[2017] UKFTT 790 (TC)

TC06196

Appeal number: TC/2016/02957

EXCISE DUTY – wrongdoing penalty – whether appellant has reasonable excuse – no – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

GENERAL TRANSPORT SPA **Appellant**

- and -

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

TRIBUNAL: JUDGE ANNE FAIRPO
MS RUTH WATTS DAVIES

Sitting in public at The Royal Court of Justice, the Strand, London on 26 May 2017

Jeremy Chivers of Tuson and Partners Limited, for the Appellant

Mr Sternberg, Counsel for HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. This is an appeal against an excise wrongdoing penalty in the sum of £9000.00 issued pursuant to paragraph 4(1), Schedule 41, Finance Act 2008 on 17 December 2016.

Preliminary matters

2. The appellant's witness, Pasquale Todisco, was unable to travel to London from Italy for the hearing but was available to provide oral evidence by telephone. At the beginning of the hearing, HMRC repeated an earlier application for the hearing to be adjourned to a later date to allow for Mr Todisco to be present in person at the hearing. HMRC, however, also stated that they would not oppose Mr Todisco giving oral evidence by telephone if the Tribunal was not minded to allow the application to adjourn.

3. We did not consider that it was in the interests of justice to adjourn the hearing as Mr Todisco was able to provide evidence by telephone and HMRC had not opposed his doing so. The hearing therefore proceeded.

4. The appellant asked for their objection to be noted to the fact that HMRC's decision maker, Officer Atkinson, was unable to appear at the hearing as he had moved to a different government department and could not be released to attend the hearing. In correspondence before the hearing, the appellant also had raised concerns at Officer Fairburn, who had taken over the matter from Officer Atkinson, giving evidence. However, no application was made to reject Officer Fairburn's evidence and so we noted the appellant's objection as requested and, for the avoidance of doubt, agreed that Officer Fairburn should be allowed to give evidence.

Background

5. The appellant is an Italian company providing containers and logistics services across Europe. It owns a substantial number of containers but uses the services of third party hauliers to physically move the containers in order to fulfil client contracts.

6. On five occasions in December, January and February 2014, Border Force seized a container owned by the appellant, as follows:

(1) 13 December 2013 – container MUCU0027803

(2) 30 December 2013 – container MUCU002747/0

(3) 3 January 2014 – container MUCU002698/3

(4) 7 January 2014 – container MUCU002209/9

(5) 19 February 2014 – container MUCU0029920

7. On each occasion, the relevant container was transporting goods on behalf of a particular customer, Giesse Bev Trade (GBT), a Romanian company.

8. The first seized container (on 13 December 2013) was manifested as continuing wine but was not accompanied by a valid Administrative Reference Code (ARC) for import on a duty-suspended basis, nor was there any pre-payment of the duty due.

9. The CMR transport document for each of the other four seized containers stated that they contained pallets of foodstuffs, and the invoice documentation accompanying some of the loads described the contents of such loads as being water in glass bottles, but each shipment was found to contain non-UK-duty paid wine.

10. In particular, the CMR for the fifth shipment, seized on 19 February 2014, detailed the load as being 30 pallets of foodstuffs and did not contained a unique ARC number to detail that any goods in the container were being transported on a duty suspended basis. The consignor of the load was shown as being Pesi Nord SRL and the consignee was shown as Sweet & Sunny Ltd.

11. Border Force issued notices of seizure in respect of each of these seizures to the appellant, the consignor, the consignee and the haulier. All correspondence, other than that addressed to the appellant, was returned to Border Force with the returned correspondence marked as "addressee gone away" or similar.

12. No challenge to the legality of the seizures was made by the appellant or any other party and the goods were condemned as forfeit to the Crown by the passage time under paragraph 5 of Schedule 3 of the Customs and Excise Management Act 1979.

13. An assessment to tax was initially issued to the appellant on 23 December 2014 but was withdrawn on 13 February 2015 without prejudice to the possibility of taking further action. Following correspondence between the appellant and HMRC, HMRC subsequently informed the appellant on 23 October 2015 that they intended to charge a penalty. An excise wrongdoing penalty for £9,000 was issued on 17 December 2015. The amount of the penalty had been reduced by 80% to reflect the 'telling, helping and giving' by the appellant. It is this penalty which is under appeal.

14. The penalty was issued in respect of the fifth seizure on 19 February 2014. HMRC took the view that the appellant had a reasonable excuse that extended across the first four seizures due to the closeness in time of those seizures and the fact that the Christmas holiday season could have delayed information. However, HMRC took the view that, by the time of the fifth seizure, the reasonable excuse no longer existed and so the penalty was issued.

15. The appellant requested a review of the decision to issue the penalty; the review, issued on 28 April 2016, upheld the decision to issue the penalty assessment. The appellant appealed to this tribunal on 26 May 2016, the grounds of appeal being that "HMRC has not taken account of relevant law and practice".

Appellant's evidence and submissions

Evidence

16. The appellant was described its representative as being a large company, audited by a major international accountancy firm. It had a strong ethical approach and took care to operate in an environmentally conscious manner.

17. The appellant's chief financial officer, Pasquale Todisco, provided a witness statement and gave oral evidence by telephone at the hearing. An interpreter was present as it was anticipated that Mr Todisco would give his evidence in Italian. During the hearing, Mr Todisco replied in both Italian and English, and answered a number of questions that were put to him in English without waiting for the question to be translated.

18. Mr Todisco confirmed that the appellant provides containers and logistics services to transport those containers, using third parties to carry out the transport. The appellant undertakes approximately 90,000 shipments per year for approximately 600-700 customers. Around 65% of shipments are international. The appellant has been in business since 1977.

19. Mr Todisco confirmed described the general process that is involved:

20. A customer order is for the transport of goods, from load point to destination. The customer specifies the goods, the load point and the destination but does not know which type of transport will be used nor to which hauliers the appellant will subcontract the transport element of the service.

21. Loading instructions are provided by the customer to the appellant, generally including an electronic copy of the CMR. These instructions are forwarded to the haulier selected by the appellant.

22. The goods are generally loaded into the container by the customer who has engaged the appellant. The haulier is not generally involved in the loading, although the haulier is required to check at the goods loaded are in accordance with the transport documents. Any discrepancy between the transport documentation and the load is to be noted by way of reservation on the original copy of the transport documents, which are provided to the haulier when the goods have been loaded.

23. The haulier is required to send a signed copy of the original transport documents, including any reservations, to the appellant.

24. Once loaded, the container is sealed by the appellant's customer with a seal, which certifies that the container has not been forced open during transport.

25. No representative of the appellant is present during the loading process.

26. Mr Todisco confirmed that the appellant obtains orders from customers through online portals, where logistics suppliers can bid for work which has been placed (in

effect, advertised) through the portal. Mr Todisco explained that this is, increasingly, the way in which all logistics companies obtain work and that direct interaction with customers is therefore increasingly rare.

27. Mr Todisco explained that the appellant takes a number of steps to verify the customer, including asking the customer to complete a form with personal and fiscal data. The customer's registration is then checked in the relevant companies' register and the customer's VAT registration is verified via VIES. The appellant also uses only traceable payment systems, so that they have a record of the origins of a payment and can trace the relevant bank flows as necessary.

28. With regard to the seizures in December 2013 and January and February 2014, Mr Todisco explained that the containers involved in the second, third and fourth seizures were already in transit when the first seizure occurred. When the appellant began to receive correspondence from HMRC, it asked its customer (GBT) for the necessary documentation to reply to HMRC. The customer repeatedly stated that it would sort out the situation.

29. Mr Todisco explained that, when it receives information that goods have been seized, the appellant contacts the customers generally by email or telephone. The goods are the property of the customer, and it is necessary firstly to inform the customer that the goods have been blocked but also secondly to ask for documentation to send to the relevant tax authority. The appellant provides all documentation in its possession to the tax authority.

30. The customer settled their invoices and the appellant thought that the problem with HMRC had been resolved.

31. Mr Todisco explained that when the fifth seizure took place, in February 2014, the appellant ceased to do business with GBT. The appellant provided HMRC with all information in its possession but did not know that the matter had not been resolved until they received the penalty notice.

