[2018] UKFTT 256 (TC)

TC06486

Appeal number:TC/2015/00375

EXCISE DUTY – excise goods charged with duty at importation – release for consumption – requirement for goods to be placed under a duty suspension arrangement immediately on importation – HMRC's discretion to make an assessment – whether tribunal has jurisdiction in relation to that discretion – whether appellant should be permitted to withdraw a concession as to circumstances in which duty point arose and liability to duty – appeal dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

DARTSWIFT INTERNATIONAL LIMITED **Appellant**

- and -

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

TRIBUNAL: JUDGE JONATHAN CANNAN
MISS SUSAN STOTT FCA

Sitting in public in Manchester on 11 October 2016 and 17 November 2017

Ms Alison Graham-Wells instructed by Jackson Canter Solicitors for the Appellant

Mr Simon Charles instructed by HM Revenue & Customs Solicitor's Office and Legal Services for the Respondents

© CROWN COPYRIGHT 2018

DECISION

Background

1. This is an appeal in relation to an assessment to excise duty in the sum of £69,858. It concerns an importation of wine from South Africa in June 2014. The appellant acted as the customs clearance agent and registered consignor in connection with the importation. The wine arrived by sea at Teesport in a container. It was intended that the wine should enter a duty suspension arrangement and be transported to an excise warehouse for bottling.

2. Issues have been raised concerning the reasonableness of the respondents' decision to make the assessment, whether the goods entered a duty suspension arrangement on importation, and whether there was an irregularity in the course of movement of the goods. It is sufficient to say by way of background at this stage that the nature of the appellant's case has changed. The appeal was listed for one day and came on for hearing on 11 October 2016. The appeal was opened and we heard evidence on behalf of the appellant and the respondents which took the whole day. We therefore invited the parties to produce written closing submissions.

3. The appellant's closing submissions sought to withdraw a concession previously made by the appellant as to the circumstances in which the excise duty point arose, and raised a different case as to why the assessment should be set aside. In the circumstances the Tribunal sought to re-list a further day for oral submissions. For reasons entirely outside anyone's control it was not possible to re-list the appeal until 17 November 2017. At the re-hearing we heard submissions as to whether the appellant should be permitted to withdraw its concession and amend its case, and if so on what terms. We deal with that issue below.

4. The appellant, acting as a customs clearance agent, made a customs declaration at or about the time the wine arrived at Teesport. The appellant was also the registered consignor for the subsequent movement of the goods in respect of which it had a movement guarantee in place. The physical movement of the goods was the responsibility of a specialist wine and spirit haulier called Paltank Ltd ("Paltank"). Paltank was acting on behalf of the owner of the goods, Off Piste Wines Limited ("Off Piste"). In fact Paltank sub-contracted to another haulier. The goods were intended to be sent to an excise warehouse, Greencroft Bottling Company Ltd ("Greencroft").

5. Difficulties arose because Paltank's sub-contracted haulier removed the wine from the port at a time when certain excise duty procedures and formalities had not been complied with. Shortly after the wine had left the port and in the circumstances set out below the error was realised by the appellant which immediately informed Paltank and the haulier returned the goods to the port. However, the goods were subsequently seized and HMRC made assessments to excise duty on the appellant and also issued joint and several liability notices to Off Piste and Paltank.

6. We set out below the legal framework relevant to what may be called the appellant's opening case and to its amended case. We describe the amended case below, but for present purposes we can broadly summarise the basis of the appellant's case in opening as follows:

(1) The wine was not placed under a duty suspension arrangement immediately upon importation. The appellant was not able to do so because Paltank had not provided it with all the information necessary to do so, in particular the intended date of delivery to Greencroft.

(2) The wine was removed from the port before it had been entered into a duty suspension arrangement. The appellant was not aware of the movement and had no control over the movement.

(3) It is unfair and unreasonable for the appellant to be assessed where the responsibility for the occurrence of an excise duty point lay with Paltank and where the appellant had sought, obtained and followed guidance given by HMRC as soon as it became aware of the position. Further, in making the assessment various irrelevant factors were taken into account.

Legal Framework and Customs and Excise Procedures

7. *The Excise Goods (Holding, Movement and Duty Point) Regulations 2010* ("the 2010 Regulations") make provision for various matters in relation to excise duty. Part 2 of the 2010 Regulations makes provision for excise duty points and the payment of excise duty. In general terms, regulation 5 provides that an excise duty point arises at the time excise goods are released for consumption in the UK at which stage duty becomes payable.

8. Regulation 6 provides that excise goods are released for consumption in the UK as follows:

> " 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."

9. Regulation 7(1) identifies the time at which goods are said to leave a duty suspension arrangement in various circumstances. The following circumstances are relevant for present purposes:

> " 7(1) For the purposes of regulation 6(1)(a), excise goods leave a duty suspension arrangement at the earlier of the time when —
>
> …
>
> (g) they leave a place of importation in the United Kingdom unless—
>
> > (i) they are dispatched to one of the destinations referred to in regulation 35(1)(a); and

(ii) are moved in accordance with the conditions specified in regulation 39;

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

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

10. The destinations referred to in Reg 35(1)(a) include a tax warehouse such as Greencroft. The conditions specified in Reg 39 include the existence of an approved guarantee provided by a registered consignor such as the appellant.

11. Regulations 8-12 determine the person liable to pay duty when excise goods are released for consumption in the UK. The persons liable depend on the circumstances in which excise goods are released for consumption. Where goods are released for consumption by virtue of regulation 6(1)(a) (leaving a duty suspension arrangement), regulation 8 sets out the persons liable for the duty. Regulation 9 sets out the persons liable in the case of goods released for consumption as a result of an irregularity in the course of movement under duty suspension. Regulation 12 sets out the persons liable in the case of goods released for consumption by virtue of regulation 6(1)(d) (goods imported that are not immediately placed under a duty suspension arrangement). The relevant provisions are as follows:

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

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

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

(b) in a case where no guarantee was required—

(i) the authorised warehousekeeper of dispatch (where the excise goods were dispatched from a tax warehouse in the United Kingdom); or

(ii) the UK registered consignor (where the excise goods were dispatched upon their release for free circulation in the United Kingdom in accordance with Article 79 of Council Regulation 2913/92/EEC).

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

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

10 …

11 …

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

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

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

12. We should state at this point that the appellant in opening its case accepted that the goods had been released for consumption in the UK by virtue of regulation 6(1)(d), namely that the goods were not immediately upon importation placed under a duty suspension arrangement. In those circumstances regulation 12(1) provides that the person liable to pay the duty is the person who declares the excise goods or on whose behalf they are declared upon importation.

13. There are certain requirements in relation to the movement of goods under a duty suspension arrangement. *Article 21 EU Council Directive 2008/118/EC* provides as follows:

"A movement of excise goods shall be considered to take place under a duty suspension arrangement only if it takes place under cover of an electronic administrative document processed in accordance with paragraphs 2 and 3."

14. Article 21 is reflected in regulation 57 of the 2010 Regulations which provides as follows:

" 57(1) Subject to regulation 60, a movement of excise goods to which this Part applies must take place under cover of an electronic administrative document.

(2) Before the excise goods are dispatched, the consignor must complete a draft electronic administrative document that complies with the EU requirements and send it to the Commissioners using the computerised system.

