary remarks, the Advocate General noted that according to CJEU settled case law it is necessary to consider not only the wording of a provision of EU law but also the context in which it occurs and the object pursued by the rules of which it is part. He also stated that: "[S]imilarly, the meaning and scope of terms for which EU law provides no definition must be determined by reference to their usual meaning in everyday language, while account is also taken of the context in which they occur and the purposes of the rules in question".

43. He went on to state amongst other things that the main purpose of the Excise Directive was to lay down rules on the holding, movement and monitoring of goods subject to excise duty in order to ensure that duty is charged in the same way in all the Members States [24]; with the purpose of the Excise Directive in mind, the legislation identifies a series of persons who are liable for payment of duty [27]; under Article 33(3) the persons liable to pay duty are the person making delivery of goods, the person holding the goods in the sense of physical possession of them, or the person to whom the goods are delivered in the second member State [28]; that the purpose would be compromised if the tax authorities were required to demonstrate that the person liable for the excise duty also knew that duty on the goods was payable; such a requirement would render the collection of tax more difficult [35]; to import a knowledge requirement into the concept of "holding" or "making the delivery" in Article 8(1)(b) and Article 33(3) would undermine its object and purposes and would create a means by which duty could be evaded relatively easily [37]; the wording of Article 33(3) is clear and broad [41]; the normal meaning of "holding" requires only physical possession [43]; and had the EU legislature intended to require actual or constructive knowledge, it would have made express provision to that effect [44].

44. The Advocate General went on to note at [45] of his opinion that:

> "[45] It is true that there is no definition of the word 'holding' in EU excise duty legislation. However, as was pointed out by the Commission, a contextual interpretation shows that there is such a definition in the customs legislation, a system that displays many parallels with excise legislation. Under

> Article 5(34) of the Union Customs Code, "holder of the goods" means the person who is the owner of the goods or who has a similar right of disposal over them or who has physical control of them."

45. The CJEU held that a person in physical control of goods is a "holder" of them even if he does not know that the goods are excise goods and/or that they have become chargeable to excise duty: [21] and [25]. Further, it reasoned as follows: where an intentional element was intended to be taken into account for the purposes of determining whether a person is liable to pay excise duty, express provision to that effect had been made [30]; limiting "holders" to persons who knew or should have known excise duty was chargeable would not be consistent with the objectives of the Directive [31]; a broad definition of the persons liable was laid down to ensure, so far as possible, that duty is collected [33]; and to impose an additional requirement of whether the person was/should have been aware would make it difficult, in practice, to collect duty from the person with whom the tax authority is in contact with and who, in many situations, is the only person from whom payment can be demanded [34].

46. Mr Firth submits that the same logic applies here. The UT should not have held that any additional requirement beyond ownership or de jure or de facto control over the goods was necessary in order to be a "holder". In his written submissions he also stated that the need for intention would be contrary to the principles of legal certainty: *BLP Group plc v. CEC* Case C-4/94 [1995] STC 424 at [24] and *Sub One Ltd v. HMRC* [2012] UKUT 34 (TCC), [15] and [2014] EWCA Civ 773, [43]. He says that this is also consistent with the approach adopted in *R v Tatham* [2014] EWCA Crim 226 at 23e per Leveson P, and *McKeown v HMRC* [2016] UKUT 479 (TCC) at [65].

47. Mr Beal KC, on behalf of HMRC, contends that the UT was correct to conclude that "the starting point in determining who is 'holding' the goods at the relevant time must be the person who has physical possession of them": [142]. He says that only when the person with physical possession of the goods has been identified, does one move on to consider whether the circumstances of that possession are such that another person with *de facto* or legal control of the goods is properly considered to be "holding" the goods. He says that that premise is supported by *HMRC v WR* at [24].

48. Furthermore, he submits that the UT was not seeking to set down an exhaustive test of what is meant by "holding" or to suggest that these were the only circumstances in which a person not in physical possession of excise goods could be said to "hold" those goods.

Discussion and conclusion

49. I agree with Mr Beal insofar as he submits that the principles set out at [131] of the UT decision were intended to be a distillation of the authorities which the UT had already considered. The reference at (1) to a person who is able to exercise legal or *de facto* control of excise goods in respect of which duty remains and unpaid "*and intends to assert that control against others"* (emphasis added), comes directly from the decision in *R v Taylor & Wood* [2013] EWCA Crim 1151 which the UT quoted at [120].