32. Mr Todisco was asked what assurances were sought from the customer after the first four seizures, to ensure that no further seizures would take place. He explained that the appellant communicated the issue to the client, stating that the goods were stopped at the border and that the customer would have incurred additional costs as the container had been stopped. The appellant was interested in the container, not the goods. The appellant needs the container to be free for their business so the goods are left at the point of seizure and it is up to the customer what they want to do with the seized goods. Mr Todisco did not know how customers resolved problems with tax authorities once their containers had been returned to the appellant.

33. Mr Todisco explained that the customer, GBT, was dealt with by two members of staff who deal with London traffic: Alfredo Ginestrini (AG) and Pierpaolo Pace (PP). These members of staff had confirmed to him that GBT had advised them on each occasion that the incorrect description of the goods on the transportation documents was a mistake in the documents.

34. Mr Todisco confirmed that the appellant had been aware in January 2014 that at least two previous loads for GBT had been seized in December 2013. He could not confirm exactly when in January 2014 the appellant had become aware of the seizures as the appellant did not take an interest once the containers had been returned. The appellant stopped working with GBT when they were surprised by the seizure in February; Mr Todisco agreed that the appellant could have stopped working with GBT before the order for the fifth shipment but at the time they did not consider that there was any reason to do so.

35. Mr Todisco was asked what steps were taken to ensure that the problem did not arise again. He explained that this was difficult: the appellant had procedures to check whether a proposed customer was a 'good client'; they only accepted payment by bank transfers so that they could identify the customer and could pass on IBAN codes to the authorities when necessary. However, for each shipment, the appellant could not be sure that goods would be as described, as the appellant did not see the goods on loading. The packaging surrounding the goods could not be opened as it would take hours to repackage the goods.

36. Mr Todisco noted that the appellant needed to be sure that something was wrong to refuse an order, otherwise they would lose money unnecessarily. As GBT had assured the appellant's staff, AG and PP, that all was ok, the appellant had no reason to suspect the customer, having no knowledge of the position after the containers had been retrieved, GBT had not been blocked on the system and so orders could still be accepted. The appellant had immediately stopped working with GBT when that shipment was seized; they had not considered stopping the business relationship earlier because the client had assured them that there was simply an error in the documentation and mistakes can be made where several loads are being dispatched.

37. Mr Todisco explained that the appellant could only check the public register, credit record and bank details of customers. They were not in a position to know what the customer is actually shipping and did not consider that there were any further control checks that could be carried out to verify loads. With regard to the last shipment seized in February 2014, the appellant had not checked the details of the location where the shipment was collected as the appellant is never present at loading and does not see the goods. The haulier is expected to advise if there is anything externally incorrect compared to the CMR.

38. Mr Todisco confirmed that the appellant had no reason to believe that the shipment in February 2014 contained wine, as it had no way to know and only learned that the shipment contained wine when contacted by HMRC. Mr Todisco confirmed that the appellant is familiar with the documentation required to transport wine across borders as one of their major clients transports substantial amounts of wine. He noted further that the appellant would not be the best company to use to smuggle wine because their containers are often checked and in regular contact with HMRC for documents.

39. Mr Todisco was asked about the 'Scheda di Transporto' for the February 2014 shipment. He explained that this was the document issued to instruct the haulier as to where to go and get the goods. The document was sent to the appellant by the haulier after loading was completed and could take up to a month to arrive. When asked, Mr Todisco did not dispute that this particular 'Scheda di Transporto' had the word 'vino' written on it although he did not know anything about why it was so written on the document. It was noted that the Scheda was dated 11 November 2013. Mr Todisco could not say when the Scheda had been received as this was not something that was tracked by the appellant.

40. Mr Todisco agreed that the appellant employed English speaking staff, including himself, and agreed that he had instructed his advisers in English and had given evidence in English: he said that it was not easy, but that he could communicate in English. He agreed that the appellant's website was also in English.

Submissions

41. The appellant submitted that there are a number of questions that need to be addressed: firstly, was the penalty raised in time; secondly, has the penalty been raised lawfully; thirdly, if the penalty is assessable, does the appellant have a reasonable excuse.

Was the penalty raised in time?

42. The relevant seizure took place on 19 February 2014. The excise wrongdoing penalty was raised on 17 December 2015. The appellant submitted that the time limit for assessment of the penalty was set down by para 16, Schedule 41, Finance Act 2008 and is the same as that for the excise duty, being 12 months from the end of the appeal period after the assessment is raised or 12 months from the date that the unpaid tax has been ascertained if no assessment has been made.

43. The appellant submitted that the second date applied, as an excise assessment and notice of penalty assessment had been issued on 23 December 2014 but had then been withdrawn on 13 February 2015 so that no assessment had been made.

44. The appellant submitted that the tax had been ascertained by 17 October 2014 as a letter from HMRC to Pesi Nord SRL, the consignor of the load on the relevant CMR, stated that "UK duty … on this wine … is … calculated as £46,121".

45. Accordingly, the appellant submitted that the relevant time limit meant that the penalty assessment should have been raised by 17 October 2015. The appellant further submitted that as the penalty assessment was raised on 17 December 2015 it was therefore out of time.

46. It was submitted that, even if the date of the first penalty assessment, 23 December 2014, was taken to be the date from which the twelve months period applied, it must have been that case HMRC had the necessary information available before they raised that assessment to be able to calculate the amounts in that

assessment. The test is the date on which the amount was 'ascertained', not the date on which it was 'assessed', which must have been earlier than 23 December 2014. The appellant submitted that HMRC must therefore have been out of time to raise the assessment on 17 December 2015.

47. Further, the appellant submitted that no new evidence had been discovered prior to the issuance of the penalty, that could justify an extension of the relevant time limit. It was submitted that the HMRC officer issuing the penalty had done so on the basis that he had found out about the previous seizures, but that it was clear from correspondence between the appellant and HMRC that HMRC were aware of previous seizures such that these could not be regarded as having been discovered and so extending any time limit for issue of the penalty.

Was the penalty raised lawfully?

48. The appellant made a number of submissions in this respect:

Had a duty point been established?

49. The appellant submitted that the burden of proof was on HMRC to show that the appellant was liable to a penalty at all, and in particular to show that a duty point had been established and that excise duty was outstanding on the date the penalty was imposed.

50. The appellant submitted that the case of *Susan Jacobson* [2016] UKFTT 570 (TC) provides that HMRC must show that two conditions have been met: firstly, that the action penalised by para 4, Schedule 41, Finance Act 2008 must take place after the excise duty point and, secondly, that when the action takes place a payment of duty is outstanding.

51. The appellant submitted that, following *B&M Retail Limited* [2016] UKUT 429 (TCC), multiple duty points can arise and it is not only a duty point in the UK which needs to be considered. The appellant submitted that the goods had been in free circulation in Italy prior to shipment and a relevant duty point had therefore been created when the goods were released into free circulation in Italy.

52. The appellant noted that the effect of Article 33(1) of Directive 2008/118/EC, which states that "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", is to create a second duty point in such cases.

53. The appellant made reference to *Jeffrey Williams* v HMRC [2015] UKFTT 330 (TC), which it submitted considered whether duty could be assessed on wine which had been destroyed. The appellant noted that Article 37 of Directive 2008/118/EC provides that "In the situations referred to in Article 33(1) … in the event of the total destruction or irretrievable loss of the excise goods during their transport in a Member

State other than the Member State in which they were released for consumption, as a result of the actual nature of the goods, or unforeseeable circumstances, or force majeure, or as a consequence of authorisation by the competent authorities of that Member State, the excise duty shall not be chargeable in that Member State". It was submitted that, as stated by Judge John Brooks in *Staniszewski* [2016] UKFTT 128 (TC), "Article 37 … can only apply to goods that have been 'totally destroyed'… at a point prior to that at which a liability to excise duty would otherwise arise".

54. The appellant submitted that, as a duty point had already arisen in Italy, and the goods had been destroyed following seizure, the provisions in *Staniszewski*, which found that a duty point had arisen in the UK regardless of the destruction of the excise goods in question, were not relevant.

55. Further, the appellant submitted that Recital 9 of Council Directive 2008/118/EC states that "Since excise duty is a tax on the consumption of certain goods duty should not be charged in respect of excise goods which, under certain circumstances, have been destroyed or irrevocably lost", and that Article 1 of the same Directive states that excise duty is "levied directly or indirectly on the consumption of excise goods".

