



TC06035

Appeal number: TC/2014/03246

EXCISE DUTY – assessment and penalty – preliminary issue – assumed earlier but unidentified release for consumption - Tribunal bound by B&M Retail [2016] UKUT 429 (TC) – preliminary issue decided in favour of HMRC

**FIRST-TIER TRIBUNAL
TAX CHAMBER**

DAVISON & ROBINSON LIMITED

Appellant

- and -

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

Respondents

TRIBUNAL: JUDGE BARBARA MOSEDALE

Decided on the papers with the consent of both parties

Mr A Johal, solicitor, of Rainer Hughes Solicitors, for the Appellant

Mr I McGoverin, solicitor, HMRC's solicitors office, for the Respondents

PRELIMINARY DECISION

1. On 9 June 2014 the appellant appealed an excise duty assessment of £400,068 issued to it on 18 July 2013. On 18 July 2014 it appealed a penalty assessment of £80,013.60 issued on 31 January 2014 to it in respect of the circumstances which gave rise to the duty assessment.

2. The parties agreed that the Tribunal should determine a preliminary issue on assumed facts. The Tribunal consented to this on the basis that it was in the interests of justice to do so.

3. The preliminary issue is whether only one excise duty point can arise in respect of specific goods, and, if the facts were found to be as assumed below, such a duty point must have arisen before the appellant purchased the goods and therefore the appellant could not be, as it was, assessed on the basis of a later duty point arising when the goods were held in its nominated warehouse.

4. *Assumed facts*

4. The appellant purchased alcoholic goods (a mixture of red, white and rosé wine of the brands and in the quantities as specified in the annex to this decision) from C&C Brands Ltd on dates between July 2011 and April 2012. The goods were delivered on the appellant's instructions on each occasion to a warehouse at Unit 5, Springhill Road, Grimethorpe, Barnsley ('the warehouse') owned and operated by Wormal Development Ltd, who held them to the appellant's order.

5. Wormal Development Ltd were not registered to, and did not hold, the goods in question in excise duty suspension. It is not known whether the goods were ever held in a duty suspension arrangement.

6. The appellant had no evidence, and did not seek to prove, that the goods in question had had the applicable UK excise duty paid, relieved, remitted or deferred under a duty deferment arrangement in respect of them at any point.

7. The appellant had no evidence of, and did not seek to prove, who delivered the goods to the warehouse nor of where the goods were held before being held in the warehouse.

8. HMRC have identified the chain of suppliers who supplied the goods in question to C&C Brands Ltd. The chain traced back to a trader who has not been located or contacted by HMRC. The appellant had no evidence, and did not seek to prove, that any of the identified suppliers had paid excise duty in respect of the goods in question. The appellant had no evidence, and did not seek to prove, that any of the identified suppliers held or stored the excise goods in question.

9. On 18 July 2013, the appellant was assessed under Regulation 10(2) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 ('the Regulations') for £400,068 on the basis that it was jointly and severally liable for the

excise duty assessed on Wormal Development Ltd, on the same date, under Regulation 10(1) of the Regulations.

10. An excise wrongdoing penalty in relation to the above assessment was imposed on the appellant under s 41 Finance Act 2008.

5 *The appellant's contentions*

11. The appellant appealed the excise duty and penalty on the basis that in respect of identified goods only one excise duty point can arise, and on the basis of the assumed facts set out above, such duty point must have arisen before the goods were purchased by the appellant and delivered to Wormal Development Ltd. This was because under Regulation 5 an excise duty point arose when goods are released for consumption in the UK, and, in order for the appellant to purchase the goods and for them to be delivered to its nominated warehouse, the goods must already have been released for consumption within the UK (within the meaning of Regulation 6(1) of the Regulations). As the appellant and Wormal Development Ltd were not the persons owning or holding the goods at the time of the original release for consumption within the UK, the appellant contends it was not liable to pay the duty and the assessment and penalty imposed on it should be discharged.

12. The appellant contends that the above analysis is unaffected by its inability to identify any of the following:

- 20 (a) the place the goods were first released for consumption in the UK;
- (b) the date the goods were first released for consumption in the UK;
- (c) the persons involved in the first release for consumption in the UK.