50. That case was concerned with appeals from confiscation orders which had been made pursuant to section 6 of Proceeds of Crime Act 2002. Messrs Taylor and Wood had both pleaded guilty to being knowingly concerned in the fraudulent evasion of duty payable on the import of cigarettes. Thereafter, in confiscation proceedings, they were each held to have benefitted to the extent of the unpaid duty. The relevant provisions were regulation 13 of the Tobacco Products Regulations 2001 and Article 7 of the Council Directive 92/12/EEC of 25 February 1992, which was a forerunner of the Excise Directive (the "1992 Directive").

51. Kenneth Parker J, who gave the judgment of the court, considered two preliminary questions. The first was whether each appellant was a person "liable to pay the duty" under regulation 13. Regulation 13 imposed primary liability to pay the duty on the person "holding the tobacco products at the excise duty point". Secondly, if the answer to the first question was "yes" , was the putative basis of the liability to pay duty under the regulation compatible with any of the bases of liability in the 1992 Directive?

52. In relation to the first question, he observed at [29] as follows:

> "29. 'Holding' is not defined in the Finance Act or in the Regulations, and there appears to be no authority on its meaning. It is plain that it denotes some concept of possession of the goods. Possession is incapable of precise definition; its meaning varies according to the nature of the issue in which the question of possession is raised (a good example being *Re Atlantic Computer Systems plc* [1990] BCC 899, CA). But it can broadly be described as control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporarily or permanently: see, for example, *Goode on Commercial Law, Fourth Edition, p 46*."

(That was the passage quoted by the UT at [120] of its decision.)

53. A haulier, Heijboer, had physical possession of the cigarettes at the excise duty point but it was acting as no more than the agent of the primary carrier, Yeardley. Yeardley was the bailee of the goods at the excise duty point and was described as an innocent agent. Both Messrs Taylor and Wood gave instructions throughout the transportation of the goods and had the legal right of control over them [30].

54. Kenneth Parker J stated at [31] in relation to regulation 13 that to seek to impose liability to pay duty on either Heijboer or Yeardley, who were no more than innocent agents, would give rise to a serious question of compatibility with the objectives of the legislation. He went on as follows:

> "Imposing liability on the appellants raises no such questions, because they were the person, who, at the excise duty point, were exercising de facto and legal control over the cigarettes. In short, responsibility for the goods carries responsibility for paying the duty."

55. On the second question, he reached a similar conclusion. At [39] he stated that both the language and purpose of Article 7 strongly supported the conclusion that a person who has *de facto* and legal control of goods at the excise duty point should be liable to pay the duty. At [40] he also concluded that the same considerations applied to the further basis of liability being "delivery" of the goods. He went on to conclude that the confiscation orders, once adjusted to reflect the excise duty evaded, were both lawful in all respects under UK and EU law.

56. A very similar approach was adopted in *R v Philip Tatham* [2014] EWCA Crim 226, to which the UT referred at [122]. That was also a case concerning smuggled tobacco on which excise duty had been evaded. At [23] Sir Brian Leveson P, who gave the judgment of the court (and who had been a member of the constitution in *Taylor & Wood*), summarised the principles derived from previous cases, where relevant, as follows:

> "23. . .
>
> a. Mere couriers or incidental custodians, who are rewarded by way of fixed fee and have no beneficial interest in the tobacco, are likely to be excluded from the definition of 'obtaining property' for the purposes of confiscation orders…
>
> …
>
> d… 'holding' for the purposes of Regulation 13(1) can be a question of law, and does not require physical possession of the goods, and the test is satisfied by constructive possession. The test for 'holding' is that the person is capable of exercising de jure and/or de facto control over the goods, whether temporarily or permanently, either directly or by acting through an agent …
>
> e. There is no need for the person to have any beneficial ownership in the goods in order to be a 'holder'... A courier or person in physical possession who lacks both actual and constructive knowledge of the goods, or the duty which is payable upon them, cannot be the 'holder' within Regulation 13(1) …"

57. As I have already mentioned, those cases were concerned with confiscation orders under the Proceeds of Crime Act 2002. They were also concerned with different regulations and as the UT observed, the court approached the matter from the perspective of domestic legislation and law, including that of bailment.