(3) The Commissioners must carry out an electronic verification of the data in the draft electronic administrative document.

(4) Where the data in the document are invalid, the Commissioners must, using the computerised system, inform the consignor of that fact without delay.

(5) Where the data in the document are valid, the Commissioners must assign to the document a unique administrative reference code and, using the computerised system, inform the consignor of that code.

(6) If the excise goods are dispatched to a tax warehouse the Commissioners must, using the computerised system, send the electronic administrative document to the authorised warehousekeeper of that warehouse.

(7) The consignor of the excise goods must provide the person accompanying the goods during the course of the movement with —

(a) a printed version of the electronic administrative document; or

(b) any other commercial document on which the unique administrative reference code is clearly stated.

(8) Whilst the goods remain in the custody or under the control of the person accompanying the goods, that person must, upon request, produce or cause to be produced to the Commissioners one of the documents referred to in paragraph (7)"

15. All goods imported into the UK must be declared at the time of importation by means of a customs entry. Customs entries are made using HMRC's centralised electronic database known as CHIEF, which stands for Customs Handling of Import and Export Freight. Entry on to CHIEF generates a Single Administrative Document known as a C88.

16. In relation to excise goods which are placed under duty suspension HMRC has a centralised electronic database which tracks the movement of such goods. It is the computerised system referred to in regulation 57 and is known as EMCS, which stands for Electronic Movement Control System. When excise goods are entered on to EMCS they are given a unique reference code known as an Administrative Reference Code ("ARC"). EMCS is used to generate the electronic administrative document ("e-AD") required by the 2010 Regulations.

17. CHIEF and EMCS are distinct systems which, certainly in June 2014, were not linked. CHIEF is concerned with customs duty and customs clearance. EMCS is concerned with the movement of excise goods under duty suspension arrangements.

18. The 2010 Regulations also make provision for "registered consignors". These are persons who are approved and registered by HMRC. A registered consignor is the only person who can make an entry in the EMCS system. Excise goods under duty suspension may only be moved from the place of importation to a tax warehouse by a registered consignor (regulation 35(c)). In the case of such movements there must be a movement guarantee (regulation 39(1)).

Evidence and Findings of Fact

19. We heard evidence from Mr Richard Lowry, the managing director of the appellant, and from Mr Mohammed Yasin, a higher officer of HMRC who works as an assurance officer in relation to traders dealing in alcohol. Mr Yasin's role includes ensuring compliance by registered persons involved in the movement of duty suspended goods and where necessary making assessments in relation to unpaid duty.

20. We shall deal with the evidence and our findings of fact under the following headings:

(1) The importation and movement of the wine.

(2) The circumstances in which Mr Yasin came to make the assessment.

(3) The appellant's dealings with HMRC prior to the importation of the goods.

(4) The review of the assessment.

(1) The Importation and Movement of the Goods

21. There was no real dispute as to the factual circumstances in which the wine came to be imported, moved from the port and then returned to the port.

22. The wine was owned and being imported from South Africa by Off Piste. Off Piste had contracted with Paltank to act in the importation of the wine and the movement of the wine from Teesport to Greencroft for bottling. Paltank was a specialist haulier in the wine and spirit sector. The appellant had worked with Paltank since 2010 and Paltank had appointed the appellant to act as the customs clearance agent for customs duty purposes and also as the registered consignor to move the goods under duty suspension to Greencroft. The appellant and Paltank were both experienced in their respective roles in relation to the importation of alcohol under duty suspension arrangements. Paltank was the only party having contact with the owner, the tax warehouse and the registered consignor.

23. The wine was in a container, reference CXTU1054196. That container was part of a larger consignment of wine owned by Off Piste In all there were 8 containers aboard the *Doris Schepers* bound for Teesport from South Africa via Rotterdam. The ship arrived at Teesport on 15 June 2014.

24. On 16 June 2014 the appellant "claimed" the 8 containers and made a customs declaration using Destin8. This gave rise to a single customs entry for all the containers. The wine was declared to customs procedure code ("CPC") 07 00 000.

25. We understand that Destin8 is a database to which the port authorities, the shipping lines, hauliers and others including the appellant have access. It is linked to CHIEF. Information in relation to an import consignment is entered onto Destin8 by the appellant. That information includes the owner of the goods, the declarant, the customs classification code, and the customs procedure code. A CPC commencing 07 indicates that the goods are duty suspended excise goods. Destin8 then transmits this information to CHIEF. When the goods arrive at the port a customs entry reference is generated and the goods are allocated by CHIEF to a specific "route" depending on the circumstances:

> Route 1 – indicates that the goods have not cleared customs and HMRC require further evidence before they will be released.
>
> Route 3 – indicates that the goods have cleared customs but HMRC want further documentary evidence.
>
> Route 6 – indicates that the goods cleared customs on arrival and are free to leave the port

26. Destin8 shows when the goods have cleared customs and that the shipping line has released the container to a haulier. It also generates a gate pass or removal note so that the goods can be removed from the port.

27. In the present case the wine was cleared via Route 6. The appellant did not make an entry on EMCS in relation to the goods at that time because Paltank had not provided it with the date of departure to Greencroft, which was a mandatory field in the electronic form for making an entry onto EMCS, together with the number of days

between departure and expected delivery. In June 2014 the system was such that the date of delivery had to be within 14 days of entry into EMCS. If the delivery was delayed or took longer than 14 days then a further amending entry onto EMCS could be made. Mr Lowry told us and we accept that there were two practical approaches when the dates of departure and delivery were not known:

(1) Wait until the dates were known and then make the entry onto EMCS. This would mean that the goods were not immediately entered onto EMCS at the time of importation, or

(2) Make the entry onto EMCS at the time of importation with a date of delivery 14 days hence, and then do a "fall back transmission" to amend the date of delivery when the date was known.

28. We are satisfied from Mr Lowry's evidence that in June 2014 it was common practice for a customs entry to be made on CHIEF without an entry being made onto EMCS. The entry would be made onto EMCS when delivery information was known. It was accepted however that such excise goods could not be removed until an entry had been made on EMCS. Mr Lowry accepted that this was a "technical breach of the rules". He also said that HMRC "acquiesced" in that breach but we make no findings in that regard. Mr Yasin, the assessing officer, was unable to assist in relation to the industry practice for making entries onto EMCS or as to HMRC's knowledge thereof. The EMCS system has since been updated to allow for delivery to a warehouse up to 28 days from the date of entry onto EMCS. This means that goods can now be entered onto EMCS even when a specific delivery date is not known.

29. The appellant took the first approach. An entry onto EMCS was required for each container of wine. The appellant has four employees making such entries. It takes approximately 20 minutes for an entry onto EMCS to be completed. Paltank was one customer of the appellant. In 2014 the appellant had more than 100 customers for which it acted as a customs agent, although they would not all be importing excise goods requiring an entry onto EMCS. The appellant provides administrative systems and the necessary expertise to complete the documentation necessary for importing and exporting goods, including excise goods. It also provides the financial guarantees necessary to move excise goods under duty suspension.

30. Paltank was aware that the appellant required the date of delivery to make an entry into EMCS. As a result no ARC was produced and no e-AD could be printed off by Paltank. Hence no movement of the goods should have taken place because regulation 57(7) and (8) require the registered consignor to provide the driver with a commercial document identifying the ARC or the e-AD. One of those documents must accompany the goods where they are being moved under duty suspension.

