[2019] UKUT 296 (TCC)

Case number: UT/2018/0033
JR/2019/004

EXCISE DUTY – assessment on wholesaler in possession of non-duty paid excise goods – whether legislation implementing article 7(2)(b) Directive 2008/118/EC proportionate – whether the FTT has jurisdiction to consider unreasonableness of assessment – meaning of "holding" excise goods – Excise Goods (Holding, Movement and Duty Point) Regulations 2010 reg 6

JUDICIAL REVIEW – whether decision by HMRC to assess claimant was unlawful

UPPER TRIBUNAL
TAX AND CHANCERY CHAMBER

IN THE MATTER OF JUDICIAL REVIEW PROCEEDINGS
AND ON APPEAL FROM THE FIRST-TIER TRIBUNAL (TAX CHAMBER)

DAWSON'S (WALES) LTD	**Appellant/Claimant**
- and -	
THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS	**Respondents/Defendants**

TRIBUNAL: Mrs Justice Falk
Judge Timothy Herrington

Sitting in public at The Royal Courts of Justice, Rolls Building, Fetter Lane, London EC4 on 22 and 23 July 2019

Sam Grodzinski QC and Michael Firth, Counsel, instructed by Morrisons Solicitors LLP and TT Tax, for the Appellant

Kieron Beal QC and Natasha Barnes, Counsel, instructed by the General Counsel and Solicitor to HM Revenue and Customs, for the Respondents

DECISION

Introduction

1. This decision relates to (i) an appeal by Dawson's (Wales) Limited ("DWL") against a decision of the First-tier Tribunal ("FTT") (Judge Mosedale) in respect of three preliminary issues released on 8 February 2018 (the "Decision") and (ii) a claim by DWL for judicial review of a decision by HMRC dated 17 October 2013 to assess DWL to excise duty in respect of certain goods held by it.

2. As is apparent from the limited agreed facts that were before the FTT, DWL was at all material times a wholesaler of alcoholic drinks. HMRC considered that there was insufficient evidence that certain supplies of goods made to DWL between 21 February 2011 and 15 May 2012 were UK duty-paid, that a duty point must have occurred and that an assessment for excise duty was required. The assessment was raised against DWL on 17 October 2013 in the sum of £3,729,381 and it is that assessment (the "Assessment") which is the subject of these proceedings.

3. The goods in respect of which HMRC have raised the Assessment were physically held by DWL. In the agreed statement of facts, it is assumed that they were not physically received and held by DWL's suppliers but that DWL's suppliers were responsible for arranging for the goods to be physically shipped direct to DWL's premises. Those suppliers had the power to instruct the physical holder of the goods to deliver them to its chosen customer and, in the present case, gave instructions for them to be delivered to DWL.

4. In respect of all the assessed supplies, HMRC traced the supply chain back from DWL's suppliers to missing, deregistered or hi-jacked companies. HMRC have no evidence that excise duty was paid, nor have they been able to establish that any of the companies, that appear further back in the chain, took physical possession of the goods prior to DWL.

5. The Assessment was made under s 12(1A) of the Finance Act 1994 ("FA 1994") on the basis that the goods were physically held outside a duty suspension arrangement and UK excise duty on those goods had not been paid, with the consequence that a duty point had arisen under regulation 6(1)(b) of the Excise Goods (Holding, Movement and Duty Point) Regulations 2010 (SI 2010/593, the "Regulations"). HMRC considered that DWL was the first known person to hold the goods and was liable to pay the excise duty under Regulation 10(1) of the Regulations.

6. DWL appealed to the FTT against the Assessment. The FTT directed that the following matters should be determined, on the basis of assumed facts, as preliminary issues on the appeal:

(1) Whether Regulation 6(1)(b) of the Regulations and/or Article 7(2)(b) of Directive 2008/118/EC ("the 2008 Directive") are incompatible with the principles of proportionality and legal certainty either:

(a) generally; or

(b) where the person assessed upon the basis of those provisions has identified its supplier to the relevant tax authority

(the "Proportionality Point").

(2) Whether the FTT has jurisdiction to consider a challenge to a decision to assess under Regulation 6(1)(b) of the Regulations based on its unreasonableness and/or public law principles on an appeal under s 16(5) FA 1994 (the "Jurisdiction Point").

(3) Whether a person who has *de facto* and/or legal control of the goods but who does not have physical possession of the goods "holds" the goods for the purpose of Regulation 6(1)(b)/Art 7(2)(b), consistent with the definition of "held" under Regulation 33 of the Regulations (the "Holding Point").

7. By the Decision, the FTT decided the preliminary issues as follows:

(1) Neither Regulation 6(1)(b) of the Regulations nor Article 7(2)(b) of the 2008 Directive is incompatible with the EU law principles of proportionality and legal certainty. That is so both generally and where the person assessed can identify its supplier.

(2) The FTT does not have jurisdiction to consider a challenge to a decision to assess under Regulation 6(1)(b) based on its unreasonableness and/or public law principles on an appeal under s 16(5) FA 1994.

(3) A person who has *de facto* and/or legal control of the goods but who does not have physical possession of the goods and who knows that the goods are duty unpaid "holds" the goods for the purposes of Regulation 6(1)(b) and Article (7)(2)(b), consistent with the definition of "held" under Regulation 33 of the Regulations.

8. The FTT's conclusions on the Proportionality Point and Jurisdiction Point determined the preliminary issues in favour of HMRC, and accordingly its conclusion on the Holding Point in DWL's favour was *obiter*. On 26 March 2018 the FTT granted DWL permission to appeal against the Decision. In a Respondent's Notice, HMRC stated that it did not accept the FTT's findings concerning the test for "holding" excise goods.

9. DWL also sought judicial review of HMRC's decision to make the Assessment. Permission to bring judicial review proceedings was initially refused by Andrew Baker J but was granted on appeal by David Richards LJ on 5 February 2019. He remitted the matter to the High Court and directed that the claim should subsequently

be transferred to the Upper Tribunal to be heard at the same time as DWL's substantive appeal. The transfer was confirmed on 12 April 2019 and it was agreed between the parties that the judicial review claim would proceed on the same assumed facts as those agreed in the statutory appeal.

Relevant Legislation

10. The 2008 Directive lays down general arrangements for excise duty, which seek to harmonise the principles to be applied across the EU as regards the point at which excise duty should be levied on excise goods and the identity of the person liable. The 2008 Directive also sets out principles governing the duty-suspended movement of goods between Member States. The 2008 Directive replaced Council Directive 92/12/EEC (the "1992 Directive"), which formerly governed these matters.

11. Article 1 states that the 2008 Directive lays down general arrangements in relation to excise duty which "is levied directly or indirectly on the consumption of… [excise goods]".

12. Article 2 provides that:

> "Excise goods shall be subject to excise duty at the time of:
>
> (a) their production, including where applicable, their extraction, within the territory of the Community;
>
> (b) their importation into the territory of the Community."

13. Article 7 makes provision for the time and place of chargeability of excise duty relevantly as follows:

> "1. Excise duty shall become chargeable at the time, and in the Member State, of release for consumption.
>
> 2. For the purposes of this Directive, 'release for consumption' shall mean any of the following:
>
> (a) the departure of excise goods, including irregular departure, from a duty suspension arrangement;
>
> (b) the holding of excise goods outside a duty suspension arrangement where excise duty has not been levied pursuant to the applicable provisions of Community law and national legislation;
>
> (c) the production of excise goods, including irregular production, outside a duty suspension arrangement;
>
> (d) the importation of excise goods, including irregular importation, unless the excise goods are placed, immediately upon importation, under a duty suspension arrangement.
>
> …"

14. Article 8 prescribes who shall be liable to pay excise duty that has become chargeable as follows:

> "1. The person liable to pay the excise duty that has become chargeable shall be:
>
> (a) in relation to the departure of excise goods from a duty suspension arrangement as referred to in Article 7(2)(a):
>
> (i) the authorised warehousekeeper, the registered consignee or any other person releasing the excise goods or on whose behalf the excise goods are released from the duty suspension arrangement and, in the case of irregular departure from the tax warehouse, any other person involved in that departure;
>
> (ii) in the case of an irregularity during a movement of excise goods under a duty suspension arrangement as defined in Article 10(1), (2) and (4): the authorised warehousekeeper, the registered consignor or any other person who guaranteed the payment in accordance with Article 18(1) and (2) and any person who participated in the irregular departure and who was aware or who should reasonably have been aware of the irregular nature of the departure;
>
> (b) in relation to the holding of excise goods as referred to in Article 7(2)(b): the person holding the excise goods and any other person involved in the holding of the excise goods;
>
> (c) in relation to the production of excise goods as referred to in Article 7(2)(c): the person producing the excise goods and, in the case of irregular production, any other person involved in their production;
>
> (d) in relation to the importation of excise goods as referred to in Article 7(2)(d): the person who declares the excise goods or on whose behalf they are declared upon importation and, in the case of irregular importation, any other person involved in the importation.
>
> 2. Where several persons are liable for payment of one excise duty debt, they shall be jointly and severally liable for such debt."

15. Article 9 prescribes the chargeability conditions and procedures for collection as follows:

> "The chargeability conditions and rate of excise duty to be applied shall be those in force on the date on which duty becomes chargeable in the Member State where release for consumption takes place.
>
> Excise duty shall be levied and collected and, where appropriate, reimbursed or remitted according to the procedure laid down by each Member State. Member States shall apply the same procedures to national goods and to those from other Member States."

16. Article 15(2) provides that the production, processing and holding of excise goods, where the excise duty has not been paid, shall take place in a tax warehouse.

17. However, it is possible to move excise duty goods from a tax warehouse under "a duty suspension arrangement" without a release for consumption occurring. Article 17 makes provision for the movement of excise goods under duty suspension arrangements within the EU, among other things, from a tax warehouse to another tax warehouse, to a registered consignee (that is, a person authorised by the competent authorities of a Member State to receive excise goods moving under a duty suspension arrangement from another Member State), or to a place where the excise goods are exported from the EU. It also provides for movement under duty suspension from the place of importation to any of the destinations referred to above where the goods are dispatched by a registered consignor (that is, a person authorised by the competent authorities of a Member State to dispatch excise goods under a duty suspension arrangement).

18. Article 18(1) makes provision for competent authorities to require that the risks inherent in the movement under a duty suspension arrangement be covered by a guarantee provided by the authorised warehousekeeper of dispatch or the registered consignor. Article 18(2) permits the guarantee to be provided by, among others, the carrier or owner of the excise goods. It is worth noting that this is the only reference to ownership, as opposed to "holding".

19. Article 20 provides that the movement of excise goods under a duty suspension arrangement shall begin either when they leave the tax warehouse of dispatch or their place of importation. This Article also provides that the movement shall end when the consignee has taken delivery of the excise goods, or the goods have left the EU, as the case may be.

20. Article 21 provides that movements of goods under a duty suspension arrangement must take place under cover of an electronic administrative document recorded in an EU wide computerised system.

21. Article 24 provides that on receipt of excise goods at the end of the duty suspended movement, a report of that event shall be submitted using the computerised system referred to above.