58. Both of those cases and the UT decision in *McKeown v Revenue and Customs Commrs* [2016] UKUT 479 (TCC) [2017] STC 294 to which Mr Firth also referred, and in which the UT adopted the Court of Appeal Criminal Division interpretation of "holding" in *Tatham*, were also referred to by this court in *HMRC v Perfect* [2019] EWCA Civ 465, [2020] STC 705.

59. In that case, the Court of Appeal decided that the first ground of appeal raised a question of law which was not *acte clair* and should be referred to the CJEU. It was that decision which led to the decision of Advocate General Tanchev and the CJEU decision in *HMRC v WR* to which I have already referred.

60. Baker LJ, who gave the judgment of the court in that case, stated that the court agreed that:

> "67. . . the natural meaning of "the words 'holding' or 'making delivery' of goods does not impute any requirement that the person is aware of the tax status of the goods. Although fairness and proportionality are, of course, cornerstones of EU law, as they are of the common law, they do not invariably exclude the imposition of strict liability. We consider that there is very considerable force in the argument that, given the policy underlying the Directive, the imposition of strict liability on a driver in these circumstances does not offend the principles of fairness or proportionality."

61. He also drew express attention at [69] to the decisions of the Court of Appeal Criminal Division in *Tatham* and *Taylor & Wood* which provide support for the alternative interpretation, albeit in the context of confiscation proceedings. He also noted at [69] that:

> "It was the clear view of the members of this Court in those cases that to seek to impose liability on entirely innocent agents would not promote the objectives of the Directive or the Regulations. . . "

It was in those circumstances that this Court referred questions to the CJEU which were answered in *HMRC v WR*.

62. The CJEU received the reference on 3 April 2019. Advocate General Tanchev delivered his opinion on 21 January 2021 and judgment was given by the CJEU on 10 June 2021. The matter was then listed for a further hearing before the Court of Appeal on 23 February 2022. Shortly before that hearing before Newey, Baker and Snowden LJJJ, Mr Perfect's solicitors informed the court that, in the light of the decision of Nugee LJ, sitting as a first instance judge, in *Wilson v McNamara* [2022] EWHC 243 (Ch), Mr Perfect no longer sought to resist HMCR's appeal on the excise duty issue. At [41] of his judgment in that case, Nugee LJ explained that there was no dispute that judgments given by the CJEU on references made before the end of 2020 are binding.

63. In *HMRC v Perfect (No 2)* Newey LJ, with whom Baker and Snowden LJJ agreed, considered the effect of the CJEU decision in *HMRC v WR* in the light of the United Kingdom's withdrawal from the European Union. At [13] Newey LJ noted that as a result of that withdrawal, courts in this jurisdiction are not generally bound by decisions of the CJEU made after 31 December 2020 but may have regard to such decisions: section 6(1) and (2) European Union (Withdrawal) Act 2018.

64. Newey LJ went on at [14] to note, however, that the agreement between the United Kingdom and the EU setting out the arrangements for the United Kingdom's withdrawal for the EU, being the Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community ("the Withdrawal Agreement"), Treaty Series No 3 (2020), provides for judgments of the EU handed down after 31 December 2020 to have "binding force in their entirety on and in the United Kingdom" if given in respect of references made by United Kingdom Courts and Tribunals before the end of 2020.

65. Having quoted Articles 4, 86 and 89 of the Withdrawal Agreement and section 7A of the European Union (Withdrawal) Act 2020, he concluded, therefore, that judgments of the CJEU on references from United Kingdom courts and tribunals made before the end of 2020 to the CJEU having been made before the end of 2020, are to have "binding force in their entirety on and in the United Kingdom" even if handed down in 2021or later [16] and [21]. He concluded, therefore, that:

> "22. That being so, it seems to me that we are bound by the CJEU's judgment of 10 June 2021to hold, as was anyway this court's inclination in 2019, that article 33 of the 2008 Directive and, hence, also regulation 13 of the 2010 Regulations:
>
> > "must be interpreted as meaning that a person who transports, on behalf of others, excise goods to another member state, and who is in physical possession of those goods at the moment when they have become chargeable to the corresponding excise duty, is liable for that excise duty, under that provision, even if that person has no right to or interest in those goods and is not aware that they are subject to excise duty or, if so aware, is not aware that they have become chargeable to the corresponding excise duty."
>
> In other words, a person need not be aware that excise duty is being evaded to be "holding" or "making . . . delivery of" goods for the purposes of regulation 13 of the 2010 Regulations or article 33 of the 2008 Directive."