31. There was no evidence as to when the goods were unloaded from the ship or where in the port they were held after they were unloaded. We do know that the goods had been unloaded sometime on or before 19 June 2014. Unknown to the appellant at this stage, the goods were scheduled to be delivered to Greencroft at 11am on 20 June 2014. There was no reason that information could not have been provided to the appellant, nor it seems any reason why the appellant could not have insisted that it was provided prior to making the customs declaration. Unknown to the appellant and apparently unknown to Paltank, at 12.39 on 19 June 2014 a haulier sub-contracted by Paltank had picked up the container intending to deliver it to Greencroft the following day. The container left the port at 14.52. The sub-contractor had a driver and an empty

tractor unit at the port, saw on Destin8 that the container was "customs cleared" and decided to pick it up early to save an extra journey the following day.

32. At 15.47 on 19 June 2014 Paltank emailed the appellant with a list of upcoming deliveries for which they would require an ARC. The list included the 8 containers owned by Off Piste and showed that the wine in this appeal was scheduled for delivery to Greencroft on 20 June 2014.

33. At this stage the appellant consulted Destin8. The appellant could identify from Destin8 that the container had already left the port at 12.39 that day. Accordingly the appellant emailed Paltank at 16.14 to inform them that the container had left the port, that the appellant could not issue an ARC and that it "*must report the removal without an ARC to EMCS. Considering the ongoing excise issue we must take advice from EMCS before we can proceed*". It is clear therefore that the appellant was quite properly intending to inform and take instructions from HMRC before proceeding.

34. Paltank replied by email timed at 16.26 stating "*Tank is on its way back to the quay – don't inform EMCS or anybody else re this matter. Tank will only deliver once ARC has been issued*". Mr Lowry considered and we agree that this was an attempt by Paltank to get the appellant to wrongfully issue an ARC knowing that the goods had already moved.

35. The appellant quite properly ignored Paltank's request and immediately telephoned HMRC's EMCS Helpdesk to report the circumstances. This was followed by an email from the appellant to the Helpdesk confirming that the wine had left the port prior to being entered on EMCS and without an ARC and asking for advice on the issue.

36. The following day at 10.55 the appellant received an email from Paltank explaining that the container had been immediately returned to the port with the seal unbroken. The delivery to Greencroft had been cancelled for the time being. Paltank wanted to know whether it would be "*OK to go ahead with ARC creation if we re-plan the delivery*".

37. A further email was received by the appellant from Paltank at 11.20 on 20 June 2014. Paltank stated that they had discussed the matter with HMRC the previous day, HMRC had checked the container and were said to be "*completely satisfied that all is in order with it, and are happy with ARC to be issued*". The email mentioned an HMRC file reference of 689.

38. Paltank also expressed concern that containers could be shown as "customs cleared" in Destin8 when an ARC had not been issued.

39. The appellant responded to Paltank at 11.45 on 20 June 2014. It was pointed out that it was likely goods would be customs cleared before an entry could be made on EMCS because a customs entry reference was required before EMCS could be completed. It was also pointed out that CHIEF was not linked to EMCS and that the appellant had no control over Destin8 or the release of containers.

40. There was a further email exchange on 20 June 2014 and then at 13.56 Paltank emailed the appellant asking for an ARC. It was stated that "*the issue is cleared through the R.F.T in Dover under reference 689 and everyone is just waiting the*

number so we can get it delivered ... the senior fraud office has [dealt] with the matter overnight, and Teesport customs…".

41. At this stage the appellant had received no advice or instructions from HMRC and at 15.33 it emailed Paltank to emphasise that they should not uplift or deliver the goods until they had heard back from the appellant.

42. On 23 June 2014 at 11.11 the EMCS Helpdesk emailed the appellant, having consulted technical officers, as follows:

> "Upon checking the import entry, the goods have been entered into an Excise duty suspension regime. However it appears from correspondence received, the goods were removed from the port before an ARC was created, thus creating a duty point as the correct procedures had not been followed.
>
> Unfortunately a retrospective ARC cannot be created.
>
> Please contact your local Excise officer for further advise (sic) on how to proceed with moving the goods and we will raise this issue through our internal network."

43. The other 7 consignments owned by Off Piste and imported on the same vessel were not entered on to EMCS until sometime after 15.47 on 19 June 2014 when delivery dates were provided to the appellant by Paltank. That was not immediately following the customs declaration.

44. Mr Lowry's view, which we accept, is that it was the fault of Paltank that the goods in this case were moved before an ARC had been obtained. Paltank were aware of the system in operation and that goods could not be moved under duty suspension unless an ARC had been issued. They were responsible for the actions of their sub-contractor.

(2) The Circumstances in which Mr Yasin came to make the Assessment

45. In this section we make findings as to the circumstances which led Mr Yasin to make the Assessment. The appellant was not aware in June 2014 of the enquiries being made by Mr Yasin.

46. On 23 June 2014 Greencroft contacted Mr Yasin to inform him that they had been notified of a duty suspended wine container due to come into their bottling facility but had not received an ARC number. Greencroft would have expected to have an ARC because regulation 57(6) of the 2010 Regulations requires HMRC to send the e-AD to the authorised warehousekeeper. Greencroft also informed Mr Yasin that Paltank had asked them to create the ARC because the appellant would not issue one. Mr Yasin advised Greencroft that if they took the goods into the warehouse without an ARC they would be in breach of the EMCS regulations. Greencroft advised Paltank that they would not accept the goods without an ARC.

47. Mr Yasin checked the movement of the goods. He established that the container had been entered for customs purposes under customs procedure code 07 00 000 indicating that the the goods were being declared for warehousing under duty suspension. He also established that no entry had been made in EMCS so that no e-AD had been issued.

48. Mr Yasin's understanding was that where goods are imported and declared for a duty suspension arrangement then the importer or the person completing the customs declaration must immediately enter the goods on the EMCS system. This had not been done, and Mr Yasin in his evidence in chief stated that as a result he concluded that the goods had been released for consumption. He considered that a duty point had arisen by virtue of regulations 5 and 6(1)(d) of the 2010 Regulations. He further considered that the appellant would be primarily liable to pay the excise duty arising, with Paltank and Off Piste being jointly and severally liable.

49. On 30 June 2014 Mr Yasin seized the container and its contents. He issued a notice of seizure and a seizure information notice to Off Piste. At the time of seizure the container and its seal were intact. Off Piste requested restoration of the wine. We understand that restoration was offered on terms that Off Piste paid the excise duty. Off Piste wanted to test the wine before paying the duty. At some stage the wine was tested and found to be unfit for human consumption, with the result that Off Piste did not pursue restoration and the wine was destroyed.

50. Mr Yasin stated in his oral evidence and we accept that he had seen the file 689 referred to by Paltank in their emails to the appellant. He had seen the file in connection with his seizure of the container. He was not sure, but thought that it was a file reference of the UK Border Force. The file was not in evidence before us.

51. Mr Yasin also looked into the appellant's import history and noted what he described as "*a history of similar irregularities*". In particular a warning letter to the appellant dated 16 April 2013 about previous breaches of the 2010 Regulations and a wrongdoing penalty assessment to the appellant dated 2 June 2014 in the sum of £125,989 relating to EMCS breaches. That penalty is the subject of a separate appeal to the tribunal which is being heard together with an appeal by Paltank against its liability for a penalty. We were provided with the Statements of Case for both those appeals but they do not assist in relation to the issues we must decide.

