TC04017

Appeal number: TC/2012/10421

PRELIMINARY ISSUE – EXCISE DUTY – Whether there can be more than one Excise Duty Point – release for consumption – liability of person holding goods where goods have already been released for consumption

FIRST-TIER TRIBUNAL
TAX CHAMBER

B & M RETAIL LTD **Appellant**

- and -

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

TRIBUNAL: JUDGE JENNIFER BLEWITT

Sitting in public at Manchester on 26 and 27 March 2014

Mr Jeremy White, Counsel instructed by DWF LLP, for the Appellant

Mr Simon Charles, Counsel instructed by HM Revenue and Customs, for the Respondents

DECISION

Background

1. The Appellant is a limited company registered for VAT which trades as one of the UK's leading value retailers. It has an annual turnover exceeding £700 million with alcoholic beverages accounting for approximately 4% of its turnover. The business was established in 1976 and employs in excess of 10,000 members of staff.

2. In the course of its business the Appellant procured stocks of alcohol for retail sale from suppliers who, under the Appellant's terms and conditions of business are required to warrant the sale of alcohol to the Appellant as "excise duty paid". The Appellant is not a tax warehouse nor otherwise eligible to receive stocks of duty suspended alcohol.

3. On 23 November 2011 HMRC attended the Appellant's warehouse at Estuary Commerce Park, Speke, Liverpool and detained a quantity of alcohol which had been purchased by the Appellant from Ruby Trading Company Limited ("Ruby"). The goods were detained under section 139 of the Customs and Excise Management Act 1979 ("CEMA") on the grounds that in HMRC's judgement and on the balance of probabilities excise duty had not been paid on the goods.

4. Following a ten week investigation HMRC found no evidence to show that any of the goods were duty paid. HMRC established that the supply chains traced back to missing or de-registered traders. On 2 February 2012 HMRC formally seized the goods pursuant to Section 139 (6) and paragraph 1 of Schedule 3 of CEMA and Part 16, section 88 of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

5. On 14 August 2012 HMRC raised an initial excise duty assessment against the Appellant, against which the Appellant appealed on 16 November 2012. Further assessments to excise duty were raised by HMRC on 19 October 2012, 31 October 2012, 5 December 2012, 27 February 2013 and 28 February 2013 in respect of purchases made by the Appellant from Ruby all of which were appealed by the Appellant.

6. The total amount of excise duty assessed against the Appellant is £5,875,143. HMRC also served a Notice of Penalty Assessment on the Appellant dated 8 August 2013 in the sum of £1,175,028.60.

Preliminary Issues

7. At a directions hearing on 16 December 2013 the Tribunal directed that the following issues should be determined as preliminary issues:

(i) Whether there can be more than one Excise Duty Point;

(ii) Whether, after goods have been released for consumption, there can be a further release for consumption without those goods being again charged with duty by reason of some further production or some further importation; and

(iii) Whether, pursuant to paragraph 6 (1) (b) of The Excise Goods (Holding, Movement and Duty Point) Regulations 2010, a person holding goods can be liable for duty if, before he held them, an Excise Duty Point arose pursuant to one of paragraphs 6 (1) (a), (c) or (d) of The Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

8. At the directions hearing on 16 December 2013 HMRC made the following concessions:

(a) That an Excise Duty Point arose pursuant to one of paragraphs 6(1)(a), (c) or (d) of The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 before the Appellant received and/or owned the goods relevant to this Appeal; and

(b) That the Appellant is not liable to pay the duty as a result of the said Excise Duty Point which arose under paragraph 6(1)(a), (c) or (d) of The Excise Goods (Holding, Movement and Duty Point) Regulations 2010.

9. Both parties submitted skeleton arguments prior to the preliminary issues hearing on 26 and 27 March 2014 together with bundles containing the relevant legal provisions and case law. The Tribunal received further written submissions from the Appellant on 9 April 2014 which brought to the Tribunal's attention EU Council Document No. 10069/08. In broad terms the additional document comprises an EU Presidency text which reflects discussions of the EU Council's Working Party on Tax Questions dated 27 May 2008. HMRC provided additional written submissions in respect of EU Council Document No. 10069/08 on 15 May 2014.

10. On 24 July 2014 HMRC provided me with the Judgment from the CJEU in Case C-165 /13 *Stanislav Gross v Hauptzollamt Braunschweig* to which the Appellant responded in writing on 1 August 2014. Oral submissions took place over two days. The following is a summary of the principal points raised by the parties for determination by the Tribunal.

Legislation

11. It may be helpful at this point to set out the EU Community law and UK domestic regulations applicable to the preliminary issues. Council Directive 2008/118/EC of 16 December 2008 ("the 2008 Directive") which repealed Directive 92/12/EEC ("the 1992 Directive") sets out the general arrangements for excise duty.

Council Directive 2008/118/EC

12. In so far as is relevant the 2008 Directive provides:

Time and place of chargeability

Article 7

1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.

2. For the purposes of this Directive, 'release for consumption' shall mean any of the following:

(a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;

(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;

(c) the production of excise goods, including irregular production, outside a duty suspension arrangement;

(d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement.

3. The time of release for consumption shall be:

(a) in the situations referred to in Article 17(1)(a)(ii), the time of receipt of the excise goods by the registered consignee;

(b) in the situations referred to in Article 17(1)(a)(iv), the time of receipt of the excise goods by the consignee;

(c) in the situations referred to in Article 17(2), the time of receipt of the excise goods at the place of direct delivery.

4. The total destruction or irretrievable loss of excise goods under a duty suspension arrangement, as a result of the actual nature of the goods, of unforeseeable circumstances or force majeure, or as a consequence of authorisation by the competent authorities of the Member State, shall not be considered a release for consumption.

For the purpose of this Directive, goods shall be considered totally destroyed or irretrievably lost when they are rendered unusable as excise goods.

The total destruction or irretrievable loss of the excise goods in question shall be proven to the satisfaction of the competent authorities of the Member State where the total destruction or irretrievable loss occurred or, when it is not possible to determine where the loss occurred, where it was detected.

5. Each Member State shall lay down its own rules and conditions under which the losses referred to in paragraph 4 are determined.

Article 8

1. The person liable to pay the excise duty that has become chargeable shall be:

(a) in relation to the departure of excise goods from a duty suspension arrangement as referred to in Article 7(2)(a):

(i) the authorised warehousekeeper, the registered consignee or any other person releasing the excise goods or on whose behalf the excise goods are released from the duty suspension arrangement and, in the case of irregular departure from the tax warehouse, any other person involved in that departure;

(ii) in the case of an irregularity during a movement of excise goods under a duty suspension arrangement as defined in Article 10(1), (2) and (4): the authorised warehousekeeper, the registered consignor or any other person who guaranteed the payment in accordance with Article 18(1) and (2) and any person who participated in the irregular departure and who was aware or who should reasonably have been aware of the irregular nature of the departure;

(b) in relation to the holding of excise goods as referred to in Article 7(2)(b): the person holding the excise goods and any other person involved in the holding of the excise goods;

(c) in relation to the production of excise goods as referred to in Article 7(2)(c): the person producing the excise goods and, in the case of irregular production, any other person involved in their production;

(d) in relation to the importation of excise goods as referred to in Article 7(2)(d): the person who declares the excise goods or on whose behalf they are declared upon importation and, in the case of irregular importation, any other person involved in the importation.