66. We are now required, therefore, to consider the Court of Appeal Criminal Division decisions in *Taylor & Wood* and *Tatham* through the prism of the CJEU decision in the *Perfect* case which is binding upon us and in particular, to consider the inclusion of the requirement of a subjective intention to assert control over excise goods, in that light.

67. Before doing so, first, it seems to me that insofar as *Taylor & Wood* includes the reference to an intention to assert control over excise goods against others it is not binding upon us. In my judgment, that purported additional element did not form part of the ratio of the decision. It was unnecessary for Kenneth Parker J's conclusion about the imposition of liability upon Messrs Taylor and Wood which he reached in relation to regulation 13 at [31] and in relation to Article 7 at [39], and his ultimate conclusion as to whether the confiscation orders were disproportionate at [50]. It is

also of note, that the additional requirement is omitted in the formulation at [23] in the *Tatham* case.

68. Secondly, if I am wrong about that and the reference to intention to assert control was part of the ratio in *Taylor & Wood*, in my judgment, that aspect of the decision was, in any event, *per incuriam*. The court approached the question of "holding" at [29] and [39] solely from the perspective of domestic law. The concept of "holding" arises, however, in the Excise Directive (and the 1992 Directive before it) and is a principle of EU law which must be approached through that lens. As the UT pointed out at [93] and [94] of its decision, it is a well-established principle that when interpreting a provision of EU law, it is necessary to consider not only the wording of the provision but its context and its aims and that a term such as "holding" should have an autonomous EU law meaning: *Kingscrest Associations Ltd v HMRC* [2005] ECR Case C-498/03 1-4442, CJEU. Legislation implementing a provision of EU law must then be interpreted, so far as possible, in conformity with EU law, thus interpreted. That was not the approach which the Court of Appeal Criminal Division adopted.

69. Thirdly, and in any event, in my judgment, it is quite clear that to the extent that the decision in *Taylor & Wood* is incompatible with the supervening decision of the CJEU in *HMRC v WR*, it must be treated as having been overruled.

70. As the Advocate General pointed out in the *Perfect* case, the meaning and scope of terms for which EU legislation does not provide a definition must be determined by reference to their usual meaning in everyday language whilst taking into account their context and the purpose of the rules in question. Furthermore, there can be no doubt that "holding" must be given a consistent meaning in all Member States and throughout the Excise Directive. Nothing turns, therefore, upon the point that the *Perfect* case was concerned with the meaning of "holding" for the purposes of Article 33 rather than Article 7(2)(b). There is also no question but that the HMDP Regulations must be interpreted in conformity with the Excise Directive.

71. If one takes all those matters into account, it seems to me that it is clear that subjective intention is irrelevant to whether a person is "holding" excise goods. The Advocate General's Opinion and the CJEU decision in *Perfect* makes that quite clear. If it were otherwise, the purpose of the Excise Directive, which, amongst other things, is to ensure that duty is charged would be compromised, the collection of tax would be rendered more difficult and evasion would be relatively easy.

72. The reference to an intention to assert control of the goods against others in [131(1)] of the UT decision cannot withstand the CJEU decision in *Perfect,* therefore, and must be wrong. I express no view, however, about the question of whether legal or de facto control is sufficient for the purposes of "holding". That issue was not directly before us and may need consideration on another occasion.

73. During the hearing of this appeal, we asked counsel to submit short notes upon the question of whether the Court of Appeal Civil Division is bound by a decision of the Criminal Division, for which we are grateful. In the light of the fact that the CJEU decision in *Perfect* is binding upon us, that question does not arise and I shall not address it here.

(2) Test over-refined?

74. What of the factors set out in [149] of the UT decision? The UT stated at [149] that where an assessment is challenged on the basis that an earlier excise duty point can be established against which assessment should be made, it would be "necessary" to establish the matters at (1) – (4) for the challenge to be successful. Mr Firth accepted that in those circumstances, the burden of proof is on the party seeking to challenge the assessment. He also submitted, however, if the factors are relevant, they would also apply to HMRC were it to seek to assess a person further up a supply chain from the person in physical possession of the excise goods upon which duty had not been paid. Mr Beal accepted that to be the case.