52. In his evidence in chief Mr Yasin stated that he "*concluded that the appellant was continuing to make the same irregularities, therefore an EX601 Officers Assessment in the amount of £69,858 was notified to the Appellant on 4 August 2014 and Joint and Several liability notifications issued to Off Piste and Paltank on the same date*". Mr Yasin did not describe the previous irregularities in his witness statement in any detail, but we are satisfied that Mr Yasin took into account what he considered to be irregularities when making his decision to assess the appellant. He also took into account the fact that the appellant had alerted the EMCS officers to the fact that the container had moved without an ARC

53. The assessment was accompanied by a letter of the same date, said to be "*issued without prejudice*". The letter referred to the failure of the appellant to enter the goods onto EMCS having declared the goods for customs duty purposes and the subsequent movement of the goods as giving rise to an excise duty point. The assessment was said to be based on regulations 5, 6(1)(d) and 12(1) of the 2010 Regulations. The letter noted the joint and several liability provision in regulation 12(3) and stated that "*each of the parties identified have been notified of that joint and several liability*".

54. Mr Yasin accepted in cross examination that the other containers owned by Off Piste had arrived in the UK on 15 June 2014 but were not entered onto EMCS until 19 June 2014. It was put to Mr Yasin that the excise duty point arose on 15 June 2014

but that he had not assessed the duty on those containers. He accepted that was the case, but explained that he had no concerns about those containers because at the time he checked they had been entered in EMCS and an ARC had been issued. No revenue had been at risk in relation to those containers.

55. Mr Yasin's evidence in relation to the excise duty point was equivocal. He appeared to consider that an excise duty point arose because the goods were not immediately entered onto EMCS on importation, but also because they were subsequently moved without being entered onto EMCS and therefore without an ARC or e-AD.

56. It was put to Mr Yasin that pursuant to regulation 12(1) HMRC were entitled to assess the appellant, Paltank and Off Piste. The appellant was the person declaring the goods, and it was doing so on behalf of Paltank and Off Piste. Mr Yasin accepted that was the case.

57. We should also mention that a container of wine owned by a business called Newgate was imported on the same vessel as the Off Piste wine. Paltank were the haulier, the wine was to be delivered to Greencroft and the appellant was acting as customs agent. Mr Yasin checked the EMCS system and found that there was no ARC for this container. He subsequently assessed the appellant for the duty in the same way as for the Off Piste container, with joint and several liability notices to Paltank and Newgate. In that case however, Newgate paid the assessment.

(3) The Appellant's Dealings with HMRC prior to the Importation

58. The appellant had been using EMCS as a registered consignor since the end of 2012. In April 2013, HMRC became aware that the appellant had entered duty suspended goods on to EMCS as registered consignor without a movement guarantee in place. The appellant contended that it had been advised by HMRC that it did not need to have a movement guarantee. The appellant co-operated fully with HMRC's enquiries at that time the matter was dealt with by way of a warning letter. The appellant was suspended from using EMCS until a movement guarantee was in placed and a warning letter was issued on 16 April 2013.

59. There were 9 consignments of excise goods imported in April 2013 which HMRC contend were moved under duty suspension without a movement guarantee being in place. A penalty of £125,989 was issued to the appellant on 2 June 2014 in relation to those goods. This penalty is the subject of a separate appeal, as mentioned above.

(4) The Review of the Assessment

60. On 3 November 2014 Mr Lowry wrote to HMRC seeking to appeal the assessment. The letter accepted that the legislation required the entry in EMCS to be made immediately following the customs declaration. Mr Lowry went on to explain factually why that had not happened. He also noted his understanding that the system had since been amended to allow delivery of excise goods up to 28 days from the date of issue of the ARC. The appellant's case was essentially that the only party to act unlawfully and to create the duty point was Paltank and that the "*actual act was not in any way in the control of Dartswift*". He requested that the duty assessment be directed to Off Piste or Paltank.

61. HMRC treated the letter as a request for a review to be carried out in accordance with sections 14 and 15 Finance Act 1994. The review was carried out by Mr Allan Donnachie who determined that the assessment should be upheld. The review letter dated 15 December 2014 briefly summarised the facts and stated that:

> " If the importer chooses to place the goods into the UK Excise warehousing regime then the importer or the person who completed the import declaration must immediately enter the goods into the EMCS system. If this is not done then an excise duty point is created by the [2010 Regulations], regulation 5 by reference to regulation 6(1)(d).
>
> You should have ensured that when you cleared the tanker through import formalities you immediately entered the goods onto EMCS. As a result of not making entry to the EMCS system, you are primarily liable to pay the duty."

62. Mr Donnachie stated that he had considered all the correspondence and information provided to him and the legislation. He did not identify specifically what correspondence and information he had considered. He relied on regulations 5, 6(1)(d) and 12(1) and found that the appellant was the person liable for the duty as the person who had declared the excise goods upon importation. He also took into account that the appellant was "*[not] the only person at fault"* and his finding that the appellant had *"[no] reasonable excuse*".

63. In conclusion Mr Donnachie found that the assessment was arithmetically correct "*and that the <u>penalty</u> accords with the relevant legislation*" (emphasis added).

64. It is notable that Mr Donnachie did not specifically identify or describe what material and information he specifically had before him at the time of making his review decision. His reference to a "penalty" was also mistaken and this reference suggests, together with the reference to fault and reasonable excuse, that he was mistakenly looking at the assessment as a penalty assessment, which it was not.

65. Mr Donnachie did not give evidence so it was not possible for the appellant to explore these points with him during the hearing. There is also an issue as to what decision is actually under appeal, whether it is Mr Yasin's assessment or Mr Donnachie's review decision. We consider that issue in more detail below.

The Appellant's Case in Opening

66. The appellant's grounds of appeal were notified to the Tribunal on 13 January 2015. The grounds noted that the assessment had been made on the basis that a duty point was created by the appellant's failure to immediately enter the goods on to EMCS and continued as follows, with references to paragraph numbers in the grounds of appeal:

> (1) At [2] it is acknowledged that the Assessment was made on the basis that there was a failure to immediately enter the goods onto EMCS after clearing import formalities.
>
> (2) At [3] it is stated that the decision to assess was incorrect. It is asserted that it was not possible for the appellant to enter the goods on to EMCS because it had not been advised of the intended delivery date.

(3) At [4] it is noted that Mr Yasin's letter dated 4 August 2014 accompanying the assessment made clear that the duty point was created once the goods were moved from the port without an ARC. No consideration had been given in the review to the fact that the appellant was only requested to issue an ARC by Paltank some 3 hours after the goods had left the port. The appellant was not in control of the goods and removal of the goods from the port was solely the responsibility of Paltank.

(4) At [5] it is asserted that the decision on review to confirm the assessment was "unfair and unreasonable" because no consideration or no proper consideration was given to the appellant's letter requesting a review dated 3 November 2014.

67. The grounds of appeal also requested that this appeal be joined with an existing appeal against a penalty referred to above. In the event, the Tribunal decided not to join the two appeals. We understand that the appeal against the penalty has now been heard. It was heard by a differently constituted panel and a decision is awaited. We have no knowledge of the evidence given or the issues raised in that appeal.