56. The appellant submitted that, as the goods in question were destroyed following seizure, after a duty point had arisen, they were not available for consumption and so HMRC were not entitled to raise an assessment in respect of excise duty. The appellant further submitted that, as there could be no excise duty charge, there could be no penalty charged. It was submitted that notwithstanding the decisions in *B&M Retail* and *Staniszewski*, consumption was important to establish the excise duty point and Articles 33 and 34 of Directive 2008/118/EC made it clear that HMRC could not assess excise goods which had been destroyed when a duty point on those goods had arisen earlier. Further, it was submitted, the goods had not been moved for a commercial purpose in the UK, as required by Article 33(4), such that the goods could not be regarded as held in the UK in order to establish an excise duty point in the UK.

57. In the alternative, the appellant submitted that they had no involvement with the wine and so could not be regarded as liable for any penalty.

58. The appellant submitted this was supported by the case of *R v Taylor and Wood* [2013] EWCA (Crim) 1151, which found that "If [the carrier] had known, or perhaps even ought to have known, that it had physical possession of the [excise goods] at the excise duty point, its possession might have been sufficient to constitute a holding of the [excise goods] at that point. However, [the carrier] had no such knowledge, actual or constructive, and was entirely an innocent agent … To seek to impose liability to pay duty on [the carrier], who, as bailees, had actual possession of the [excise goods] at the excise duty point but who were no more than innocent agents, would raise serious questions of compatibility with the objectives of legislation".

59. The appellant submitted that, as they had no knowledge of the true content of the shipments, they were innocent agents and could not be regarded as being in possession of the goods contained in those shipments. It was submitted for the

appellants that possession was also a requirement for the goods to be regarded as having been released for consumption by the appellant, such that a duty point could have arisen. Without possession, the goods could not have been released for consumption and so no duty could become payable as that would be contrary to the objectives of the legislation, particularly Recital 9 of Council Directive 2008/118/EC and Article 1 of the same Directive.

60. On this point, the appellants also submitted in their skeleton argument that the penalty was not lawfully issued because the original penalty issued on 23 December 2014 had been issued with knowledge of the previous four seizures. That penalty had been withdrawn. The issuing officer, Officer Atkinson, had received no further information to substantiate the issue of the subsequent penalty notice.

Was there a reasonable excuse?

61. The appellant submits that the *Nigel Barrett* [2015] UKFTT 239 case confirms that, simply because something is capable of being done, failure to do that thing is not automatically mean that the taxpayer has not acted reasonably. Instead, the circumstances of the taxpayer should be taken into account. It was submitted that HMRC’s view that the appellant should have been suspicious of the February 2014 shipment and could have viewed the load in the van was not appropriate. HMRC had not considered that the load was in a sealed container, so that viewing the load would not have shown that the documentation was incorrect.

62. Whilst the appellant said they had some sympathy with the suggestion from HMRC that the appellant should have carried out checks of the load point and destination, they submitted that this was not practical. It was submitted that the appellant was a small business and that it did not have the capacity to establish load points and destinations.

63. The appellant submitted that they were, throughout, no more than an agent for GBT. The appellant was not present when the container was loaded, nor during its transport by road, rail and ship.

64. The appellant also submitted that, under Article 11 (1 & 2) of the Schedule to the Carriage of Goods by Road Act 1965 the appellant is entitled to rely on the information provided by the consignor and has no duty to make an enquiry as to the accuracy or the adequacy of the documents provided by the sender.

65. Further, as Articles 17 and 18 of the Schedule would make the appellant liable to costs by opening and damaging the packaging so the appellant submitted that it is reasonable that the appellant as a commercial business would not wish to expose itself to such liability, particularly as the appellant was obliged to rely on the sender’s documents by virtue of Article 11.

66. The appellant submitted that the penalty was based on the HMRC officer’s personal opinion that the appellant should or ought reasonably to have known that the goods manifested as foodstuffs were in reality wine. The appellant submitted that no

evidence was provided that the appellants should or ought reasonable to have been aware that the goods manifested as foodstuffs were wine and so the penalty was raised on the basis of suspicion rather than facts. The appellant submitted that suspicion, rather than factual knowledge, has no place in a commercial environment and is prejudicial to international trade.

67. With regard to the Scheda di Transporto with the word "vino" written on it, it was submitted that there was no evidence as to why this word had been written on the Scheda, nor who it had been written by. As such, it was submitted that it had no relevance.

68. The appellant submitted that the case of *Jeffrey Williams* provided that "the burden of proof would be on HMRC to show that [the appellant] knew, and/or had reason to know, the [hidden] nature of the goods being transported as part of the fraudulent enterprise".

69. The appellant submitted that HMRC's view, that on the basis of the preceding seizures the appellant should either have refused to provide GBT with a container for the shipment in February 2014 or should have arranged for the goods transported to be searched, was not reasonable or practical for the following reasons:

(1) The appellant was not fully aware of the previous seizures; the seizure notices addressed to the appellant had been sent by second class post and HMRC had not shown that the appellant had received these by the time it accepted the order for the fifth shipment.

(2) The appellant submitted that its staff had received assurances from GBT that the previous seizures had arisen from clerical error which was being corrected. Therefore it was submitted that the appellant's staff had no reason to disbelieve their customer and had assumed that the customer was dealing with the matter in conjunction with HMRC and that the appellant's involvement was confined to obtaining the return of their container and providing assistance to HMRC as requested. In addition, it was submitted for the appellant that, by the time of the last seizure, senior management had not had the opportunity to review the background to the first four seizures and so had not been able to make a commercial decision as to whether to continue to act for the customer. Such decision was only made after the last shipment was seized.

(3) The appellant submitted that they had no staff present at the loading of the pallets or during shipment and so would not have been physically able to search the goods and, in any case, to do so would have made them liable for costs as previously noted.

(4) It was submitted that HMRC's suggestion that the appellant could have contacted Border Force in advance of the February 2014 shipment was not reasonable: it would not be appropriate for the appellant to go to a tax authority where it had no reason to believe that the customer was involved in smuggling. If anything, it was submitted, Border Force should have informed the appellant of their suspicions.

70. The appellant submitted that it was not reasonable for HMRC to raise a penalty in these circumstances and that the burden of proof should be on HMRC to demonstrate that the appellant was not an innocent carrier or agent, and that it had actual knowledge or reason to know the hidden nature of the goods being carried. It was submitted that the appellant had taken all reasonable steps to check the order and was entitled to rely on information provided in the CMR. The appellant had also cooperated with HMRC throughout the process and, it was submitted, was in no way at fault.

Human Rights provisions

71. The appellant submitted that paragraph 3(a) of Article 6 of the European Convention for Human Rights requires that the appellant has a minimum right to be informed promptly in a language that he understands of the accusation made. The appellant submitted that HMRC were aware that the appellants were Italian but made no effort to correspond with them in their own language but, instead, requested replies to technical queries in English.

72. Accordingly it was submitted that the appeal should be upheld.

HMRC evidence and submissions

73. Officer Fairburn provided a witness statement and oral evidence at the hearing. A witness statement for Officer Atkinson, who had issued the penalty notice, was also provided but Officer Atkinson had not been given permission to attend by his present employer and so was unable to attend the hearing. The correspondence between the parties was also included in evidence.

74. Officer Fairburn's evidence summarised the information in Officer Atkinson's statement and confirmed that he had reviewed the entirety of the evidence up to the point of submission to the independent review. Officer Fairburn confirmed that he fully endorsed the decision to apply the penalty to the fifth shipment for the reasons given by the decision maker and at the level applied.

75. On being questioned by the appellant's representative, Officer Fairburn confirmed that he had not been the compliance officer throughout the proceedings but had taken over the matter on 19 December 2016. He had reviewed the file and discussed it with Officer Atkinson as part of the handover of the matter. He had worked on the same team as Officer Atkinson but not on the same files and so had not had any substantial involvement before taking the matter over.

76. Officer Fairburn confirmed that he was satisfied that the matter had been conducted properly and that the penalty notice had been properly and lawfully issued. He did not consider that the appellant had a reasonable excuse, based on the information recorded in the case file.

77. Officer Fairburn was asked why the original assessment had been withdrawn. He explained that, from the case records, it appeared that it had been believed that the

liability had moved to GBT (the appellant's customer) and so the assessment was withdrawn. The penalty notice was issued when it became clear that what had appeared to be a reasonable excuse was not in fact so.