75. Mr Firth submits that the appropriate test is set out in *R v Tatham* at [23(d)] and there is no basis for the prescriptive requirements set out at [149] of the UT decision. He says that such an approach is consistent with the purpose of the Excise Directive which, as the Advocate General and the CJEU in *Perfect* case explained, is, amongst other things, to ensure that duty is collected.

76. I prefer Mr Beal's approach in this regard. If Mr Firth were correct, it seems to me it would lead to the opposite effect from the one which he advocates. Rather than cast a wide net which would encourage the collection of duty, the reverse would be the case. Anyone in physical possession of excise goods who was assessed for excise duty would immediately point to the chain of supply and contend that there must have been an earlier release for consumption and a person in de facto or legal control of the goods before them and, accordingly, that they were not liable. HMRC, in all likelihood, however, would be unable to identify a person to assess.

77. The first factor at [149(1)] is who had physical possession at the time that the alleged earlier excise duty point arose. It seems to me that this approach is supported by the decision of the CJEU in the *Perfect* case itself. In that case, the touchstone was the physical possession of the excise goods.

78. It is also consistent with the approach in *B&M,* Case C-325/99 *G van de Water v Staatssecretaris van Financien* [2001] and *D&R*. In *B&M*, the UT held at [155] that once any of the events in Article 7 have occurred it is incumbent on the Member State in question to ensure that duty is paid. It went on:

> "Therefore, in circumstances where it is unable to assess any person who caused a prior release for consumption to occur, it is open to the member state to assess, in accordance with its own procedures, any person who is found to be holding the goods within the meaning of art 7(2)(b) of the 2008 Directive."

79. The *Van de Water* case was concerned with the interpretation of Article 6 of the 1992 Directive which was the predecessor of the Excise Directive. The terms of Article 6(1) of the 1992 Directive were broadly equivalent to Article 7(2) of the Excise Directive, save that there was no equivalent provision to article 7(2)(b). There was no specific provision, therefore, that the holding of excise goods outside a duty suspension arrangement where excise duty had not been levied in itself amounted to a release for consumption.

80. As the UT in this case explained, Mr Van de Water had a large quantity of pure alcohol and gin in his shed. The gin had been produced from pure alcohol acquired

from a third party. The shed was not a tax warehouse and therefore, the gin and the pure alcohol were held outside a duty suspension arrangement. The question for the CJEU was whether Article 6(1) should be interpreted as meaning that the mere holding of a product subject to excise duty amounted to a release for consumption where that duty had not yet been levied in accordance with the applicable provisions of Community law and national legislation.

81. The CJEU noted that:

> "34. For a suspension arrangement to be effective, strict controls must be imposed to stop any "leaks". In other words, "in order to ensure that the tax debt is eventually collected it should be possible for checks to be carried out in production and storage facilities".
>
> 35. To that end, production, processing and holding of products subject to excise duty and placed under a suspension arrangement can only take place in a tax warehouse duly authorised by the Member State within whose territory it is situated; the proprietor of the warehouse, the "authorised warehousekeeper", is required to comply with certain specific requirements and to consent to strict checks, so as to ensure that in due course the tax debt is paid by the person liable.
>
> 36. With certain exceptions, the intra-Community movement of products subject to excise duty under a duty-suspension arrangement may take place only between tax warehouses. In any event, the products must be accompanied by a document which is drawn up by the consignor and identifies the goods transferred and, where necessary, by another document certifying that excise duty has been paid in the Member State of destination or that any other procedure for collection of duty in that State has been complied with. The controls are further strengthened by the imposition of a general duty on traders in each Member State to inform their tax authorities of deliveries dispatched or received, a duty fulfilled by means of the abovementioned document."

82. The CJEU held at [40] that once it was established that the product had departed from a suspension arrangement without excise duty having been paid, it was clear that the holding of the product constituted a release for consumption within Article 6(1) and that duty had become chargeable.