68. In our view a fair reading of the grounds of appeal indicates that the appellant was not challenging the proposition that a duty point had arisen because the wine was not immediately on importation entered onto EMCS. The appellant's case was that it was unfair and an unreasonable exercise of discretion by HMRC to assess the appellant when it was not culpable.

69. The appellant's case in its skeleton argument dated 26 September 2016 and in opening confirms that view of the grounds of appeal. In particular, it was accepted that the duty point arose when the goods were not immediately entered on to EMCS at the time of importation and it was not suggested that the duty point only arose when the good were moved from the port. At [12] the skeleton argument states as follows:

> "A acted responsibly and in accordance with the legislation at all times. While there was a delay on its part in complying with the requirements of Reg 6(1)(d) and the consignment was removed from the port before entry into duty suspension, that delay was not unreasonable (s12(2)(d) FA refers)."

70. The reference to section 12(2)(d) was to the Finance Act 1994. Section 12 of the Finance Act 1994 so far as relevant provides as follows:

> " 12(1) Subject to subsection (4) below, where it appears to the Commissioners—
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
>
> (b) that there has been a default falling within subsection (2) below,
>
> the Commissioners may assess the amount of duty due from that person to the best of their judgement and notify that amount to that person or his representative.
>
> (1A) Subject to subsection (4) below, where it appears to the Commissioners—
>
> (a) that any person is a person from whom any amount has become due in respect of any duty of excise; and
>
> (b) that the amount due can be ascertained by the Commissioners,

> the Commissioners may assess the amount of duty due from that person and notify that amount to that person or his representative.
>
> (2) The defaults falling within this subsection are—
>
>> (a) any failure by any person to make … as required or directed by or under any enactment any returns, accounts, books, records or other documents;
>>
>> (b) any omission from or any inaccuracy in any returns, accounts, books, records or other documents which any person is required or directed by or under any enactment to make …
>>
>> … ;
>>
>> (d) any unreasonable delay in performing any obligation the failure to perform which would be a default falling within this subsection."

71. The appellant contends, as we understand it, that the failure to enter the wine onto EMCS would be a default within section 12(2)(a) and section 12(2)(d) therefore engages issues of reasonableness. We consider that argument below.

72. At [15] – [18] of the skeleton reference was made to Regs 6(1)(d) and 12(1) and at [17] its was stated:

> "Accordingly, A **<u>or</u>** Paltank (on whose behalf A, as Paltank's agent, declared the importation), **<u>or</u>** Off Piste (on whose behalf Paltank instructed A to declare the importation) may be held liable to duty by [HMRC]."

73. The skeleton continues by asserting that there was no provision for joint and several liability pursuant to Reg 12(3) as relied on by Mr Yasin because there was no irregular importation. It was asserted that absent an irregular importation, there was provision for only one person to be liable for the duty, and that liability was clearly directed at the owner of the goods or the person with responsibility for failing to adhere to proper procedures.

74. The appellant's case in its skeleton was that the decision to assess amounted to an exercise of discretion. The decision to assess the appellant was unreasonable in a public law sense because Mr Yasin failed to take into account factors which showed the appellant was not culpable. Further, that Mr Yasin took into account irrelevant factors concerning alleged previous wrongdoing by the appellant in making his decision. In particular it is said that he took into account the penalty imposed in relation to previous irregularities when that penalty was the subject of a review which had not yet been concluded. As such, he pre-judged the penalty review.

75. In the course of opening the appeal, Ms Graham-Wells who appeared for the appellant also stated in terms that the main thrust of the appellant's case was the discretion in section 12 Finance Act 1994. She accepted that regulation 6(1)(d) was engaged, because the goods had not been placed into duty suspension through EMCS immediately, and that the respondents could assess the appellant.

76. The appellant's position, prior to the evidence being heard, could not have been clearer. It was accepted that an excise duty point had arisen because the appellant had not immediately entered the goods into duty suspension by making an entry in EMCS. It was also accepted that the appellant, Paltank or Off Piste could be assessed under

regulation 12(1). The liability of Paltank or Off Piste was not a joint and several liability under regulation 12(3) because there was no "irregular importation".

The Appellant's Amended Case

77. The appellant served written closing submissions on 23 November 2016, extending to 148 paragraphs and sought permission to rely on a further document, namely certain guidance produced by HMRC in 2011 relating to the operation of EMCS. The closing submissions also sought to put forward a new case which it was acknowledged was an amendment to the case previously put forward. The appellant sought to withdraw its "concession" that an excise duty point arose when the appellant failed to immediately enter the goods into duty suspension on importation. It sought to argue that the assessment was not only unfair and unreasonable, as had previously been submitted, but that it was also unlawful because the appellant was not liable to pay the duty.

78. The appellant's amended case that it was not liable to excise duty may be summarised as follows:

(1) It is arguable, based on domestic and EU law, that "importation" for the purposes of regulation 6(1)(d) means:

(a) The goods coming within the limits of the Port of Teeside,

(b) When customs control procedures are completed by reference to the routing described by Mr Lowry, or

(c) When the goods move beyond the first customs office and left the port.

(2) Importation occurred when customs formalities were completed, and when the goods were allocated to Route 6. This occurred after the appellant had made entries on Destin8, including the use of CPC 07 00 000 which had the effect of placing the goods under a duty suspensive arrangement. At the time of importation the goods were therefore placed under a duty suspension arrangement. As such, any assessment could only be justified on the basis of regulation 6(1)(a) (goods leaving a duty suspension arrangement) and the appellant did not fall within the category of persons liable for duty in regulation 8.

(3) In the alternative, if importation occurred when the goods left the port, the goods had already been placed under a duty suspension arrangement and the same result follows.

(4) In both cases, entry onto EMCS was not required to place the goods under a duty suspension arrangement. EMCS is concerned with the movement of goods which have already been placed under duty suspension.

(5) In the further alternative, if entry onto EMCS was required to enter the goods into a duty suspension arrangement, the appellant was a person liable under regulation 12(1) and the appellant relied on its case as opened to the effect that it was unfair and unreasonable to assess the appellant.

79. Ms Graham-Wells submitted that the amended case was the result of:

(1) Evidence in chief given by Mr Lowry as to the procedures involving Destin8, CHIEF and routing on importation of the goods, and

(2) Evidence given by Mr Yasin in cross examination in relation to when the excise duty point arose and why the other containers were not the subject of assessments. In particular that an excise duty point arose when the goods were moved out of the port without an ARC or e-AD.

80. Ms Graham-Wells pointed out and we accept that there is nothing in the legislation or in the HMRC guidance which states that the entry of goods into a duty suspension arrangement occurs when the goods are entered into EMCS. In particular we were referred to Notice 196 which concerns the UK requirements for warehousing of excise goods held in duty suspension and Notice 197 which concerns the UK requirements for the holding and movement of excise goods in duty suspension.

81. It seems to us at first sight that there is some force in Ms Graham-Wells argument that entry onto CHIEF with a CPC 07 00 000 enters the goods into duty suspension at the time of importation and that entry onto EMCS is concerned with movement of goods under duty suspension. That appears to have been the understanding of the EMCS Helpdesk in its email to the appellant dated 23 June 2014. However, we have not at this stage heard full evidence or any detailed submissions from Mr Charles in relation to the appellant's amended case. It is also part of the respondents submissions that even if the wine was released for consumption pursuant to regulation 6(1)(a) then the appellant would remain liable pursuant to regulation 8 or 9.