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

> "1. Without prejudice to Article 36(1), where excise goods which have already been released for consumption in one Member State are held for commercial purposes in another Member State in order to be delivered or used there, they shall be subject to excise duty and excise duty shall become chargeable in that other Member State…

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.

…

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

23. Article 34 requires excise goods moving between Member States pursuant to the provisions of Article 33 to move under cover of an accompanying electronic administrative document. This Article also provides that, before the goods are dispatched, the persons liable to pay the excise duty must submit a declaration to the competent authorities of the Member State of destination and guarantee payment of the excise duty.

24. The Finance (No. 2) Act 1992 (the "1992 Act") contains the necessary authority for the making of regulations to implement the provisions in the 2008 Directive concerning the chargeability of goods to excise duty in the United Kingdom and the persons liable to pay such duty.

25. The Regulations are the relevant regulations made pursuant to the powers contained in the 1992 Act currently in force. The Regulations also implement other provisions of the 2008 Directive.

26. Regulation 5 provides that "there is an excise duty point at the time when excise goods are released for consumption in the United Kingdom".

27. Regulation 6(1) states as follows:

"(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."

28. Regulation 7(1) prescribes the point in time at which excise goods leave a duty suspension arrangement, for example when they leave a tax warehouse otherwise than in accordance with Regulation 35 (see below), there is an irregularity in a movement under duty suspension, or they are found to be missing from a tax warehouse.

29. Regulations 8 to 12 of the Regulations prescribe those who are liable to pay the duty when excise goods are released for consumption in accordance with Regulation 6. In each case, the relevant regulation provides that other persons involved or participating in the relevant event are jointly and severally liable to pay the duty with the person who the relevant provision says is responsible for payment. For example, under Regulation 10, the following persons are liable to pay the excise duty when the conditions in Regulation 6(1)(b) are met:

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

30. Regulation 13 provides, so far as relevant, in relation to excise goods already released for consumption in another Member State which are held for a commercial purpose in the United Kingdom:

> "(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."

31. There are strict requirements as to where excise goods in duty suspension may be held and how they may be moved. Regulations 34 to 37 provide as follows:

> "34. Excise goods may be deposited and kept under duty suspension arrangements only in a tax warehouse.
>
> 35. Excise goods of a certain class or description may only be imported into or exported from the United Kingdom under duty suspension arrangements if they are–
>
> (a) dispatched from a tax warehouse to–

(i) another tax warehouse approved in relation to excise goods of that class or description;

(ii) a registered consignee who has been registered in relation to excise goods of that class or description;

(iii) a place from where they will leave the territory of the EU;

(iv) an exempt consignee where the goods are dispatched from the United Kingdom to another Member State or are dispatched from another Member State to the United Kingdom;

(b) dispatched by a registered consignor in another Member State from the place of importation to any of the destinations referred to in paragraph (a); or

(c) dispatched by a UK registered consignor from the place of importation to any of the destinations referred to in paragraph (a), other than a UK registered consignee.

36. An authorised warehousekeeper or UK registered consignee whose terms of approval so allow may import excise goods under duty suspension arrangements to a place of direct delivery in the United Kingdom.

37. Excise goods of a certain class or description may only be moved wholly within the United Kingdom under duty suspension arrangements if they are—

(a) dispatched from a tax warehouse to–

(i) another tax warehouse approved in relation to excise goods of that class or description;

(ii) a place from where they will leave the territory of the EU; or

(b) dispatched by a UK registered consignor from the place of importation to either of the destinations referred to in paragraph (a)."

Regulation 39 also requires the risks of movements under duty suspension arrangements to be covered by guarantees securing the duty, unless the movement is between tax warehouses.

32. Part 11 of the Regulations deals with the importation of excise goods which have already been released for consumption in another Member State. Regulation 68 provides as follows:

"(1) Excise goods to which this Part applies must be consigned–

(a) to the person shown on the accompanying document as the recipient; or

(b) if the recipient is not in the UK, to an ultimate destination outside the United Kingdom.

(2) The excise goods must at all times be accompanied by an accompanying document that complies with the EU requirements.

(3) An accompanying document must not be amended.

(4) The person to whom any excise goods are consigned must ensure, so far as it is in that person's power to do so, that the EU requirements are complied with at all times. ..."

33. The Regulations recognise that where there is an irregularity in the movement of goods under a duty suspension arrangement it can be difficult to establish when an excise duty point arises. For example, Regulation 80(2) provides:

> "Where an irregularity occurs in the United Kingdom, the excise goods are released for consumption in the United Kingdom at the time of the irregularity or, where it is not possible to establish when the irregularity occurred, the time when the irregularity is detected or first comes to the attention of the Commissioners."

The Decision

34. DWL's appeal to the FTT was initially stayed in order to await the decision of the Upper Tribunal in *B & M Retail Limited v HMRC* (*"B & M"*). That decision was released on 10 October 2016 ([2016] STC 2456). *B & M* decided that a person holding excise duty goods in respect of which duty had not been paid could be assessed under Regulation 6(1)(b) notwithstanding that in principle an earlier release for consumption had occurred. The decision also dealt with the question as to whom HMRC could assess for the unpaid duty in circumstances where there had been multiple releases for consumption. At [69] the Upper Tribunal recorded a submission from HMRC in the following terms:

> "HMRC's general policy is to assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise duty goods were held at a static location outside a duty suspension arrangement, in circumstances where the duty has not been paid, relieved, remitted or deferred, and where they do not have sufficient evidence before them to assess any other person as liable for excise duty by virtue of any earlier excise duty point that may have occurred. Such an assessment would be made on the basis that the holding of the goods in such circumstances amounted to a 'release for consumption' thus triggering an excise duty point. That phrase is a term of art and should not be interpreted by reference solely to its natural and everyday meaning."

35. In the light of that submission, at [150], the Upper Tribunal found as follows:

> "We accept that, if the correct interpretation of the 2008 Directive is that there can be more than one release for consumption in respect of the same goods, then which of the various persons who may have had some involvement with the goods is to be assessed for duty in respect of those goods will in many cases depend on the exercise of discretion on the part of HMRC. In relation to their policy in this regard, as Mr Beal [Counsel for HMRC] explained it to us, HMRC

> appear to exercise their power to assess on the basis that only one assessment can be made in respect of the same goods. That in our view is consistent with our interpretation of the 2008 Directive and the policy behind it. As we record at [69] above, HMRC's general policy is to assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise duty goods were held at a static location outside a duty suspension arrangement, in circumstances where the duty has not been paid, relieved, remitted or deferred, and where they do not have sufficient evidence before them to assess any other person who is liable for the excise duty by virtue of any earlier excise duty point that may have occurred."

36. The position changed following the release of the later Upper Tribunal decision in *Davison & Robinson Limited v HMRC* [2019] STC 694 (*"Davison & Robinson").* The Upper Tribunal said this at [79] and [80]:

> "79. …. Mr Beal [again Counsel for HMRC] accepted in argument that, as a matter of law and not merely as a matter of HMRC's discretion, HMRC was obliged to assess against the earliest point in time at which they are able to establish, on the evidence before them, that excise goods have been held outside a duty suspension arrangement. In *B & M* the Upper Tribunal appeared to have proceeded on the basis that the question as to who should be assessed where there had been a series of circumstances which could have led to an assessment was purely a matter of HMRC's discretion, which could only be challenged through the medium of judicial review: see [150] to [153] of the decision.
>
> 80. We accept that the position is as accepted by Mr Beal. It is consistent with our analysis that the Directive requires an assessment to be made against the first established excise duty point…."

37. *Davison & Robinson* had not been decided at the time the FTT heard the preliminary issues in this case and released the Decision. The stay on DWL's appeal had been lifted following the release of the decision in *B & M* and the first two of the preliminary issues before the FTT were informed solely by the findings in *B & M* as set out above. In particular, DWL argued before the FTT that if the legislation provided for the creation of more than one excise duty point with HMRC having a discretion as to which of those excise duty points it would make an assessment against, then the legislation was not proportionate and resulted in a lack of legal certainty, at least where the appellant's supplier could be identified (the Proportionality Point). It also argued that the FTT had jurisdiction to consider whether the Assessment could be challenged on the basis that either HMRC's policy on which duty point to assess was wrong or had been misapplied (the Jurisdiction Point). It submitted that in this case HMRC ought to have discharged the Assessment where an earlier duty point was identified.

38. As we explain later, as a result of the change of position since *Davison & Robinson*, the FTT's findings on the first two of the preliminary issues before the FTT are no longer matters on which we need to express a view. Accordingly, in our summary of the Decision we deal primarily with the FTT's findings on the third of the preliminary issues, namely the question of what constitutes "holding" for the purposes of the 2008 Directive and the Regulations.

39. The preliminary issues were decided on the basis of the following agreed assumed facts which were summarised by the FTT at [5] to [8] as follows:

> "5. The appellant purchased certain alcoholic drinks from about 10 suppliers. It is assumed for the purposes of the preliminary hearing that the appellant's immediate suppliers at no point took physical possession of the goods the excise duty assessment on which was at issue in this appeal. It is, however, also assumed that the appellant's immediate supplier arranged for the goods to be shipped and delivered to the appellant's premises. More particularly, it is assumed that the appellant's immediate suppliers had the power to instruct the persons (albeit unidentified) who had physical possession of the goods to deliver them to the appellant, and that that power was exercised in favour of the appellant in respect of the goods at issue in this appeal.
>
> 6. It is assumed, as can be inferred from the above, that the goods the subject of the assessment were physically held by the appellant at the point they were seized by HMRC. It is also assumed, and follows logically, that prior to the goods being physical [sic] held by the appellant, the goods were physically held in the UK by someone else. It is assumed that that person cannot be identified.
>
> 7. It is also assumed that the chain of supply which culminated in the supplies to the appellant of the goods at issue in this appeal commenced with a missing, de-registered or hijacked company. It is assumed that none the traders in this chain of supply subsequent to that missing company, but prior to the appellant, can be shown ever to have had physical possession of the goods.
>
> 8. The appellant was given by its suppliers W5 documents (certifying payment of excise duty and VAT) in respect of some of the supplies in issue: it is assumed, for the purpose of this preliminary hearing only, that those documents were forgeries and that no excise duty was paid on the goods the subject of the assessment."

40. The FTT recorded at [4] that the assumed facts were facts which one or other of the parties would seek to prove if the matter went to a full hearing.

41. As mentioned above, there were three points to be decided as preliminary issues before the FTT. We have already summarised the first two of these, the Proportionality Point and the Jurisdiction Point. The third point was the question as to whether the meaning of "holding" included legal ownership with power to direct delivery but without physical possession (the Holding Point). If it did then DWL said it followed that each supplier in the supply chain before DWL had been "holding" the excise goods, which meant that there was at least one identifiable duty point prior to DWL's holding of the goods, with the result that the Assessment should be discharged.

42. As we have referred to above, both the Proportionality Point and the Jurisdiction Point were decided by the FTT in favour of HMRC.