83. In *D&R*, the assumed facts were substantially the same as they are in this case. The UT was concerned with whether it is open to HMRC to assess a person who is found to be holding excise goods, in respect of which the holder cannot demonstrate that the duty has been paid, in circumstances where a prior event which would entitled HMRC to make an assessment on somebody else must have occurred but where, when, how and by whom that event occurred cannot be established [65]. The UT went on to state at [67] that:

> ". . . Clearly, HMRC cannot make an assessment until it has the necessary information on which to establish when, how, where and by whose acts the excise duty point occurred. Therefore, in the absence of any relevant information in relation to any prior release for consumption, HMRC must assess the person who it finds to be holding the goods in question, since that is the only excise duty point which HMRC is able to establish."

84. The UT relied upon those authorities and in my judgment, was right to do so. The approach in those cases was supported in the Court of Appeal in the first *Perfect* case, albeit obiter, and was endorsed by the Advocate General in *HMRC v WR*. He stated at [48] of his Opinion that as the UK UT had already correctly ruled in *B&M*,

> "48. . . . – a case which did not directly involve Article 33 of the Directive but concerned rather the interpretation of, and liability under, Article 7 of the Directive, but is still relevant here – 'in our view Gross provides clear authority that once excise goods in respect of which duty has not been paid are circulating within the Member State of their destination then the authorities of that Member State have the ability to choose which of sequential holders of the goods to assess, provided that there has not been a prior assessment. This is consistent with the underlying policy of the 2008 Directive … that it is the duty of the Member State concerned to ensure that duty is paid on goods that are found to have been released for consumption. The decision in the case is therefore consistent with the principle that it should be possible to assess a person found to be holding goods in respect of which duty has not been paid, even though there may have been a prior release for consumption of those goods within the same Member State, so long as there has been no prior assessment of the outstanding duty'.
>
> 49. I would cite here approvingly also the judgment of 19 March 2019 (paragraph 66) where the referring court ruled that 'we agree that the underlying policy of the 2008 Directive is … that it is the obligation of every Member State to ensure that duty is paid … It would be a distortion of the internal market were Member States not to take steps to ensure that goods in respect of which excise duty should have been paid cannot circulate freely within the single market alongside goods on which duty has been paid. As the Upper Tribunal further observed in Davison and Robinson, [(18)] in the absence of any relevant information relating to any prior release for consumption, HMRC must assess the person who it finds to be holding the goods in question, if that is the only excise duty point which can be established. We note HMRC's submission that where, as [WR] here, a driver is unable to identify the consignor, or the importer, or his employer, the only person who can be assessed for the duty is the driver himself. If he

> cannot be assessed in circumstances where HMRC or a Tribunal concludes that he was unaware that the goods were liable to duty, the opportunities for smuggling and fraud are manifestly greater. Accordingly, strict liability appears to have been an accepted feature of the regime under successive Directives . . . "

It seems to me, therefore, that the UT was correct to focus upon who had physical possession at the time of the alleged earlier excise duty point.

85. Mr Firth's reliance upon the decision in *Tatham* case does not help him. Not only must that authority be viewed through the lens of the *Perfect* case, but it must also be borne in mind that it was concerned with a situation in which the person in physical possession of the goods was known. In this case, on the assumed facts, no one can be shown to have had physical possession of the goods when an earlier duty point must have arisen. The same was true in *McKeown v HMRC* [2017] STC 294, UT.

86. DWL does not take issue with the second factor set out at [149(2)] of the UT's decision. That is who is the person alleged to have de facto or legal control over the goods who it is said should be assessed instead of the subsequent holder and how that person is said to have such control. It does take issue, however, with factors (3) and (4) which are the time at which the duty point arose and where the goods were at the relevant time, respectively.

87. In relation to factors (3) and (4), it is immediately apparent from the terms of Article 7(1) of the Excise Directive that the time of the release for consumption is crucial to the question of whether and when duty is chargeable.

88. Further, as the UT held, both the time at which the duty point arose and the location of the goods at the time are crucial to the smooth running of the duty regime. As the UT pointed out at [106] of its decision, in *BP Europa SE v Hauptzollamt Hamburg-Stadt*, Case C-64/15 [2016] ECLI: EU: C: 2016:62 the CJEU held that Article 20(2) of the 2008 Directive, which provides that the movement of excise goods under a duty suspension arrangement ends when the consignee has taken delivery of those goods, must be interpreted as meaning that taking of delivery must be regarded as occurring when the consignee is in a position to know precisely what quantity of goods he has actually received, in that case on unloading in full: see [32] to [35] of the judgment. The facts of that case were that on receiving goods transported under a duty suspension arrangement from one tax warehouse to another the consignee discovered that it had received an amount less than that stated on the electronic administrative document accompanying the load. The Court held that the discovery of the shortfall amounted to an irregularity in relation to the duty suspension arrangement in the sense that the goods which did not form part of the delivery must therefore be regarded as having been removed from the duty suspension arrangement, with the result that a release for consumption in respect of those goods had occurred: see [42] and [43] of the judgment.