Binding authority

13. The Upper Tribunal considered these issues in the case of *B&M Retail Ltd* [2016] UKUT 429 (TCC). Its conclusion was:

[155] Our analysis of the wording of the 2008 Directive, and of the policy considerations which are evident from its recitals and the observations in the authorities about the need to ensure that unpaid excise duty is collected when goods have been released for consumption within the EU, leads us to conclude that the correct interpretation of the 2008 Directive, and consequently the Regulations, is that once any one of the four events mentioned in Article 7 of the 2008 Directive has occurred then it is incumbent on the Member State in question to ensure that the duty is paid. 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.

[156] We agree with HMRC that, if B&M's contentions were correct, then, in particular in relation to imported excise goods, if HMRC were

5 unable to establish how or when the goods concerned were imported, the products would have to go untaxed, even though the person holding them were unable to show duty had been paid. Such a result would be clearly contrary to the objection of the 2008 Directive to ensure that duties properly chargeable are collected.

10 [157] As a consequence, we have concluded that the preliminary issue should be resolved in favour of HMRC. In particular, we consider that the recognition by HMRC that one or more other excise duty points must, in principle, have been triggered before B&M received the relevant goods did not preclude HMRC from assessing B&M for excise duty in respect of the goods pursuant to Regulation 6(1)(b). This conclusion is subject to HMRC's power to reimburse B&M the amount of the assessment, in accordance with their stated policy, should it later be established through evidence that an assessment can be made in respect of an excise duty point which arose prior to B&M holding the goods.

15 14. The Tribunal is bound by the Upper Tribunal's ruling. The effect of the ruling appears to be that it is open to HMRC to assess any person who is found to be holding the goods which cannot be shown to be duty paid unless an earlier duty point can be identified and assessed. On the assumed facts in this case, an earlier duty point cannot be identified and assessed. Wormall Developments Ltd can therefore be assessed to the duty on the goods as the person holding the goods the first time a release for consumption under Regulation 6(1) in respect of those goods can be identified; the appellant's joint and several liability to that assessment flows from Regulation 10(2).

Decision

15. The preliminary issue is therefore decided against the appellant.

16. 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.

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**BARBARA MOSEDALE
TRIBUNAL JUDGE**

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RELEASE DATE: 31 JULY 2017

GOODS	QTY (Cases)	No Cans or Bottles / Case	SIZE (mls)	Bulk Litres	H/litres	Excise Duty Rate	Excise Duty	C&C Brands Sales Invoice No
Echo Falls White	560	6	750	2,520.00	25.20	£241.23	£6,079.00	170
Echo Falls Rose	420	6	750	1,890.00	18.90	£241.23	£4,559.25	170
Blossom Hill Merlot	128	6	750	576.00	5.76	£241.23	£1,389.48	170
Blossom Hill Cabernet Sauvignon	128	6	750	576.00	5.76	£241.23	£1,389.48	170
Blossom Hill Rose	384	6	750	1,728.00	17.28	£241.23	£4,168.45	170
Hardys VR Pinot Grigio	336	6	750	1,512.00	15.12	£241.23	£3,647.40	170
Hardys VR Sauvignon Blanc	224	6	750	1,008.00	10.08	£241.23	£2,431.60	170
Hardys VR Shiraz	448	6	750	2,016.00	20.16	£241.23	£4,863.20	170
Hardys VR Merlot	448	6	750	2,016.00	20.16	£241.23	£4,863.20	170
Lindemans Bin 85	224	6	750	1,008.00	10.08	£241.23	£2,431.60	187
Lindemans Bin 95	112	6	750	504.00	5.04	£241.23	£1,215.80	187
Lindemans Bin 45	448	6	750	2,016.00	20.16	£241.23	£4,863.20	187
Lindemans Bin 50	448	6	750	2,016.00	20.16	£241.23	£4,863.20	187
Lindemans Bin 65	336	6	750	1,512.00	15.12	£241.23	£3,647.40	187
Hardys VR Chardonnay	224	6	750	1,008.00	10.08	£241.23	£2,431.60	187
E & J White Zinfandel	450	6	750	2,025.00	20.25	£241.23	£4,884.91	187
E & J White Grenache	450	6	750	2,025.00	20.25	£241.23	£4,884.91	187
Blossom Hill Chardonnay	256	6	750	1,152.00	11.52	£241.23	£2,778.97	187
Le Piat D'or Chardonnay	115	6	750	517.50	5.18	£241.23	£1,248.37	187
Le Piat D'or Sauvignon Blanc	115	6	750	517.50	5.18	£241.23	£1,248.37	187
Casillero Diablo Merlot	140	6	750	630.00	6.30	£241.23	£1,519.75	188
Casillero Diablo Cabernet Sauvignon	140	6	750	630.00	6.30	£241.23	£1,519.75	188
Casillero Diablo Carmenere	280	6	750	1,260.00	12.60	£241.23	£3,039.50	188
Casillero Diablo Pinot Grigio	110	6	750	495.00	4.95	£241.23	£1,194.09	188
Casillero Diablo	140	6	750	630.00	6.30	£241.23	£1,519.75	188