2. Where several persons are liable for payment of one excise duty debt, they shall be jointly and severally liable for such debt.

13. The Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ("the 2010 Regulations") provide as follows:

The Excise Goods (Holding, Movement and Duty Point) Regulations 2010

Regulation 5

5. 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

6.–(1) Excise goods are released for consumption in the United Kingdom at the time when the goods –

(a) leave a duty suspension arrangement;

(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;

(c) are produced outside a duty suspension arrangement; or

(d) are charged with duty at importation unless they are placed, immediately upon importation, under a duty suspension arrangement.

(2) In paragraph (1)(d) "importation" means–

(a) the entry into the United Kingdom of excise goods other than EU excise goods, unless the goods upon their entry into the United Kingdom are immediately placed under a customs suspensive procedure or arrangement; or

(b) the release in the United Kingdom of excise goods from a customs suspensive procedure or arrangement.

(3) In paragraph (2)(a) "EU excise goods" means excise goods imported into the United Kingdom from another Member State which have been produced or are in free circulation in the EU at that importation.

Regulation 7

7.–(1) For the purposes of regulation 6(1)(a), excise goods leave a duty suspension arrangement at the earlier of the time when–

(a) they leave any tax warehouse in the United Kingdom or are otherwise made available for consumption (including consumption in a tax warehouse) unless–
(i) they are dispatched to one of the destinations referred to in regulation 35(1)(a); and
(ii) are moved in accordance with the conditions specified in regulation 39;

(b) they are consumed;

(c) they are received by a UK registered consignee;

(d) they are received by an exempt consignee in cases where the goods are dispatched

from another Member State;

(e) the premises on which the goods are deposited cease to be a tax warehouse;

(f) they are received at a place of direct delivery in the United Kingdom;

(g) they leave a place of importation in the United Kingdom unless–
(i) they are dispatched to one of the destinations referred to in regulation 35(1)(a); and
(ii) are moved in accordance with the conditions specified in regulation 39;

(h) there is an irregularity in the course of a movement of the goods under a duty suspension arrangement which occurs, or is deemed to occur, in the United Kingdom;

(i) there is any contravention of, or failure to comply with, any requirement relating to the duty suspension arrangement; or

(j) they are found to be deficient or missing from a tax warehouse.

(2) An excise duty point does not occur at the time when excise goods leave a duty suspension arrangement–

(a) by virtue of paragraph (1)(a) or (g), if they are delivered for export, shipment as stores or removal to the Isle of Man;

(b) by virtue of paragraph (1)(j), if it is shown to the satisfaction of the Commissioners that the absence of, or deficiency in, the goods is due to a legitimate cause.

…

Regulation 8

Goods released for consumption in the United Kingdom-persons liable to pay

8.–(1) Subject to regulation 9, the person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(a) (excise goods leaving a duty suspension arrangement) is the authorised warehousekeeper, the UK registered consignee or any other person releasing the excise goods or on whose behalf the excise goods are released from the duty suspension arrangement.

(2) In the case of an irregular departure from a tax warehouse any other person involved in that departure is jointly and severally liable to pay the duty with the persons specified in paragraph (1).

Regulation 9

9.–(1) The person liable to pay the duty when excise goods are released for consumption by virtue of an irregularity in the course of a movement of the goods under a duty suspension arrangement which occurs, or is deemed to occur, in the United Kingdom is–

(a) in a case where a guarantee was required in accordance with regulation 39, the person who provided that guarantee;

(b) in a case where no guarantee was required–
(i) the authorised warehousekeeper of dispatch (where the excise goods were dispatched from a tax warehouse in the United Kingdom); or
(ii) the UK registered consignor (where the excise goods were dispatched upon their release for free circulation in the United Kingdom in accordance with Article 79 of Council Regulation 2913/92/EEC).

(2) Any other person who participated in the irregularity and who was aware, or should reasonably have been aware, that it was an irregularity, is jointly and severally liable to pay the duty with the persons specified in paragraph (1).

(3) In this regulation "irregularity" has the meaning given by Article 10(6) of the Directive.

Regulation 10

10.–(1) 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.

(2) Any 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).

Regulation 11

11.–(1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(c) (production of excise goods outside a duty suspension arrangement) is the person producing the excise goods.

(2) In the case of irregular production of excise goods, any other person involved in their production is jointly and severally liable to pay the duty with the person specified in paragraph (1).

Regulation 12

12.–(1) The person liable to pay the duty when excise goods are released for consumption by virtue of regulation 6(1)(d) (importation of excise goods that have not been produced or are not in free circulation in the EU) is the person who declares the excise goods or on whose behalf they are declared upon importation.

(2) In the case of an irregular importation any person involved in the importation is liable to pay the duty.

(3) Where more than one person is involved in the irregular importation, each person is jointly and severally liable to pay the duty.

Authorities

14. In addition to a number of law reports and proposals arising from the 1992 and 2008 Council Directives, the Tribunal was also referred to the following authorities:

- *G. Van de Water and Staatssecretaris van Financien* (Case C-325/99)
- *Terrance Nolan v HMRC* [2014] UKFTT 240 (TC)
- *Brinkmann Tabakfabriken GmbH and Hauptzollamt* (Case C-365/98)
- *Stanislav Gross v Hauptzollamt Braunschweig* (Case C-165 /13)
- *Staatssecretaris van Financien v B. F. Joustra* (Case C-5/05)
- *Cape Brandy Syndicate v Inland Revenue Commissioners* [1921] 1 KB 64
- *The Queen v Immigration Appeal Tribunal ex parte Gustaff Desiderius Antonissen* (Case C-292/89)

The Appellant's Case

15. The Appellant submits that the preliminary issues may be reduced to one question, namely:

"Can there be more than one release for consumption per Member State?"

The Appellant contends that this question must be answered in the negative.

16. The Appellant submits that HMRC's case offends the plain words of the legislation and the fundamental principles of excise duties. It is inconsistent with the derivation of the relevant legislation and only an interpretation of Regulations 5 and 6 of the 2010 Regulations that conforms to the proper interpretation of Article 7 of the 2008 Directive can be correct.

17. The Appellant contends that as Regulations 5 and 6(1) both contain the definite article "*the*", a plain and literal interpretation requires the conclusion that there is a single release for consumption per Member State; the language refers to a single point in time.

18. The Appellant submits that HMRC's interpretation implies that the words "*at the time when"* (set out in Regulations 5 and 6 of the 2010 Regulations) be read as "*every time when*". Relying on *Cape Brandy Syndicate* the Appellant submits that a construction requiring words to be read into a taxing provision should be avoided. As Article 7(1) of the 2008 Directive uses the word "*the*" in the same context, the Appellant contends that interpretation applied by HMRC is flawed. The use of the expression "*shall mean any of the following*" in Article 7(2) indicates that excise duty shall be payable when "*any*" release for consumption event has been reached and not, as HMRC contends, that there may be more than one release for consumption per importation or production.