82. We were referred to a number of authorities in relation to the withdrawal of concessions. The leading case is *Pittalis v Grant [1989] 1 QB 605*, recently considered by the Upper Tribunal in *Revenue & Customs Commissioners v Astral Construction Ltd [2015] UKUT 21 (TCC)*. Both cases were in the context of withdrawing concessions made at first instance when the matter reaches an appellate court or tribunal. In Pittalis, Nourse LJ at p611stated the general principles as follows:

> " The stance which an appellate court should take towards a point not raised at the trial is in general well settled: *Macdougall v. Knight* (1889) 14 App Cas 194 and *The Tasmania* (1890) 15 App Cas 223. It is perhaps best stated in *Ex parte Firth, In re Cowburn* (1882) 19 Ch D 419, 429, per Sir George Jessel M.R.:
>
> > ' the rule is that, if a point was not taken before the tribunal which hears the evidence, and evidence could have been adduced which by any possibility would prevent the point from succeeding, it cannot be taken afterwards. You are bound to take the point in the first instance, so as to enable the other party to give evidence.'
>
> Even if the point is a pure point of law, the appellate court retains a discretion to exclude it. But where we can be confident, first, that the other party has had opportunity enough to meet it, secondly, that he has not acted to his detriment on the faith of the earlier omission to raise it and, thirdly, that he can be adequately protected in costs, our usual practice is to allow a pure point of law not raised below to be taken in this court. Otherwise, in the name of doing justice to the other party, we might, through visiting the sins of the adviser on the client, do an injustice to the party who seeks to raise it."

83. Ms Graham-Wells submitted that in the present case:

(1) HMRC had had a fair opportunity to meet the amended case, which arises as a result of the concession being withdrawn. They had had time to consider the issues following the appellant's written closing submissions made in November 2016.

(2) There was no detriment to HMRC, because the grounds of appeal included the amended case and the parties must be taken to have served their evidence based on the grounds of appeal.

84. Ms Graham-Wells rightly accepted that HMRC should be permitted to further cross examine Mr Lowry and re-examine Mr Yasin in light of the withdrawal of the concession. It was also suggested that the appellant may want to adduce further evidence in the light of evidence given in the separate penalty appeal.

85. Mr Charles submitted that if HMRC had known the appellant was pursuing its amended case then it would have presented its case differently and may have taken a different view of the evidence, including the cross examination of Mr Lowry and the re-examination of Mr Yasin. We accept that is the case. It can be illustrated by reference to Mr Yasin's evidence. His evidence in part suggested that the excise duty point arose when the goods left the port, rather than on the immediate failure to enter the goods onto EMCS. Ms Graham-Wells submitted that this should have been the subject of re-examination by Mr Charles. We do not accept that submission. There was no need for Mr Charles to re-examine on this point in circumstances where the appellant had conceded that the excise duty point arose on the failure to immediately enter the goods onto EMCS on arrival at the port.

86. We accept that if HMRC had known there was an issue in relation to the excise duty point then different considerations would or at least would likely have required further resources to be allocated to the appeal. For example there may well have been a different view as to the nature and extent of any policy input and legal advice. If the appellant is permitted to run its case based on regulation 6(1)(a), then significant issues arise as to the basis of liability which have not so far been canvassed in the evidence. For example it would be necessary to consider and identify the precise time and place of importation which may depend on when the goods were taken off the vessel and how and where they were then stored, including the layout of the port and the positioning of customs offices and facilities. Further evidence might also be necessary as to the procedure for entering CPCs and as to the nature and effect of entering such codes. It also occurs to us that evidence as to customs procedures prior to the introduction of EMCS in 2011 might also be relevant. It might also be necessary to consider whether there was an irregularity in the course of movement of the goods for the purposes of regulation 9.

87. Issues such as these were referenced by May LJ in *Jones v MBNA Interbnational Bank [2000] EWCA Civ 514 at [52]* where, in the context of raising a new point on appeal but relevant for present purposes, he stated:

> " Parties to litigation are entitled to know where they stand. The parties are entitled, and the court requires, to know what the issues are. Upon this depends a variety of decisions, including, by the parties, what evidence to call, how much effort and money it is appropriate to invest in the case, and generally how to conduct the case; and, by the court, what case management and administrative decisions and directions to make and give, and the substantive decisions in the case itself. Litigation should be resolved once and for all, and it is not, generally speaking, just if a party who successfully contested a case advanced on one basis should be expected to face on appeal, not a challenge to the

> original decision, but a new case advanced on a different basis. There may be exceptional cases in which the court would not apply the general principle which I have expressed. But in my view this is not such a case."

88. Mr Charles did suggest that one way to deal with the appellant's application, short of making directions for further evidence, would be to permit it to raise its amended case on submissions alone, without reference to the evidence. We do not consider that this is a realistic option, and Ms Graham-Wells was not prepared to accept those terms. The amended case is not a pure question of law. It relies upon findings of fact as to how the goods were dealt with on arrival from South Africa, including for example the routing of the goods.

89. We do not consider that there was anything in the evidence given by Mr Lowry or Mr Yasin which should not have been known to the appellant prior to the hearing. Clearly Mr Lowry's evidence in chief cannot be new material which was not available to the appellant when the appeal first came on for hearing. Even in relation to Mr Yasin's evidence, his apparent confusion about when the excise duty point arose was foreshadowed in the correspondence. For example in his decision letter dated 4 August 2014 where he stated as follows:

> " As the EMCS procedure was not followed correctly and the transporter moved the tanker an excise duty point was created."

90. In our view there were no facts adduced by Mr Yasin which should have affected the way in which the appellant put its case. He was a witness of fact, although for the purpose of explaining his assessment it was inevitable that he would also have to explain his view of the law, in particular when the excise duty point arose. Any misunderstanding he might have as to the law does not affect his factual evidence and it should not have affected the way in which the appellant put its case.

91. We consider that it would be unfair to the respondents if evidence is given by witnesses in relation to the issue identified, and is later relied upon in relation to different issues raised subsequently, without the opportunity for the respondents to recall those witnesses. Especially where, as here, some of the evidence is not relevant to the identified issue but is used as a springboard to justify the withdrawal of a concession that had previously been made.

92. Mr Charles submitted that not only was the appellant withdrawing a concession, but that it was also seeking to amend its grounds of appeal. We have summarised the grounds of appeal above. The grounds of appeal identify at [2] that HMRC were assessing on the basis of a duty point created by the failure to immediately enter the goods onto EMCS. The grounds then identify at [4] that Mr Yasin's decision letter refers to a duty point created once the goods were removed from the port without an ARC. There was no clear assertion or admission by the appellant as to when the duty point arose until service of the appellant's skeleton argument on 26 September 2016. It is not entirely clear to us whether the concession was made in the skeleton argument, or had previously been made in the grounds of appeal. It seems likely that the concession was made in the grounds of appeal because nowhere does the appellant contend that Mr Yasin was wrong to rely on regulation 6(1)(d) and regulation 12. In any event, by the date of the skeleton argument the case was clearly being advanced based on an acceptance that the excise duty point arose on the failure to immediately enter the goods onto EMCS.