78. Officer Fairburn considered, from the case notes, that Officer Atkinson had only been nominally aware of other seizures at the time the first assessment was withdrawn. He had not had the full facts and, in particular, had not had information to indicate that the seizure notices had been issued to the appellant. Such information had only arisen later, as a result of correspondence with the appellant and the appellant's representatives.

79. From the case notes Officer Fairburn considered that, once he realised that such correspondence had taken place, Officer Atkinson had thought that the appellant, having been advised on four occasions that there was a problem with the shipment, should have taken more care with regard to the fifth shipment.

80. It was put to Officer Fairburn that the correspondence between HMRC and the appellant at the time had only been in relation to the containers. Officer Fairburn noted that the seizure notices were very different to the email correspondence, and notified the recipient that may need to take action.

81. With regard to correspondence between the appellant and HMRC, it was noted that HMRC had established that letters sent by HMRC to the appellant had arrived between 7 and 12 days after posting. Further, emails relating to the first four shipments were exchanged between Border Force and the appellant before the fifth shipment was dispatched. In particular, an employee of the appellant, Alfredo Ginestrini had sent emails to Border Force on 3 and 10 January 2014 (each copied to another employee of the appellant, Pierpaolo Pace) which concerned the containers involved in the second and third seizures.

82. With regard to the circumstances of the fifth shipment, HMRC noted that their investigations had shown a number of matters, including in particular that the intended recipient of the goods was a missing trader: when HMRC had visited the address listed on the CMR, the trader occupying the unit had no knowledge of the consignee (Sweet & Sunny Ltd). The notice of seizure had been returned by to Border Force with the comment that the "addressee has gone away". Further, the only business found at the address of the consignor was not Pesi Nord SRL (the consignor shown on the transport documents for each shipment) but, instead, is the address of another company, Da Viro SRL. Correspondence to Pesi Nord SRL was returned marked "sconosciuto", meaning "not known". The location for the pickup of this shipment was checked on the internet and was found to be the location of the Arione Mario de Arione winery.

83. Officer Atkinson's witness statement states that he took over this matter from a colleague on 19 November 2014. Officer Fairburn stated that the matter had previously been dealt with by another enquiry officer, Mrs Lilley.

84. On 21 November 2014, Officer Atkinson of HMRC wrote to the appellants stating that they intended to issue an excise duty and penalty assessment in respect of the fifth seizure. The letter stated, inter alia, the total amount of excise duty (£46,121) and penalty (£26,519) that HMRC intended to charge. The letter also stated that HMRC would write to the appellants again to let them know much to pay and when to pay. The penalty explanation included the information that "this is the third occasion (28/12/2013 and 3/1/2014) in under 3 months that you have been involved with similar seizures of wine from containers". The letter requested a response for the provision of any relevant information from the appellant by 21 December 2014.

85. By a letter dated 23 December 2014, Officer Atkinson wrote to the appellant issuing the duty assessment and penalty notice. The letter advised that the amounts shown in the letter of 21 November 2014 were incorrect and at the excise duty due was in fact £45,009. The penalty was, accordingly, reduced to £25,880. Officer Atkinson's witness statement states that, having received no reply to his letter of 21 November 2014, he "progressed to issuing the assessment and penalty notice" on 22 December 2014.

86. Following an exchange of correspondence, on 13 February 2015 Officer Atkinson wrote to the appellant to withdrawn the excise duty and penalty assessment "due to the information provided" and "without prejudice to further action should further information be received". Officer Atkinson's witness statement stated that he believed there was enough evidence to move the liability to the appellant's customer, GBT and that the appellant had no access to the containers at loading and so decided to withdraw the penalty on the basis stated in his letter.

87. Officer Atkinson's witness statement further explained that, subsequently, he had discussed the case with a colleague and learnt that there had been four previous seizures involving the appellant and the same customer, GBT. These seizures were being dealt with by his colleague. In discussion, they had taken the view that given the amount of seizures involving these parties, consideration had to be given to wrongdoing penalties. Having taken over the information in respect of these other seizures from his colleague, Officer Atkinson's witness statement states that he reviewed the information and noted that the documents showed that the other seizures had the same pickup location, Via B Aires, 103 Canelli (AT), 14053 Italy as that in the fifth shipment with which he had been dealing.

88. Officer Atkinson wrote to the appellant's representative on 1 April 2015 to confirm that he was looking at all of the seizures and was considering a wrongdoing penalty for the five seizures. He requested more information regarding the appellant's customer and the shipments, including the explanations given by the customer for the seizures, and the reason why the appellant had continued transporting containers.

89. Officer Fairburn stated that the case papers showed that Officer Atkinson had incorporated his colleague's four additional enquiries into his own due a change of duties for the other officer and to give some continuity to the traders involved.

90. On 12 May 2015, Officer Atkinson issued GBT, the appellant's customer, with an excise assessment for all five seizures.

91. On 27 May 2015, the appellant responded to Officer Atkinson's further enquires to say that they were not happy with having to deal with further queries which they
5 regarded as outside their control and time consuming.

92. On 28 May 2015, the appellant's representatives responded to state that the appellant's customer had advised that the problems with the shipments had been the result of a clerical error which they would resolve. The appellant had taken a commercial decision to continue providing services for a reasonable period of time
10 having received these assurances that the seizures were the result of a clerical error. As confirmation was not received that these matters were resolved, and in light of subsequent seizures, the appellant had ceased working with the customer.

93. Following further correspondence, Officer Atkinson's witness statement stated that he considered that the appellant had not provided information to demonstrate
15 whether each seizure subsequent to the first had made them suspicious, or at which point they had realised that the clerical error was not substantiated, nor why they continued providing transportation after each seizure. The appellants had advised that they did not accept that any new procedures were needed after the previous seizures.

94. Officer Atkinson's witness statement stated that did consider that, as the second,
20 third and fourth shipments were all transported before the "actual second seizure" he accepted that these could not have been checked before they left Italy. This view was confirmed in subsequent correspondence.

95. Following further correspondence, Officer Atkinson's witness statement notes that the appellant had explained that they would have followed normal procedure in
25 regards to the ARC number that would need to be provided the appellant it were aware that the shipment was alcohol. Officer Atkinson's witness statement then notes that this does not explain why there was no ARC for the load subject to the first seizure which was manifested as wine. The appellant explained that the customer had not mentioned that the load was wine when they placed the order. The appellant
30 advised that they had made no changes to their procedures as a result of seizures because they were a victim of customers not providing full and correct information rather than inadequate procedures, although they were investigating whether there were amendments it could make to reduce the risk further.

96. As a result of the correspondence with the appellant, Officer Atkinson's witness
35 statement states that he considered that wrongdoing penalties could be applied to all the five seizures unless the appellant had a reasonable excuse. His witness statement states that he sought policy advice and was referred to a recent decision in the case of *Barrett* [2015] UKFTT 239 (TC) in which the test of reasonable excuse was held to be an objective one, based on what a reasonable taxpayer in the position of the
40 taxpayer would have done in those circumstances.

97. Officer Atkinson's witness statement states that he considered that the fifth seizure was not unexpected or unusual, that it was not the case that it could not be reasonably foreseen nor that it was beyond the appellant's control. He considered that the appellant did not conform to the standard of the reasonable taxpayer in the *Barrett* case and would expect the appellant to have taken steps within their control.

98. He states that he gave the benefit of doubt for the first seizure despite it being manifested as wine and for the second, third and fourth due to the containers having departed before the seizures started in the UK.

99. These considerations were set out in a letter to the appellant on 23 October 2015, stating that the appellant could have made simply checks to verify the consignor and consignee. Alternatively, they could have notified Border Force or the haulier to ask them to check the container. Officer Atkinson accepted that it was not practical or economical to check every container, but that it would have been appropriate to do so in this case, given the four previous seizures. He recognised that seizures of containers are an occupational hazard but that the decision to transport more containers for the same customer after four seizures was "inexplicable".

100. That letter also notes that Officer Atkinson had investigated the eighteen other shipments made by the appellant for the customer and had been unable to contact or verify any of the consignees or consignors for these shipments. He advised that quick basic internet checks on the consignee and consignor's name and address could assist in preventing smuggling by customers.

101. Officer Atkinson's witness statement states that he did not consider that the customer's assurances could be credible after four seizures, but that these had been simply accepted by the appellant.