43. As regards the Proportionality Point, at [78] the FTT concluded that the legislation envisaged multiple duty points. It then said at [79] that HMRC were not

bound to assess the earliest identified duty point. The FTT said that to the extent that it was HMRC's current policy to do so that resulted from an exercise of discretion conferred on them by the legislation and was not required of them by the legislation.

44. At [120] to [123] the FTT set out its conclusions on the Proportionality Point, finding that legislation, as interpreted in *B & M*, provides for unconditional multiple releases for consumption and multiple excise duty points, without double taxation, which is an appropriate and proportionate method of ensuring that the objective of the assessment and collection of duty on non-paid duty paid goods in free circulation is met. It also found that the legislation as so interpreted gave sufficient legal certainty.

45. As regards the Jurisdiction Point, DWL relied on its interpretation of s 16(4) and (5) FA 1994. Those are the provisions which set out the FTT's powers in respect of appeals against different types of decision on excise duty 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, 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 the 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."

46. DWL's appeal against the Assessment is a decision that falls within the scope of s16(5). That gives the FTT a full merits jurisdiction, in contrast to the supervisory jurisdiction conferred by s 16(4) which applies to decisions made by HMRC pursuant to its discretionary powers, such as approving warehouse keepers and deciding whether or not to restore seized excise goods. DWL says that because s 16(5) states that the FTT's powers on appeals within the scope of that provision "shall also include" other powers, there is a necessary implication that the FTT's powers on s 16(5) appeals include all those listed powers conferred in s 16(4), with the result that the FTT has power to consider the reasonableness of HMRC's decision to assess DWL rather than against any other person in respect of any earlier established excise duty point.

47. That argument was rejected by the FTT. The FTT found at [141] that Parliament intended the FTT to have full appellate jurisdiction over decisions such as the assessment in this case, but did not intend it to exercise supervision of HMRC's decision whether or not to make (or discharge) an assessment which was otherwise correct in law.

48. As regards the Holding Point, the FTT referred at [145] to the assumed facts, being that neither party could identify a person who physically held the goods prior to DWL, but that the person who owned the goods and supplied them to DWL could be identified. It observed that if that person was the "holder" of the goods then a duty point earlier than the one occasioned by DWL buying the goods and taking possession of them could be identified. The FTT therefore identified the "crucial question" as whether a person who owned the goods, and who had the power to direct them to be delivered to its customer but who did not have physical possession of the goods, was "holding" the goods within the meaning of the legislation.

49. The FTT reviewed a number of authorities on the meaning of "holding", which were all decided in the context of what is now Article 33 of the 2008 Directive. We refer to those authorities in detail later, but they principally relate either to the question whether someone other than the person who had physical possession of the goods could be said to be "holding" them, or to the question whether someone who merely had physical possession of the goods without having either actual or constructive knowledge of the fact that excise duty not been paid on them could be said to be "holding" the goods.

50. HMRC had submitted before the FTT that although the cases on Article 33 demonstrated that "holding" as used in that provision had a very wide meaning, embracing a person who did not have physical possession of the goods but was capable of exercising control over them, the term had a narrower meaning where used elsewhere in the 2008 Directive because Article 33 had no equivalent to Article 8(1)(b), which allows a person "involved" in holding under Article 7 to be liable for the duty. HMRC relied on *Euro Trade and Finance Limited v HMRC* [2016] UKFTT 279 (TC) where the FTT had said that when used in Article 15 of the 2008 Directive, which deals with the holding of excise duty goods in a tax warehouse, the term was concerned with the physical possession of goods rather than the legal ownership of them, Article 15(2) requiring duty suspended goods to be physically located in a warehouse.

51. The FTT rejected that submission. It concluded that the term had the same meaning when used throughout the 2008 Directive, and accordingly that a person would be "holding" the goods for the purposes of Article 7(2)(b) if he had control over them without physical possession. Its reasoning was set out at [162] to [164] as follows:

> "162. Firstly, I do not accept that what was said in *Euro Trade* was necessarily inconsistent with the line of cases on the meaning of 'holding' in Art 33 from *Taylor and Wood* down to *Perfect.* Those cases decided that the goods were "held" by a person who had both control of them and knowledge they were duty unpaid excisable goods. Yet it seems to me that an owner of non duty paid

goods stored in a tax warehouse lacks the necessary control to be "holding" the goods under the *Taylor and Wood* test. Owners of duty unpaid goods held in a tax warehouse in duty suspense lack practical control of the goods as they are unable to remove the goods from the warehouse without the payment of duty. Therefore, they do not have the ability to freely move those duty unpaid goods, despite their legal ownership of them. That is in contrast to a situation of non-duty paid goods, held outside a tax warehouse, where the owner of the goods, albeit not necessarily in physical possession of the goods, can order them to be moved around at will.

163. Secondly, and most significantly, it seems highly unlikely to me that the authors of the Directive used the word "holding" with the intention it should mean different things in different articles of the same Directive. It is a normal rule of statutory construction (not to mention common sense) that the same word is intended to have the same meaning in the same piece of legislation: there would have to be a very strong indication that that was not the intention for the same word to be given different meanings in the same legislation. And what HMRC say about Art 8(1)(b) … does not amount in my view to an indication that the authors of the directive did intend to give different meanings to the same word. I can see no good reason at all why 'holding' should have had different meanings in different parts of the direction [sic].

164. And that brings me to the third point which is that, bearing in mind that I have said that one of the main objectives of the directive was the assessment and collection of duty on excisable goods in free circulation in a member State, it also seems likely that a wide meaning of "holding" was intended by the authors of the Directive. It would create more duty points, and more opportunity for the tax authority to actually assess and collect the tax."

52. Nevertheless, because of its findings on the Proportionality Point and the Jurisdiction Point, the preliminary issues hearing was decided in favour of HMRC.

Issues to be determined

53. The procedural position at the date of the substantive hearing before us, following the granting of permission to appeal by the FTT in relation to the matters determined in the Decision and the granting of permission to DWL to bring a claim for judicial review, was as follows:

(1) DWL had permission to appeal against the findings of the FTT on the Proportionality Point. In essence, its grounds of appeal were a repeat of the arguments it made before the FTT, as referred to at [37] above.

(2) DWL had permission to appeal against the findings of the FTT on the Jurisdiction Point. As argued before the FTT, its grounds of appeal rested on the interpretation of s 16(4) and (5) FA 1994.

(3) HMRC, by virtue of having raised the point in its Respondent's Notice, was able to challenge the FTT's conclusions on the Holding Point.

(4) DWL had permission to pursue a claim by way of judicial review that HMRC's decision to make the Assessment should be quashed on the basis that

(i) it was based on an error of law, namely HMRC's failure to understand the meaning of "holding" in Regulation 6(1)(b) of the Regulations, (ii) was wholly unreasonable because HMRC did not consider their policy correctly or acted irrationally and (iii) was contrary to DWL's legitimate expectation that HMRC's policy would be applied properly. As DWL said in its claim form, those were the same arguments which it wished to pursue in its statutory appeal to the Upper Tribunal, but the judicial review proceedings were instituted in order to protect its position in the light of the possibility that the FTT has no jurisdiction to consider the matter.

54. In its skeleton argument, DWL accepted that, following the Upper Tribunal's decision in *Davison & Robinson*, the legislation is proportionate. DWL's case was that to respect the requirements of proportionality and legal certainty, Regulation 6(1)(b) must be read as limited to situations where it has not been possible to establish an excise duty point against a specific identified holder at any earlier point in time. It does not challenge the conclusion, reached in *B & M* and confirmed in *Davison & Robinson*, that there can be more than one "release for consumption" for the purposes of Article 7 of the 2008 Directive.

55. Furthermore, DWL now accepts that since the Upper Tribunal found at [80] of *Davison & Robinson* that the 2008 Directive requires HMRC, as a matter of law, to make an assessment against the first established excise duty point and it does not have a discretion to make an assessment against any other excise duty point that may have arisen in respect of the same goods, DWL has a full merits appeal pursuant to s 16(5) FA 1994 against the Assessment on the ground that in this case HMRC has not made an assessment against the first established excise duty point.

56. That position is apparent from the view expressed by the Upper Tribunal in *Davison & Robinson* on the hypothetical example recorded at [55] of that decision. The example was that a Mrs Smith, the owner of a corner shop, bought a case of gin from a wholesaler at a wholesale price. Unbeknown to her the gin had been bought by the wholesaler at a knockdown price because duty had not been paid on it, and the wholesaler had thus made an enhanced profit. It was submitted that according to the Upper Tribunal's findings in *B & M*, HMRC had a discretion as to whom to assess, so that Mrs Smith was at risk of being liable to pay the duty because she was holding excise goods and could not demonstrate that the duty had been paid. Based on its finding at [80] that the 2008 Directive requires an assessment to be made against the first established excise duty point, the Upper Tribunal said this later in the same paragraph:

> "…were Mrs Smith able to satisfy HMRC that she acquired the goods in the manner in which she contended, then it would not be open to HMRC to assess Mrs Smith but they would have to proceed against the wholesaler from whom she purchased the goods, who in turn might provide evidence that established an earlier excise duty point. Therefore, if HMRC pursued Mrs Smith rather than any other person who it was able to establish was a previous holder of the goods, or who caused any other prior event which gave rise to an excise duty point, then it would be open to Mrs Smith to challenge any assessment made by HMRC through an appeal to the FTT. That tribunal would have a full merits jurisdiction

> to consider Mrs Smith's appeal and to decide whether it accepted Mrs Smith's evidence that she had bought the goods in question from the wholesaler. If it did, the assessment against her would have to be discharged."

57. Therefore, DWL accepts that it has the right to challenge the Assessment on the basis of its contention that HMRC has not complied with the legal requirement to assess against an earlier identified excise duty point, and the FTT has power to set aside the Assessment were it to agree with DWL. DWL therefore accepts that it has no need to pursue its ground of appeal based on proportionality and legal certainty and we therefore say no more about that ground.

58. As regards the Jurisdiction Point, DWL accepts that, while contending that the point is important as a matter of general principle, it is effectively academic in this case. HMRC agree with DWL that the point is now moot. As HMRC submitted, the point is also the subject of DWL's judicial review claim, which it has permission to pursue in the Upper Tribunal alongside the statutory appeal. If necessary, therefore, the point could be determined through the judicial review proceedings in this Tribunal.

59. Dealing first with the judicial review proceedings, the challenge to the decision of HMRC to make the Assessment was made on the basis that HMRC had improperly exercised its discretion to make the Assessment. As has now been established in *Davison & Robinson*, HMRC has no discretion as to whom it should assess in a situation where there have been multiple holders of excise duty goods in respect of which duty remains unpaid. It is required to assess against the first established excise duty point.

60. As was recently affirmed by the Court of Appeal in relation to tax cases in *Glencore Energy UK Ltd v HMRC* [2017] EWCA Civ 1716, judicial review will be refused where a suitable alternative remedy is available unless the circumstances are exceptional such that there is a compelling need to intervene. That principle is based on the fact that judicial review is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective: see the judgment of Sales LJ, in particular at [53], [55] and [61].