19. The Appellant submits that the context of Regulation 6(1)(b) of the 2010 Regulations must be considered. Regulation 7(1) both defines situations when excise goods leave a duty suspension arrangement under Regulation 6(1)(a) and also

provides that "*the earlier*" of the circumstances is the release for consumption. The Appellant contends that for HMRC's interpretation of Regulation 6(1)(b) to be consistent with the context of Regulation 7(1), a release for consumption would be required in every situation listed in Regulation 7(1)(a)-(j) which cannot be the intention behind Regulation 7(1).

20. The Appellant's argument is that it is inconsistent, legally uncertain and irrational for there to be only one release for consumption under Regulations 6(1)(a), (c) and (d) and many under 6(1)(b). By way of analogy, Mr White for the Appellant submits that an interpretation such as that applied by HMRC, namely using the legislation as a payment provision, could give rise to the following scenario; if the Appellant sold the goods to a supermarket, that supermarket would be liable for excise duty. If a member of the public purchased the goods from that supermarket, that person would then be liable. The idea that every person who holds duty unpaid excise goods is an excise debtor cannot be correct. Article 7(2)(b) and Regulation 6(1)(b) were enacted to address "difficult cases" such as the non-exempt use of exempt goods.

21. HMRC's interpretation places reliance on the non-collection of the duty to support a further release for consumption. The two conditions of Regulation 6(1)(b) of the 2010 Regulations are holding and non-collection. It is intended to implement Article 7(2)(b) of the 2008 Directive which in turn requires a release for consumption in respect of excise goods that have not previously been released for consumption and collection in the Member State of holding.

22. The Appellant argues that HMRC appear to interpret the word "*levied*" in Article 7(2)(b) of the 2008 Directive as meaning paid or collected. A comparison of the use of the word "*levied*" throughout the 2008 Directive shows that this interpretation cannot be correct: in Article 1(1) "*levied"* refers to the charge to duty. In Article 9 the phrase "*levied and collected*" is used which implies that "*levied*" means charged but not paid. In Articles 10(5) and 36(5) the word probably means charged and collected. The Appellant's case is that these examples show that there are cases where "*levied*" refers to the process of charge and collection, cases where the word denotes the process of charge only however there are no cases where "*levied*" refers to collection alone. In Article 7(2)(b) of the 2008 Directive the meaning is both charged and collected. The Appellant submits that the words of Regulation 6(1)(b) were intended to mean the same as those in Article 7(2)(b), i.e. charged and collected. If this interpretation is correct, the UK has correctly interpreted the 2008 Directive. If not, Community law requires direct effect to be given to the Directive.

23. Article 33 of the 2008 Directive provides that excise duty must be levied in the Member State of import. In Article 7(2)(b) the words "*has not been levied*" means duty not levied in the Member State of import. It consequently creates a second release for consumption in a second Member State but it does not create a second release for consumption in the same Member State. If a second release for consumption in the same Member State was created, provision would have been made for the right to reimbursement or remission of the duty such as that which exists under Article 33(6).

24. It is the Appellant's case that excise goods are charged *in rem* on production or importation into the Community. The duty is charged *in personam* upon release for consumption at an excise duty point. Once excise goods have been released for consumption in a Member State they become free of duty; the charge *in rem* has been replaced by the charge *in personam*. There can be no further charge *in personam* in that Member State because the goods are no longer charged *in rem* beforehand and there is no excise duty to charge on the person.

25. According to the Pre-Lex, which followed the main stages of the decision making process, the 2008 Directive did not change the scope of the charging provisions for excise goods at Community level. Therefore only an interpretation of Article 7 of the 2008 Directive which conforms to the proper interpretation on Article 6 of the 1992 Directive can be correct. The Appellant's point is that it is clear from Regulation 4 of the 1992 Regulations (which implemented Articles 5-10 of the 1992 Directive) that there can only be one release for consumption for each production or importation.

26. The Pre-Lex for the 2008 Directive suggests that the insertion of Article 7(2)(b), which was inserted by the Council, was made *"to clarify the provisions and improve readability of the Directive"* (Council paper 9928/08 point 5). The Pre-Lex establishes that throughout the process of proposal, consultation and enactment of the 2008 Directive there was no intention to create more than one release for consumption per Member State. If the 1992 Directive encompassed more than one release for consumption it is possible that the 2008 Directive has the same effect.

27. The Appellant submits that *Van de Water* does not support the proposition that there can be more than one release for consumption per Member State. The Appellant notes that the ECJ was answering a different question to that posed in the preliminary issues before this Tribunal, namely:

"Can the mere holding of a product subject to excise duty within the meaning of Article 3(1) of the Directive be regarded as a release for consumption within the meaning of Article 6(1) of that directive, if and in so far as duty has not already been levied on it pursuant to the applicable provisions of Community law and national legislation?"

28. The question posed in *Van De Water* was whether a release for consumption by mere holding was possible in respect of specified goods in specified circumstances. The Netherlands Supreme Court did not ask whether mere holding was always a release for consumption in respect of all goods in all circumstances. The Court was asking about goods that had been charged *in rem* but not charged *in personam*. The ECJ held that mere holding of goods subject to excise duty could be a release for consumption because it could be a departure from a duty suspension arrangement under Article 6(1)(a); this presupposes that the products were under duty suspension before the mere holding. The mere event of holding does not constitute a release for consumption unless the goods are in duty suspension prior to the holding and the duty has not already been levied. The authority is silent on the issue of goods which have already been released for consumption before the mere holding.

29. Following the conclusion of the oral hearing of the preliminary issues the Appellant submitted additional written submissions in respect of the EU Council Document No. 10069/08. The Appellant argues that the document appears to record the first instance that Article 7(2)(b) appeared in the 2008 Directive. The purpose of the Article was stated to be (in the explanatory note) "*to provide for further clarity of the text*". The Appellant's argument is that there is no suggestion the purpose of Article 7(2)(b) was to enact multiple excise duty points.

30. In conclusion the Appellant submits that its case in respect of the preliminary issues demonstrates:

- There cannot be more than on excise duty point in a Member State;
- There cannot be a further release for consumption in a Member State without those goods being again charged with duty by reason of some further production or importation into the Community or some further removal to the UK from another Member State;
- A person holding excise goods cannot be liable for duty if before he held them an excise duty point arose pursuant to one of the paragraphs 6(1)(a), (c) or (d) of the HMDP Regulations 2010.

HMRC's Case

31. The basis of the assessments raised against the Appellant relies on HMRC's view that Regulation 6(1)(b) provides for more than one excise duty point per Member State and thereby renders a person holding excise goods liable to pay the relevant excise duty if the duty due and payable upon the said goods, as a result of an earlier release for consumption, has not been paid.

32. HMRC submits that any argument raised by the Appellant to the effect that the 2010 Regulations are incompatible with the 2008 Directive is outside the Tribunal's jurisdiction. HMRC contends that in order to construe the 2008 Regulations properly and, so far as it is possible, in a manner consistent with the wording and purpose of the 2008 Directive, Regulation 6(1)(b) should be analysed by way of sub-categories in the following way:

- The language of the Regulations;
- The context and purpose of Regulation 6(1)(b); and
- A consideration of the Directive and the need, if possible to construe the Regulations consistently with it.