102. The appellant's representative wrote to Officer Atkinson on 19 November 2015, and confirmed that the haulier for the fifth shipment had counted the number of pallets in the shipment and checked their condition to ensure that they agreed with the order and the CMR. The appellant advised that they did not consider that HMRC's inability to contact Pesi Nord SRL had any relevance as Pesi Nord was not the sender as mean by the Schedule to the Carriage of Goods Act 1965. The appellant was not acting on behalf of either Pesi Nord SRL or Sweet & Sunny Limited and the appellant considered that there was "no relevance to [the appellant] that HMRC was unable to trace either of these parties and [did] not accept that [the appellant was under any responsibility to make contact with them".

103. Officer Atkinson wrote to the appellant on 23 November 2015, explaining that the relevance of Pesi Nord was that they were shown as the consignor on the CMR and that he considered that the appellant should have checked them as part of fail-safe checks to ensure that the next shipment was legitimate given that he considered that the appellant should have made such checks given the previous mis-manifesting of goods by the customers.

104. On 17 December 2015, Officer Atkinson issued the penalty assessment in the sum of £9,000 to the appellant.

105. Officer Atkinson's witness statement states that after four seizures of alcohol and the mis-manifesting of the goods, he considered that the appellant "ought to have known that they were facilitating fraud" and "could have done additional checks (simple internet checks on consignee or consignor) to verify whether it was a legitimate" shipment and that the haulier could have been instructed to "check the boxes when picked up". Officer Atkinson's witness statement states that he "would not advocate this level of checking in all circumstances, but these were far from normal circumstances, something any responsible trader would have recognised".

Submissions

106. HMRC agreed that the issues for the tribunal to consider were as set out by the appellant: firstly, was the penalty raised in time; secondly, has the penalty been raised lawfully; thirdly, if the penalty is assessable, does the appellant have a reasonable excuse.

Was the penalty issued in time?

107. HMRC submitted that the penalty was clearly issued in time: paragraph 16(4) of Schedule 41 of Finance Act 2008 requires that the penalty should be raised within twelve months of the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed or, where no assessment to tax had been made, within twelve months of the date on which the amount of tax unpaid by reason of the relevant act or failure is ascertained.

108. HMRC submitted that, as the assessment of tax had been raised on 23 December 2014, the appeal period expired on 22 January 2015 and the twelve month period ran from that date. The penalty was issued on 17 December 2015, within the twelve month period and so was issued within the relevant time limit.

109. HMRC submitted that it would be necessary to read words into the legislation to interpret paragraph 16(4)(a) as referring only to assessments to tax which had been issued and not withdrawn.

110. In the alternative, HMRC submitted that even if paragraph 16(4)(a) could be interpreted as requiring that the assessment to tax had not been subsequently withdrawn, the penalty had still been issued within twelve months of the date on which the amount of tax had been ascertained.

111. HMRC submitted that the letter of 21 November 2014 referred to by the appellant did not contain an ascertainment of the amount of tax. Instead, that letter stated only HMRC's intention and was not a final notification, as confirmed by the subsequent issue of the assessment on 23 December 2014 which included an amended amount of duty, different to that stated in the letter of 21 November 2014, such that the date on which the amount of tax was ascertained was 23 December 2014. The

penalty notice was issued within twelve months of this date and so was issued within the relevant time limit.

Has the penalty been raised lawfully?

112. HMRC submitted that, at the point that the goods were seized, an excise duty point was established. They submitted that the case of *Jeffrey Williams,* referred to by the appellant, expressly did not decide whether consumption was necessary to establish a duty point and so could not be considered to be an authority for that purpose. That case considered the matter only in passing and the decision was concerned with the question of whether there had been deliberate wrongdoing.

113. HMRC submitted that the case of *B&M Retail* made it clear, at §115, that HMRC were entitled to assess duty on goods circulating in the UK: "there will be a distortion of the internal market if goods in respect of which duty has not been paid are circulating freely alongside goods where duty has been paid". Accordingly, it was submitted that HMRC are subject to a duty to ensure that excise duty is levied and paid where goods in respect of which duty has not been paid are found.

114. Further it was noted that the decision in *B&M Retail* found that, at §155, "where [a Member State] is unable to assess any person who caused a prior release for consumption to occur, it is open to the Member State to assess … any person who is found to be holding the goods" and that (§156) it would be "clearly contrary to the objective of the 2008 Directive to ensure that duties properly chargeable are collected" for the relevant goods to go untaxed if the person holding them was unable to show that duty had been paid and HMRC were unable to assess the person who had caused a release for consumption. In this case, it was submitted that the alcohol contained in the fifth seizure was not properly held outside a duty suspension arrangement and excise duty had not been levied. It was therefore appropriate for HMRC to decide that a duty point existed on that basis.

115. *B&M Retail* went to conclude that "the recognition … 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" (§157). HMRC submitted that the fact that other excise duty points might in principle have been triggered before the appellant received and held the goods is not relevant.

116. *B&M Retail* also held that the "basis of chargeability in the second Member State is that a person in that Member State is either delivering, holding or receiving the goods in circumstances where the duty has been paid. In those circumstances, the national authorities can assess to duty whoever they find to be in that position at the relevant time" (§116). It was submitted that the appellant was plainly delivering and holding goods at the relevant time.

117. Accordingly, it was submitted that the fact that HMRC were not precluding from issuing the penalty by the fact that there may have been a duty point prior to the appellant receiving the goods in question. It was also submitted that the decision in

B&M Retail, as a decision of the Upper Tribunal, is binding on this tribunal such that it is not open to this tribunal to find that the penalty had not been lawfully issued on the basis that HMRC were unable to establish a duty point.

118. Further, HMRC submitted that the appellant's argument that no penalty could be issued because the goods had been destroyed was without substance as the goods had been destroyed after seizure and not at the time they were delivered to the UK.

119. It was submitted that the *Staniszewski* case confirmed HMRC's position as the judge had agreed that (§39) "any argument to the effect that seizure of the goods could constitute "the total destruction or irretrievable loss of the excise goods during their transport … as a consequence of authorisation by the competent authorities of that Member State" would lead to excise goods being seized and forfeited because they were liable to unpaid excise duty ceasing to be liable to that duty by reason of their seizure and forfeiture and, in the absence of liability to excise duty, the goods would no longer be liable to seizure and forfeiture. If this were the case it would lead to the absurd position that goods could never be seized and subject to forfeiture as the very act of seizure and forfeiture would render the goods not liable to seizure or forfeiture in the first place" and (§40) "It is clear from the Directive and the Regulations (which have implemented the Directive into domestic law) that excise duty becomes chargeable when excise goods are "released for consumption" (see Article 7 and Regulations 5 and 6) or when held for commercial purposes in Member State other than that from which they were released for consumption (see Articles 32 and 33 and Regulation 13) and not, in the literal sense as envisaged by the consumption point, when they are actually consumed."

120. It was therefore submitted that the appellant's argument that there could be no duty point because the goods had not been consumed was not sustainable.

121. Further, HMRC submitted that the case of *Taylor and Wood*, also referred to by the appellant was an appeal in respect of criminal proceedings in relation to fraudulent evasion of excise duty and not directly relevant to this matter. The excise duty in that case had been established when the excise goods entered the relevant English port. The points in the decision referred to by the appellant were, it was submitted, merely obiter and not binding.

Reasonable excuse

122. HMRC reminded the tribunal that the burden of proof is on the appellant to show on the balance of probabilities that it had a reasonable excuse, and submitted that the test of whether a reasonable excuse had been made out is an objective one, following the decision in *Nigel Barrett* [2015] UKFTT 239 (TC).

123. HMRC accepted that the appellant had a reasonable excuse in respect of the first four shipments as a result of the chronology of events.

124. HMRC submitted that the appellant had not shown on the balance of probabilities that it had a reasonable excuse with regard to the fifth shipment for the following reasons:

(1) The appellant knew of the first four seizures at the time that it accepted the order for the shipment that resulted in the fifth seizure, given the correspondence in January 2014 showing that the appellant's employees were aware of the seizures as, for example, they referred to the fourth seizure in email correspondence in early January 2014. The appellant's submission that it had not received notice of the seizures due to the length of time that second class post took to arrive was, therefore, not relevant.

(2) It appears that the appellant took no steps to terminate its commercial relationship with its customer, GBT, until after the fifth seizure.