61. As we have mentioned above, in the light of the position established in *Davison & Robinson*, DWL can pursue its challenge to the Assessment through the statutory appeal route and it therefore has an effective alternative remedy. There are no points which arise as a result of the judicial review claim which cannot be determined through the statutory appeal. We see no pressing public interest in this case which means that we should not let that process take its course.

62. In those circumstances the claim for judicial review should be dismissed.

63. Turning to the Jurisdiction Point, we have also concluded that it is not appropriate to decide whether the FTT was right to conclude that it had no jurisdiction under s 16(5) FA 1995 to consider a challenge under public law principles to HMRC's decision to assess DWL. As HMRC submitted, it is not the function of the courts or tribunals to decide hypothetical or academic questions which do not impact on the

parties before them: see *R (Rusbridger) v Attorney General* [2004] 1 AC 357, per Lord Hutton at [35].

64. Therefore, although we heard argument on the point, we do not think it is either necessary or appropriate for us to determine the Jurisdiction Point, and we will leave the question to be argued in a case where it is necessary to do so. We therefore say no more about the scope of s 16(5) FA 1994.

65. Consequently, the only issue we need to determine is the Holding Point. In relation to that issue:

(1) HMRC contend that the notion of physical possession is at the heart of the concept of "holding". Determining who is in physical possession of the goods is the appropriate starting point for determining who holds the goods, although in certain circumstances the owner of the goods, through the principles of agency, can also be considered to be the holder of the goods. HMRC contend that as it cannot be established when the goods were first held outside a duty suspension arrangement, the only excise duty point that can be established is that which arises through the holding of the goods by DWL, and therefore HMRC are entitled to assess DWL in respect of the unpaid excise duty pursuant to Regulation 10(1) of the Regulations as the person found physically holding the goods.

(2) DWL contend that the "holder" of goods includes persons exercising *de jure* and/or *de facto* control over the goods, whether temporarily or permanently, either directly or by acting through an agent. Therefore, on the facts in this case, HMRC was obliged to assess DWL's suppliers and not DWL. That is because the identities of all those suppliers were known to HMRC, and because those suppliers had the power to instruct the physical holder of the goods to deliver them to its chosen customer.

Discussion

Introduction

66. We start with some observations on the essential features of the scheme set out in the 2008 Directive, as implemented in the UK through the Regulations. As stated in its recitals, the 2008 Directive harmonises at EU level the concept, and conditions for chargeability, of excise duty by making clear the point at which excise duty should be levied on excise goods (expressed as being at the time they are released for consumption) and the identity of the person liable to pay the duty (see recital (8) in particular).

67. As set out above, Article 2 of the 2008 Directive states that excise duty shall be charged on the production of excise goods, or on their importation into the territory of the EU. The Directive does, however, permit duty-suspended movements of excise goods to take place within the EU and sets out principles governing such movements. In short, excise goods will be subject to duty upon their production or importation into the EU, unless current duty suspension arrangements apply to them. If such

arrangements do apply then chargeability to duty is deferred while the goods remain in duty suspense. Excise goods subject to duty suspension arrangements must generally be held in a "tax warehouse", that is a place where excise goods may be produced, processed, held, received or dispatched under duty suspension arrangements, provided it is operated by an authorised warehousekeeper in the course of his business (Article 4(11) of the 2008 Directive).

68. The principle that duty is charged on production or importation unless duty suspension arrangements apply explains why, as provided for in Article 15(2) of the Directive, the production, processing and holding of excise goods where the excise duty has not been paid must take place in a tax warehouse. Furthermore, once there is a departure from a duty suspension arrangement, whether irregular or not, that amounts to a "release for consumption" and excise duty becomes payable at that time: see Article 7 of the Directive. The identity of the person liable to pay the duty also depends on the particular circumstances in which chargeability has arisen, for example, importation, production or departure from duty suspension: see Article 8.

69. Therefore, as HMRC submitted, in order for this scheme to operate effectively and for it to be known by HMRC when duty has become chargeable and against whom an assessment for the relevant duty may be made, it is necessary to establish the provenance of excise goods and, in particular, when they are being held outside a tax warehouse, whether they are subject to a duty suspension arrangement and, if not, whether the duty has been paid on them. It explains why there are strict conditions concerning the movement of goods under a duty suspension arrangement, with movement only being permitted under cover of an electronic administrative document recorded on a computer system, the obvious intention being that the authorities can track the movements of the goods.

70. HMRC submit that as a result of these features, it is important to know who has possession of excise goods at any particular time. The scheme is such that excise goods in respect of which duty has not been paid are either held in a duty suspension arrangement or they are not. If they have left the duty suspension arrangement there is a charge to duty, which can only be levied following an investigation as to where the goods are to be found and what is happening to them. HMRC submit that effective operation of the duty suspension arrangements depends on it being possible to account for the location of the goods at any particular time. The conditions of the duty suspension arrangements establish an audit trail for the goods at all times, so that when they are held in duty suspense they must be held in a tax warehouse and there are strict record keeping requirements on tax warehouses to enable that audit trail to be followed. When the goods are moved, movement takes place under strict conditions, with an electronic administrative document accompanying the goods, and a guarantee that the requirements will be met. We return to those submissions later.

B & M and Davison & Robinson

71. The Upper Tribunal in *B & M* and *Davison & Robinson* dealt with the circumstances in which a release for consumption arises. The particular issue that arose in those cases was whether a person in possession of excise goods in respect of

which duty had not been paid could be assessed to the unpaid duty on those goods on the basis that an excise duty point had been created under Regulation 6(1)(b) of the Regulations and that the taxpayer was the person liable to pay the duty under Regulation 10(1) of the Regulations as the person holding excise duty goods at the excise duty point (or, in the case of *Davison & Robinson*, liable under Regulation 10(2) as a person involved in the holding).

72. The facts in those cases were very similar to the assumed facts in this case, in that HMRC discovered a quantity of excise goods held by or for the taxpayer in respect of which HMRC had no evidence that the duty had been paid. HMRC established that the supply chains traced back to missing or deregistered traders.

73. In each case the taxpayer argued that, under the scheme established by the Regulations, only one excise duty point could arise in respect of identified goods, and under Regulation 5 that arose when the goods were released for consumption in the UK. On the facts, the goods in question must have been released for consumption within the UK pursuant to one of the other events specified in Regulation 6(1) of the Regulations before they came to be held by the taxpayer.

74. In *B & M* the Upper Tribunal held that the correct interpretation of the 2008 Directive, and consequently the Regulations, was that once any one of the four events mentioned in Article 7 of the 2008 Directive had occurred then it was incumbent on the Member State in question to ensure that the duty was paid. Therefore, in circumstances when it was unable to assess any person who caused a prior release for consumption to occur, it was open to the Member State to assess, in accordance with its own procedures, any person who was found to be holding the goods within the meaning of Article 7(2)(b) of the 2008 Directive. It followed that the recognition by HMRC that one or more excise duty points had, in principle, to have been triggered before B & M received the relevant goods did not preclude HMRC from assessing B & M for excise duty in respect of the goods pursuant to Regulation 6(1)(b). That conclusion was subject to HMRC's power to reimburse B & M, in accordance with their stated policy to assess against the first excise duty point that could be established, the amount of the assessment should it later be established through evidence that an assessment could be made in respect of an excise duty point that arose prior to B & M holding the goods. (See the conclusions at [155] to [157].)

75. At [145] of *B & M*, the Upper Tribunal held that Regulation 6(1)(b) is intended to apply in circumstances where goods in respect of which excise duty has not been paid are being held but it has not been possible to establish an excise duty point at any earlier point in time, the provision contemplating that there may have been, as a matter of principle, an earlier event constituting an excise duty point.

76. The Upper Tribunal came to that conclusion in the light of its finding that the policy behind the 2008 Directive is the need to ensure that unpaid excise duty is collected when goods have been released for consumption within the EU. It said this at [149]:

> "As a number of the ECJ cases that we have referred to above demonstrate, it is clearly the intention of the EU legislature that member states should take all necessary steps to ensure that goods in respect of which excise duty should have been paid cannot circulate freely within the EU alongside goods where duty has been paid. That would be a clear distortion of the internal market. If B & M's contentions were correct, then, as [Counsel for HMRC] submitted, HMRC would be powerless to prevent that happening if they were unable to detect where, when, how and by whose agency the prior event which B & M contends will necessarily have triggered an excise duty point has occurred…."

77. This reasoning was approved in *Davison & Robinson*. At [67] the Upper Tribunal elaborated on what was necessary to establish an excise duty point and thus give rise to a duty on the part of HMRC to make an assessment. It said:

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

78. It was not necessary in that case for the Upper Tribunal to give any further guidance as to what was necessary to establish that a person further up the supply chain from the person found to be holding the goods had himself been a holder of the goods, thus establishing an earlier excise duty point against which the assessment should be made. That is the central issue in this case, to which we will return later.

79. In *HMRC v Perfect* [2019] EWCA Civ 465 ("*Perfect*"), a case that we will consider in more detail later, the Court of Appeal at [66] approved the observation of the Upper Tribunal in *Davison & Robinson* that in the absence of any relevant information relating to any prior release for consumption, HMRC must assess the person whom they find to be holding the goods in question, if that is the only excise duty point which can be established. In the same paragraph, the Court of Appeal agreed with the Upper Tribunal's finding in *B & M* that the underlying policy of the 2008 Directive is that it is the obligation of every Member State to ensure that duty is paid on goods that are found to have been released for consumption, so as to avoid a distortion of the internal market.

HMRC's policy

80. As we have mentioned, HMRC's policy is to assess against the earliest point in time at which they are able to establish, on the evidence before them, that an excise duty point arose: see *B & M* at [69] as set out at [34] above for a full statement of the policy. As has been determined in *Davison & Robinson*, HMRC are required to apply that policy as a matter of law.

81. As is apparent from the witness statement of Ms Christine Penistone of HMRC filed in the judicial review proceedings, HMRC has interpreted the term "holding", as used in the 2008 Directive and the Regulations, to mean the physical possession of the goods, including access to those goods and control of the location where those goods

are held. They take the view that the term does not mean simple ownership of or title to the goods but nonetheless, HMRC will look at the control which a person is able to exercise over the goods, for example if they are physically held by his or her agent.

82. This is elaborated in the following passage taken from HMRC's internal guidance:

> "Definition of holding
>
> There is no definition of "holding" given in Council Directive 2008/118 or in the HMDP Regulations. You should keep the concept of holding as uncomplicated as possible and consider this primarily to mean the physical possession of the goods. Physical possession will normally involve some form of physical control over the goods, including access to those goods and control over the location where those goods are held. It does not mean simple ownership or title of the goods."