33. HMRC contends that the starting point is Regulation 5 of the 2010 Regulations which refers to *"…an excise duty point at the time when…"* HMRC submits that these words refer to a continuing event rather than a snapshot of time and if the Tribunal was in any doubt, any ambiguity is resolved by Regulation 7 (1) which provides that:

"For the purposes of regulation 6(1)(a) excise goods leave a duty suspension arrangement at the earlier of the time when…" (emphasis added).

34. Mr Charles on behalf of HMRC submits that the language of the 2010 Regulations is decisive in making clear that the holding of goods upon which duty has not been paid results in a release for consumption. HMRC's interpretation is that the natural meaning of Regulation 6(1)(b) reflects a continuous state of affairs which starts when the goods are first held outside a duty suspension arrangement without UK excise duty having been paid and the excise status of the goods continues until the duty is paid. It is, according to HMRC, artificial to suggest that the event occurs in an instant.

35. By comparison the wording of Regulation 13 of the 2010 Regulations includes the phrase *"…the excise duty point is the time when those goods are first so held"* by which the draftsman drew a distinction between an excise duty point arising at a precise moment and the continuous state of affairs described in Regulation 6(1)(b).

36. On HMRC's case, when the words of Regulation 6(1)(b) are given their natural and plain meaning they indicate that a pre-requisite of that Regulation is that the goods must, by reason of the occurrence of an earlier release for consumption, have been exposed to an excise duty point.

37. HMRC contends that it is apparent from the wording of the 2010 Regulations that every product upon which excise duty is payable will be released for consumption when one of the circumstances set out in Regulations 6(1)(a),(c) or (d) occurs with the consequence that Regulation 6(1)(b) must result in a release for consumption occurring at a time or following an event other than those identified in Regulations 6 (1)(a),(c) or (d). The only sensible construction is that the said release for consumption occurs at a time when goods are held and the duty due under Regulations 6(1)(a), (c) or (d) has not been paid (citing *Terence Nolan v HMRC* in support).

38. HMRC contends that this construction is consistent with the ECJ's decision in *G. Van de Water v Staatssecretaris van Financien* ("*Van de Water*"). *Van de Water* was a case in which Mr Van de Water was found to be holding 2,000 litres of pure alcohol which intended to use in manufacturing gin. The Netherlands tax authority argued that the holding amounted to a release for consumption and created an excise duty point under the 1992 Directive. The ECJ held that the holding of a product outside a suspension arrangement where excise duty has not been paid constitutes a release for consumption and as a consequence duty has become chargeable (at §34 – 36):

> *"As the Netherlands Government and the Commission have pointed out, it is clear, first, from the scheme of the Directive and, second, from its provisions concerning the definition and operation of tax warehouses and suspension arrangements, such as Articles 4(b) and (c), 11(2), 12 and 15(1), that a product subject to excise duty which is held outside a suspension arrangement must at some point and in some way have been released for consumption*

within the meaning of Article 6(1).

Article 6(1) of the Directive in fact provides that the term 'release for consumption' covers not only any manufacture or importation of products subject to excise duty outside a suspension arrangement but also any departure, including irregular departure, from such an arrangement. By placing such a departure on the same footing as a release for consumption within the meaning of Article 6(1), the Community legislature has clearly indicated that any production, processing, holding or circulation outside a suspension arrangement gives rise to the chargeability of the excise duty.

In those circumstances, once it is established before the national court that such a product has departed from a suspension arrangement without the excise duty having been paid, it is clear that the holding of the product in question constitutes a release for consumption within the meaning of Article 6(1) of the Directive and that the duty has become chargeable."

39. HMRC submits that *Van de Water* made clear that, despite the absence of a provision similar to Regulation 6(1)(b) being found in the 1992 Directive, the mere fact of "*holding of a product*" could amount to a release for consumption. The fact that a product held outside of a suspension arrangement must have already been released for consumption is not a bar to there being a further release for consumption. Both the facts and the decision in *Van De Water* support HMRC's case in demonstrating that under the 1992 Directive there could be more than one excise duty point and release for consumption.

40. The Appellant's contention that Regulation 6(1)(b) applies to duty which becomes due under Regulation 13 of the 2010 Regulations is flawed because the Regulation 13 sets out expressly when the excise duty point for duty arising under it occurs without reference to a release for consumption. In those circumstances there is no need to have regard to Regulation 6. Furthermore Regulation 13 implements Article 33 of the 2008 Directive which is governed by its own self-contained mechanism and has no reference to Article 7. Similarly Article 36 is a self-contained mechanism.

41. HMRC's arguments in respect of the 2010 Regulations apply with equal force to the 2008 Directive. HMRC makes the point that the fact that the 2008 Directive uses the words *"…"release for consumption" shall mean any of the following"* indicates that there can be more than one release for consumption.

42. The attention drawn by the Appellant to the use of the word "*levied*" in the 2008 Directive suggests that the issue is not whether the relevant duty has been paid but whether it has been charged. HMRC submits that such an argument, if accepted, would render Regulation 6(1)(b) of the 2010 Regulations redundant in this case as there is no dispute that the goods which are the subject of the preliminary issues hearing and substantive appeal were released for consumption pursuant to one of Regulation 6(1) (a), (c) or (d) and thereby duty had already been charged. However, to read the word "paid" in the Regulations as meaning charged would be to distort its

plain and natural meaning. Furthermore, any argument that the 2010 Regulations are incompatible with the 2008 Directive is denied and outside the jurisdiction of the Tribunal. HMRC relied on the fact that the Appellant's skeleton argument accepted that within the context of Articles 1, 10 and 35 of the 2008 Directive the use of "*levied*" means charged and collected.

43. HMRC submits that the distinction drawn by the Appellant as to a charge *in rem* and a charge *in personam* is academic. Article 1 of the 2008 Directive, as a scoping provision, covers both charge and payment. Consequently Regulation 6(1)(b)of the 2010 Regulations applies to the actions of the Appellant as, irrespective of whether it has been charged, the relevant duty has not been paid.

44. HMRC contends that there is no reason to have regard to the fundamental principles of excise duties relied on by the Appellant (in respect of which it was noted by Mr Charles for HMRC that no authority was cited in support) because the Regulations themselves provide a complete and comprehensive mechanism that governs how and when liabilities for excise duty arise. Furthermore the construction sought by the Appellant to be placed on the 2008 Directive is inconsistent with the ECJ's decision in *Van de Water.*

45. Mr Charles submits that the Appellant's submissions in respect of direct effect are irrelevant unless it can point to clear incompatibility between the 2010 Regulations and the 2008 Directive, in which case direct effect must be given to the Directive. The parties agree that *"levied"* means charged and collected. The use of *"paid"* in the Regulations is not inconsistent with that meaning and no further inconsistency has been identified by the Appellant. HMRC relies on the Opinion of the Advocate General Mr Mischo in *Brinkmann Tabakfabriken GmbH and Hauptzollamt Bielefeld* ("*Brinkmann*") as support of for the proposition that the Appellant has failed to identify any provision within the 2008 Directive which can be said to be unequivocal such as to engage the principle of direct effect:

"The Court has consistently held that, whenever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where the State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly."

46. HMRC note that by virtue of Article 9 of the 2008 Directive the principle of direct effect has no impact in respect of any liability designated by the Member State where release for consumption occurs:

"*The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place.*

Excise duty shall be levied and collected and, where appropriate, reimbursed or remitted according to the procedure laid down by each Member State. Member States

shall apply the same procedures to national goods and to those from other Member States."