(3) There is nothing to show that the appellant took any steps to check that the load which it agreed to transport in this fifth shipment was properly manifested notwithstanding that it had been notified that it had transported four containers in the previous two months which were not properly manifested in that they mis-stated the contents in the manifests and the CMR documentation in the case of the second, third and fourth shipments or, in the case of the first shipment seized on 13 December 2013, did not have an ARC number or evidence of duty pre-payment.

(4) The appellant has not provided any evidence to show that it took steps to raise the seizures with its customer other than a conversation in which it is asserted that the customer said that the seizures or mis-manifesting of the loads was the result of 'clerical error'.

(5) The appellant has not provided any evidence that shows that it has processes in place to combat smuggling or to prevent seizures of goods that it agrees to transport. This is surprising for a company which asserts that it engages in a substantial volume of shipping.

(6) The appellant's assertions that it was reviewing its relationship with GBT at the time of the fifth seizure does not amount to a reasonable excuse and demonstrate that the appellant did not take reasonable care to avoid the failings that led to a penalty being imposed.

(7) The appellant did not conduct any checks of the consignor or consignee of any of the goods transported that were seized. Simple internet searches of these would have shown that neither of those companies operated from the addresses given. It was clear from such checks that the pickup point was a winery. The appellant's failure to carry out even these basic checks against the background of four previous seizures reveals a manifest lack of due diligence.

(8) The appellant relies on the CMR Convention to show that it was not required to undertake these checks. However, the provisions of the Convention allow, for example, for reservations to be entered onto the consignment note, indicating that the carrier is not prohibited from making such checks.

(9) The Scheda di Transporto for the fifth shipment clearly shows "vino" handwritten on the document with no explanation as to who wrote this and the appellant could not establish that it did not have this document, dated 11 November 2013, in its possession before the shipment took place in February 2014.

125. HMRC submitted that, for these reasons, the appellant had failed to establish to the objective standard required that it had a reasonable excuse for its acts and failings which led to the imposition of a penalty in this case.

126. With regard to the appellant's submissions as to Article 6 of the European Convention for Human Rights, and the requirement to communicate in a language understood by the appellant, HMRC submitted that the appellant had not established that it had suffered any prejudice. The appellant is a company with a UK subsidiary, with an English language website and English speaking staff. Mr Todisco had given a substantial amount of his evidence in English. It was clear that the appellant's staff understood English and so there was no breach of Article 6.

127. HMRC submitted that the original decision of 17 December 2015 and review decision of 11 April 2016 were rational and proper and that no basis to overturn them had been established. It was also submitted that there had been no challenge to the amount of the penalty imposed. Accordingly, it was submitted that the appeal should be dismissed.

Relevant law

128. The substantive relevant law is set out in the appendix to this decision.

Findings of fact

129. We find the following facts:

(1) The appellant is a carrier which provides containers in order to transport goods for customers. It uses third party hauliers to move the containers and does not itself attend at pickup or dropoff locations of shipments..

(2) The appellant discussed the matter with its customer after the first four seizures. The appellant therefore knew of the first four seizures before it accepted the order to transport the shipment that was subject to the fifth seizure.

(3) The appellant made no additional checks in respect of that shipment load beyond its standard checks as to the identification of its customer and, in particular, had made no checks as what was at the location specified as the pickup point.

(4) The appellant's concern in respect of the shipments was with the whereabouts of its containers and not the goods which were being transported.

(5) The penalty under appeal was issued on 17 December 2015.

(6) A penalty and an assessment to excise duty had previously been issued on 23 December 2014 and both were withdrawn on 11 February 2015.

(7) An assessment to tax was issued to the appellant's customer on 12 May 2015.

(8) On the balance of probabilities, the amount of the assessment to which this penalty relates was established on 22 December 2014.

(9) At the time that he issued the original penalty, the decision maker, Officer Atkinson, knew that there had been two other seizures involving the appellant on 28 December 2013 and 3 January 2014.

Decision

Was the penalty raised in time?

130. Paragraph 4 of Schedule 41 FA 2008 requires that a penalty assessment must be made within twelve months of either (a) the end of the appeal period in respect of the relevant assessment to tax or, (b) where no assessment to tax has been made, the date twelve months after the date on which the relevant amount of tax was ascertained.

131. The penalty under appeal was issued on 17 December 2015. The appellant submits that, as the assessment was withdrawn, the first deadline cannot apply and that HMRC must have been out of time for the second deadline as they submit that the relevant amount of tax must have been ascertained before 17 December 2015 as the penalty assessment was dated 23 December 2015 and therefore the amount of tax must have been ascertained some time before that date.

132. Paragraph 4(4)(a), which provides that the relevant deadline where there has been an assessment to tax is "the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed".

133. We find that the legislation does not include any words that could indicate that this section does not apply where the assessment of tax is withdrawn, nor is it necessary to read any such words into the legislation to render the meaning of this section clear.

134. Accordingly, we find that this penalty was issued in time.

135. In the alternative, this legislation deals with penalties in respect of excise duty. An assessment to excise duty can be made on a number of different parties involved with the excise goods, depending on the circumstances. The penalty assessment need not be raised on the same person as that on which the assessment to tax is raised.

136. This is made clear in this case as the original assessment was withdrawn because HMRC had formed the view at that point that the liability to excise duty had moved to the appellant's customer, and a subsequent assessment was raised against

the appellant's customer on 12 May 2015 in respect of the fifth shipment as well as the other four shipments.

137. If the withdrawal of an assessment to tax in circumstances where another person may subsequently be assessed in respect of that tax were to mean that the original assessment should be treated as never having been issued, as submitted by the appellant, in assessing a deadline for issue of a penalty, we find that the subsequent assessment on the appellant's customer in respect of the tax unpaid on fifth shipment, to which the penalty relates, would create a new, later, deadline for the issue of that penalty under this legislation such that the penalty assessment was still issued in time.

138. Finally, even if the withdrawal of the assessment were to mean that the relevant deadline should be established under paragraph 4(4)(b), we find that, on the balance of probabilities, the amount of tax was ascertained less than twelve months before the date of issue of the penalty. The amount of the tax, and the penalty, were changed between the date of the advisory letter (21 November 2014) and the date on which Officer Atkinson's witness statement states that he progressed to issue the penalty (22 December 2014). The deadline set for a response to his letter of 21 November 2014 was 21 December 2014 and we find that, on the balance of probabilities, he would not have reconsidered the amount of tax until he came to recheck the calculations on issuing the assessment, having received no reply. Accordingly, as the penalty assessment was issued on 17 December 2015, and we find that on the balance of probabilities the amount of tax was ascertained on 22 December 2015, the penalty notice was issued in time.

Was the penalty lawfully raised?

139. The appellant submitted that the penalty assessment had not been lawfully raised because no excise duty point had been established or, in the alternative, the goods had been destroyed before being moved for a commercial purpose or released for consumption, or in the further alternative, the appellants were innocent agents and it would be contrary to the objective of the relevant legislation to impose the penalty upon them.

Was an excise duty point established?

140. The appellant submitted that an excise duty point had been established when the goods had been released into free circulation in Italy prior to shipment and, as the goods had been destroyed following seizure, the decision in *Staniszewski*, which found that a duty point had arisen in the UK regardless of the destruction of the excise goods in question, were not relevant. As an excise duty point had already arisen, the UK authorities were therefore precluded from raising an assessment to excise duty and equally precluded from raising a penalty assessment.

141. We are bound by, and in any case agree with, the decision in *B&M Retail* in the Upper Tribunal that HMRC were not precluding from issuing the penalty by the fact that there may have been a duty point prior to the appellant receiving the goods in question.

142. We agree with the decision in *Staniszewski* that "Article 37 [of Directive 2008/118/EC] … can only apply to goods that have been "totally destroyed" or "irretrievably lost" in specific circumstances at a point prior to that at which a liability to excise duty would otherwise arise." However, we also find that, as in *Staniszewski* this is not the position in the present case.

143. The appellant stated that the excise goods were released for consumption in Italy. The excise goods were clearly held for a commercial purpose in the United Kingdom as the provisions of Article 33(4), which set out conditions under which goods are not regarded as held for commercial purposes, only apply where the goods are moving under cover of the formalities set out in Article 34: that is, where the excise goods are moving under duty suspension arrangements or where duty has been pre-paid. Clearly, the excise goods in this case were not moving under cover of the formalities set out in Article 34 such that the goods are not precluded from being held for a commercial purpose in order to be delivered or used in the United Kingdom (and therefore within Article 33).