83. Under a sub-heading of "Establishing the time when goods are first held outside of a duty-suspension arrangement", the guidance continues:

> "It is not sufficient to move the duty point back to a time when a person had only legal title to the goods or if their involvement was through the exchange of paperwork, invoices or by financing the deal. For a person to be holding those goods at the earlier time, you must be able to demonstrate some form of physical possession or control over those goods. You may find you can demonstrate an earlier holding from a signed delivery note, from the stock records and/or other paper documentation. The provision of an invoice alone may not always be strong enough evidence to demonstrate a physical holding.
>
> In many cases, you will come across an elaborate paper trail which makes it difficult to trace back from the end customer to the supplier of the goods. In such cases, many of those involved may never have taken actual physical possession or control of those goods and cannot be considered to have been holding those goods outside a duty-suspension arrangement. This category of person/s may include 'brokers' or 'agents' who don't take physical possession of the goods, despite being involved in the purchase or sale of those goods. However, it may be that some of these other persons will be jointly and severally liable if it can be established that they have been 'involved' in the holding of the goods...
>
> Where as the result of your investigation, you identify an earlier holding of those goods, this will create an earlier duty point and you should assess the person liable for the duty at that earlier time. This principle applies even where the person who was holding those goods is a 'missing' or 'deregistered' trader. In this case, you may still be able to capture other parties involved in the holding under the joint and several liability provision.
>
> Conversely, where the current holder of the goods is unable to provide evidence of duty payment and where you are unable to identify an earlier duty point, you should assess the person currently holding the goods. The duty point will be the earliest time the current holder took physical possession of the goods. If you are unable to identify the actual time when those goods were first so held outside a duty-suspension arrangement, then the duty point will be the time when the holding was discovered."

The parties' arguments in outline

84. HMRC submit that they have followed the policy set out above in this case. They submit that it follows from the assumed facts that the goods were physically held in the UK by somebody else prior to being physically held by DWL. However, the assumed facts also assume that the goods were not physically received and held by DWL's supplier. Consistent with these assumed facts was the FTT's assumption that the person who physically held the goods in the UK prior to DWL could not be identified. DWL cannot now go behind those assumed facts. Nor has DWL shown that HMRC's statement in their decision letter dated 17 October 2013 that DWL was the first known person to hold the goods, in the sense of having physical possession of them, was wrong.

85. HMRC submit that some type of physical possession of defined goods at a given point in time and in a specific geographical location has to be established. There is no evidence that any particular person ever had possession of the identified relevant goods at any specific time prior to their being held by DWL. They accept that a person liable for holding duty unpaid excise goods could have the requisite possession through the actions of an appointed agent, or alternatively could be found to be involved in that holding and therefore jointly and severally liable to pay the duty under Regulation 10(2) of the Regulations. However, they submit that, in all instances, some form of possession of the goods by someone at an identified time and place must exist in order for the goods to be held, otherwise the requirements for HMRC to be able to raise an assessment in respect of an earlier excise duty point are not met.

86. HMRC submit that possession cannot be demonstrated solely on the basis of a paper trail of purchase orders and sales invoices. It has always been HMRC's position that mere title to or ownership of goods is not sufficient to establish a "holding" for the purposes of Regulation 6(1)(b) of the Regulations. In this case, the suppliers had no actual possession of the goods and they had no control over them either, since they were not in charge of the actual delivery to DWL. They were mere sellers and only had ownership of the goods until the point of sale.

87. HMRC submit that this position is consistent with the scheme laid down in the 2008 Directive and the Regulations; that scheme focuses on possession of excise duty goods held outside a duty suspension arrangement; nobody can be assessed if there is no one physically holding the goods and therefore it is necessary to identify physical possession by a particular person at a particular location. For example, abandoned or lost goods are not regarded as being held by anybody. Ascertaining whether goods remain subject to a duty suspension arrangement, and accordingly whether a charge to excise duty has arisen, depends on being able to account for the goods and who possesses them at any particular time. The duty position can only be established by investigating where the goods are and what is happening to them. HMRC would need to know where the goods have been to determine at what point they became held outside a duty suspension arrangement.

88. In this particular case, whilst HMRC knew the identity of the suppliers, they had no knowledge of who delivered the goods to DWL. They say that the dates of the invoices are of no assistance in establishing the dates of delivery and therefore when the supplies were made. There is no knowledge as to when instructions for delivery were given; the assumed facts assume that instructions were given.

89. DWL submits that, as found by the FTT, a person who has *de facto* and/or *de jure* control over the goods is a "holder" even if he does not have physical possession. They rely on the case law in relation to Article 33 which we consider below. Therefore, DWL submits that the Assessment must be discharged because HMRC knew, at the time of assessing DWL, who its suppliers were. Those suppliers had *de facto* and/or *de jure* control of the goods, which they exercised by ensuring delivery to HMRC. They were therefore in control of the delivery of the goods to DWL. The essence of DWL's case on the interpretation of "holding" is that HMRC had all the evidence they needed to assess against specific persons earlier in the supply chain, namely DWL's suppliers for the goods in question. Furthermore, in relation to those suppliers, DWL submits that as well as knowing who the supplier was and when the supply was made, HMRC knew the exact duty payable because all of that information was taken from the invoices that DWL received from the suppliers. The information taken from those invoices formed the basis of HMRC's calculations as to the amount of the Assessment, as set out in the schedule to the Assessment.

90. Therefore, in terms of establishing when, how, where and by whose acts the excise duty point occurred (the test determined by the Upper Tribunal in *B & M*), the excise duty point was created by an identified supplier having the power to direct how the goods were to be delivered, and exercising that power by directing whoever physically possessed the goods to deliver them to DWL. The goods were held in the United Kingdom, and no more specificity about the actual location was necessary. Therefore, HMRC did not need to know anything further in order to raise an assessment on the relevant suppliers.

91. If further specificity was required then DWL submits that, given in each case the suppliers caused the goods to be delivered to DWL's premises, the suppliers must have held the goods immediately before they arrived at DWL's premises. The goods were delivered by a person acting under the control of DWL's suppliers, and therefore that control must have been exercised at the time which was immediately before the delivery of the goods in question. It was not necessary to have knowledge of the identity of the haulage company delivering the goods or the particular deliveries made (for example, whether there were combined loads); all that mattered was that the delivery company was acting on the supplier's behalf. If a precise location was needed then it could be identified as just outside the entrance to DWL's premises. HMRC could not say that they were unaware of the precise dates of delivery; that is a matter that may require investigation at the substantive hearing of the appeal.

The authorities

92. We now turn to a number of the authorities cited to us with a view to establishing the extent to which they provide support for the parties' submissions as summarised above.

93. We start by emphasising that the term "holding" as used in the 2008 Directive must be given an autonomous EU law meaning. This is apparent from the objective of the 2008 Directive of achieving harmonisation (see [66] above) and the need to avoid a divergent application of the rules between Member States, and from the history of the inclusion of Article 7(2)(b) in the 2008 Directive, which followed the *van de Water* case referred to below. It is underlined by the reference made to the CJEU[1] by the Court of Appeal in *Perfect*, also referred to below.

94. It is also a well-established principle that in interpreting a provision of EU law it is necessary to consider not only the wording of the provision, but its context and its aims. Therefore, interpreting the term by reference to common law concepts such as bailment and constructive possession or purely by reference to its ordinary and natural meaning in the English language is of limited assistance.

95. For example, in *Kingscrest v CCE* [2005] ECR I-4442 ("*Kingscrest*"), a case dealing with a VAT exemption provided for in the Sixth Council Directive for bodies which were recognised as "charitable" by the Member State concerned, the CJEU held that the term "charitable" must be given a definition distinct from that given to it by domestic law because the exemption had its own independent meaning in Community law and must therefore be given a Community definition: see [22] and [25] of the judgment. Furthermore, as the CJEU held at [26] of *Kingscrest*, the need for a uniform interpretation of directives makes it impossible for the text of a provision to be considered in isolation; it must be interpreted and applied in the light of the versions existing in the other official languages. By way of example Mr Beal took us to the French version of the 2008 Directive which uses the term "*detention*", which translates more precisely as "possession". Equivalent terms meaning "possession" are to be found in the Spanish and German versions.

96. As far as the context and purpose of the 2008 Directive is concerned, as we set out at [76] to [79] above, the Upper Tribunal in both *B & M* and *Davison & Robinson* supported its conclusion that a person who held goods in respect of which excise duty had not been paid could be assessed notwithstanding the existence of a prior event which amounted to a release for consumption, on the basis that the policy behind the 2008 Directive was the need to ensure that unpaid excise duty is collected when goods have been released for consumption within the EU. This finding was supported by the Court of Appeal in *Perfect*.

[1] In this decision we use the acronym "CJEU" to refer to the Court of Justice of the European Union or the European Court of Justice, as the context may require.

97. In coming to that conclusion, the Upper Tribunal found support from the CJEU's judgment in *van de Water v Staatssecretaris van Financien* (Case C-325/99) [2001] ECR I-2729, which dealt with the interpretation of Article 6 of the 1992 Directive (the predecessor legislation: see [10] above). The terms of the charging provisions, contained in Article 6(1) of the 1992 Directive, were broadly equivalent to those contained in Article 7(2) the 2008 Directive except in one important respect. Article 6 of the 1992 Directive did not contain the equivalent of Article 7(2)(b) of the 2008 Directive and accordingly there was no specific provision that the holding of excise goods outside a duty suspension arrangement where excise duty had not been levied in itself amounted to a release for consumption.

98. Mr van de Water held a large quantity of gin in his shed which had been produced from pure alcohol acquired from a third party. The shed was not a tax warehouse. Both the manufactured gin and the pure alcohol were therefore held outside a duty suspension arrangement.

99. The question for the CJEU was whether Article 6(1) of the 1992 Directive was to be interpreted as meaning that the mere holding of a product subject to excise duty constituted a release for consumption where that duty had not yet been levied in accordance with the applicable provisions of Community law and national legislation.

100. The CJEU recognised at [29] to [31] of its judgment that excise goods are subject to excise duty on production or importation, which is therefore the taxable event, but because chargeability to excise duty depends on a release for consumption, the point at which duty becomes chargeable may be deferred by duty suspension arrangements. The CJEU also observed at [33] that the production, processing and holding of products subject to excise duty, where that duty has not been paid, must take place in an authorised tax warehouse. The CJEU recognised at [34] that "a product subject to excise duty which is held outside a suspension arrangement must at some point and in some way have been released for consumption" within the meaning of Article 6(1) of the 1992 Directive.

101. The CJEU placed much emphasis on the departure of goods from a duty suspension arrangement giving rise to a charge to excise duty. It said this at [35] and [36] of its judgment:

> "35. Article 6(1) of the Directive in fact provides that the term 'release for consumption' covers not only any manufacture or importation of products subject to excise duty outside a suspension arrangement but also any departure, including irregular departure, from such an arrangement. By placing such a 'departure' on the same footing as a release for consumption within the meaning of Article 6(1), the Community legislature has clearly indicated that any production, processing, holding or circulation outside a suspension arrangement gives rise to the chargeability of the excise duty.
>
> 36. In those circumstances, once it is established before the national court that such a product has departed from a suspension arrangement without the excise duty having been paid, it is clear that the holding of the product in question

> constitutes a release for consumption within the meaning of Article 6(1) of the Directive and that the duty has become chargeable."

102. It should be noted that, as the CJEU observed at [41] of its judgment, the 1992 Directive did not specify the person liable to pay the duty chargeable (in contrast to the 2008 Directive). However, the Court said in the same paragraph that it followed from the scheme of the Directive that "the national authorities must in any event ensure that the tax debt is in fact collected".