47. In response to the Appellant's subsequent reliance on EU Council Document No. 10069/08 ("EU Council Document") HMRC submits that the Tribunal can gain little, if any assistance from the European Pre-Lex materials placed before it by the Appellant. The Pre-Lex contains general comments regarding the readability of the 2008 Directive and is silent on the issues that fall to be determined by the Tribunal. The process which led to the drafting of the 2008 Directive was so far removed from the construction exercise before the Tribunal that it can have no bearing on the preliminary issues to be determined. It is accepted by the Appellant that the 2008 Directive has been correctly implemented into the 2010 Regulations; in those circumstances it is difficult to see how the EU Council Document can assist the Tribunal in construing the 2010 Regulations. The EU Council Document has little or no relevance to the preliminary issues and does not, in any event, support the Appellant's case.

48. In answer to the questions to be determined as preliminary issues HMRC contends as follows:

- There can be more than one excise duty point;
- There can be a further release for consumption in a Member State without the relevant goods having been charged again with duty by reason of some further production or some further importation into the Community or some further removal to the UK from another Member State;
- A person holding excise goods can be liable for duty if before he held them an excise duty point arose pursuant to one of Regulations 6(1) (a), (c) or (d).

Discussion and Decision

49. My starting point was to consider the 2008 Directive. The Directive repealed Council Directive 92/12/EEC (which had been substantially amended several times) "*in the interests of clarity*" (first recital).

50. I consider that the principal purpose of the 2008 Directive is two-fold: firstly to harmonise the conditions for charging excise duty across Member States and secondly to ensure the collection of taxes. The 2010 Regulations must be construed, so far as is possible, in a manner which is compatible with the 2008 Directive. The eighth recital to the 2008 Directive provides useful guidance on this matter:

"Since it remains necessary for the proper functioning of the internal market that the concept, and conditions for chargeability, of excise duty be the same in all Member States, it is necessary to make clear at Community level when excise goods are released for consumption and who the person liable to pay the excise duty is."

51. A distinction is drawn in the 2008 Directive between the concept of chargeability and the conditions for chargeability. Article 2 of the 2008 Directive provides for certain goods to be subject to excise duty which gives rise to the concept of chargeability. Articles 7 – 10 set out the time and place of chargeability which gives rise to the conditions for chargeability. Article 7(1) states that:

"Excise duty shall become chargeable at the time, and in the Member State, of release for consumption."

52. Article 7(2) goes on to define "*release for consumption"* as any of the following:

- The departure of excise goods from a duty suspension arrangement (Article 7(2)(a));
- The holding of excise goods outside a duty suspension arrangement where excise duty had not been levied (Article 7(2)(b));
- The production of excise goods outside a duty suspension arrangement (Article 7(2)(c));
- The importation of excise goods unless placed immediately upon importation under a duty suspension arrangement (Article 7(2)(d)).

53. I found no inconsistency between the 2008 Directive and 2010 Regulations in providing that duty is chargeable following the chargeable events which constitute release for consumption. Regulation 5 of the 2010 Regulations reflects the words of Article 7(1) of the 2008 Directive; namely that an excise duty point arises (i.e. the goods have chargeable status) at the point in time when those goods are released for consumption. Regulation 6(1) provides that the four events set out in Article 7(2) constitute release for consumption.

54. I was urged by both parties to apply the ordinary and plain meaning of the language in the Regulations. HMRC argues that the natural meaning of the language of Regulation 6(1)(b) reflects a continuous state of affairs. The Appellant argues that the use of the definite article represents a "snapshot" in time and therefore a single release for consumption. I pause to observe that the natural and everyday meaning of "release" means to set free, or exempt from charge, the goods (in this context, for consumption or free movement). Once this event has occurred I cannot envisage circumstances in which the said goods could be said to be released, or freed again. For the goods to be released for consumption a second time, third time or repeatedly the goods, by inference, must return to a state of non-release prior to that second or third release.

55. The interpretation of legislation involves looking for the intention behind the use of the particular language and considering to what extent that language, as opposed to the principles, should be determinative of the issue. In my view, the language of the 2010 Regulations does not lend itself to a pattern of sequential

detention and release and furthermore language which did envisage a repeated chronology of detention and release would be contrary to the purpose of the 2008 Directive which was designed to clarify the point at which excise goods are released for consumption.

56. I am not persuaded that it would be right to determine the preliminary issues solely on the interpretation of certain words within the 2010 Regulations without considering the provisions as a whole. However if such an approach were correct, that is to say restricted to the meaning of certain words, it appears to me that the Appellant makes the stronger argument. The eighth recital of the 2008 Directive makes clear that the purpose of the Directive is to identify "*when goods are released for consumption*". Had it been intended to establish more than one release for consumption (and therefore more than one excise duty point) it seems to me that the 2008 Directive and 2010 Regulations would have used clear and unequivocal language. The 2010 Regulations identify four separate events, each of which constitute a situation whether of long or short duration, that sets the time at which goods are released for consumption. I conclude that each event represents a single event in time. Furthermore I find force in the Appellant's argument that as Articles 7(2)(a), (c) and (d) of the 2008 Directive and Regulations 6(1)(a), (c) and (d) of the 2010 Regulation represent specific points in time, it follows that Article 7(2)(b) ("*the holding*") and Regulation 6(1)(b) (*"are held"*) are also intended to identify a point in time.

57. It is submitted by HMRC that the words of Article 7(2) of the 2008 Directive: *""release for consumption" shall mean <u>any</u> of the following"* (my emphasis) supports the argument that there can be more than one release for consumption. I am not persuaded that this is so. I accept that in applying an everyday meaning, *"any"* could refer to all of the events set out in Article 7(2) but I find that it could equally apply to only one event. I note that the 2010 Regulations contain the word "*or*" after Regulation 6(1)(c) which is not incompatible with the Directive and expressly implies that there cannot be more than one of the separate events which, on occurrence provides for the goods to be released for consumption. The difficulty with any contrary interpretation arises when a second event subsequently occurs which (on HMRC's argument) by reference to the Regulations could constitute a release for consumption.

58. The Appellant submits that the two conditions of Regulation 6(1)(b) are holding and non-collection and that Regulation 6(1)(b) applies to duty due (by virtue of time) under Regulation 13 (which implements Article 33 of the 2008 Directive).

Article 33:

"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.

2. The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in that other Member State.

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.

4. Without prejudice to Article 38, where excise goods which have already been released for consumption in one Member State move within the Community for commercial purposes, they shall not be regarded as held for those purposes until they reach the Member State of destination, provided that they are moving under cover of the formalities set out in Article 34.

5. Excise goods which are held on board a boat or aircraft making sea-crossings or flights between two Member States but which are not available for sale when the boat or aircraft is in the territory of one of the Member States shall not be regarded as held for commercial purposes in that Member State.

6. The excise duty shall, upon request, be reimbursed or remitted in the Member State where the release for consumption took place where the competent authorities of the other Member State find that excise duty has become chargeable and has been collected in that Member State."

59. Regulation 13 provides:

"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 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
(b) by a private individual ("P"), except in a case where the excise goods are for P's own use and were acquired in, and transported to the United Kingdom from, another Member State by P."