Shiraz Rose								
Casillero Diablo Malbec	140	6	750	630.00	6.30	£241.23	£1,519.75	188
Casillero Diablo Shiraz	220	6	750	990.00	9.90	£241.23	£2,388.18	188
Casillero Diablo Viognier	110	6	750	495.00	4.95	£241.23	£1,194.09	188
E & J White Zinfandel	150	6	750	675.00	6.75	£241.23	£1,628.30	188
Hardys VR Shiraz	224	6	750	1,008.00	10.08	£241.23	£2,431.60	188
Hardys VR Shiraz	95	6	750	427.50	4.28	£241.23	£1,031.26	188
Hardys VR Chardonnay	560	6	750	2,520.00	25.20	£241.23	£6,079.00	188
Banrock Station Shiraz	224	6	750	1,008.00	10.08	£241.23	£2,431.60	188
Black Tower Reisling	128	6	750	576.00	5.76	£241.23	£1,389.48	188
Black Tower White	128	6	750	576.00	5.76	£241.23	£1,389.48	188
Black Tower Merlot	128	6	750	576.00	5.76	£241.23	£1,389.48	188
Blossom Hill Chardonnay	128	6	750	576.00	5.76	£241.23	£1,389.48	188
Lindeman Bin 50	112	6	750	504.00	5.04	£241.23	£1,215.80	188
Echo Falls Red	1120	6	750	5,040.00	50.40	£241.23	£12,157.99	198
Echo Falls Rose	1400	6	750	6,300.00	63.00	£241.23	£15,197.49	198
Echo Falls White	980	6	750	4,410.00	44.10	£241.23	£10,638.24	198
Echo Falls White	75	6	750	337.50	3.38	£241.23	£814.15	198
Casillero Diablo Chardonnay	110	6	750	495.00	4.95	£241.23	£1,194.09	205
Casillero Diablo Merlot	137	6	750	616.50	6.17	£241.23	£1,487.18	205
Banrock Station Merlot	224	6	750	1,008.00	10.08	£241.23	£2,431.60	205
Paul Masson Red	120	6	750	540.00	5.40	£241.23	£1,302.64	205
Paul Masson Rose	120	6	750	540.00	5.40	£241.23	£1,302.64	205
Blossom Hill Red	256	6	750	1,152.00	11.52	£241.23	£2,778.97	205
Blossom Hill White	256	6	750	1,152.00	11.52	£241.23	£2,778.97	205
Blossom Hill Rose	256	6	750	1,152.00	11.52	£241.23	£2,778.97	205
Blossom Hill White Zinfandel	512	6	750	2,304.00	23.04	£241.23	£5,557.94	205
Le Piat D'or Sauvignon Blanc	115	6	750	517.50	5.18	£241.23	£1,248.37	205
Stowellas Tempranillo	140	6	750	630.00	6.30	£241.23	£1,519.75	205
Hardys VR Shiraz	145	6	750	652.50	6.53	£241.23	£1,574.03	205