103. In our view it is clear from the Court's comments at [35] and [36] of its judgment that the focus of the scheme is on the location of the goods in question and whether or not they are being held within a duty suspension arrangement. Once the goods have departed from such an arrangement, duty becomes chargeable and Member States must ensure that it is collected.

104. This view is supported by the opinion of Advocate General Colomer in the same case. At [28] of the opinion the Advocate General stated that the scheme guarantees the collection of excise duty by establishing common rules on chargeability and by subjecting the intra-Community movement of goods subject to excise duties to conditions which make it possible to identify and locate on Community territory products on which excise duty has not yet become chargeable although the chargeable event has already occurred. The Advocate General recognised at [31] to [33] that there is generally a lapse of time between the manufacture or importation of goods and their release for consumption which is bridged by a duty suspension arrangement. This arrangement must be subject to strict controls, enabling checks to be carried out, in order to be effective so as to ensure that the tax debt is eventually collected (paragraph [34]).

105. The Advocate General stated at [40] that it was the intention of the legislature that no product subject to excise duty "should be present on Community territory outside a suspension arrangement unless excise duty had been paid", and that meant that the mere holding of a product in such circumstances makes duty chargeable. Again, this statement places emphasis on where the goods concerned are located.

106. Similarly, in *BP Europa SE v Hauptzollamt Hamburg-Stadt*, Case C-64/15 (2016) ECLI: EU: C: 2016:62 the CJEU held that Article 20(2) of the 2008 Directive, which provides that the movement of excise goods under a duty suspension arrangement ends when the consignee has taken delivery of those goods, must be interpreted as meaning that taking of delivery must be regarded as occurring when the consignee is in a position to know precisely what quantity of goods he has actually received, in that case on unloading in full: see [32] to [35] of the judgment. The facts of that case were that on receiving goods transported under a duty suspension arrangement from one tax warehouse to another the consignee discovered that it had received an amount less than that stated on the electronic administrative document accompanying the load. The Court held that the discovery of the shortfall amounted to an irregularity in relation to the duty suspension arrangement in the sense that the goods which did not form part of the delivery must therefore be regarded as having been removed from the

duty suspension arrangement, with the result that a release for consumption in respect of those goods had occurred: see [42] and [43] of the judgment.

107. In our view the reasoning in this case again demonstrates that the focus of the scheme is on precisely what goods are the subject of a duty suspension arrangement at any particular time, and where it is found that goods have departed from such an arrangement the relevant authorities must be in a position to make an assessment in respect of the excise duty chargeable in respect of those goods.

108. In *Polihim SS EOOD v Nachalnik na Mitnitsa Svishtov*, Case C-355/14 (2016) ECLI: EU: C: 2016: 403 the issue before the CJEU was whether a sale by the owner of excise goods held in an authorised tax warehouse to a purchaser who sold the goods on to an end user who was exempt from excise duty for the purposes of the relevant Bulgarian tax legislation resulted in a release for consumption at the time of the sale to the intermediate purchaser, the latter entity not having the status of an end-user exempt from excise duty.

109. At [38] of its judgment the CJEU identified the relevant question as being whether the sale of excise goods within a tax warehouse, without those goods having physically left the warehouse, constitutes a release for consumption of those goods.

110. At [43] the CJEU recorded that the referring court was doubtful as to whether the sale of the goods to an intermediate purchaser, without that purchaser ever having actual control of those goods, constituted a release for consumption of the goods. At [48] the CJEU said that the reference in Article 7(2)(a) of the 2008 Directive to the "departure of excise goods… from a duty suspension arrangement" meant "the physical departure of those goods from the tax warehouse and not their sale". In support of that conclusion, the CJEU said at [51] that excise duty is a tax levied on consumption and not on sale, so that the time at which it becomes chargeable must be very closely linked with the consumer. Consequently, at [52] it held that so long as the goods in question remain in the tax warehouse of an authorised warehousekeeper, there can be no consumption, even if those goods have been sold by the authorised warehousekeeper.

111. Furthermore, at [53] the CJEU stated that the expression "irregular departure" as used in Article 7(2)(a) of the 2008 Directive "cannot be understood other than as meaning the physical removal of goods from such an arrangement" with the result that "the release for consumption… takes place at the time of the physical removal of excise goods from a duty suspension arrangement". The court therefore concluded at [55] that "the sale of excise goods held by an authorised warehousekeeper in a tax warehouse does not bring about their release for consumption until the time at which those goods are physically removed from that tax warehouse".

112. In our view, this reasoning provides support for HMRC's submissions recorded at [69] and [70] above to the effect that the scheme set out in the 2008 Directive focuses on the physical location of the excise goods and whether or not a release for consumption has occurred by virtue of the goods having physically left an authorised tax warehouse, or otherwise having left a duty suspension arrangement. The corollary

of that position is that in terms of who is liable to be assessed at the time that such release for consumption occurs, the starting point will be who is "holding" the goods in the sense of being physically in possession of them at the time the release for consumption occurs.

113. On the other hand, there is a series of cases on which Mr Grodzinski relies to support his submission that the concept of "holding" goes wider than mere physical possession, and that a person can be regarded as the holder of goods when he is either in constructive possession of those goods or is in control of them.

114. Under English domestic law, constructive possession arises under a relationship of bailment, that is where the bailee has physical possession of the goods by virtue of their delivery to him by the bailor for a specific purpose, such as to deliver them to another person at the direction of the bailor, with the result that the bailor has constructive possession of the goods. The holder of a bill of lading has constructive possession of the goods subject to the bill of lading because, although he does not have physical possession of them, he can demand their delivery up by the shipowner at the completion of the voyage to which the bill of lading relates.

115. In the Court of Appeal's judgment in *R v Bajwa* [2012] 1 WLR 601, in considering Regulation 13 of the Tobacco Products Regulations 2001, which provides that when an excise duty point arises in respect of tobacco the person liable to pay the duty is the person holding the tobacco products at the excise duty point, Aikens LJ, giving the judgment of the court, said this at [33]:

> "'Holding' is an imprecise term which could embrace actual possession of the tobacco products and, perhaps, both constructive possession… and also control of the tobacco products."

116. The case involved a conspiracy to import counterfeit cigarettes which were transported on a vessel to Felixstowe. The Court had to consider whether any of the conspirators were "holding" the counterfeit cigarettes at the time that the vessel entered the port of Felixstowe. Aikens LJ said this at [77]:

> "The first question is whether any defendant was 'holding' the counterfeit cigarettes at the time that the vessel entered the port of Felixstowe on 22 September 2004. As the law currently stands, that depends on whether any of them had possession or control of the cigarettes at that point. Obviously, none of them was physically in possession of the cigarettes at the time. However, it is elementary commercial law that if a person is the lawful holder of a bill of lading then he has 'symbolic' or 'constructive' possession of the goods that are identified in the bill of lading, such that he can demand their delivery up by the shipowner at the completion of the contractual voyage. We are prepared to assume, without deciding the point, that for the purposes of Regulation 13(3)(e) of the 2001 Regulations**,** a person who is the lawful holder of a bill of lading for the goods in respect of which he intends to import will be 'holding' those goods, whether or not he is the consignor or consignee named in the bill of lading."

117. However, at [78] the Court said that one of the difficulties about establishing "possession" by means of the holding of the bill of lading in that case was that the bill

of lading did not identify the cigarettes as being within the particular container to which the bill of lading related. This indicates that the actual, and identified, location of the excise goods is a relevant factor in determining whether a person who has control of goods, for example through the holding of a bill of lading, is to be regarded as holding them for the purpose of the relevant regulations.

118. There are a number of cases which deal with the situation where excise goods are held by a bailee, such as a firm or individual transporting them on the instructions of another person, and the question whether it is the bailee or the bailor who is to be regarded as holding them at the time that an excise duty point arises.

119. *R v Taylor & Wood* [2013] EWCA Crim 1151 concerned appeals against confiscation orders made under s 6 of the Proceeds of Crime Act 2002. One of the questions for the Court of Appeal was whether the appellants, Taylor and Wood, who would use their businesses to arrange transportation of smuggled cigarettes to the UK, were liable for the unpaid excise duty on those goods and so had obtained a pecuniary advantage by evading it. On the facts, neither had ever taken physical control of the cigarettes. Instead, they had arranged for a firm of hauliers, Yeardley, to bring the cigarettes from Belgium to the UK. Yeardley had sub-contracted the job to a Dutch firm, Heijboer. The documentation which accompanied the goods described the goods as textiles but the smuggled cigarettes had been hidden within the consignment. It was accepted that neither Yeardley nor Heijboer had knowledge of the smuggling or the true nature of the goods that were being carried.

120. On the question of the meaning of "holding" in this context the Court held as follows:

> "29. 'Holding' is not defined in the Finance Act or in the Regulations, and there appears to be no authority on its meaning. It is plain that it denotes some concept of possession of the goods. Possession is incapable of precise definition; its meaning varies according to the nature of the issue in which the question of possession is raised (a good example being *Re Atlantic Computer Systems plc* [1990] BCC 899, CA). But it can broadly be described as control, directly or through another, of the asset, with the intention of asserting such control against others, whether temporarily or permanently: see, for example, *Goode on Commercial Law, Fourth Edition, p 46*. In a case of bailment, the bailee has actual, or physical, possession and the bailor constructive possession. In other words, if the bailee holds possession not for any interest of his own but exclusively as bailee at will, legal possession will be shared by bailor and bailee.
>
> 30. In this case Heijboer had physical possession of the cigarettes at the excise duty point, but Heijboer was acting as no more than the agent of the primary carrier, Yeardley. Yeardley was, therefore, in law the bailee of the cigarettes at the excise duty point and, not apparently having any interest of its own in the goods, shared legal possession with the person having the right to exercise control over the goods, as explained above. If Yeardley had known, or perhaps even ought to have known, that it had physical possession of the cigarettes at the excise duty point, its possession might have been sufficient to constitute a 'holding' of the cigarettes at that point. However, Yeardley had no such knowledge, actual or constructive, and was entirely an innocent agent. That

> important fact then turns the focus on the person or persons who were exercising control over the cigarettes at the excise duty point. There is no doubt that Wood (through Events) was such a person. Wood, as a matter of fact, under the contract with Yeardley gave instructions throughout the transportation to the carrier. Wood was correctly shown on Yeardley's invoice to be Yeardley's client and the consignee of the goods that were being transported. Under the Convention[2], as a matter of law, Wood (through Events) had the legal right of control over the goods. It is also known that Taylor (through TG) was acting together with Wood in exercising control over the cigarettes throughout the transportation. TG was shown on the CMR to be the consignee, a designation which represented accurately, if incompletely, the true state of affairs. There is no good reason to distinguish the position, in this context, of the two appellants.
>
> 31. There is nothing, furthermore, in this interpretation and application of Regulation 13(1) to the facts of this case that would be inimical to the purposes of the Finance Act. To seek to impose liability to pay duty on either Heijboer or Yeardley, who, as bailees, had actual possession of the cigarettes at the excise duty point but who were no more than innocent agents, would raise serious questions of compatibility with the objectives of the legislation. Imposing liability on the appellants raises no such questions, because they were the persons who, at the excise duty point, were exercising de facto and legal control over the cigarettes. In short, responsibility for the goods carries responsibility for paying the duty."