93. In our view at this stage of the appeal and given the history of the appeal it would be disproportionate and unfair to the respondents to have a further hearing for additional evidence to be called, with yet further submissions from both parties. Especially where the evidence to date has been given and tested in relation to a different case. Even if we were minded to permit the amended case to be raised, it is likely that we would direct the appeal to start afresh. However we are not minded to do so.

Reasons

94. In this section of our decision we deal with the Appellant's case as opened. The appellant's case in opening was essentially as follows:

(1) Mr Yasin should have exercised his discretion not to make the assessment in circumstances where the appellant was not culpable for the excise duty point arising and where the appellant took advice and guidance from HMRC when it became aware the goods had moved from the port.

(2) The decision under appeal was the review decision and the decision to confirm the assessment was unreasonable.

(3) The tribunal has jurisdiction to consider the reasonableness of the review decision, and in the circumstances we should find that the review decision was unreasonable.

95. We must first identify the decision under appeal, and our jurisdiction in relation to that decision.

96. Where an assessment to excise duty is made, whether under section 12(1) or 12(1A) Finance Act 1994, the review provisions in that Act are engaged. The review provisions are also engaged in relation to any decision concerning restoration of goods seized under the customs and excise Acts.

97. Section 13A FA 1994 defines what is a 'relevant decision' for the purposes of FA 1994. For present purposes it provides as follows:

> "13(2) A reference to a relevant decision is a reference to any of the following decisions –
>
> …
>
> (b) so much of any decision by HMRC that a person is liable to any duty of excise, or as to the amount of his liability, as is contained in any assessment under section 12 above."

98. Section 14 FA 1994 makes provision for reviews of decisions under section 152(b) Customs & Excise Management Act 1979, that is decisions in relation to restoration of goods forfeited or seized by HMRC and linked decisions. It provides as follows:

> "14(1) This section applies to the following decisions by HMRC, not being decisions under this section or section 15 below, that is to say –

(a) any decision under section 152(b) of the Management Act as to whether or not anything forfeited or seized under the customs and excise Acts is to be restored to any person or as to the conditions subject to which any such thing is so restored;

(b) any relevant decision which is linked by its subject matter to such a decision under section 152(b) of the Management Act."

99. It is important to note that there can be a review of a linked decision under section 14(1)(b) only if HMRC are required to review of the restoration decision – see section 14(2A).

100. Section 15 FA 1994 then sets out the review procedure, pursuant to which HMRC may confirm, withdraw or vary the decision. Ms Graham-Wells submitted that Mr Donnachie's review was carried out pursuant to section 15.

101. Off Piste requested restoration of the wine, and restoration was offered upon condition that the duty was paid. Off Piste did not pursue the question of restoration because the wine was found to be unfit for human consumption. There is no evidence that Off Piste required HMRC to review the decision on restoration. However, the assessment letter from Mr Yasin dated 4 August 2014 offered the appellant the opportunity of a review of his decision. There was no reference to this being a statutory review within section 14 and the time given to request a review was 30 days from the date of the decision, rather than the 45 days provided by section 14(3) FA 1994. Mr Donnachie's review letter dated 15 December 2014 was expressed to be a formal review carried out in accordance with sections 14 and 15 Finance Act 1994. We have noted other anomalies with Mr Donnacie's letter above. We are not satsified that his letter was in fact a review under those provisions.

102. Mr Yasin's decision to make the assessment is a relevant decision. The review of a relevant decision not linked to a restoration decision takes place pursuant to section 15A, for which there is a 30 day time limit to request a review. In those circumstances any appeal is against the relevant decision, that is the decision to assess rather than the review decision (see section 16(1B)). We were not referred to these provisions but we consider that the appeal in the present case against Mr Yasin's decision to assess.

103. In any event the powers of the tribunal on an appeal against an assessment or a review decision in the present circumstances are set out in section 16 FA 1994 which so far as relevant provides as follows:

" (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 further review 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 further review, 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."

104. Whichever decision is under appeal, it is not a decision as to an ancillary matter, so we are concerned with section 16(5). Ms Graham-Wells submitted that use of the words "shall also include" in section 16(5) means that where the tribunal's powers derive from that sub-section the tribunal also has available to it the powers contained in section 16(4). In particular, if we were to find that Mr Yasin's decision to assess was unreasonable then we could direct that it should cease to have effect and require a further review.

105. In relation to the reasonableness of the decision under appeal, the appellant's submissions as we understand them are as follows:

(1) In so far as the decision under appeal is the review decision of Mr Donnachie, the absence of any evidence from Mr Donnachie meant that all we had before us was his review letter. The reasoning in that letter was unsatisfactory such that the decision was clearly unreasonable and a further review should be directed under section 16(4) and (5).

(2) In so far as the decision under appeal was the assessment made by Mr Yasin, that too was unreasonable because the appellant was not culpable given the circumstances in which the excise duty point arose. We should direct that the decision should cease to have effect and direct a review of that decision under section 16(4) and (5).

(3) In any event, even if the power to consider the reasonableness of the decision did not derive from section 16(4) and (5) FA 1994, as a matter of law Mr Yasin had a discretion to assess the appellant pursuant to regulation 6(1)(d) and section 12 FA 1994 and the tribunal is entitled to consider whether he was reasonable to exercise that discretion and make the assessment.

106. We can deal with Ms Graham-Wells' submission as to the interaction between section 16(4) and (5) quite briefly in the light of a recent decision of the Upper Tribunal in *Butlers Ship Stores Limited v Commissioners for HM Revenue & Customs [2018] UKUT 0058*. That decision was released on 6 March 2018, following the closing submissions of the parties. Given the history of this appeal, and because the point is clearly dealt with by the Upper Tribunal, we have not invited further submissions from the parties. Lady Wolfe, sitting in the Upper Tribunal, rejected the appellant's arguments that the F-tT had been wrong in that case to conclude that it had jurisdiction only under section 16(5) and had none of the powers set out in section 16(4) (see [145] – [151] of the Upper Tribunal decision). We acknowledge that the reasoning in those paragraphs was not necessary for the ultimate decision on that appeal and is therefore persuasive rather than binding on us. However, the arguments were dealt with in much greater detail in that case than they have been before us and we are content to adopt the reasoning of the Upper Tribunal. We are satisfied that our powers in the present case under section 16(5) do not permit us to consider the reasonableness of the decision under appeal to provide the remedies set out in section 16(4).

107. We must next consider whether we have jurisdiction to quash or vary the decision to assess on the grounds that it was unreasonable to assess the appellant, and that the assessment ought to have been made against Paltank or Off Piste. Ms Graham-Wells' argument was that use of the words "… the Commissioners may assess …" in sections 12(1) and 12(1A) Finance Act 1004 gave the respondents a discretion which must be exercised in accordance with ordinary public law principles of fairness, reasonableness and proportionality. The appellant had no control over the way in which the duty point arose and had acted entirely reasonably and properly. Further, there was no loss to the revenue because the goods had been returned to the port and subsequently destroyed.

108. The appellant put forward no authoritative support for its submission that the tribunal has jurisdiction to consider the reasonableness of the decision to make an assessment against the appellant.