Lindemans Bin 95	112	6	750	504.00	5.04	£241.23	£1,215.80	205
Lindemans Bin 85	224	6	750	1,008.00	10.08	£241.23	£2,431.60	205
E & J White Zinfandel	308	6	750	1,386.00	13.86	£241.23	£3,343.45	205
E & J Pinot Grigio	150	6	750	675.00	6.75	£241.23	£1,628.30	205
E & J Sauvignon Blanc	40	6	750	180.00	1.80	£241.23	£434.21	205
Blossom Hill Red	1152	6	750	5,184.00	51.84	£241.23	£12,505.36	218
Blossom Hill White	1152	6	750	5,184.00	51.84	£241.23	£12,505.36	218
Blossom Hill Cabernet Sauvignon	128	6	750	576.00	5.76	£241.23	£1,389.48	218
Blossom Hill Grenache	128	6	750	576.00	5.76	£241.23	£1,389.48	218
Blossom Hill Pinot Grigio	300	6	750	1,350.00	13.50	£241.23	£3,256.61	218
Echo Falls White Zinfandel	280	6	750	1,260.00	12.60	£241.23	£3,039.50	218
J P Chenet Colombard Chardonnay	120	6	750	540.00	5.40	£241.23	£1,302.64	218
Stowells White Zinfandel	320	6	750	1,440.00	14.40	£241.23	£3,473.71	223
E&J Gallo Red	300	6	750	1,350.00	13.50	£241.23	£3,256.61	223
E&J Gallo White	600	6	750	2,700.00	27.00	£241.23	£6,513.21	223
E&J Gallo Shiraz	300	6	750	1,350.00	13.50	£241.23	£3,256.61	223
E&J Gallo White Grenache	300	6	750	1,350.00	13.50	£241.23	£3,256.61	223
E&J Gallo Chardonnay	300	6	750	1,350.00	13.50	£241.23	£3,256.61	223
Blossom Hill White	768	6	750	3,456.00	34.56	£241.23	£8,336.91	223
Blossom Hill White Zinfandel	512	6	750	2,304.00	23.04	£241.23	£5,557.94	223
Echo Falls Pinot Grigio	140	6	750	630.00	6.30	£241.23	£1,519.75	223
Echo Falls Pinot Grigio	160	6	750	720.00	7.20	£241.23	£1,736.86	223
Stowells Sauvignon Blanc	140	6	750	630.00	6.30	£241.23	£1,519.75	230
JP Chenet White	200	6	750	900.00	9.00	£241.23	£2,171.07	230
Echo Falls White	1120	6	750	5,040.00	50.40	£241.23	£12,157.99	230
Echo Falls Pinot Grigio	160	6	750	720.00	7.20	£241.23	£1,736.86	230
Echo Falls White Zinfandel	160	6	750	720.00	7.20	£241.23	£1,736.86	230

Echo Falls Cabernet Sauvignon	160	6	750	720.00	7.20	£241.23	£1,736.86	230
E&J Gallo Shiraz	150	6	750	675.00	6.75	£241.23	£1,628.30	230
E&J Gallo White Grenache	145	6	750	652.50	6.53	£241.23	£1,574.03	230
Paul Mason Rose	120	6	750	540.00	5.40	£241.23	£1,302.64	230
Blossom Hill White	384	6	750	1,728.00	17.28	£241.23	£4,168.45	230
Blossom Hill White	120	6	750	540.00	5.40	£241.23	£1,302.64	230
Blossom Hill Red	128	6	750	576.00	5.76	£241.23	£1,389.48	230
Blossom Hill Red	42	6	750	189.00	1.89	£241.23	£455.92	230
Blossom Hill Pinot Grigio	256	6	750	1,152.00	11.52	£241.23	£2,778.97	230
Blossom Hill Grenache Rose	120	6	750	540.00	5.40	£241.23	£1,302.64	230
Blossom Hill White Zinfandel	128	6	750	576.00	5.76	£241.23	£1,389.48	230
Blossom Hill Zinfandel Rose	640	6	750	2,880.00	28.80	£241.23	£6,947.42	231
E&J Gallo Red	600	6	750	2,700.00	27.00	£241.23	£6,513.21	231
Echo Falls Red	320	6	750	1,440.00	14.40	£241.23	£3,473.71	231
Echo Falls White	960	6	750	4,320.00	43.20	£241.23	£10,421.14	231
Blossom Hill White Zinfandel	1408	6	750	6,336.00	63.36	£241.23	£15,284.33	232
Blossom Hill White	1280	6	750	5,760.00	57.60	£241.23	£13,894.85	232
Blossom Hill Red	640	6	750	2,880.00	28.80	£241.23	£6,947.42	232
Echo Falls Red	1760	6	750	7,920.00	79.20	£253.39	£20,068.49	258
Echo Falls White	1760	6	750	7,920.00	79.20	£253.39	£20,068.49	258
Blossom Hill White Zinfandel	256	6	750	1,152.00	11.52	£253.39	£2,919.05	258
E&J Gallo White Zinfandel	320	6	750	1,440.00	14.40	£253.39	£3,648.82	258

Total Excise Duty **£400,068.20**