144. Therefore, in accordance with Article 33 (and UK implementing legislation, we find that the goods were subject to and became chargeable to excise duty in the United Kingdom when held in the United Kingdom. The goods were not destroyed until after this excise duty point had arisen, and so the United Kingdom was not precluded from raising an assessment to excise duty and, accordingly, was not precluded from raising the penalty assessment.

145. In the alternative, the appellant submitted that they had no involvement with the wine and so could not be regarded as liable for any penalty, and cited *Taylor and Wood* in support of this, particularly the comment that "To seek to impose liability to pay duty on [the carrier], who, as bailees, had actual possession of the [excise goods] at the excise duty point but who were no more than innocent agents, would raise serious questions of compatibility with the objectives of legislation".

146. We note, however, that *Taylor and Wood* concerned criminal proceedings, rather than civil proceedings, and the carriers referred to in the decision quoted on behalf of the appellant in this case were not subject to those criminal proceedings: the quotation is therefore judicial commentary and not binding authority. The judge was also referring to the imposition of criminal liability in respect of the excise duty itself and not to the imposition of penalties.

147. We note also that paragraph 4 of Schedule 41 Finance Act 2008, which contains the penalty provisions requires only that the person on whom the penalty is imposed is "concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods". There is no requirement in the legalisation that the person be specifically aware that the goods involved are excise goods.

148. Accordingly, we find the legislation does not require specific knowledge on the part of P, the person on whom the penalty s assessed, and so HMRC is not precluded from raising the penalty assessment.

149. At this point, we also note that the appellant had also submitted that meant that they could not be regarded as being in possession of the goods contained in those shipments, and that possession was also a requirement for the goods to be regarded as having been released for consumption. Without possession, the goods could not have been released for consumption and so no excise duty point could arise and no duty could become payable as that would be contrary to the objectives of the legislation, particularly Recital 9 of Council Directive 2008/118/EC and Article 1 of the same Directive.

150. As set out in §143 above, we have found that the goods should be regarded as having been held for a commercial purpose in the UK such a duty point arises regardless of the question of whether the goods have been released for consumption. We also agree with Judge Brooks in *Staniszewski* that "It is clear from the Directive and the Regulations (which have implemented the Directive into domestic law) that excise duty becomes chargeable when excise goods are "released for consumption" (see Article 7 and Regulations 5 and 6) or when held for commercial purposes in Member State other than that from which they were released for consumption (see Articles 32 and 33 and Regulation 13) and not, in the literal sense as envisaged by the consumption point, when they are actually consumed."

151. Finally, the appellants also submitted in their skeleton argument that the penalty was not lawfully issued because the original penalty of 23 December 2014 had been issued with knowledge of the previous four seizures. That penalty had been withdrawn. The issuing officer, Officer Atkinson, had received no further information to substantiate the issue of the subsequent penalty notice.

152. The penalty notice dated 23 December 2014 refers only to Officer Atkinson being aware that the appellant had been involved in two seizures in December. We find from the evidence presented that Officer Atkinson became aware of the other seizures, and the detail in respect of those seizures only after the original penalty assessment had been withdrawn.

153. As the penalty assessment was withdrawn "without prejudice to further action should further information be received", we find that the information as to two further seizures involving the same customer within a short period of time is "further information" substantiating the issue of the penalty notice on 17 December 2015.

154. We therefore find that the penalty notice was lawfully issued.

Was there a reasonable excuse?

155. Paragraph 20 of Schedule 41 Finance Act 2008 a person is not to be liable to a penalty in respect of an act or failure where there is a reasonable excuse for that act or failure.

156. The appellant submitted that the burden of proof would be on HMRC to show that the appellant knew, and/or had reason to know, that they were transporting excise

goods. We note that the burden of proof is, in fact, on the appellant to show that they had a reasonable excuse.

157. The appellant submits that they have a reasonable excuse in respect of their involvement with the goods subject to the fifth seizure when duty was outstanding and had not been deferred on those goods because:

(1) The appellant were not informed by their customer that the goods were excise goods and, as they were not present at loading, could not have known that the goods were excise goods. Further, the goods were in sealed containers so that it would not have been obvious that the goods were excise goods. The appellant would have been liable for the costs of damage caused to the packaging and goods if they had required the haulier to open the packaging to check the goods.

(2) The appellant had taken all reasonable steps and was entitled to rely on the information provided by their customer under Article 11 (1 & 2) of the Schedule to the Carriage of Goods by Road Act 1965 and has no duty to make an enquiry as to the accuracy or the adequacy of the documents provided by the sender.

(3) It was not practical for the appellant to carry out internet checks of the load point and destination for shipment.

(4) The appellant was not fully aware of the previous seizures because the seizures notices had been sent by second class post.

(5) Senior management had not had the opportunity to review the background to the first four seizures and so had not been able to make a commercial decision as to whether to continue to act for the customer.

(6) The appellant had been assured by its customer that the previous seizures resulted from clerical error.

(7) It was not reasonable to expect the appellant to have contacted Border Force in advance of the fifth shipment as it had no reason to believe that the customer was smuggling excise goods.

158. We agree that the test of reasonableness is an objective test as set out in the *Nigel Barrett* case: "The test of reasonable excuse involves the application of an impersonal, and objective, legal standard to a particular set of facts and circumstances. The test is to determine what a reasonable taxpayer in the position of the taxpayer would have done in those circumstances, and by reference to that test to determine whether the conduct of the taxpayer can be regarded as conforming to that standard."

159. We have considered the evidence put to us and we find that the appellant knew of the first four seizures in December and January 2014, as shown by email correspondence between Border Force and the employees of the appellant, before the order for the load subject to the fifth seizure was accepted. The fact that the seizure notices were sent by second class post and may have been delayed is, therefore, not relevant to whether the appellant had a reasonable excuse.

160. The appellant's evidence is that they were concerned only with the return of their containers and that they accepted their customer's assertion that the four seizures were a clerical error without further checks.

161. We agree that it would be impractical to carry out substantial checks in respect of every order but we find that a reasonable taxpayer, knowing that the previous four shipments for a particular customer had all been seized and had proved to contain excise goods and not the goods which had been stated on the order for transport, would have undertaken additional checks before accepting a fifth order for shipment.

162. We find that a simple check of the pickup location would have shown that it was a winery. We find that a reasonable taxpayer in these circumstances would have concluded that this shipment was likely to again contain wine rather than the non-excise goods on the order and would have taken action to ensure that they were not again involved in transporting excise goods in breach of relevant legislation.

163. We note HMRC's submission that a reasonable taxpayer could have informed Border Force of the fifth load and note that this could have been a reasonable course of action but note that a reasonable taxpayer could also have, for example, chosen to refuse the order if the customer did not provide the appropriate duty suspension transport documentation or evidence that duty had been pre-paid.

164. We note the provisions of Article 11 of the Schedule to the Carriage of Goods by Road Act 1965 but also note that that Article does not preclude or prohibit the appellant from making basic checks such as that set out above.

165. We note that the appellant states that senior management had not had time to review the background to the first four seizures before accepting the fifth order. We consider that a reasonable taxpayer, in these circumstances, would have procedures in place to promptly review at the appropriate level matters such as the seizure of a number of shipments all relating to a single customer within a short space of time.

166. We therefore find that the appellant did not, applying the objective test of reasonableness, have a reasonable excuse for its involvement with the load that was the subject of the fifth seizure and this penalty assessment.

Was there a breach of the Human Rights legislation?

167. The appellant submitted there had been a breach of Article 6 of the European Convention of Human Rights as no steps were taken to inform the appellant of the seizures and consequences in their own language.

168. Article 6 provides, as relevant that "everyone charged with a criminal offence has [the right[] to be informed … in a language which he understands … of the nature and cause of the accusation against him".

169. We find, therefore, that the requirement of the Convention is not that the communication be in the appellant's own language but, instead, that the communication be in a language which the appellant understands.