121. We note the emphasis by the Court of Appeal on the question as to who was exercising *de facto* and legal control over the goods at the time the excise duty point arose as being determinative of who was to be regarded as the "holder" of the goods in question at that time. On the basis that neither Yeardley nor Heijboer had any knowledge that they were carrying excise goods in respect of which duty had not been paid and were purely acting as the agent of those who were exercising *de facto* and legal control over the goods, it was determined that it was the latter rather than the former who were the "holder" of the goods in those particular circumstances. We observe that, on the facts, it was possible to establish the identity both of those who had physical possession of the goods at the time of the excise duty point, and those who were exercising control over the goods at that time and how that control was being exercised. It was therefore clear from this knowledge that a defined excise duty point could be established because a time and place where particular excise goods were being held outside a duty suspension arrangement could be identified.

122. A similar result was arrived at in *R v Philip Tatham* [2014] EWCA Crim 226. The issue again centred on smuggled tobacco on which excise duty had been evaded. The case against the appellant described his role as meeting and greeting incoming loads of smuggled cigarettes, involvement in distribution and slaughter and dealing with customers. One of the questions that had to be determined by the Court of Appeal was whether this role was sufficient to assess the appellant for excise duty on

[2] The reference to the "Convention" is to the Convention on the Contract for the International Carriage of Goods by Road: see [8] of the judgment and see further [124] below.

the smuggled goods on the basis that he was holding the goods, thereby giving rise to an excise duty point.

123. At [23] Sir Brian Leveson P, who gave the judgment of the court, summarised the principles derived from previous cases, which so far as relevant to this case are:

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

124. The observations at [25] and [26] of the judgment as regards the significance of the international consignment note ("CMR"), which under the Convention on the Contract for the International Carriage of Goods by Road (the "Convention") must accompany the conveyance of goods by road, are also relevant. As the court observed, much like a bill of lading, the CMR has details as to the consignor, consignee and cargo but there is a significant difference in that unlike a bill of lading the CMR is not a document of title. However, the Convention allocates passage of title and risk so that constructive "delivery" of the goods (so as to be in the legal possession of the buyer) takes place when the seller delivers them to the carrier. That matches the rebuttable presumption as to the time that title passes from seller to buyer in s 32 of the Sale of Goods Act 1979[3].

125. In *Tatham*, it was held that as the appellant was the ordinary consignee of deliveries of the goods to the UK, because legal rather than physical possession of the goods was sufficient and he had the necessary actual knowledge and intent to defraud, he was the holder of the goods at the excise point: see [37] and [40] of the judgment. This case again demonstrates the need to examine the precise factual circumstances that are alleged to demonstrate that a particular person was holding the goods at the relevant time.

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[3] Section 32 (1) provides:

> "(1)Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier (whether named by the buyer or not) for the purpose of transmission to the buyer is prima facie deemed to be a delivery of the goods to the buyer."

126. In *McKeown v HMRC* [2017] STC 294 the Upper Tribunal considered the position of lorry drivers found to be carrying excise goods on which duty had not been paid, and who were assessed on the basis that they were "holding" the goods. The case was a joint hearing of three appeals by self-employed lorry drivers based in Northern Ireland who were stopped by the UK border force at Dover, each found to be carrying substantial amounts of alcoholic beverages in their lorries on which duty had not been paid. In all three appeals the FTT found that the drivers had not been innocent parties to the importation of alcoholic products without payment of excise duty. After reviewing *Taylor & Wood* and *Tatham* the Upper Tribunal held at [65] and [66]:

> "65. There is no question that the appellants had physical possession of the goods but that is neither necessary nor, by itself, enough to constitute 'holding' for the purposes of reg 13. In order to be 'holding the goods', a person must be capable of exercising *de jure* and/or *de facto* control over the goods, whether temporarily or permanently, either directly or by acting through an agent. In this case, as the tribunals found, the drivers had control over the goods. That was, in our view, obviously correct. The appellants, as drivers, had custody of the goods and were responsible for them during their transportation. The fact that the drivers had obligations to others, who had engaged them to transport the goods, and those others had control over the drivers does not mean that the drivers did not also have *de jure* and *de facto* control, albeit subject to obligations owed to and direction by the others.
>
> 66. A person who has *de jure* and *de facto* control of goods but who lacks both actual and constructive knowledge of them and the fact that duty is payable on them, cannot be said to be 'holding' the goods for the purposes of reg 13. In these cases, however it was not disputed that the appellants knew the nature of the goods they were carrying and that they were subject to excise duty…"

127. In the Upper Tribunal in *Perfect* ([2017] UKUT 476 (TCC)) HMRC challenged the FTT's finding that Mr Perfect, a lorry driver transporting excise goods in respect of which the duty had not been paid, was not "holding" those goods for the purpose of Regulation 13 of the Regulations on the basis that Mr Perfect was an "innocent agent" who lacked actual or constructive knowledge of the fact that the goods that he was carrying were liable to excise duty which had not been paid, although, unlike the couriers in *Taylor & Wood*, Mr Perfect did know that he was transporting excise goods. HMRC contended, contrary to the finding of the Upper Tribunal in the first sentence of [65] of its decision in *McKeown,* that physical possession of the goods by Mr Perfect was sufficient to constitute him the holder of the goods, notwithstanding that others may have had constructive possession of the goods at the same time. HMRC contended that the "innocent agent exception" only extends to those cases where the agent has no knowledge (actual or constructive) of the nature of the goods as excise goods, so that the driver who knows that he or she is carrying excise goods can never be immune from liability for any excise duty which goes unpaid on those goods.

128. The Upper Tribunal rejected those submissions, relying in particular on paragraph [23e] of *Tatham* which stated in terms that a person who lacks both actual and

constructive knowledge of the goods, or the duty which is payable on them, cannot be the holder for the purposes of the legislation even if that person is in physical possession: see [55] of the decision. They also said at [57] that to impose liability on a driver simply because he was in possession of the goods at the time when a fraud is discovered, but without knowledge of what has occurred or is intended, is neither fair nor proportionate and thus would infringe the EU law principles of fairness and proportionality.

129. As indicated at [79] above, the Court of Appeal has considered an appeal by HMRC against the decision in *Perfect*. In its judgment the Court of Appeal has decided that HMRC's contentions raise a question of EU law which is not *acte clair* and that the matter should therefore be referred to the CJEU. The court accepted HMRC's submissions that the natural meaning of the word "holding" does not impute any requirement that the person is aware of the tax status of the goods and that, given the policy underlying the 2008 Directive, there is considerable force in the argument that the imposition of strict liability on a driver in the circumstances does not offend the principles of fairness or proportionality, but accepted that *Taylor & Wood* and *Tatham* provide support for the alternative interpretation advanced on behalf of Mr Perfect. Given that and the fundamental importance of proportionality in EU law, the court concluded that it was certainly arguable that had there been any intention to impose strict liability in the 2008 Directive, it would have been expressly stated: see [67] to [70] of the judgment.

130. The questions referred to the CJEU, as set out at [71] of the judgment, are as follows:

> "(1) Is a person ('P') who is in physical possession of excise goods at a point when those goods become chargeable to excise duty in Member State B liable for that excise duty pursuant to Article 33(3) of Directive 2008/118/EC ("the Directive") in circumstances where that person
>
> (a) had no legal or beneficial interest in the excise goods;
>
> (b) was transporting the excise goods, for a fee, on behalf of others between Member State A and Member State B; and
>
> (c) knew that the goods he was in possession of were excise goods but did not know and did not have reason to suspect the goods had become chargeable to excise duty in the Member State B at or prior to the time that they became so chargeable?
>
> (2) Is the answer to question (1) different if P did not know that the goods he was in possession of were excise goods?"

131. The CJEU's answers to these questions will therefore most likely give helpful guidance as to the extent to which physical possession alone of excise goods in respect of which duty has not been paid is sufficient to constitute a person a "holder" of the goods for the purposes of the Regulations. Those answers may also be of assistance in determining the extent to which the distinction drawn in the domestic cases between constructive possession and physical possession, based on the domestic

law concept of bailment as well as, where relevant, the Convention, is of relevance in determining the EU law meaning of “holding”. Pending the CJEU delivering its judgment on these questions, we proceed on the basis of the following principles, as derived from the cases reviewed above:

(1) A person who is able to exercise legal or *de facto* control of excise goods in respect of which duty remains unpaid, and intends to assert that control against others, whether temporarily or permanently, is to be regarded as "holding" those goods for the purposes of the 2008 Directive and the Regulations.

(2) Depending on the circumstances, a person having physical possession of such goods, and sharing legal possession of them with the person mentioned in (1) above, may be regarded as holding them for those purposes.

(3) An innocent agent of a person mentioned in (1) or (2) above having physical possession of such goods is not to be regarded as holding those goods for those purposes.

(4) Actual or constructive knowledge of physical possession of such goods might be sufficient to constitute "holding" for those purposes and take such a person outside the status of "innocent agent".

132. We should clarify that the principles referred to in (3) and (4) above, and the accuracy and extent of the qualification to principle (2), may be affected by the outcome of the reference in *Perfect*. However, their correctness or otherwise does not determine the outcome of this appeal.

133. Before turning to the application of the principles (1) and (2) in this case we make two further observations.

134. First, there is nothing in the cases to suggest that a person may be regarded as holding goods simply by virtue of being the owner of them, whether that be as the legal or beneficial owner. At [23e] of *Tatham* it was made clear that the concept of holding is not co-extensive with beneficial ownership, and at [29] of *Taylor & Wood* it was made clear that the focus is on possession of the goods, whether that be physical or constructive possession.

135. Secondly, none of the cases deal specifically with the situation where a person has legal or *de facto* control over the goods but it has not been possible to establish who actually had physical possession of the goods at any identified point in time during the period that such control existed. The cases that we have reviewed in which it was determined that a person other than the person physically holding the goods was the holder on the basis of control over the goods all involved situations where on the facts it was possible to establish who had physical possession of the goods at the time that the excise duty point arose. It is fair to say that the starting point was the person physically holding the goods. For example, in the case of bailment, the Court of Appeal in *Taylor & Wood* pointed out at [29] that legal possession is shared with the bailor where the bailee holds not for any interest of his own but as bailee at will,

and at [30] considered the position of both Yeardley and Heijboer before considering that of the appellants (see [120] above).

136. Whilst none of the cases deal with a situation where the details of physical possession are not established, our view is that they do demonstrate that it is necessary, when seeking to determine whether a person without physical possession of goods is to be regarded as their holder on the basis of that person having or exercising legal or *de facto* control over the goods, to establish on the evidence the basis on which it is said that such control exists.

Conclusions

137. DWL's case on the Holding Point, as summarised at [89] to [91] above, is straightforward. In essence, the case rests on the following:

(1) The assumed fact that the suppliers of the relevant excise goods to DWL were identified as such on the invoices relating to the supplies.