60. HMRC contends that Regulation 13 makes no reference to a release for consumption and therefore does not need to be considered in the context of Regulation 6(1)(b). This seems to me to be correct; the release for consumption dealt with by Regulation 13 is that which occurs in a Member State other than the UK. In those circumstances, under Regulation 13(1) the excise duty point occurs when the goods are first held for a commercial purpose. The issue of liability is dealt with under Regulation 13(2) which negates the necessity to look elsewhere in the Regulations. Regulation 13(1) makes no reference to there being a second release for consumption but instead states: "*where excise goods already released for consumption…*" which I find implies that the single event which satisfies one of the conditions for release for consumption has occurred and cannot take place a second time.

61. Mr Charles for HMRC argues that the use of the words "*first so held*" in Regulation 13 indicates that the draftsman intended to specify a point in time. It was submitted that the absence of such specific wording in Regulation 6(1)(b) reflects the intention that no single point be identified, as there can be more than one release for consumption. I am not persuaded that this is the case. Regulation 13 refers to goods already released for consumption in a Member State and thereafter held in the UK for a commercial purpose. In my view it is designed to identify without ambiguity the conditions of chargeability of goods which have been moved from one Member State to the UK as distinct from Regulation 6 which covers the variety of events which trigger the conditions for chargeability of excise goods within the UK where there has been no previous release for consumption.

62. The Appellant submits that Regulation 7 of the 2010 Regulations provides further guidance by reference (in respect of Regulation 6(1)(a)) to leaving a duty suspension arrangement as being "*the earlier of the time when…*" I agree that Regulation 7 identifies a point at which goods leave a duty suspension arrangement as a specific moment. In my view this provision provides further support for the argument that for there to be a release for consumption there must be one identifiable point in time as opposed to numerous points.

63. HMRC submits that a pre-requisite of Regulation 6(1)(b) is that the excise goods have already been exposed to an earlier release for consumption under Regulation 6(1)(a), (c) or (d). Although I agree that it is likely by implication that in most cases an event under either Regulation 6(1)(a), (c) or (d) will have occurred, I am not convinced that this must be the case in every instance. I considered the EU Council Document submitted by the Appellant after the oral hearing. The Document, which was prepared as part of the process leading to the drafting of the 2008 Directive, confirms that the purpose of the 2008 Directive is to provide further clarity on the issue of excise duty. It was proposed that a special provision could be included within Article 7(2) to cover "*goods that are exempted from excise duty but not used in accordance with the purposes for which they were granted exemption*". The Document stated:

"*It is understanding [sic] of the Presidency that these goods are already released for consumption upon granting exemption from excise duty. If subsequently, they are used*

for other purposes than exempt purposes, the chargeability is covered by other provisions of paragraph 2."

64. The Appellant submits that the non-exempt use of goods released for consumption falls within the category of "difficult cases" that is governed by Article 7(2)(b). I note the submissions of Mr Charles that without further information as to what, if anything, came of the proposal the Document does not assist, particularly given the final comment of the Presidency Note which suggests that such a proposal would be unnecessary as "*the chargeability is covered by other provisions of paragraph 2*". It seems to me that this confirms the likelihood that there will be an identified release for consumption under Article 7(2)(a), (c) or (d) but the question then arises as to what situation Article 7(2)(b) envisages.

65. I had in mind the Appellant's example of a member of the public who purchases non-duty paid goods from a supermarket, which on the face of it would fall within Article 7(2)(b) of the 2008 Directive. However, it seems to me that where an earlier release for consumption is identified, for example by that member of the public evidencing from where the goods were purchased, an earlier point of release for consumption, and therefore excise duty point, arises. By way of comparison I considered the situation whereby goods are imported or manufactured illegally and without duty being paid. If those goods were passed on to another person who was not involved in the illegal activity but was aware of the illegal activity and the fact that duty had not been paid, prima facie there would be a release for consumption due to his holding of the goods, as would be the case for the member of the public. However if, in this scenario, the holder of the illegally imported goods did not identify the source of those goods, then it must follow that his holding of the goods would be the only identifiable point of release for consumption. In construing the provisions in this way, the purpose of collection of taxes is met without a potentially unjust outcome.

66. I take the view that, in the absence of any evidence to identify an event under Regulation 6(1)(a), (c) or (d), Regulation 7(2)(b) applies to ensure the collection of tax. I find this conclusion supported by *Terrance Nolan v HMRC* in which, as part of a criminal investigation into excise duty fraud Mr Nolan was found to be holding non duty paid cigarettes for which he was convicted. I should note that *Nolan* did not specifically address the questions which fall to be determined by me and it was unknown to what extent, if any, the issue of multiple duty points was argued. In those circumstances I was therefore cautious not to attach too much weight to it. The appeal in the FTT concerned an assessment arising from the unpaid duty. Judge Mosedale stated at §28, 29 and 33:

"…the cigarettes which appear to have led HMRC to the appellant's house were the Richmans (see §5). Interception of the van carrying these goods as suggested by Mr Young would presumably only have led to an earlier duty point for the Richmans: but HMRC have already identified an earlier duty point for the Richmans. Mrs Quarterman's evidence was that papers passed to her relating to other criminal proceedings arising out of the same operation showed, in relation to the Richmans, evidence that there was an earlier release for consumption of these goods, which she assessed against other persons. Therefore, she amended her earlier assessment of Mr

Nolan to remove the Richmans from it (§4).

29. These cigarettes no longer form part of the assessment. There is absolutely no evidence of the source of the HRT or Hatemans: the appellant has refused to disclose from where he obtained them. It therefore seems impossible for the appellant to make out a case that HMRC could have identified an earlier duty point on these, irrespective of the question of whether HMRC should have done so if they could…

Therefore, if no earlier duty point had arisen, the goods were subject to duty under (b) above as, when present in Mr Nolan's home they were "outside a duty suspension arrangement" and duty had not been paid.

HMRC have already identified an earlier duty point for the Richmans. Mrs Quarterman's evidence was that…there was an earlier release for consumption of these goods, which she assessed against other persons."

67. HMRC argue that in the case of *Nolan* the Tribunal accepted that the effect and therefore true construction of Regulation 6(1)(b) was that release for consumption had taken place under Regulation 6(1)(a), (c) or (d) and thereafter a further release for consumption occurred under Regulation 6(1)(b) as goods are held and duty was due.

68. I do not agree; as I interpret *Nolan*, the 2010 Regulations were construed in a manner by which it was identified where the goods were held in order to ensure the collection of tax where no other (earlier) release for consumption (and therefore duty point) had been identified. In such circumstances a distinction can be drawn between an earlier identifiable release for consumption and no such earlier identifiable event.

69. HMRC rely on *Van de Water* in support of its argument. HMRC contends that the fact that a product which is held outside a suspension arrangement must have already been released for consumption is not a bar to there being a further release for consumption. HMRC argue that the 2010 Regulations should therefore be construed in a manner consistent with this principle. In my view, the construction urged upon me reads too much into the judgment. The 1992 Directive (under which the case was decided) did not include the provision found in Article 7(2)(b). Consequently the events which were deemed to constitute release for consumption were limited to the following:

- Any departure from a suspension arrangement;
- Any manufacture of those products outside a suspension arrangement;
- Any importation of those products where they were not placed under a suspension arrangement.