89. As the UT pointed out at [107], this reasoning demonstrates that the focus of the scheme is on precisely what goods are the subject of a duty suspension arrangement at any particular time, and where it is found that goods have departed from such an

arrangement the relevant authorities must be in a position to make an assessment in respect of the excise duty chargeable in respect of those goods.

90. In *Polihim SS EOOD v Nachalnik na Mitnitsa Svishtov*, Case C-355/14 [2016] ECLI: EU: C: 2016: 403 the issue before the CJEU was whether a sale by the owner of excise goods held in an authorised tax warehouse to a purchaser who sold the goods on to an end-user who was exempt from excise duty for the purposes of the relevant Bulgarian tax legislation resulted in a release for consumption at the time of the sale to the intermediate purchaser, the latter entity not having the status of an end-user exempt from excise duty. At [38] of its judgment the CJEU identified the relevant question as being whether the sale of excise goods within a tax warehouse, without those goods having physically left the warehouse, constitutes a release for consumption of those goods. At [48] the CJEU stated that the reference in Article 7(2)(a) of the Excise Directive to the "departure of excise goods… from a duty suspension arrangement" meant "the physical departure of those goods from the tax warehouse and not their sale".

91. The CJEU also stated at [51] that excise duty is a tax levied on consumption and not on sale, so that the time at which it becomes chargeable must be very closely linked with the consumer. As a result, at [52] it held that so long as the goods in question remain in the tax warehouse of an authorised warehouse keeper, there can be no consumption, even if those goods have been sold by the authorised warehouse keeper. In addition, [53] the CJEU held that the expression "irregular departure" as used in Article 7(2)(a) of the 2008 Directive "cannot be understood other than as meaning the physical removal of goods from such an arrangement" with the result that "the release for consumption… takes place at the time of the physical removal of excise goods from a duty suspension arrangement". The court concluded, therefore, at [55] that "the sale of excise goods held by an authorised warehouse keeper in a tax warehouse does not bring about their release for consumption until the time at which those goods are physically removed from that tax warehouse".

92. I agree with Mr Beal that these authorities support the conclusion that the scheme of the Excise Directive focuses on the physical location of the excise goods and on whether or not a release for consumption has occurred by virtue of the goods having physically left an authorised tax warehouse, or otherwise having left a duty suspension arrangement.

93. Those authorities also support the conclusion that the time at which the excise duty point arises is relevant. *HMRC v Jacobson* [2018] UKUT 0018 (TCC) and *R v Bawja* [2012 1 WLR 601 also support that proposition in general terms.

94. It seems to me, therefore, that the matters at (3) and (4) of [149] of the UT decision, being the time at which the excise point arose and where the goods were being held at that time, are factors to be taken into consideration where an assessment is challenged on the basis that an earlier excise duty point can be established. In the circumstances of this case, the burden of proof is on DWL.

(3) Consideration of "holding" as a preliminary issue

95. Lastly, did the UT err in deciding that the question of whether a person is a holder is a mixed question of fact and law and, therefore, was unsuitable to be decided as a

preliminary issue? It follows from what I have already said that in the circumstances of this case in which a person in physical possession of excise goods upon which duty has not been paid seeks to contend that HMRC should have assessed a person earlier in the chain of supply who did not have physical possession of the goods, it is inevitable that a detailed consideration of the facts is necessary in order to determine whether that person was "holding" the goods. The UT was correct to conclude, therefore, that such a question is not suitable for consideration as a preliminary issue on the basis of assumed facts.

Conclusion

96. I would allow the appeal on ground 1 and dismiss the appeal on grounds 2 and 3 for all of the reasons set out above.

Lord Justice Arnold:

97. I agree.

Lady Justice Elisabeth Laing:

98. I also agree.