170. The appellant's staff communicated throughout in English and we were not provided with any evidence that they had requested that communication be conducted in Italian. Giving evidence at the hearing, Mr Todisco clearly understood questions put to him in English as he did not always wait for the interpreter to translate the question before replying. Mr Todisco gave a substantial number of his replies in English. The appellant also has a UK subsidiary and an English language website..

171. We find, therefore, that the appellant understands English and that communication in English did not breach any rights as to the language of communication that the appellant may have had under Article 6 of the Convention on Human Rights.

Conclusion

172. We find that :

(1) the penalty notice was issued in time; and

(2) the penalty notice was lawfully issued; and

(3) the appellant does not have a reasonable excuse for its involvement with the goods at a time when the payment of duty was outstanding and had not been deferred; and

(4) the communication in English by Border Force and HMRC to the appellant did not breach any rights as to the language of communication that the appellant may have had under Article 6 of the Convention on Human Rights.

173. The appeal is dismissed and the penalty is upheld in the amount assessed.

174. 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.

ANNE FAIRPO
TRIBUNAL JUDGE

RELEASE DATE: 3 NOVEMBER 2017

APPENDIX – RELEVANT LAW

SCHEDULE 41, FINANCE ACT 2008

4–
5 (1) A penalty is payable by a person (P) where—
(a) after the excise duty point for any goods which are chargeable with a duty of excise, P acquires possession of the goods or is concerned in carrying, removing, depositing, keeping or otherwise dealing with the goods, and
(b) at the time when P acquires possession of the goods or is so concerned, a
10 payment of duty on the goods is outstanding and has not been deferred.

(2) In sub-paragraph (1)—
"excise duty point" has the meaning given by section 1 of F(No 2)A 1992, and
"goods" has the meaning given by section 1(1) of CEMA 1979.
15

16–
(1) Where P becomes liable for a penalty under any of paragraphs 1 to 4 HMRC shall–
(*a*) assess the penalty,
20 (*b*) notify P, and
(*c*) state in the notice the period in respect of which the penalty is assessed.

…

25 (4) An assessment of a penalty under any of paragraphs 1 to 4 must be made before the end of the period of 12 months beginning with–
(*a*) the end of the appeal period for the assessment of tax unpaid by reason of the relevant act or failure in respect of which the penalty is imposed, or
(*b*) if there is no such assessment, the date on which the amount of tax unpaid by
30 reason of the relevant act or failure is ascertained.
(5) In sub-paragraph (4)(*a*) "appeal period" means the period during which–
(*a*) an appeal could be brought, or
(*b*) an appeal that has been brought has not been determined or withdrawn.

35 19–
(1) On an appeal under paragraph 17(1) the tribunal may affirm or cancel HMRC's decision.

(2) On an appeal under paragraph 17(2) the tribunal may—
40 (a) affirm HMRC's decision, or
(b) substitute for HMRC's decision another decision that HMRC had power to make.

(3) If the First-tier tribunal substitutes its decision for HMRC's, the tribunal may
45 rely on paragraph 14–

(a) to the same extent as HMRC (which may mean applying the same percentage reduction as HMRC to a different starting point), or
(b) to a different extent, but only if the tribunal thinks that HMRC's decision in respect of the application of paragraph 14 was flawed.

5

(4) In sub-paragraph (3)(b) "flawed" means flawed when considered in the light of the principles applicable in proceedings for judicial review.

(5) In this paragraph, "tribunal" means the First-tier Tribunal or Upper Tribunal (as
10 appropriate by virtue of paragraph 18(1)).

20—
(1) Liability to a penalty under any of paragraphs 1, 2, 3(1) and 4 does not arise in relation to an act or failure which is not deliberate if P satisfies HMRC or (on an
15 appeal notified to the tribunal) the tribunal that there is a reasonable excuse for the act or failure.

(2) For the purposes of sub-paragraph (1)—
(a) an insufficiency of funds is not a reasonable excuse unless attributable to events
20 outside P's control,
(b) where P relies on any other person to do anything, that is not a reasonable excuse unless P took reasonable care to avoid the relevant act or failure, and
(c) where P had a reasonable excuse for the relevant act or failure but the excuse has ceased, P is to be treated as having continued to have the excuse if the relevant act
25 or failure is remedied without unreasonable delay after the excuse ceased.

FINANCE (NO.2) ACT 1992

1–
30 (1) Subject to the following provisions of this section, the Commissioners may by regulations make provision, in relation to any duties of excise on goods, for fixing the time when the requirement to pay any duty with which goods become chargeable is to take effect ("the excise duty point").

35 (2) Where regulations under this section fix an excise duty point for any goods, the rate of duty for the time being in force at that point shall be the rate used for determining the amount of duty to be paid in pursuance of the requirement that takes effect at that point.

40 (3) Regulations under this section may provide for the excise duty point for any goods to be such of the following times as may be prescribed in relation to the circumstances of the case, that is to say—
(a) the time when the goods become chargeable with the duty in question;
(b) the time when there is a contravention of any prescribed requirements relating
45 to any suspension arrangements applying to the goods;
(c) the time when the duty on the goods ceases, in the prescribed manner, to be suspended in accordance with any such arrangements;

(d) the time when there is a contravention of any prescribed condition subject to which any relief has been conferred in relation to the goods;
(e) such time after the time which, in accordance with regulations made by virtue of any of the preceding paragraphs, would otherwise be the excise duty point for those goods as may be prescribed;

and regulations made by virtue of any of paragraphs (b) to (e) above may define a time by reference to whether or not at that time the Commissioners have been satisfied as to any matter.

(4) Where regulations under this section prescribe an excise duty point for any goods, such regulations may also make provision—
(a) specifying the person or persons on whom the liability to pay duty on the goods is to fall at the excise duty point (being the person or persons having the prescribed connection with the goods at that point or at such other time, falling no earlier than when the goods become chargeable with the duty, as may be prescribed); and
(b) where more than one person is to be liable to pay the duty, specifying whether the liability is to be both joint and several.

EXCISE GOODS (HOLDING, MOVEMENT AND DUTY POINT) REGULATIONS 2010

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.

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.

13–

(1) Where excise goods already released for consumption in another Member State are held for a commercial purpose in the United Kingdom in order to be delivered or used in the United Kingdom, the excise duty point is the time when those goods are first so held.

(2) Depending on the cases referred to in paragraph (1), the person liable to pay the duty is the 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 …

FINANCE ACT 1994

16–

…

(4) In relation to any decision as to an ancillary matter, or any decision on the review of such a decision, the powers of an appeal tribunal on an appeal under this section shall be confined to a power, where the tribunal are satisfied that the Commissioners or other person making that decision could not reasonably have arrived at it, to do one or more of the following, that is to say—
(a) to direct that the decision, so far as it remains in force, is to cease to have effect from such time as the tribunal may direct;
(b) to require the Commissioners to conduct, in accordance with the directions of the tribunal, [a review or further review as appropriate] of the original decision; and
(c) in the case of a decision which has already been acted on or taken effect and cannot be remedied by a review or further review as appropriate, to declare the decision to have been unreasonable and to give directions to the Commissioners as to the steps to be taken for securing that repetitions of the unreasonableness do not occur when comparable circumstances arise in future.

(5) In relation to other decisions, the powers of an appeal tribunal on an appeal under this section shall also include power to quash or vary any decision and power to substitute their own decision for any decision quashed on appeal.

(6) On an appeal under this section the burden of proof as to—
(a) the matters mentioned in subsection (1)(a) and (b) of section 8 above,
(b) the question whether any person has acted knowingly in using any substance or liquor in contravention of section 114(2) of the Management Act, and

(c) the question whether any person had such knowledge or reasonable cause for belief as is required for liability to a penalty to arise under section 22(1), (1AA), (1AB) or (1AC) or 23(1) of the Hydrocarbon Oil Duties Act 1979 (use of fuel substitute or road fuel gas on which duty not paid),

shall lie upon the Commissioners; but it shall otherwise be for the appellant to show that the grounds on which any such appeal is brought have been established.

DIRECTIVE 2008/118/EC

ARTICLE 33

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

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.

…

ARTICLE 37

1. In the situations referred to in Article 33(1) … in the event of the total destruction or irretrievable loss of the excise goods during their transport in a Member State other than the Member State in which they were released for consumption, as a result of the actual nature of the goods, or unforeseeable circumstances, or force majeure, or as a consequence of authorisation by the competent authorities of that Member State, the excise duty shall not be chargeable in that Member State.

…