70. The Appellant seeks to distinguish *Van de Water* on the basis that the ECJ was answering a different question to those posed in the preliminary issues hearing. I do not agree that the case is irrelevant, although I bore in mind that the Netherlands Supreme Court did not ask whether there could be more than one release for

consumption per Member State. It seemed to me that the case provides useful guidance, albeit in a slightly different context on how to approach the Directive and cannot be ignored.

71. In the absence of a specific provision to reflect the situation now covered by Article 7(2)(b), the ECJ had to determine whether Mr Van de Water's holding of the goods constituted a release for consumption. It did so by implication that by the fact of the holding, the goods had been released for consumption under Article 6(1) of the 1992 Directive and that the holding formed part of that release (at §36):

"*once it is established before the national court that such a product has departed from a suspension arrangement without the excise duty having been paid, it is clear that the holding of the product in question constitutes a release for consumption within the meaning of Article 6(1) of the Directive and that the duty has became chargeable."*

72. The ECJ did not say that both events constituted a separate release for consumption; indeed it had no need to as the provision now found in Article 7(2)(b) did not exist and was therefore not considered.

73. I considered the parties' submissions in respect of Article 33 of the 2008 Directive which I note uses the language "*already been released for consumption…*" in providing for reimbursement or remission of duty paid (Article 33 (6)) in the Member State where release for consumption occurred. There is no parallel provision in Article 7(2). I drew the inference from this that the necessity for a provision to allow for reimbursement (under Article 33) arises from the potential for double taxation where goods have moved from one Member State to another. No such provision is contained in Article 7(2) as the potential for double taxation does not arise where there is an identifiable point of release for consumption.

74. As to the use of the word "*levied*" in the 2008 Directive, HMRC submits that the use of "*paid"* in the Regulation 6(1)(b) in the 2010 Regulations is not incompatible and should be construed consistently with the 2008 Directive to mean "charged". Mr Charles submits that Regulation 6(1)(b) applies to the facts of this appeal as irrespective of whether or not duty has been charged, it has not been collected. The Appellant drew attention to the use of the word "*levied"* throughout the 2008 Directive, submitting that it does not necessarily include collection, but may do. Ultimately both parties appeared to agree that the use of the word in Article 7(2)(b) in the 2008 Directive probably means both charged and collected. That being so, it seems to me that there is no incompatibility between the 2010 Regulations and 2008 Directive in this regard and further consideration of the point by me would not assist in determining the preliminary issues.

75. Regarding the distinction drawn by the Appellant of excise goods being charged *in rem* (subject to excise duty) and then charged *in personam* (whereby a person is liable to pay the duty upon release for consumption at an excise duty point) I do not agree that once goods are released for consumption in a Member State, those goods are free of excise duty because the charge *in rem* is replaced by charge *in personam* with the consequence that there can be no further charge *in personam* as no charge *in*

rem precedes it. Returning to my starting point, I consider that the only distinction to be drawn is that between the concept of chargeability and the conditions for that chargeability. There is one duty that attaches to the goods and that duty must be paid; the issue as to with whom the liability rests is left to the Member State in question, by virtue of Regulations 8, 9, 10, 11 and 12.

76. I take the view that this interpretation is supported by *Van de Water* in which it was stated at §28:

"The Commission, for its part, observes that Article 6(1) of the Directive is designed to establish the point in time at which the excise duty becomes actually chargeable, and not to determine the person from whom the duty should be claimed…Once it is established that duty is chargeable, it is for the Member States to determine, in accordance with Article 6(2) of the Directive, how the duty is to be levied and, in particular, from whom it is to be claimed."

77. As regards the Appellant's reliance on the fundamental principles of excise duties I accept the submissions of HMRC that the 2008 Directive and 2010 Regulations provide a comprehensive mechanism governing the chargeability of excise duties and therefore whilst the background to them may be of interest, it provides no decisive authority or clear guidance on the preliminary issues to be determined.

78. I considered the case of *Brinkmann* and the circumstances in which the doctrine of direct effect should be implemented (at § 56 of the Opinion of Advocate General Mr Mischo):

"The Court has consistently held that, whenever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may be relied upon by an individual against the State where the State fails to implement the directive in national law by the end of the period prescribed or where it fails to implement the directive correctly."

And at §38 of the Judgment:

"However, it must be borne in mind that, as the Court has consistently held, the Member States' obligation arising from a directive to achieve the result envisaged by the directive and their duty under Article 5 of the EC Treaty (now Article 10 EC) to take all appropriate measures, whether general or particular, is binding on all the authorities of Member States.…the national court which has to interpret that law must do so, as far as possible, in light of the wording and purpose of the directive so as to achieve the result it has in mind…"

79. I agree with the comments made on behalf of HMRC; no specific provision was identified by the Appellant as incompatible with the 2008 Directive such as would give rise to direct effect. To the contrary, the 2010 Regulations are, in my view, compatible with the 2008 Directive.

80. The Pre-Lex to the 2008 Directive to which the Appellant referred me, save for a generic comment regarding readability, is silent on the issue of whether the inclusion of Article 7(2)(b) was intended to create a second release for consumption. Both parties accepted that to infer a purpose or intention in the absence of any further information would be purely speculative and, in my opinion, unhelpful.

81. Furthermore, in respect of the Pre-Lex and various Committee Reports and Council documents to which I was referred, the case of *Antonissen* made clear that there is only a narrow ambit for the use of such documents where provisions are ambiguous or unclear (at §23 and 27 of the Opinion of Mr Advocate General Darmon and §18 of the Judgment):

"23. In light of these few judgments is seems to me to be difficult to take the view that a declaration of the Council entered in the minutes of one of its meetings has as a matter of principle no role to play in the interpretation of provisions of Community law…Having said this, the conditions for and limits to reference to declarations of the Council entered in the minutes of a Council meeting have to be defined…

27. …I therefore conclude that a declaration…can constitute a guide for the interpretation or provisions of a measure of secondary legislation the drawing up or adoption of which gave rise to that declaration, only in so far as the aim is to clarify the meaning of those provisions which are ex hypothesi ambiguous or equivocal.

18. …such a declaration cannot be used for the purpose of interpreting a provision of secondary legislation where, as in this case, no reference is made to the content of the declaration in the wording of the provision in question. The declaration therefore has no legal significance."

82. As stated earlier in this decision I do not find that the terms of the 2008 Directive or 2010 Regulations are equivocal and in such circumstances, taken together with the lack of any specific declarations, I find the documents provided little assistance to me.

83. I was also provided with the case of *Stanislav Gross* which was decided under the 1992 Directive. HMRC provided no substantive written submissions save that the authority is relied upon in support of its case. The dispute and question referred for preliminary ruling can be found at §12, 14 and 15 of the judgment:

"Mr Gross brought an action before the Finanzgericht (Finance Court) which ruled that the excise duty was chargeable pursuant to the first sentence of Paragraph 19 of the TabStG. The Finanzgericht found that, in the dispute before it, cigarettes bearing no German tax markings had been brought from another Member State into German fiscal territory for commercial purposes outside a suspension arrangement. The Finanzgericht reproduced the factual findings made in the judgment of the criminal court. After the cigarettes had entered German fiscal territory, Mr Gross took possession of them as recipient, thereby becoming liable to excise duty in accordance with the second sentence of Paragraph 19 of the TabStG…

The referring court harbours doubts as to whether Article 9(1) of Directive 92/12 is to be interpreted as meaning that excise duty is owed by any person who, for commercial purposes, holds in one Member State products subject to excise duty which have been released for consumption in another Member State, or whether that provision must be narrowly construed, to the effect that excise duty is owed only by the person who first holds the products for commercial purposes in the former Member State.