(2) The relevant goods were identified by those invoices and the excise duty chargeable in respect of those goods could be calculated by reference to the goods which were the subject of those invoices, which was in fact how HMRC calculated the duty charged pursuant to the Assessment.

(3) The goods were situated in the United Kingdom at the time of their supply to DWL.

(4) At the time of the relevant supply the supplier was holding the goods within the meaning of Regulation 10(1) of the Regulations because it had *de facto* and/or *de jure* control of the goods, which it exercised by ensuring that the goods were delivered to DWL.

138. Therefore, DWL submits that in establishing an excise duty point by reference to the question of when, how, where and by whose acts the excise duty point occurred, HMRC had all the information necessary in that regard to assess the relevant supplier as the holder of the goods at the time that the supply to DWL took place, and accordingly the Assessment was unlawful because HMRC were able to establish an excise duty point in relation to the goods prior to those goods being held by DWL.

139. We reject those submissions. In our view, DWL's case fails to take proper account of the aims of the 2008 Directive and the manner in which those aims are pursued through the strict controls over the movement of excise goods imposed by the 2008 Directive. The essence of those controls is that at all times the location of excise duty goods in respect of which duty has not been paid, being either an authorised tax warehouse or in the course of movement under a duty suspension arrangement, can be identified. In our view, it is clear from the policy of the 2008 Directive (which as recently confirmed by the Court of Appeal at [66] in *Perfect* is that Member States are obliged to ensure that duty is paid on excise goods that are found to have been released for consumption) that the strict controls referred to above focus on where the goods are physically located at any particular time prior to their release for consumption. As a result, in the absence of any evidence that establishes an earlier

excise duty point, the person holding those goods at the time that it is established that the goods are being held at a specific location but are no longer held pursuant to a duty suspension arrangement must be chargeable to the unpaid duty.

140. DWL's approach is to take as the starting point for determining who has held the goods since the release for consumption occurred the evidence that establishes that a person earlier in the supply chain had *de facto* or legal control over the goods, rather than any evidence which establishes who had physical possession of goods in the supply chain, or where the goods were located. In essence, DWL submits that once it is established that there is a person earlier in the supply chain who had such *de facto* or legal control that is sufficient to conclude that that person was the holder of the goods at the time the release for consumption occurred for the purposes of the Regulations.

141. In our view, the case law demonstrates that that is not the correct approach. As we have said at [103] above, *van de Water* demonstrates that the scheme of the 1992 Directive, which has been followed in the 2008 Directive, is that once the goods have left a duty suspension arrangement duty must be paid. The clear focus is therefore on the goods and what is happening to the goods at any particular time. The question as to who is to be responsible for the payment of the duty is to be established as the next step. That approach is supported by the other authorities we have analysed at [106] to [112] above.

142. It follows from the fact that the focus of the scheme established under the 2008 Directive is on the goods themselves that the starting point in determining who is "holding" the goods at the relevant time must be on the person who has physical possession of them. That was certainly the case in *van de Water*.

143. We do not however dispute, as determined in the various cases on which Mr Grodzinski relies, that it is possible for a person with *de facto* or legal control over the goods to be treated as "holding" them. However, in our view the cases are consistent with an approach that establishes first who has physical possession of the goods but then considers whether the circumstances of that possession are such that it is inappropriate for that person to be considered to be "holding" the goods.

144. All the cases relied on by DWL concerned instances of transportation of excise goods from one Member State to another following release for consumption, and therefore the relevant legislation was Article 33 of the 2008 Directive (or its predecessor in the 1992 Directive), and Regulation 13 of the Regulations or the corresponding provisions regarding tobacco products. Although HMRC before the FTT, and to an extent before us, argued that the term "holding" as used in Article 33 had a wider meaning than that used in Article 7, so that when used in Article 33 it embraced a person who did not have physical possession of the goods but was capable of exercising control of them, which was not the case with Article 7, we do not accept that it was intended that the word should mean different things in different articles of the same Directive. We therefore agree with what the FTT said on that point at [163] of the Decision, as set out at [51] above. We therefore accept that the reasoning in the

Article 33 cases is equally applicable to cases interpreting the meaning of "holding" when used in Article 7.

145. The reasoning in *Taylor & Wood*, *Bajwa* and *Tatham* is based primarily on a domestic law analysis which recognises that under English law a person can be in possession of goods without physically holding them. However, as we have said the term "holding" must be given an independent EU law meaning and in that context both the EU authorities and the different language versions of the 2008 Directive focus on the question of physical possession. The reasoning in *Perfect* in the Upper Tribunal approves the reasoning in *Taylor & Wood* and *Tatham* but places it in an EU law context by its conclusion that it would infringe the EU law principles of proportionality and fairness to impose liability on an innocent agent. That is where the law currently stands, pending the judgment of the CJEU following the reference in *Perfect.*

146. Therefore, in our view the question of whether a person who has *de facto* or legal control over excise goods in respect of which duty has not been paid and which are established to be in the physical possession of another person is, in the circumstances of a particular case, "holding" those goods, and conversely whether it is appropriate for a person who has physical possession of those goods to be assessed as the holder of the goods, must be established in all the circumstances by reference to the available evidence. As we have said, in all the Article 33 cases it was possible to establish who had physical possession of the goods at the time of the alleged excise duty point. In some but not all of those cases it was possible to establish that there was another person who had *de facto* or legal control and the nature of that control, and find that person to be liable for the duty rather than the person who had physical possession.

147. It follows that we accept that HMRC's policy, as encapsulated in the passage from the policy quoted at [82] above, to the effect that the concept of "holding" primarily means the physical possession of the goods, is consistent with the 2008 Directive. Therefore, in order for a person other than the person found to be in physical possession of the goods to be assessed a factual enquiry will need to be undertaken as to who was in physical possession of the goods in question at the time that it is alleged that another person had *de facto* or legal control over the goods. It will then be necessary to determine whether in all the circumstances it is appropriate to assess that other person for the unpaid duty, rather than the person in physical possession of the goods.

148. It follows that we also endorse the guidance set out at [83] above and broadly accept HMRC's submissions based on that guidance, as summarised at [84] to [88] above.

149. In summary, in circumstances where HMRC seek to assess the person found to be holding excise duty goods in respect of which duty has not been paid pursuant to Regulation 10(1) of the Regulations and that person challenges the assessment on the basis that an earlier excise duty point can be established against which the assessment should be made, for that challenge to be successful it will be necessary to establish:

(1) Who had physical possession at the time that the alleged earlier excise duty point occurred. For example, the earlier excise duty point might be established immediately before the goods concerned were delivered to the premises of the subsequent holder, by reference to the physical possession of the courier delivering those goods.

(2) Who is the person alleged to have *de facto* or legal control over the goods who it is said should be assessed rather than the subsequent holder (if it is the case that the courier was an innocent agent and it is not appropriate to assess the courier), and how that person is said to have such control and the basis on which it was being exercised. For example, the terms of supply to the person alleged to have *de facto* or legal control might mean that in fact that person never had control of the goods and did not direct their delivery. Control might have been exercised by another entity earlier in the chain of supply in compliance with a request by the person in question to deliver them to the subsequent holder. Alternatively, for example, the terms of supply to the subsequent holder, including where relevant the operation of the Sale of Goods Act or the Convention (see [124] above) might mean that the goods were already under the control of the subsequent holder while in transit to him.

(3) The time at which the excise duty point arose. Whilst precise temporal exactitude is not essential (see, for example, *HMRC v Jacobson* [2018] UKUT 18 (TCC) at [46]), in our view the date of an invoice is not sufficient in itself without establishing who was in possession of the goods at some identified point or points in time. In that context, and as already indicated, the terms of the relevant sale may be relevant, in particular as to when delivery is deemed to have occurred. Copies of CMRs, if they can be obtained, may be relevant.

(4) Where the goods were being held at the relevant time. In the case of goods being transported, that could be by reference to the means of transport or the location of that means of transport at some point in time, possibly immediately prior to the delivery of the goods at a particular location. We do not consider that the goods need necessarily to be shown to have been static at a particular place at a single fixed point in time (again, see *Jacobson*). For example, in the case of means of transport the transport used, the start and/or end points of the journey and a defined period of time within which it must have occurred might be identified.

150. Turning to the position in this case, it follows from our analysis that we cannot determine the Holding Point in favour of DWL on the basis of the agreed and assumed facts on which the preliminary issues hearing proceeded. The assumed and agreed facts contained no detail as to the matters referred to at [149] above. In particular, the assumed facts included a statement that none of the entities in the supply chain had been established to have taken physical possession. There is nothing in those assumed facts that identifies the person who physically held the goods before they were delivered to DWL, and the FTT assumed at [6] (see [39] above) that that person could not be identified.

151. Therefore, as this is an appeal only against the FTT's determination of the preliminary issues, which was made only on the basis of the assumed and agreed facts, we must determine the Holding Point in favour of HMRC.

Errors of law and the exercise of the Tribunal's powers

152. It follows from our analysis in respect of the Holding Point that the FTT made an error of law in concluding on the basis of the agreed and assumed facts that the supplier of the goods to DWL was holding those goods within the meaning of Regulation 10(1) of the Regulations.

153. It also follows from the fact that the law has moved on as regards the Proportionality Point following *Davison & Robinson*, that the FTT made an error of law in its conclusions on that point as well.

154. Those errors of law are material and accordingly we should exercise our discretion pursuant to s 12 of the Tribunals, Courts and Enforcement Act 2007 to set aside the Decision.

155. It also follows from our analysis as to the manner in which the Holding Point should be determined, that as matters have turned out the FTT's decision to hold a preliminary issues hearing as regards the Holding Point also involved an error of law. In particular, the Holding Point could not be properly determined without extensive fact finding as to the circumstances in which the goods were held prior to their delivery to DWL. As the Upper Tribunal said in *Wrottesley v HMRC* [2016] STC 1123 at [28] and [68], the FTT should exercise its power to direct a preliminary issue with caution and the power should be used sparingly, particularly in cases where the points to be decided are a mixture of fact and law.

156. In those circumstances, the correct course to take is to remit the matter to the FTT in order that the Holding Point and any other outstanding issues that remain to be determined by the FTT on the appeal can be determined at a substantive hearing (rather than at a preliminary issue hearing) in the light of (a) the findings in this decision and (b) the full facts. We direct accordingly. In that context, it will be open to DWL to adduce such evidence as it can in order to establish that there was an earlier excise duty point prior to the supply to DWL of the goods which were the subject of the Assessment. The FTT will be able to make appropriate directions in that regard, including directions as to disclosure.

Disposition

157. The Decision is set aside and the matter is remitted to the FTT in accordance with the directions set out above.

158. The claim for judicial review is dismissed.

Costs

159. Any application for an order for costs in relation to this appeal must be made in writing within one month after the date of release of this decision and, unless both parties agree that the costs should be the subject of detailed assessment, be accompanied by a schedule of the costs claimed sufficient to allow summary assessment of such costs as required by rule 10(5)(b) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

MRS JUSTICE FALK **JUDGE TIMOTHY HERRINGTON**

UPPER TRIBUNAL JUDGES
RELEASE DATE: 4 October 2019