109. Mr Charles referred us to decisions of the Upper Tribunal in *Commissioners for HM Revenue & Customs v Hok [2012] UKUT 363* (at [36]-[41] and [56]-[58]) and *Commissioners for HM Revenue & Customs v Abdul Noor [2013] UKUT 071* (at [87]). He relied on these cases as authority for the proposition that the tribunal has no such jurisdiction. He also relied on a decision of the F-tT in *Barrett v Commissioners for HM Revenue & Customs [2015] UKFTT 329* (at [77]-[96]) as persuasive support for the proposition.

110. The relevant principles were recently summarised by the Upper Tribunal in *Birkett v Commissioners for HM Revenue & Customs [2017] UKUT 79* at [30]:

> " 30. The principles that we understand to be derived from these authorities are as follows:
>
> (1) The FTT is a creature of statute. It was created by s. 3 of the Tribunals, Courts and Enforcement Act 2007 (**"TCEA"**) "for the purpose of exercising the functions conferred on it under or by virtue of this Act or any other Act". Its jurisdiction is therefore entirely statutory: *Hok* at [36], *Noor* at [25], *BT Trustees* at [133].
>
> (2) The FTT has no judicial review jurisdiction. It has no inherent jurisdiction equivalent to that of the High Court, and no statutory jurisdiction equivalent to that of the UT (which has a limited jurisdiction to deal with certain judicial review claims under ss. 15 and 18 TCEA): *Hok* at [41]-[43], *Noor* at [25]-[29], [33], *BT Trustees* at 5 [143].
>
> (3) But this does not mean that the FTT never has any jurisdiction to consider public law questions. A court or tribunal that has no judicial review jurisdiction may nevertheless have to decide questions of public law in the course of exercising the jurisdiction which it does have. In *Oxfam* at [68] Sales J gave as examples county courts, magistrates' courts and employment tribunals, none of which has a judicial review jurisdiction. In *Hok* at [52] the UT accepted that in certain cases where there was an issue whether a public body's actions had had the effect for which it argued – such as whether rent had been validly increased (*Wandsworth LBC v Winder* [1985] AC 461), or whether a compulsory purchase order had been vitiated (*Rhondda Cynon Taff BC v Watkins* [2003] 1 WLR 1864) – such issues could give rise to questions of public law for which judicial review was not the only remedy. In *Noor* at [73] the UT, similarly constituted, accepted that the tribunal (formerly the VAT Tribunal, now the FTT) would sometimes have to apply public law concepts, but characterised the cases that Sales J had referred to as those where a court had to determine a public law point

either in the context of an issue which fell within its jurisdiction and had to be decided before that jurisdiction could be properly exercised, or in the context of whether it had jurisdiction in the first place.

(4) In each case therefore when assessing whether a particular public law point is one that the FTT can consider, it is necessary to consider the specific jurisdiction that the FTT is exercising, and whether the particular point that is sought to be raised is one that falls to the FTT to consider in either exercising that jurisdiction, or deciding whether it has jurisdiction.

(5) Since the FTT's jurisdiction is statutory, this is ultimately a question of statutory construction."

111. It is clear that there is no general supervisory jurisdiction in relation to the discretion of HMRC. In *C & E Commissioners v J H Corbitt (Numismatists) Ltd [1980] STC 231*, cited by Jacob J in *C & E Commissioners v National Westminster Bank [2003] EWHC 1822 (Ch)* at [49]:

" There is authority which supports the conclusion that general conduct towards taxpayers is outwith the Tribunal's jurisdiction. I turn first to Lord Lane (with whom Lords Scarman and Simon agreed) in CCE v Corbitt [1980] STC 231 at p.239h:

' Assume for the moment that the tribunal has the power to review the commissioners' discretion. It could only properly do so if it were shown the commissioners had acted in a way which no reasonable panel of commissioners could have acted; if they had taken into account some irrelevant matter or had disregarded something to which they should have given weight. If it had been intended to give a supervisory jurisdiction of that nature to the Tribunal one would have expected clear words to that effect in the 1972 Act. But there are no such words to be found. Section 40(1) sets out nine specific headings under which an appeal may be brought and seems by inference to negative the existence of any general supervisory jurisdiction.'

(Section 83 is the successor to the s.40(1) of the 1972 Act referred to. There are now more specific headings but no general supervisory jurisdiction has been conferred.)"

112. The jurisdiction under section 16(5) is what may be termed a full appellate jurisdiction. The tribunal has power to quash or vary the decision or to substitute its own decision. It is significant that the statute provides no specific basis on which the jurisdiction to exercise that power might arise and further that the F-tT has no judicial review jurisdiction. That may be contrasted with the powers in section 16(4) which are expressed to apply only where the tribunal is satisfied that the Commissioners could not reasonably have arrived at the decision. Section 16(5) is not engaged by such a finding. We are satisfied that the powers in section 16(5) arise only where the decision is wrong in law.

113. In the present case the assessment would be wrong in law if we were to decide on the facts as found that the appellant was not liable to be assessed to duty, or that the amount assessed was excessive. In our view, that is the extent of our jurisdiction under section 16(5) Finance Act 1994. HMRC often has a discretion in relation to the enforcement of tax liabilities under its powers of care and management. In our view use of the words "may assess" in section 12 simply recognised that discretion and

there is nothing in section 16 to indicate that the F-tT is given any jurisdiction to supervise the exercise of that discretion.

114. For completeness, we do not consider that section 12(2)(d) FA 1994 assists the appellant in relation to the point of jurisdiction. The appellant's argument was that section 12(2)(d) engages issues of reasonableness which fall within the jurisdiction of the tribunal. However, the respondents do not rely on section 12(1) for the purposes of their assessment, they rely on section 12(1A). Hence they do not rely on defaults falling within section 12(2) and no issue as to the reasonableness of any delay in performing the obligations referred to in that sub-section arises.

115. On the case before us the appellant accepts that the respondents were entitled to make an assessment against it pursuant to regulation 12(1) and section 12 FA 1994, and there is no dispute as to the amount of that assessment. It is not necessary for us to consider for the purposes of this appeal whether or not the respondents were also entitled to treat Paltank and Off Piste as jointly and severally liable pursuant to Reg 12(3) on the basis of an irregular importation.

116. Finally, Ms Graham-Wells criticised Mr Yasin for not setting out in his witness statement his knowledge of the previous irregularities which he took into account in issuing the assessment to the appellant, or the weight he attached to those matters. We have found that we have no jurisdiction to consider Mr Yasin's exercise of discretion to make an assessment against the appellant. We do not accept the criticism made of Mr Yasin as to the way in which he gave his evidence. We do acknowledge that Mr Yasin did not clearly distinguish circumstances where an excise duty point arises because goods are not immediately on importation entered into duty suspension, and circumstances where the excise duty point arises because goods in duty suspension leave duty suspension, for example because of an irregularity in the course of movement. However, given the basis on which the appellant put its case that failure is not significant for present purposes.

Conclusion

117. For the reasons given above we must dismiss the appeal. The result may seem harsh on the appellant, but any remedy it might have would be by way of judicial review of the respondents' decision to make the assessment or by way of a civil claim against Paltank. We express no view as to the merits of such action.

118. 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.

JONATHAN CANNAN
TRIBUNAL JUDGE

RELEASE DATE: 3 MAY 2018
© CROWN COPYRIGHT 2018