In those circumstances, the Bundesfinanzhof decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Does the second subparagraph of Article 9(1) of Directive 92/12 … notwithstanding its schematic connection with Article 7(3) of that directive, preclude legislation of a Member State under which a person who, for commercial purposes, holds products subject to excise duty which have been released for consumption in another Member State is not liable for duty in circumstances where he did not acquire those products from another person until after the entry process had been completed?'"

84. The Appellant submits that the case has no specific application to the present proceedings but that the context is of some relevance and supports the Appellant's case. The Appellant notes that the CJEU's judgment was based on Article 33 of the 2008 Directive (which was transposed into domestic law by Regulation 13 of the 2010 Regulations) with no reference to Article 7 (2)(b). The authority can therefore be distinguished on the basis that HMRC's assessment in this appeal was not pursued under Article 33 and the scope of *Stanislav Gross* is restricted to that provision.

85. The Appellant also, in its written submissions dated 1 August 2014, appeared to suggest that the liability arose from Mr Gross' participation in the holding of goods:

"The central question in Gross was whether a Member State was allowed to designate a person as liable to pay excise duty such as Mr Gross who may be said to have participated in the holding by the smuggler. In essence, the CJEU answered that such a person could be made liable…This is an irrelevant consideration in the present proceedings."

86. I do not agree (if such was the intended meaning given to the judgment by the Appellant) that Mr Gross' liability arose as a result of his participation in the holding <u>by the smuggler</u> (my emphasis), which appears to suggest that he had not held the goods. I consider the general principle to be derived from the judgment is that any person who holds goods for a commercial purpose (as Mr Gross was found to do) in the destination Member State can be held liable to pay the excise duty even if he was not the first holder of those products in the said Member State (at § 21, 24 – 28):

"*It is not in dispute that Mr Gross had repeatedly obtained the products at issue from other persons after those products had been unlawfully brought into German fiscal territory…in order to resell them and thereby derive income.*

…Under paragraphs 1 and 3 of Article 7, read in conjunction, excise duty is due in

the Member State in which the products are held, inter alia, from the person receiving the products at issue or from the relevant trader.

In particular, in expressly providing that the person 'receiving the products' at issue may be liable to excise duty on products subject to that duty released for consumption in a Member State and held for commercial purposes in another Member State, Article 7(3) of Directive 92/12 must be interpreted as meaning that any holder of the products at issue is liable to excise duty.

A more restrictive interpretation, to the effect that only the first holder of the products at issue is liable to excise duty, would defeat the purpose of Directive 92/12. Under that directive, the movement of products from the territory of one Member State to that of another may not give rise to systematic checks by national authorities, which are liable to impede the free movement of goods in the internal market of the European Union. Consequently, such an interpretation would render more uncertain the collection of excise duty due upon the crossing of an EU border.

That conclusion is also supported by Article 33(3) of Council Directive 2008/118 of 16 December 2008 concerning the general arrangements for excise duty and repealing Directive 92/12 (OJ 2009 L 9, p.12), which simplifies the provision made under Article 7 of Directive 92/12 by referring solely to the person 'to whom the goods are delivered in the other Member State' (Metro Cash & Carry Danmark, C-315/12, EU:C:2013:503, paragraph 36).

It follows from the foregoing that Article 9(1) of Directive 92/12, read in conjunction with Article 7 of that directive, must be interpreted as allowing a Member State to designate as liable to excise duty a person who holds for commercial purposes, on the fiscal territory of that State, products subject to excise duty that have been released for consumption in another Member State, in circumstances such as those of the case before the referring court, even though that person was not the first holder of those products in the Member State of destination."

87. Useful guidance was provided by the Court at § 16, 17 and 20:

"By its question, the referring court asks, in essence, whether Article 9(1) of Directive 92/12 must be interpreted as allowing a Member State to designate as liable to excise duty a person who holds for commercial purposes, on the fiscal territory of that Member State, products subject to excise duty that have been released for consumption in another Member State, even though that person was not the first holder of those products in the Member State of destination.

At the outset, it should be noted that the aim of Directive 92/12 is to lay down a number of rules on the holding, movement and monitoring of products subject to excise duty, in particular so as to ensure that chargeability of excise duties is identical in all the Member States. That harmonisation makes it possible, in principle, to avoid double taxation in relations between Member States (Scandic Distilleries, C-663/11, EU:C:2013:347, paragraphs 22 and 23).

It should be borne in mind that, in the procedure laid down in Article 267 TFEU for cooperation between national courts and the Court of Justice, it is for the latter to provide the referring court with an answer which will be of use to it and enable it to determine the case before it. To that end, even if, formally, the question referred for a preliminary ruling relates directly to the interpretation of Article 9 of Directive 92/12, that does not prevent this Court from providing the referring court with all the elements of interpretation of EU law that may be of assistance in adjudicating the case pending before it, whether or not the national court has referred to them in the wording of its questions. It is, in that regard, for the Court to extract from all the information provided by the national court, in particular from the grounds of the order for reference, the points of EU law which require interpretation in relation to the subject-matter of the dispute (see Worten, C-342/12, EU:C:2013:355, paragraphs 30 and 31).”

88. I bore in mind that *Stanislav Gross* was decided under Articles 9 and 33 of the 1992 Directive (with reference to Article 33 of the 2008 Directive). In applying the principles therein to the 2008 Directive in order to give effect to its purpose of collection of excise duty it is clear that a Member State can designate as liable for duty any person who holds goods for a commercial purpose. However, *Stanislav Gross* must be confined to its facts in that it addressed the situation where goods had already been released for consumption in one Member State and were held for a commercial purpose in another. In that context the scope of the provisions (both under the 1992 and 2008 Directive) are wider than those applicable in this case. The authority does not provide authority for the proposition that the second or third holder of the goods is liable to duty on the basis that there is deemed to be a second or third release for consumption by each of those subsequent holders but rather the criteria to be met was whether the goods were held for a commercial purpose.

Conclusion

89. Having considered the provisions applicable to this case, all of the documents to which I was referred and the submissions of both parties I reached the following conclusion in respect of the questions to be determined:

(i) That there cannot be more than one excise duty point;

(ii) That, after the goods have been released for consumption at an identified point, there cannot be a further release for consumption and therefore the goods cannot be charged again with duty by reason of some further production or further importation;

(iii) That, pursuant to Regulation 6(1)(b), a person cannot be liable for duty if, before he held the goods, an identified Excise Duty Point arose pursuant to one of Regulations 6 (1)(a), (c) or (d).

90. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with this decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax

Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this decision notice.

JENNIFER BLEWITT
TRIBUNAL JUDGE

RELEASE DATE: 16 September 2014